
THE COMPETITION LAW REVIEW

Volume 4 Issue 2 pp 77-121

July 2008

What Has Competition Done for Consumers in Liberalised Markets?

*KJ Cseres**

This paper reviews current regulatory approaches designed to correct market failures and distribute the benefits of liberalization to consumers in recently liberalised network industries. Present evaluations of the liberalisation process show that opening up markets to more competition has not yet resulted in either expected levels of competitiveness or in envisaged consumer benefits. Many consumer related failures were little anticipated; legislation to protect and assist consumers was either late coming or inadequate and often lacked effective enforcement. The paper examines market failures primarily related to the demand side; such as information asymmetries, unfair trade practices, unfair standard contract terms, high search and switching costs, and imperfect decision-making processes. It, however, discusses these imperfections in the broader context of market failures related to incoherent regulation and ineffective competition law enforcement and shows how poor coordination between these regulatory fields leads to suboptimal outcomes. The interplay between general consumer protection and specific consumer issues of sector regulation is discussed and elaborates on specific market deficiencies that draw attention to the intersection between consumer protection and competition law. The discussion incorporates theoretical insights from neoclassical and behavioural economics to consumer problems. The paper focuses on what the liberalization process, so far, has done for consumers by looking at and evaluating both the legislative and policy developments and recent proposals at European level as well as actual implementation and enforcement of these legislations at national level. More specifically, it deals with the energy and the telecommunications markets and their recent developments in the EU. Two case studies provide insight on national regulatory approaches: a case study of the liberalization of the Hungarian telecommunications market and a case study of the liberalization of the Dutch electricity market. The paper proposes a new mode of regulation as well as a new mode of coordination among different layers and fields of regulation and enforcement in order to remedy consumer problems and to achieve competitive markets.

1. INTRODUCTION

This paper reviews current regulatory approaches that are designed to correct market failures and distribute the benefits of liberalization to consumers in recently liberalised network industries. Market failures could be, among others, the result of inadequate regulation, ineffective competition law enforcement, insufficient consumer protection or inadequate coordination between the above. Present evaluations of the liberalisation process show that opening up markets to more competition has not yet resulted in either expected levels of competitiveness or in envisaged consumer benefits. Many consumer related failures were little anticipated, legislation to protect and assist consumers was either late coming or inadequate and often lacked effective

* Associate Professor of Law, Amsterdam Center for Law & Economics, University of Amsterdam, Roetersstraat 11, 1018 WB Amsterdam, The Netherlands. e-mail: k.j.cseres@uva.nl.

enforcement. In fact, the situation has little changed in this respect. Consumers are often not able to take the advantages made possible by effective competition as a result of information asymmetries, unfair trade practices, unfair standard contract terms, high search and switching costs or imperfect decision-making processes. This paper focuses on what the liberalization process so far has done for consumers by looking at and evaluating legislative and policy developments and recent proposals at European level as well as actual implementation of legislation and enforcement at national level. The paper discusses whether a new mode of regulation as well as a new mode of coordination among different layers and fields of regulation and enforcement is necessary to remedy consumer problems and to achieve competitive markets. The paper is structured in seven sections. The second section briefly introduces the liberalization of the network industries. The third section discusses the interplay between market failures primarily identified on the demand side and competition law. This section elaborates on specific market deficiencies that draw attention to the intersection between consumer protection and competition law. It, moreover, provides theoretical insights from neoclassical and behavioural economics discussing this intersection. The fourth section first describes the overall European framework of the liberalization process and the role of consumer protection issues therein as well as the relationship between sector regulation and consumer protection. It then deals more specifically with the energy and the telecommunications markets and the recent developments in EU policy in these fields. Section five is a case study of the liberalization of the Hungarian telecommunications market and section six is a case study of the liberalization of the Dutch electricity market. Section seven summarizes the issues discussed in the preceding sections and makes further conclusions for policy and law making.

2. LIBERALIZATION OF NETWORK INDUSTRIES: REGULATORY APPROACH

From the 1980s governments tried to limit their intervention in the market mechanism to creating the conditions in which consumers and competition can push markets to socially optimal results by opening markets to competition and simplifying existing regulation. The economic rationale behind this new approach was that by removing barriers to entry, and allowing consumers free choice among several providers of goods and services, competition and innovation will be fostered, leading to cost effectiveness, lower consumer prices and improved quality and variety, and ultimately lead to economic growth. Accordingly, competition has been introduced into markets that previously were dominated by state monopolies. Deregulation has been predominant in the network industries such as telecommunications, post, electricity, gas, transport and water. In the 1980s Britain took a lead in the deregulation and liberalization process and many EU countries followed suit; however, at a slower pace. The EU has gradually taken a role in stimulating and requiring its Member States to follow suit in the liberalization process. These competition enhancing reforms were in the first place focused on introducing and guaranteeing the full operation of competitive forces. However, merely relying on and sustaining effective competition proved to be ineffective to achieve the envisaged goals. Certain framework laws were necessary to

delineate property rights, contracts, firm behaviour, institutional set-up and to assist consumers.

This wide-spread liberalisation has transferred relevant parts of law making and law enforcing to private parties. Consumers have been entrusted with tasks that used to belong to the public law realm. The task of disciplining the market has been shifted from the state to private individuals who became responsible for making decisions and enforcing their rights in markets where previously they were dependent on the state. More competition and less regulation has been expected to lead to increased consumer welfare in terms of price, quality and choice but experience has not (yet) showed evidence of more optimal market functioning for consumers.

The (de)regulatory approach to opening up markets in the network industries has been strongly tilted in favour of the supply side. The legislative tools primarily targeted a competitive market structure by introducing specific regulatory frameworks that complemented existing competition rules and institutions. Market failures were in the first place anticipated on the supply side and therefore (de)regulation was aimed at effective competition through disciplining incumbent and new firms. It seems that it has been assumed that competition and competition law tools will be sufficient to activate consumers to make new choices by lowering prices and widening the range of products and services. Consumers could, however, not make (optimal) use of their newly acquired possibilities. Regulatory approaches strongly focused on supply side market failures and the role and function of private consumers in the liberalization process has been largely neglected.¹

While consumers were envisaged as the ultimate beneficiaries of the liberalized markets this premise holds only when consumers are responsive to price and output and thus able to seek the best price-quality combination on offers. If demand is inelastic and switching costs are high or unfair trade or abusive practices prevent them acting in their best interest they will not be able to enjoy the advantages of a competitive market. Moreover, empirical studies in recently liberalized markets showed high degree of consumer inertia and indicated that many consumers despite the optimal balance between search, switching costs and expected gains are not taking advantage of beneficial switching and, in some cases, are switching to higher-cost suppliers.²

Traditionally utility markets were regulated and it was believed that utilities can be the best distributed through a monopoly. The shortcomings of this approach have led to the liberalisation and deregulation of these markets worldwide. While potential contestability of these markets are regarded as a strong and often sufficient competitive constraint on incumbents, empirical research implies that the competitiveness of these

¹ HW Micklitz & LA Reisch, 'Consumers and deregulation of the electricity market in Germany' (2006) 29(4) *Journal of Consumer Policy* 399-415, p 406.

² M Giuliatti, C Waddams Price, and M Waterson, 'Consumer choice and competition policy: a study of UK energy markets' (2005) 115 *The Economic Journal* 949-968; C Wilson and C Waddams Price, 'Irrationality in Consumers' Switching Decisions: when more firms may mean less benefit', CCP Working Paper 05/04, ESRC Centre for Competition Policy, University of East Anglia, 2005.

markets is also related to the fact whether consumers are mobile and able to switch suppliers. In the next section the interplay between market failures on the demand side and competition as well as the interplay between consumer protection and competition law enforcement will be discussed.

3. THE INTERPLAY BETWEEN DEMAND SIDE MARKET FAILURES AND COMPETITION LAW

Deregulation and liberalization have the potential to increase competition and benefit consumers but this assumption will only hold when consumers have the legal and economic competence, the capacity, opportunity and motivation to take on the responsibilities shifted from the state to private individuals in the course of liberalization. As a starting point consumers will have the capacity and opportunity to assume responsibility for their own transactions and enforce their rights when markets are transparent, information costs are affordable and abuse of market power and unfair trade practices are controlled.³

While it is usually correct to assume that consumers change their behaviour and allegiance in response to price changes, this only holds if the market supplied the necessary information, which businesses and consumers need to behave rationally and conclude efficient transactions. Consumers facing significant information problems will make less rational decisions and might eventually make the market perform sub-optimally. This is especially so in markets of non-homogeneous, complex products such as financial services, where such consumer behaviour can often create significant barriers to entry and therefore influence the way markets operate.⁴ The question is whether and to what extent these market imperfections influence competition law enforcement and whether competition law enforcement can remedy these failures.

Imperfect consumer information may affect competition in the market and lead to what former Director General of the OFT, John Vickers, calls ‘micro-competition’ problems,⁵ for example, when sellers with market power exploit information asymmetries which leads to abuse. A poorly informed consumer who is not aware of alternative choices before his purchase and who might be subject to the seller’s pressure is in fact subject to market power. Or a consumer entering a contract with unfair contract terms is subject to the exploitation of market power. Consumers’ information problems thus can have relevant implications for competition analysis. Imperfect information may make a market that appears competitive behave anti-competitively,

³ Th.B.C Poiesz, ‘The free market illusion: psychological limitations of consumer choice in Market regulation: lessons from other disciplines’, Ministry of Economic Affairs, 2004, The Hague, p 17; Micklitz & Reisch, op cit n 1, p 405.

⁴ M Waterson, ‘The role of consumers in competition and competition policy’ (2003) 21 International Journal of Industrial Organisation 129-150, p 146.

⁵ Deceit by one group of sellers may lead consumers to doubt the integrity of an entire industry or to distrust markets generally. Therefore competition is not simply fundamental to consumer policy but, as the chairman of the OFT remarked, ‘much consumer policy is competition policy’. J Vickers, ‘Economics for consumer policy’, British Academy Keynes Lecture, 29 October 2003, p 7, 16-17.

because it can provide a basis for market power. Imperfect information-based market power may harm consumers by imposing excessive (unfair) prices or other unfair trading conditions and thus distort consumers' otherwise welfare maximising choice. Sellers may exploit consumers' lack of knowledge about their rights or their inability to understand standard contract terms, complex goods, to conduct direct comparisons and to monitor service delivery.⁶

3.1 Standard contract terms: competition or consumer law problem?

Standard contract terms is an area where both consumer and competition issues might arise and makes it subject to both consumer and competition law enforcement. Standard contract terms can reduce transaction costs for both business and consumers. Market transparency in fact might require some kind of level of standardization in order to guarantee comparability of different offers. They can also reduce switching costs by making comparison and choice between the different providers easier. However, when switching costs are created by the firm itself in order to lock in consumers then standardization can be caught by competition law enforcement as being anti-competitive.⁷

Standard contract terms are generally subject to the control of competition law and consumer law concerning unfair contract terms. Accordingly, standard contract terms should not be abusive and thus should impose unfair disadvantages on consumers as these harm consumer welfare. What amounts to unfair as anti-competitive in competition law and unfair as unlawful in consumer law differs substantially and could lead to different or even conflicting judgments on the basis of one or the other set of legislation. But both cases concern an inequality of bargaining power, economic duress and undue influence and thus they concern a situation where one party uses its stronger position vis-à-vis other market players to obtain terms that it could not have without that disparity in power. This leads to a situation of exploitation in both competition and consumer law.⁸ In regulated sectors the sector specific regulators have to control the content of contracts and their compliance with regulatory goals.⁹

3.2. Neoclassical and behavioural economics on information failures and remedies

Information provisions are often considered as effective means to cure information asymmetries and assist consumers in their decision-making process. Neoclassical economics provides useful insights on how information affects the dynamics of markets, the determinants of bargaining and drives regulatory approaches of consumer

⁶ Vickers, *ibid*, p 7.

⁷ Cafaggi, 'Self-Regulation in European Contract Law', European University Institute Law Working Paper No. 2006/43, p 13.

⁸ P Akman, 'A Tale of Three Cities: Fairness, Welfare and Exploitative Abuse under Article 82 EC', unpublished PhD thesis, 2008, and P Akman, 'To Abuse, or not to Abuse: Discrimination between Consumers', CCP Working Paper 06-18.

⁹ Cafaggi, *op cit* n 7, p 13-14.

protection to a more effects and cost-benefit based analysis. The assumptions of neoclassical economics, however, treat key aspects of consumer decision making as exogenous and as such can say little about the amount, the nature of and the way information should be framed and disclosed to consumers. Behavioural economics based on empirical research deals with endogenous aspects of consumer decision-making and questions present policies for consumer protection. Insights from neoclassical economics on information asymmetry, adverse selection, moral hazard, transaction costs as well as recent findings of behavioural economics about systematic cognitive errors of consumers' decision making have relevant implications for designing new regulatory frameworks and setting priorities for regulatory agencies.¹⁰ Both streams will be briefly reviewed below.

Neoclassical economics focus on market failures originating from information failures. It identifies the sources of information deficiencies and thus consumer harm either in the lack of competition or in the fact that information is unavailable, not costless, or the uncertainty of individuals about the quality of product characteristics. The more difficult it is to determine the quality of a product, the more information about the quality of that product will need to be provided in order for the consumer to make an informed decision to offset the market failure of information asymmetry and subsequent adverse selection, which can be relevant to all product characteristics.

Information problems can be solved through uninformed consumers' screening or sellers' signalling. Screening is when uninformed consumers search for information on their own or with the help of third parties with special knowledge or capabilities.¹¹ In the case of signalling sellers show that they are interested and that they offer high quality. Signals can be warranties, reputation, brands, advertising or franchising, but they will only succeed if sellers of high quality goods use them.¹² Reputation and brands as signals of quality can however act as barriers to new entrants and decrease competition. Product comparison modalities like reviews on the internet can considerably decrease information search costs enabling increased competition and the benefits accruing from that competition to consumers but may at the same time facilitate collusion among firms.

Information asymmetry cannot be solely offset by regulating the mandatory provision of information. The search costs of gathering and evaluating more information to improve a decision about buying a product or a service have to be weighed against the

¹⁰ G Akerlof, 'The market for 'lemons': quality uncertainty and the market mechanism' (1970) 84 Q. J. Econ. 488-500; GJ Stigler, 'The economics of information', (1961) 69(3) JPE 213-225; HA Simon, 'A Behavioral Model of Rational Choice' in, HA Simon, *Models of man: social and rational: mathematical essays on rational human behaviour in a social setting*, New York: Wiley, 1957.

¹¹ Insurance brokers or estate agents are good examples. Information suppliers may have special equipment or experience in evaluating goods and their information costs are lower than the same costs of consumers. They can even control the producer's behaviour after the contract has been signed.

¹² T Wein, 'Consumer information problems – causes and consequences' in, S Grundman, W Kerber & S Weatherhill (eds.), *Party autonomy and the role of information in the Internal Market*, de Gruyter: Berlin, 2001, pp 85-6.

benefits of that added information.¹³ The search costs of acquiring and using information and the opportunity costs of time have to be weighed against the expected benefits.

Neoclassical economics starts from a number of assumptions such as market players have stable set of preferences and they make consistent and rational choices in order to maximize their own welfare. However, recent empirical findings of behavioural economics challenge these assumptions on the basis of examining what people actually do, how consumers analyse, interpret and use product and service information. Consumer preferences seem to fluctuate depending on the situation in which they have to make their decisions. Individuals lack the ability to build constant and reasoned preferences because they are influenced by the context where they seem exhibit certain cognitive errors related to time or memory or simple miscalculation. Consumer behaviour is context dependent and the form, context, quantity and substance of information have an impact on the ability of individuals to assess that information.¹⁴ Consumers will only look for and process a certain amount of information. As a consequence individuals fail to maximize their welfare under specific circumstances. As a consequence individuals fail to maximize their welfare under specific circumstances¹⁵ and they take short cuts when making decisions leading to choices that might be inconsistent with promoting their own welfare.¹⁶

The theory of bounded rationality argues that the capacity of the human mind to conceive and process complex information is relatively limited. Behavioural or experimental economics found that consumers may rely on heuristics instead of being guided by rationality.¹⁷ The new research showed that decision-makers systematically fail to deal with information even in situations where the market does not have difficulty in producing the socially optimal amount of information or in distributing it efficiently.¹⁸ In these situations consumer harm is a result of behavioural biases.¹⁹ These biases can take many forms such as misunderstanding small probabilities, pseudo-certainty, hyperbolic discounting, overconfidence, default bias, decision-conflict as a result of information overload.²⁰

¹³ This is referred to as rational apathy, a term originating from political science literature explaining why people do not vote.

¹⁴ R Smith, S King, 'Does competition law adequately protect consumers?' [2007] ECLR 416.

¹⁵ RB Korobkin, & TS Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88(4) Cal LRev 1051-1144.

¹⁶ HA Simon, op cit, n 10, pp 261, 270-271.

¹⁷ Th.B.C Poiesz, 'The free market illusion: psychological limitations of consumer choice in Market regulation: lessons from other disciplines', Ministry of Economic Affairs, 2004, The Hague, p.17

¹⁸ TS Ulen, 'Information in the market economy – Cognitive errors and legal correctives' in, S Grundman, W Kerber, & S Weatherhill (eds.), *Party autonomy and the role of information in the Internal Market*, de Gruyter: Berlin, 2001, pp 98-99, 105.

¹⁹ OECD, Roundtable on economics for consumer policy, Summary Report, DSTI/CP(2007)1/FINAL, p 11

²⁰ Decision-making heuristics cause consumers to underestimate benefits of searching and switching, for example in case of endowment bias consumers value more what they have than what they might have or in

The implications for consumer protection policy and lawmaking differ in the case of neoclassical economics and behavioural economics. Neoclassical economics identifies consumer detriment in the presence of market power of suppliers and encourages remedies such as vigorous competition policy enforcement.²¹ However, simply increasing competition and competition law enforcement efforts does not always lead to optimal market circumstances for consumers; as experience in the liberalized markets proves. Information deficiencies are still present and may lead to consumer harm in competitive markets as well. For example, in case a dominant firm exploits its customers by applying unfair contract terms the enforcement agency can intervene but only on the basis of competition law principles and only by taking account of the interests attached to free competition. It will not engage in an assessment how consumers can be assisted to spot unfair contract terms and help them enforce their rights. Neoclassical economics encourages more and better information to remedy market failures on the demand side, such as mandatory disclosure or third-part certification. However, more disclosure may conflict with competition policy as it might lead to collusion and it may not be as useful for consumers either. Behavioural economics suggests that intervention should be imposed with a 'lighter hand'.²² It suggests remedies aimed at framing effects and thus steer consumers' choices towards welfare enhancing options.²³ Paternalistic guidance towards certain options through framing the way information is provided could assist consumers to de-bias their decision-making and to channel their decisions to socially beneficial options.²⁴

The difficulty lies in the fact that the predictions of the neoclassical model are often elegant, but prove to be wrong when empirically tested and evidence from behavioural economics research is difficult to channel into a useable taxonomy for regulation but it is more likely to be accurate.²⁵ In order to determine whether to intervene and how to intervene to assist consumers a complex array of issues has to be taken into account. Not only the costs of intervention, but also the costs imposed on business and the different groups of consumers (informed, sophisticated, uninformed and vulnerable) have to be considered. Regulatory tools imposing measures that ultimately diminish competition that increases consumer choice should be avoided. Highly complex systems of information disclosure originally aiming at lowering information costs will obviously restrict competition and will have counterproductive effects. Consumers

case of hyperbolic discounting when they rationally do not weigh present gains against future benefits and put too much weight on the immediate. Framing biases originate from the specific ways objective information is provided. OECD, Roundtable on economics for consumer policy, Summary Report, DSTI/CP(2007)1/FINAL, p 12.

²¹ R Smith, S King, 'Does competition law adequately protect consumers?' [2007] ECLR 417.

²² OECD Roundtable discussion on private remedies: class action/collective action; interface between private and public enforcement, United States of America DAF/COMP/WP3/WD(2006)34, p 18.

²³ R Sunstein & RH Thaler, 'Libertarian Paternalism Is Not An Oxymoron' (2003) 70 U Chicago LRev 1159.

²⁴ OECD Roundtable discussion on private remedies: class action/collective action; interface between private and public enforcement, United States of America DAF/COMP/WP3/WD(2006)34, p 18.

²⁵ RH Thaler, 'Toward a Positive Theory of Consumer Choice' (1980) Journal of Economic Behavior and Organization 1 39-80.

unable to make informed choices are forced to employ expensive intermediaries and business has to bear the costs of the ineffective disclosure. Some consumer protection measures create barriers to entry that limit the freedom of sellers and might eventually lead to higher prices for consumers.

Interventions therefore should be evidence-based, focused and evaluated to ensure that it is not unnecessarily applied. It should be examined why the market-based solution does not work or why that solution might be socially sub-optimal.²⁶ It also has to be demonstrated why government regulation is going to be better than markets in providing low-cost information. Even where a relevant market failure has been identified, government should only act when this is feasible and it is cost-effective to do so. The costs and benefits of particular forms of intervention and alternatives thereto should be examined and represented. Consumer regulation will only make consumers better off if it either improves consumer estimates of the value of information or reduces the cost of information to consumers.

In the following section the European framework of liberalization will be discussed from the consumer protection perspective. Special attention will be paid to policy measures and legislation on consumer interests in the telecommunications and energy market.

4. EUROPEAN FRAMEWORK

In the EU the liberalization process has taken place in a number of sectors where services of general economic interest (SGEI) are provided; such as telecommunications, postal services, transport and energy. The Commission argued that it has always promoted 'controlled' liberalisation, i.e. gradual opening-up of the market accompanied by measures to protect the general interest.²⁷ Still, the legislation on services of general economic interests has evolved on the basis of the principle of an open and competitive internal market and accordingly along the lines of competition law, state aid and sector regulation. While Article 86(2) EC and the case-law since *Corbeau*²⁸ clearly lays down the right of the Member States to determine and regulate services of general economic interest from the mid-90s the Commission tried to obtain competences in this field. The Amsterdam Treaty introduced Article 16 EC, which did not provide the Community with new competences, but has conferred responsibility upon both the Community and the Member States to ensure, each within their respective sphere of competences that their policies enable services of general economic interest to fulfill their missions. This provision does not provide the Community with specific means of action but it was an attempt to reduce the Member States' leeway to define, organize,

²⁶ These are self-correcting mechanisms that are based on private law norms of tort, contract and property rights that they are the result of government action. G Hadfield, R Howse, M Trebilcock, 'Information Based Principles for Rethinking Consumer Protection Policy' (1998) 21 *Journal of Consumer Policy* 131-169, p 155.

²⁷ Green Paper on services of general economic interest, COM(2003) 270 final, Brussels, 21.5.2003, p 4.

²⁸ Case C-320/91 *Corbeau* [1993] ECR I-2533, para 14.

finance and monitor services of general interest.²⁹ Correspondingly, sector specific regulations in the EU have developed on the basis of minimum harmonization. Issues of consumer protection have been identified as key elements in the regulation of SGEI and grouped around a number of principles such as universal access, affordability, transparency choice, safety and security of services, continuity, high quality, redress and compensation mechanisms, representation and participation, independent regulatory authorities and effective enforcement.³⁰ In the following the discussion will focus on the regulation and the enforcement of these consumer protection issues.

4.1. Consumer protection issues

Alongside competitiveness, consumer interests, and their protection as one of the Community values have been central in the liberalization process and the way policy developed on services of general interest as evidenced in the White Paper on services of general interest in 2004.³¹

There has been no clear cut European policy on consumer issues in the process of liberalization. Issues of consumer policy were largely left to the Member States providing them substantial leeway to upgrade consumer rights that had only marginally been prescribed by EU Directives.³² However, many of the Member States remained reluctant to do so. Consumer rights and regulation of consumer transactions are dispersed in several pieces of secondary legislation. Preventive measures such as guaranteeing transparency of information and contract terms, access to information, fair contractual terms, choice, affordability and quality of services had already been enacted in the consumer *acquis*. General consumer law and thus contract law related issues are regulated in Directive 93/13 on unfair contract terms and Directive 97/7 on distance selling. More specific sector regulatory legislation such as the Electricity Directive 2003/54 and the Universal Service Directive 2002/22 (Article 3 and Annex II) contain specific rules (Articles 3, 9-11, 20-22, 34) related to consumer protection. These soft law instruments regulate mainly issues such as universal service provision, access to (cross-border) services, affordability of tariffs, physical safety, reliability, security continuity, choice, access to and transparency of information, contractual terms and tariffs as well as quality of services. These issues are mainly related to contract law and especially pre-contractual information disclosure. However, the absence of these sector regulatory issues in general EU contract law as well as any cross-references between general consumer contract law and sector regulations is striking.

²⁹ "The Community for its part has competencies in areas that are also relevant for services of general interest, such as: the internal market, competition and State aid, free movement, social policy, transport, environment, health, consumer policy, trans-European networks, industry, economic and social cohesion, research, trade and development co-operation, and taxation", Green Paper, op cit, n 27, pp 9-10.

³⁰ Green Paper, op cit, n 27, pp 39-41, White Paper on services of general interest, COM(2004) 374 final Brussels, 12.5.2004, p 9.

³¹ White Paper on services of general interest, COM(2004) 374 final Brussels, 12.5.2004.

³² Micklitz & Reisch, op cit, n 1, p 406, 412.

Moreover, the absence of provisions or clear guidelines on enforcement of the substantive rights and access to justice is remarkable. Appropriate redress in case of complaints through effective means of dispute resolution and remedial measures such as injunctions and compensation through private enforcement have been either neglected or only briefly touched upon; as in Article 34 Directive 2002/22 on out-of-court dispute settlements and in Article 23 (5-12) Directive 2003/54 on complaints. These provisions lack references to the consumer legislation in this field such as Directive 98/27/EC on injunctions, Regulation 2006/2004 on consumer protection cooperation and Recommendation 98/527 on out-of-court settlements of consumer disputes or the recent Green Paper on damages actions.³³

Private enforcement is a powerful instrument to make consumer rights hard and deter future anti-consumer conduct. While compensation has been mentioned no individual or collective rights have been drafted upon which a consumer could claim damages. A legal action, however, could plausibly be based on Article 82 EC for abuse of a dominant position through excessively high or unfair prices or applying other unfair conditions *vis-à-vis* consumers.

Similarly no guidelines for institutional framework that guarantee effective enforcement have been set out. Public enforcement in the Member States takes place through a wide variety of agencies either resorting to national competition authorities, specific sector regulatory agencies or national consumer authorities.

4.2. Sector regulation and general consumer law

The relationship between general competition law and sector regulation has been extensively dealt with in the liberalization process both at EU and at national legislative levels. The same cannot be said about the relationship between general consumer law and sector regulation. However, this was essential as recent evaluations and new proposals in the EU indicate. These evaluations concluded that the regulatory framework was insufficient to enable consumers to reap the full benefit of the liberalisation process. In many countries liberalisation has led to mixed results. While it improved competition for large users, and provided better prices, new products and services at the same time, it also resulted in much consumer harm. The lack of transparency in prices, the confusing variety of products and services and numerous unfair trade practices raised major difficulties for final consumers in exercising their newly acquired choice. The complexity of product selection resulted in certain cases consumers being disconnected from or disadvantaged in the market.

Consumers' position *vis-à-vis* service providers has traditionally been weak in many Member States and their grip of traditional advertising and retail mediums has considerably weakened over these consumer markets. The problems consumers face in these markets are principally related to information failures. The sources of consumer harm can be found in dominant firms applying unfair contract terms, high search and

³³ Green on damages actions, COM(2005) 672, 19.12.2005.

transaction costs or in the imperfect decision-making process either as a result of incomplete information or because of misleading and unfair commercial practices. Moreover, manufactured confusion is a deliberate tactic some firms use to avoid price competition, especially in the telecommunications sector. All the same, recent empirical studies show that consumers deviate from rational behaviour; even when information is available to them and considerable cost savings are possible they will limit their use of that information and create potential consumer harm. Many consumers are not taking advantage of beneficial switching and, in some cases, are switching to higher-cost suppliers.

The Commission's Consumer strategy 2007-2013 acknowledged that as liberalization further develops transition to liberalized services such as electricity, gas, post and telecommunications poses challenges for consumers and regulators to ensure consumer welfare is maximized. For example, while e-commerce has great potential to improve consumer welfare, by making a greater range of products available, boosting price competition and developing new markets, it also brings significant new challenges and in particular it weakens the grip of traditional advertising and retail mediums over consumer markets. The Commission argued that while the expected benefits of liberalization are considerable, it also challenges traditional modes of regulation, self-regulation and enforcement methods. Traditional consumer rights will be less and less adapted to the digital age.³⁴

The Commission in its new proposals for amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services argued that 'regulatory fragmentation and inconsistencies between the activities of the national regulatory authorities were found to jeopardize not only the competitiveness of the sector, but also the substantial consumer benefits from cross-border competition.'³⁵ 'The current fragmentation hinders investment and is detrimental to consumers and operators. Inconsistencies in the national regulatory authorities' application of remedies, even under similar market conditions, undermine the internal market in electronic communications, do not ensure a level playing field between operators established in different Member States, and prevent the realization of consumer benefits from cross-border competition and services.'³⁶

This is a similar line of argument as the one in the Commission's Green Paper on the review of the consumer *acquis* where it claimed that consumers lack the confidence to

³⁴ EU Consumer Strategy 2007-2013, COM(2007) 99 final, pp 3-4.

³⁵ Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, COM(2007)697 rev1, p 14.

³⁶ *Ibid*, p 3, 15.

make cross-border purchases because of the fragmentation of national legal rules on consumer protection.³⁷ The Commission sees a direct link between the lack of consumer confidence and the fragmentation of consumer rules in the Member States and argues that this fragmentation is on the one hand the result of minimum harmonisation and on the other hand, it is the consequence of the inconsistencies between the EC Directives.³⁸

The fragmentation and inconsistency between general consumer law and sector specific regulations seems to be a real problem. More coordination by the Commission both in terms of legislation and enforcement between the different DGs, as well as with the Member States, seems indispensable. While the different sectors exhibit different industry features, and thus require different policies and regulation, there are also similarities in market failures on the demand side and in the way regulation can approach them as Commissioner Reding has recently argued comparing the telecommunications and the energy sectors.³⁹

The EU regulatory framework is now being revised in order to serve the interests of consumers by strengthening their rights through improving, for example, information provisions and other contractual terms in order to facilitate switching and to make efficient and informed choices.⁴⁰ These reform proposals will be further reviewed below.

4.3. EU regulatory reforms in the energy and telecommunications sectors

A common EU energy market has been implemented since 1999 through a number of directives beginning in 1996⁴¹ and the second round of measures entered into force in 2003.⁴² Since then, implementation and the practical results of the Directives have been annually monitored and reported through detailed country reviews and the sector inquiry. This monitoring showed that uneven progress has been achieved since 1999. The current European legislation of 2003 had to be properly transposed into national legislation and energy markets opened up for consumers and new entrants by 1 July

³⁷ Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final.

³⁸ *Ibid*, p 3.3

³⁹ The Network Industries in the 21st Century: Regulating for Growth and Competition in the Internal Market, European Government Business Relations Council, Brussels, 5 March 2007.

⁴⁰ Commission Press Release, 'Commission proposes a single European Telecoms Market for 500 million consumers' IP/07/1677, 13 November 2007; Commission Press Release, 'Energising Europe: A real market with secure supply' IP/07/1361, 19 September 2007, and DG Competition report on energy sector inquiry, SEC(2006) 1724, 10 January 2007, p 4.

⁴¹ Directive 96/92/EC concerning common rules for the internal market in electricity, OJ 1997, L27/1, and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ 1998, L204/1.

⁴² Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ 2003, L176/37, Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ 2003, L176/57, Regulation 1228/2003/EC on conditions for access to the network for cross-border exchanges in electricity, OJ 2003, L176/1, and Regulation 1775/05/EC on conditions for access to the natural gas transmission network, OJ 2005, L289/1.

2007. While the basic concepts of the internal energy market have become embedded in terms of the legal framework, institutional arrangements and the physical infrastructure such as IT equipment, but meaningful competition does not exist in many Member States. Moreover, consumers often do not have any real possibility of opting for an alternative supplier.

Therefore, the Commission has, throughout 2005-06, been conducting an inquiry for the gas and electricity sectors under competition law. The European Commission's recently released Report on energy sector inquiry⁴³ among others 'has identified a number of serious shortcomings which prevent European energy users and consumers from reaping the full benefit of the liberalisation process.' As a consequence, the Commission has put forward a Draft Charter on the Rights of energy consumers⁴⁴ as an attempt to set out the rights consumers have in the areas of electricity and gas supply. The Commission does not consider the future European Charter on the Rights of Energy Consumers to be a legal document. Instead, the Charter should set out, in an easily comprehensible way existing Community legislation and possible elements for future action in relation to universal service, contracts, prices, tariffs, monitoring, free choice of suppliers, information, complaints and dispute settlement, representation, social measures and protection against unfair commercial practices. The role of the Charter seems to be limited to a policy document that intends to inform consumers better and encourage effective enforcement of consumer rights in the Member States. However, such a 'soft' instrument might not be sufficient to enforce consumer rights effectively in the EU.

Furthermore, in September 2007 the Commission has adopted a third package of legislative proposals⁴⁵ to ensure an effective choice of supplier and benefits to all EU consumers. The Commission's new proposals put consumer choice, fairer prices, cleaner energy and security of supply at the centre of its approach. The Commission also proposes to establish an Agency for the cooperation of National Energy Regulators, with binding decision powers, to complement national regulators. This will ensure the proper handling of cross-border cases and enable the EU to develop a real European network working as one single grid, promoting diversity and security of supply. The Proposal for a Directive amending Directive 2003/54/EC proposes among others measures that would strengthen the market regulatory powers of national regulatory agencies among others to make consumer protection measures effective and to reinforce substantive rules by effective, appropriate and dissuasive sanctions.⁴⁶ The main amendment to the consumer protection provisions are made in Annex A where

⁴³ Report on energy sector inquiry SEC(2006) 1724.

⁴⁴ Draft Charter on the Rights of energy consumers, COM(2007) 386 final.

⁴⁵ Proposal for a Directive amending Directive 2003/54/EC concerning common rules for the internal market in electricity, COM(2007) 0528; Proposal for a Regulation amending Regulation 1228/2003/EC, COM(2007) 0531; Proposal for a Directive amending Directive 2003/55/EC, COM(2007) 0529; Proposal for a Regulation amending Regulation 1775/2005/EC, COM(2007) 0532; and, Proposal for a Regulation, COM(2007) 0530.

⁴⁶ Proposal for a Directive amending Directive 2003/54/EC, *ibid*, Recital 18.

measures for providing consumers with consumption data in the format and procedure Member States define free of charge, proper information about monthly consumption and costs and unrestricted switching of suppliers.⁴⁷

Similarly, in the telecommunications sector the Commission has put forward new proposals for reforming current telecomm regulations in order to bring more competition and better regulation to the telecomm sector as well as to combat the fragmentation of telecomm regulation throughout the Member States and to improve the protection of consumer interests. The Commission proposes to strengthen consumer rights through giving consumers more choice by reinforcing competition between telecomm operators to promote investment into new communication infrastructures and making communication networks more reliable and more secure, especially in case of viruses and other cyber-attacks. Further, a new European Telecom Market Authority will support the Commission and national telecoms regulators in ensuring that market rules and consumer regulation are applied consistently, independently and without protectionism in all the Member States.

The proposed Directive amending Directives 2002/22/EC, 2002/58/EC and 2006/2004 proposes measures targeted at improving the transparency and publication of comparable, adequate and up-to-date information in an easily accessible form for users related to price increase and allowing third parties to use publicly available tariffs (e.g. for the purpose of selling or making available interactive guides) and national regulatory authorities to make such guides available when these are not available on the market (Article 21(2) to (6)). Further, facilitating use of and access to e-communications for disabled users (Articles 7, 22, 26(4),33) facilitating the switching of suppliers by consumers through, among other, strengthened provisions on number portability (Article 30), improving obligations related to emergency services (Article 26), ensuring basic connectivity and quality of service (Articles 20(5), 22). In addition, rules have been proposed to monitor retail tariffs, further information provisions in consumer contracts (Article 20(2h)(4)(6)) and that consumer interests are taken into account in consultations on the regulatory framework for electronic communications (Article 33) as well as a reinforced call to the Member States for transparent, simple and inexpensive out-of-court procedures for dealing with unresolved disputes between consumers and undertakings providing electronic communications networks and/or services, relating to the contractual conditions and/or performance of contracts concerning supply of such networks or services. Moreover, procedures should enable disputes to be settled fairly and promptly and a system of reimbursement and/or compensation could be established (Article 34). These are minimum measures that the Member States may extend to cover disputes involving other end-users.

Most of the new proposals focus on providing more and better information for consumers. However, as explained above increasing the amount of information may not help but rather accelerate consumers' problems. This is the case of so-called inertia

⁴⁷ Article 27b, Proposal for a Directive amending Directive 2003/54/EC, *ibid.*

when people are unable to process complex information and go on to take irrational decisions. Or the oversupply of information may be counterproductive and may deteriorate market transparency, a situation referred to as ‘confusopoly’.⁴⁸ Empirical studies in recently liberalized markets showed high degree of consumer inertia and indicated that many consumers despite the optimal balance between search, switching costs and expected gains are not taking advantage of beneficial switching and, in some cases, are switching to higher-cost suppliers.⁴⁹ Even when comparative information is available to consumers this inertia may be explained by computational difficulties, perceptions that search costs are high, or by possibly misplaced trust in consumers’ present supplier. Thus consumer confusion and ‘information-overload’ are rather the reasons for these mistakes than other ‘rational’ explanations of consumer mistakes such as perceived differences in firm quality or uncertainty over consumers’ own demand.⁵⁰ In the light of these theoretical and empirical results the Commission should reconsider the measures proposed for the assistance of consumers. It could encourage Member States to introduce measures, such as model standard term contracts, that frame decisions for consumers without being mandatory for firms, or set up systems that provide tips and tools and functional information that is easy to access and understand.

Moreover, enforcement and institutional matters should be more clearly elaborated. Policy measures should concentrate on, and recommend guidelines for, governance on enforcement distribution and the institutional framework. The imposition of another layer of enforcement agency at central EU level seems to provide little help in this respect when these issues are primarily to be solved at national levels.

In the following two case studies of national developments are presented in order to examine liberalization on a more micro-level where, beyond implementation of EU legislation, enforcement exhibits the actual problems market players and regulators face. First, the liberalization of the Hungarian telecommunications market will be discussed and then the Dutch electricity market. The paper will examine the results of market opening in these two cases with regard to consumer interests and the impact of consumer behaviour on competitive market outcomes. The different regulatory approaches will be analyzed and compared with the regulatory framework suggested by the EU.

⁴⁸ J Gans, ‘The Road to Confusopoly’, available on the ACCC conference website at www.accc.gov.au/content/index.phtml/itemId/658141/fromItemId/3765.

⁴⁹ M Giuliotti, C Waddams Price and M. Waterson, ‘Consumer choice and competition policy: a study of UK energy markets’, (2005) 115 *The Economic Journal* 949-968; C Wilson & C Waddams Price, ‘Irrationality in Consumers’ Switching Decisions: when more firms may mean less benefit’, CCP Working Paper 05/04, ESRC Centre for Competition Policy, University of East Anglia, 2005.

⁵⁰ C Wilson & C Waddams Price, ‘Irrationality in Consumers’ Switching Decisions: when more firms may mean less benefit’, CCP Working Paper 05/04, ESRC Centre for Competition Policy, University of East Anglia, 2005.

5. LIBERALIZATION OF THE HUNGARIAN TELECOMMUNICATIONS MARKET

5.1. The first wave of liberalization

Despite the heritage of the socialist economies the development of economic policy from the end of 1980s in the Eastern European countries has been similar to the Western jurisdictions. From the end of the 1980s over-regulated markets have been deregulated, former state monopolies have been abolished and several sectors have been liberalised. By 2004 Hungary had made reasonable progress in liberalising its electricity, gas and telecommunications markets.⁵¹ Independent regulatory agencies had been established with a mandate to open up markets to competition, prevent incumbents from abusing their position and avoid collusion between operators.

Gradual liberalisation of the telecommunications market started with the 1997 amendment of the 1992 Telecommunications Law, but its pace has not been satisfactory. The main fixed line telecommunication market was opened in December 2001 with some temporary exceptions, notably delay in the expiry of local telephone concessions to 2002. The Telecommunication Act XL of 2001 harmonised Hungarian telecommunication legislation with the European *acquis* and signalled the beginning of the liberalisation of the Hungarian telecommunications market. Nevertheless, restrictions in fixed-line services continued to be much higher than in the mobile telephony sector and higher than in most other EC countries. The opening-up of the telecommunications sector did not result in the introduction of fierce competition in the case of fixed telecommunications. This was partly due to the abusive, exclusionary conduct of Matáv (today Magyar Telekom). Magyar Telekom's strong position partly reflected a tilting of regulations against new entrants. The dominant fixed-line network operator was able to restrict end users' ability to choose the services of other operators. The actual effects of the 2001 liberalisation of the fixed telecommunications market remained almost unnoticed for final consumers until 2003. On the market for business users, alternative suppliers were striving to stay on the market but possibilities for expansion were restricted. Price regulation ceased to exist both in the case of retail and interconnection services. However, in the case of operators enjoying a significant market power, a price-cap mechanism was applied to retail services and the Act prescribed the basis for calculating the cost for their interconnection services.⁵²

The reasons for the failure of this initial liberalisation were to be found in regulatory shortcomings and failures that did not enable number portability and restricted carrier pre-selection (CPS). One consequence was that suppliers could create preferential tariff packages that rational consumers opted for and subsequently suppliers concluded long-term contracts with the consumers who were accordingly locked-in and CPS was

⁵¹ OECD, 'Product market competition and economic performance in Hungary', Economics Department Working Papers No. 381, 2 March 2004, p 17.

⁵² GVH, Hungarian Competition Authority, Annual Report 2003, p 11.

excluded.⁵³ Moreover, access charges and interconnection fees remained relatively high, with the latter resulting in price squeezes on new entrants and helping the incumbent retain its market share. Unbundled access to the local loop was provided by law, but was not applied in practice, partly because of price squeezes. Magyar Telekom, the incumbent in the Hungarian telecom market was condemned several times and fined by the Hungarian Competition Authority (Gazdasági Versenyhivatal hereinafter GVH) for abusing its dominant position. For example, in the period February-July 2002 Magyar Telekom charged higher prices for interconnection services than for retail services offered to end users. The margin between the two prices left no room for competitors to enter the market. Magyar Telekom introduced tariff packages for end consumers including preferential prices for local, national and international calls. Certain packages were designed for smaller, while others for larger, undertakings and there were packages for residential consumers as well. In preferential packages designed for undertakings, Magyar Telekom excluded the possibility of CPS in the case of national and international calls. On the basis of these facts the investigators of the GVH concluded that Magyar Telekom had abused its dominant position as the margin between wholesale prices charged for competitors and retail prices provided by Magyar Telekom for consumers was negative and therefore ineligible for effective competition. The GVH also found the exclusion of the possibility of pre-selection illegal.⁵⁴

In the telecommunications sector the expiry of the exclusivity clauses in the concession contracts concluded for telecom services was the most essential change in 2001. Large consumers could benefit from the changes in an indirect way through price decreases, wider choice. These also had some positive effects also for small consumers. Still, the results were modest due to the negative consequences of the recession that begun in 2000 and 2001 and there were also some failures by the legislators and law-enforcers. The regulatory environment was unable to create an appropriate background for a regulatory intervention, which could have been adjusted to market circumstances. In certain cases the regulations were overly rigid, containing inflexible framework and this did not allow interventions that could have served the interest of the market taking into account the existing circumstances.⁵⁵

The first wave of liberalisation of the Hungarian telecom market was clearly a failure in terms of weak regulatory tools to make viable competition possible. The measures that were taken in order to facilitate the liberalisation of telecom markets were often late coming and actions actually taken were incremental. This was mainly because of terms

⁵³ CPS has been available for long distance calls, international calls and calls to mobiles since 2002. Since mid-2004, following the expiration of the eight-year concessions, Hungarians can use CPS for their local communications. The arrival of CPS operators should stimulate the market, which has been stable for several years. GVH, Hungarian Competition Authority, Annual Report 2003, p 2; GVH, Report 2007, p 13.

⁵⁴ Vj-100/2002, GVH, Report 2003, p 10.

⁵⁵ GVH, Report 2002, p 15.

of exclusive rights given in concession contracts made at the time of privatisation but also because of technical and market considerations.⁵⁶

Act XL of 2001 delineated the institutional background of the sector by designating the National Communications Authority of Hungary (NCAH) and the Arbitration Committee as bodies mainly responsible for liberalisation. The most important implementing rules have been also enacted; nevertheless, they were not applicable at the time of market opening.⁵⁷ Another factor holding back progress in these areas was that even though there was a close working relationship between the telecommunications regulator, the Ministry of Telecommunication and the GVH, the regulator's powers seemed to have been both weak and too carefully used.⁵⁸

5.2. The second wave of liberalisation

The current regulatory framework is governed by Act C of 2003 on Electronic Communications (hereinafter AEC). The AEC replaced the Telecommunication Act of 2001, when it came into effect on January 1, 2004. The AEC intended to reduce the power of the incumbent, Magyar Telekom and to intensify competition in Hungary's telecommunications market as well as to attain EU standards. The main objectives of the AEC were to intensify competition between technologies and service providers, to create transparency on the telecom and internet markets, to offer real choices to customers, to protect consumers against service providers and to accelerate the spread of the internet.

The AEC regulates mainly contractual aspects of consumer protection, standard contract terms, information disclosure, complaints with the supplier (Articles 128-144), universal service (Articles 120-125), quality of services (Article 139) and designated the post of the Representative of Communications Consumer Rights.

The Representative of Communications Consumer Rights is an information and contact centre liaising between the consumers (subscribers) and the market players (service providers, authorities and other organisations). Its chief tasks include investigation of possible solutions for problems affecting considerable user groups, preventive work for the enforcement of consumers' interests, in cooperation with partner organisations if necessary. One of its tasks of particular importance is to keep users well-informed to enable them to use the available resources as efficiently as possible.⁵⁹ While the AEC regulates subscriber contracts and information provisions within these contracts, these contracts are further regulated by Government Decree 345/2004. (XII.22.) on the requirements for the quality of the electronic communications service related to customers protection.

⁵⁶ GVH, Report 2003, p 2.

⁵⁷ GVH, Report 2001, pp 3, 11.

⁵⁸ GVH, Report 2001, p 12.

⁵⁹ See Article 126 of the AEC.

The AEC lays down cooperation with both the Consumer Authority (Article 21) and the Competition Authority (GVH) (Article 20) as to better coordinate division of competences. This has also been encouraged by the European Commission as a safeguard to allow consumers effective access to the competent body.⁶⁰

The Board of the NCAH may after detecting a violation during the market surveillance, apply sanction progressively, as consistent with the severity of the infringement (Article 68). Accordingly, it may take provisional measures, determine the conditions of the performance of specific activities, adopt a cease and desist order, make public the information obtained in justified cases specified in the AEC to the benefit of consumers, publish its resolution on establishing an unlawful conduct in a daily newspaper of nationwide circulation at the cost of the offender, particularly if it serves the prevention or reduction of serious detriment to consumers, order a service provider to publish a corrigendum in connection with any statement the service provider has made to mislead a large number of consumers, or seize or confiscate, under the procedure governed in specific other legislation, any equipment or instrument that has been used for illegal activities or without proper authorization. In the event of any serious or repeated violation of obligations, if the above mentioned sanctions did not achieve sufficient results, the NCAH shall have powers to suspend or prohibit the related electronic communications activities, or may suspend or withdraw the individual licenses granted for the use of radio frequencies and identifiers.

Fulfillment of the regulatory objectives in Hungary shows a varied picture. Interconnection fees stood at 224 % of the EU average and had to be reduced to the EU level by May 1, 2004. Number portability became possible from January 1, 2004 for fixed-lines and from May 1, for mobile phone numbers. The new law encouraged new market entrants by measures such as granting exemptions from paying into the Universal Service Fund for two years. Still, competition in the telecommunications sector had a double-edged effect. The mobile voice services market is characterized by very strong and intensifying competition and also there is medium-size competition in the data services (internet services) market, although this is mostly not attributable to access-infrastructure competition. But there is limited competition in the fixed voice services and audiovisual content delivery markets. This dichotomy is reflected also along the consumer interests and in respect of certain services; the consumers clearly require wider choice and more information and more transparency of the market. In

⁶⁰ European Commission, DG Staff working document Annex to the communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee of the Regions European electronic communications Regulation and markets 2006 (12th REPORT), COM(2007)155 Brussels, 29 March 2007, p 204; Staff working document Annex to the communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee of the Regions European electronic communications Regulation and markets 2005 (11th REPORT) COM(2006)68 final Brussels, 20.2.2006, p 201.

respect of the sector interests the current market was characterized by financial stability, but a relatively low and decreasing level of investment.⁶¹

The effects of the new regulatory regime on consumers were alleged to be substantial. The protection of consumer interests in their relationship with all players within the electronic communications market has been claimed to be one of the priorities of the reforms. This protection should have been realised, among other things, through guaranteeing consumers a free choice of electronic communications networks, service providers and services, ensuring the ability to communicate with other consumers by way of electronic communications irrespective of the fact whether such consumers have a contractual relationship with the same, or other service providers. Furthermore, consumers were promised the use electronic communications services under publicly available, defined and equitable terms and for the lowest price and at the highest quality and to receive reliable, transparent and up-to-date information concerning the features of electronic communications services and the conditions concerning their use.⁶²

Based on HCSO (Hungarian Central Statistical Office) data, telecommunications prices have grown slower than the inflation rate since 2002, and they even decreased for the first time in 2004. The decrease of the fixed line, mobile and Internet tariffs is partly attributable to rising competition. Based on the calculations of the HCSO, the *per capita* telecommunications expenditure has nearly quadrupled in real terms since 1995. On one hand, this considerable growth is attributable to the fact that the services have become available to a wide audience – in parallel with the development of the infrastructure. On the other hand, it is also due to the price increase of electronic communications services, which have fallen below the consumer price index in every year since 2000 and, moreover, turned into a slight decrease in 2004, based on HCSO data. The consumer price of telephony fell by 0.7%, as stated by the HCSO, in 2004, after a 1.2 percent increase in 2003. As of January and May, fixed line and mobile numbers have become portable, and new fixed line services targeting the residential market segment were introduced in the summer of 2004 – extending the positive effects of competition to this segment.⁶³ In 2006 the reduction in fixed-line interconnection fees, wholesale broadband service prices, mobile termination rates, the monthly rental fee for local loop unbundling and the related one-off charges should be emphasized.

While it seems that after the regulatory changes of 2003 competition is indeed emerging and new entrants appear on the market, the assumption that competition by its nature delivers desirable outcomes and results in the formerly monopolistic telecom market has proved to be wrong. In practice consumers see limited benefits from the changes. Consumers face a number of difficulties on both the fixed-line telephone market as

⁶¹ National Communications Authority, The National Communications Authority's Strategy on Electronic Communications Regulation 2006-2010, 2006/09/07, p 27.

⁶² Article 2 b, of AEC.

⁶³ NCAH Annual Report, 2004, pp 5, 8.

well as on the mobile telephone market. These difficulties are mainly related to information failures and these market failures prevent consumers from switching to a cheaper or a higher quality provider and make use of the possibilities and choices the process of competition offers. At the same time these information failures make it possible for dominant companies to retain their market power in the market without being threatened by considerable competitive constraints. Accordingly, these market failures result in both competition law and consumer law problems and call for active enforcement. Specific cases will be analyzed below in the following section. The expected positive outcomes, which the introduction of competition to the telecom market should have produced especially lower prices, is, on the one hand, not yet perceivable and, on the other hand, they cannot be enjoyed by the ultimate addressees of the changes.

In the fixed-line services market competition is taking off, but real price differences are not yet noticeable. By European comparison in 2004 in the fixed voice market in Hungary the level of competition was among the lowest, while the mobile market was in the medium group in terms of competition. By 2005 the situation improved primarily in the fixed market due to an already perceivable competition generated by the entrance of Tele2 and UPC. In the first half of 2005 Tele2 became the second largest player in terms of originated voice calls and the number of cable telephony subscriptions has grown to tens of thousands.⁶⁴

The incumbent company Magyar Telekom retains its strong market position and competition is not yet present as a result of late introduction and enforcement of sector specific measures. Magyar Telekom holds 60% of the revenues of all market players in the telecommunications market and it is the only company that has both fixed-line and mobile infrastructure. Accordingly, Magyar Telekom's competitive advantage *vis-à-vis* its competitors is significant and is expected to remain so as the company can more easily invest and create bundled services as well as new telecommunications services.⁶⁵ The dominant player has an insurmountable competitive advantage resulting from its more efficient and flexible infrastructure with higher transmission capacity and from business integration encompassing the total range of electronic communications services that it has carried out. With the widening market convergence and use of bundled services the dominant operator increasingly leverages its power to the majority of the electronic communications markets and several elements of the value chain as well.⁶⁶

How little consumers can discipline telecommunications providers and how little competitive constraint has been exercised on the incumbent, Magyar Telekom, can be illustrated by cases concerning both abuse of a dominant position as well as misleading

⁶⁴ National Communications Authority, The National Communications Authority's Strategy on Electronic Communications Regulation 2006-2010, 2006/09/07, p 26.

⁶⁵ National Communications Authority, The National Communications Authority's Strategy on Electronic Communications Regulation 2006-2010, 2006/09/07, pp 25, 44.

⁶⁶ National Communications Authority, The National Communications Authority's Strategy on Electronic Communications Regulation 2006-2010, 2006/09/07, p 48.

consumers. Magyar Telekom was fined for abusing its dominant position by setting excessively high wholesale prices for its competitors in its contracts necessary for network access to provide services through the operation of blue and green dial numbers.⁶⁷ In another case Magyar Telekom has been fined for misleading consumers and applying a comparative advertising in an illegal way.⁶⁸

In the mobile services market competition has been fierce from the very beginning. Sharp competition has often resulted in unfair commercial practices that were misleading consumers. In the heat of competition mobile operators use advertisements that try to lock in consumers by applying false statements.⁶⁹ The choice for consumers is even further impeded by the fact that the tables of tariffs of service providers are impenetrable and subscriber contracts are long and inaccessible for an average consumer. Consumers have major difficulties to get objective and accessible information.⁷⁰

In both the fixed-line and mobile phone markets Hungarian consumers face misleading advertisements, false statements and troubles with invoices. Advertisements of service providers focus on high-sounding fantasy names but lack essential product information. Loyalty contracts have been recently the subject of increased attention as these contracts locked in consumers and significantly limited consumers' choice of provider. Telecommunications providers restricted consumer choice by imposing disproportionate and unfair contract terms. The termination of fixed term subscriber contracts and the change of programme package before expiry of the fixed term contract has been tied to a unilaterally established condition or to an economic condition that could not be justified and was not proportionate to either the provided advantage of the loyalty contract or the obligation of the supplier to perform the contract. Moreover, fixed term contracts after expiry of the fixed period have been automatically prolonged or have been transformed into contracts for undetermined time. After several protests from the national consumers' association, the NCAH issued

⁶⁷ Each fixed line service provider has to offer services through blue and green (coloured) numbers to its business subscribers, otherwise the providers would run the risk of losing their market presence. In order to provide this type of service they also have to grant consumers from other networks the possibility to get these coloured numbers which are used by their subscribers. This condition is particularly important as far as the subscribers of Magyar Telekom are concerned since the market share of Magyar Telekom (previously MATÁV) is 80%. Magyar Telekom used this situation to set asymmetric wholesale (access) fees in its contracts concluded with its two aforementioned competitors - in order to grant symmetrical (retail) call fees. PanTel on PanTel though Magyar Telekom as a service provider also used these devices. Vj-66/2004/72.

⁶⁸ Vj-32/2005/20.

⁶⁹ Many consumer deception cases before the HCA provide evidence of this negative effect of fierce competition. For example, in Vj-6/2004 where the HCA has fined Vodafone for the advertisement of its 'VitaMAX Duo' price plan, which implied that consumers would be charged on the basis of network minutes. Vodafone has thereby deceived consumers and violated Art.8 (2) a, of the Hungarian Competition Act. Pannon GSM has also been fined recently for misleading consumers: Vj-191/2004, Vj-170/2004.

⁷⁰ G Fischer, 'Consumer rights, consumer protection problems after the liberalisation of the telecommunications market, National Association of Consumer Protection', VIII Conference on telecommunications liberalisation, Budapest, 25 April, 2005.

a decision prohibiting this kind of unjustified discrimination among consumers.⁷¹ However, this decision concerns only fixed-line suppliers and the mobile service suppliers.⁷²

Tariff packages in the mobile market are also problematic for consumers. There are more than 1000 packages available and this results in confusion and decision-making difficulties for choice on the consumer side. The NCAH has set up a website for information comparisons but the data changes so rapidly that the website cannot provide up to date information.⁷³

Consumers should be provided objective and transparent information that helps them to search for and switch to a more efficient service provider. In order to provide them with the assistance they need consumer behaviour should be monitored and studied in the telecom market. In 2004 there was a study on the practice of Hungarian mobile telephone customers.⁷⁴ This study shows that 19% of the mobile telephone users has switched to another supplier and the main reason for switching was lower minute fees. From another survey it appears that 37.9% of the respondents were not aware of the fact that switching to another fixed line telephone provider was possible and 28.3% thought they could not switch to another fixed line telephone provider.⁷⁵ These surveys do not focus in details on consumers' awareness and willingness to search and switch. More specific surveys would be helpful for tackling the problems consumers face in this market.

They have at this point little solace for their problems. Consumers stand defenceless *vis-à-vis* the price and advertisement wars of service providers. More independent platforms that offer objective and transparent information could be welcomed. One such platform is a monthly journal of the National Association of Consumer Protection, the only civil organisation for the protection of consumers. The above mentioned Tantusz website is a consumer information system that has been set up by the Representative of Communications Consumer Rights (within the NCAH) in order to provide consumers with more transparent information on electronic communications services regarding choice and price comparisons on including fixed, mobile, broadband and cable TV services.

While the NCAH has recently stepped up its enforcement efforts by imposing more significant fines on operators and, in order to enforce its decisions, it participates more actively in regulatory policy making, there are still concerns about the slow course of

⁷¹ Újabb NHH lépés a korrekt hűség szerződések érdekében, Tilos a „röghöz kötés”, Press release 2007/09/12.

⁷² G Fisher, 'Problémák a hírközlés és az informatika területén', 2007, http://www.ofe.hu/inet/ofe/hu/menu/publikaciok/fischer/object/hirkozles_fischer.ppt

⁷³ Tantusz: <http://tantusz.nhh.hu/>, Fischer, 2007, *ibid*.

⁷⁴ Rt Társi, 'Mobiltelefon szolgáltatások fogyasztói szokásainak felmérése a 14 éves és idősebb magyar lakosság körében', Budapest 2004 (Analysing study on the habits of mobile telephone customers older than 14 in Hungary).

⁷⁵ Telekommunikációs szokások, Szonda Ipsos, Nemzeti Hírközlési Hatóság, 2004 (Study on telecommunications habits of the the general public).

dispute resolutions and about the fact that its decisions are systematically challenged before the appeals courts. This both slows down the final decision-making process as court procedures can take years and results in legal uncertainty.⁷⁶

There are several administrative bodies who are responsible for consumer protection: the NCAH, the Representative of Communications Consumer Rights, the GVH and the Consumer Authority. The division of powers among these bodies is, however, not always clear. Moreover, dispute settlement between consumers and business entities can be referred to the Consumer Arbitration Boards, independent bodies and they operate at the regional chambers of commerce.⁷⁷ Consumers can turn with their complaints to their service providers and on the basis of the AEC to the Representative of Communications Consumer Rights.⁷⁸

Even though, the powers of the Representative are rather limited it has also stepped up its enforcement efforts by imposing heavy fines on operators for misleading advertising.⁷⁹ Furthermore, access to court is a possibility, but it is of course a long and expensive procedure and consumers are therefore advised to turn to arbitration boards for the enforcement of consumer rights.⁸⁰

5.3. Relevant cases

The legal problems envisaged during the liberalization of the Hungarian telecommunications market can be the best captured through the case-law of the GVH. The reason for that lies in the institutional setup and its development in Hungary. While several bodies are presently responsible for the enforcement of consumer interests in the telecommunications market, initially it was only the GVH, which

⁷⁶ Commission staff working document annex to the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, European Electronic Communications Regulation and Markets 2006 (12th REPORT), SEC(2007) 403, p 198.

⁷⁷ For a detailed overview see, University of Leuven, 'The study on alternative means of consumer redress other than redress through ordinary judicial proceedings: National Reports - Hungary' (2007) http://ec.europa.eu/consumers/redress_cons/adr_en.htm

⁷⁸ See Article 126 of the AEC. The HFJK is an information and contact centre liaising between the consumers (subscribers) and the market players (service providers, authorities and other organisations). Its chief tasks include investigation of possible solutions for problems affecting considerable user groups, preventive work for the enforcement of consumers' interests, in cooperation with partner organisations if necessary. One of its tasks of particular importance is to keep users well-informed to enable them to use the available resources as efficiently as possible.

⁷⁹ Commission staff working document annex to the Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, European Electronic Communications Regulation and Markets 2006 (12th REPORT), SEC(2007) 403, p 204.

⁸⁰ The Hungarian arbitration boards form a modern alternative dispute resolution scheme and comprise an out-of-court model of public complaints boards, which are based on administrative law and have been set up and financed by the state.

effectively enforced competition rules and provisions related to consumer fraud⁸¹ The sector regulator was later established and armed with insufficient enforcement powers and the Consumer Authority (General Inspectorate for Consumer Protection) lacked professional and well-prepared personnel; they were mostly unaware of the requirements of a truly consumerist society and at the beginning they could not sufficiently assist consumers with their problems.⁸² This institutional tilting is, however, still characteristic as the high percentage of the GVH's decisions evidence. For example, similarly to previous years in 2006 the majority of cases of unfair manipulation of consumer choice are related to telecommunications or financial services.⁸³ Moreover, still in 2006 the GVH's advocacy was strong on the telecommunications market. The GVH communicated its position about competition policy aspects not only when it was asked by other authorities but it also presented a comprehensive report about competition on the electronic communications market.⁸⁴

The following cases mirror a two-fold approach to protect consumer interests by enforcing the provisions of the HCA on abuse of dominance and the provisions on consumer fraud.

As to abuse of dominance the GVH has been enforcing the competition rules in cases concerning unfairly excessive increase of cable TV prices and the disadvantageous restructuring of programme packages that resulted in unjustifiable detriment for consumers as well as establishing standard contract terms that enable the providers to unilaterally change prices and programme packages. These cases were dealt with under Article 21(a) of the Hungarian Competition Act (HCA) which is equivalent to Article 82(a) EC stating that it is prohibited to abuse a dominant position, particularly in business relations, including the application of standard contractual terms, to set unfair purchase or selling prices or to stipulate in any other manner unjustified advantages or to force the other party to accept disadvantageous conditions. The above mentioned

⁸¹ The Hungarian Competition Act is a comprehensive piece of legislation regulating cartel agreements, abuse of a dominant position, merger control but also unfair competition law and the unfair manipulation of consumer choice. For an English text see the website of the GVH: <http://www.gvh.hu>

⁸² The fact that the GICP used to be subordinated to the Ministry of Home Affairs reveals its original role during the communist regime. It was first of all a supervising body and as such its authoritative power was considerable. It was more a political than an economic body. Earlier the GICP's staff consisted mostly of people with an engineering background, with only a small number of lawyers and economists. These people were well-trained bureaucrats within the socialist administration, which meant that they were more used to executing central orders than to assessing the problems on the marketplace. Their legal background was mostly based on administrative law and they were unfamiliar with theories of the market economy and the issues of consumer protection. Before the transition the GICP's work first of all consisted of market control-related duties, such as inspection of product safety, quality control, monitoring compliance with legal regulations and administrative provisions and consumer quality complaint cases. They controlled, supervised and sanctioned smaller private traders, but not the big state companies. The protection of consumers was limited in their actual work. At the beginning they also seemed to be very cautious in declaring the practices of certain traders as damaging for consumers. KJ Cseres, *Consumer Protection and Competition Law*, The Hague, Kluwer International, 2005.

⁸³ GVH, Annual Report 2006, p 5.

⁸⁴ GVH, Annual Report 2006, p 7.

cases often concerned also the misleading of consumers but have been analyzed and decided under Article 21(a) HCA while establishing that the enforcement of competition rules is in itself not always sufficient. The fact that some of these cases have been terminated without finding an infringement, and without fining the companies, proved the necessity of regulatory intervention instead of competition law enforcement.

One group of cases concerned excessive pricing through unfairly excessive increase of cable TV prices. Excessive pricing is a cautiously and, exceptionally enforced part of Article 82 EC violations by the Commission and even though national jurisdictions more actively enforce this and similar provisions, its enforcement is not without controversy and a solid benchmark of unfair or excessive prices is missing. Uncertainties of enforcement are even greater in the network industries, where *ex ante* tariff regulation is often necessary to create efficiency-driven prices and *ex post* regulation thus is not appropriate in this case.⁸⁵ In the practice of the GVH excessive pricing is when it significantly exceeds the economic value of the services, i.e. the sum of the economically reasonable costs and the fair profit attributable to the particular sector.⁸⁶ In a proceeding initiated by the GVH against Antenna Hungária Magyar Műsorszóró és Rádióhírközlési Nyrt (AH, the Hungarian broadcasting company) the alleged abusive conduct was excessive pricing on the markets of national analogue terrestrial television broadcast diffusion services, which would enable unfair cross subsidization on the market of television broadcast distribution services thereby excluding competitors from that market or hinder their entry. The GVH established several times that there is no particular prevailing cost allocation method, any deviation from which would entail an infringement of competition law. The GVH also considered that from a competition policy point of view, contractual disputes not affecting long-term consumer welfare or the reallocation between different production levels are indifferent. Potentially excessive prices in television broadcasting are exactly this phenomenon, since consumers do not have to pay for terrestrial reception to the content providers. Finally the Competition Council informed in detail the National Telecommunications Authority about its experience in the case.⁸⁷

Another group of cases that has been typical in the TV cable sector concerned disadvantageous restructuring of programme packages and qualified as unjustified advantages violating Article 21(a) HCA. These cases deal with unfair contract terms and they represent an interesting intersection of competition law principles as envisaged in Article 21(a) HCA and consumer-contract law principles as laid down in Article 209/B Hungarian Civil Code.⁸⁸ The GVH has dealt with this issue in details in its decision

⁸⁵ For a more detailed overview see M Van der Woude, 'Unfair and excessive prices in the energy sector', 2007 EU Competition Law and Policy Workshop/Proceedings, European University Institute, Robert Schuman Centre for Advanced Studies.

⁸⁶ Vj-27/2005, GVH, Annual Report 2006, p 36.

⁸⁷ GVH, Annual Report 2006, p 36.

⁸⁸ Article 209/B of the Hungarian Civil Code:

against UPC Hungary Kft's policy concerning the structuring of programme packages.⁸⁹ The undertaking changed its programme packages by placing certain popular programmes into a package, which could be received by the consumers only by the use of a decoder. Moreover, the Competition Council challenged certain points of the standard contract terms granting unilateral possibility for the undertaking to increase its prices in a non-transparent way. Consumers were, therefore, unable to predict, calculate and control the price increase. The GVH interpreted the term "unjustified advantage" under Article 21(a) EC as an objective category but in the absence of a separate definition of this term under the HCA it made reference to Article 209/B of the HCC. It emphasized that as an objective concept competition law does not apply the notion of good faith and therefore the condition as laid down in Article 209/B (1) HCC 'in violation of the obligation to act in good faith' does not constitute an element of 'unjustified advantage' under Article 21(a) HCA.⁹⁰ This can be explained by the fact that the HCC regulates equal relations while the HCA concerns economically subordinated actors. In sum, the GVH considers a standard contract term unjustified that enables an undertaking in a dominant position to unilaterally change prices as the reasons of price increase are unclear and provide scope for unilateral interpretation by the dominant undertaking.⁹¹ What amounts to an advantage is another issue that has not been defined neither in the HCA nor in the GVH's practice. The GVH has not identified the term advantage as the revenue from the increased price exceeding the consumer price index if this increased price cannot be justified by economically reasonable costs and fair profit of the undertaking. Accordingly, there is presently no clear guidelines on what amounts to an 'unjustified advantage' under Article 21(a) HCA.

(1) A general contract condition, or the term of a contract between an economic organization and a consumer, shall be regarded unfair if the clause or term, in violation of the obligation to act in good faith, unilaterally and unjustifiably establishes the contractual rights and obligations of parties to the detriment of one of the parties.

(2) The definition of rights and obligations is unilaterally and unjustifiably detrimental, in particular if

a) it substantially deviates from major provisions of the contract; or

b) it is incompatible with the subject matter or purpose of the contract.

(3) When establishing the unfair nature of a contract condition, it shall be necessary to examine all of the circumstances leading to the conclusion of the contract as well as the nature of the stipulated service and the relationship of the condition in question with other contract conditions and other contracts.

(4) Other legal regulations may define the conditions that are regarded to be unfair in respect of contracts concluded with consumers or that shall be regarded as unfair until proven otherwise.

(5) The provisions on unfair contract conditions shall not be applied to a contract clause stipulating the service and the consideration for such, if the phrasing of such clause is clear and understandable for both parties.

(6) The contract conditions defined by legal regulation, or established in accordance with the provisions of legal regulations, shall not be deemed unfair.

⁸⁹ Vj-126/2000.

⁹⁰ Vj-126/2000 XIV.; GVH, A kábeltelevíziós szolgáltatók műsorjelelosztó szolgáltatásával kapcsolatos versenyfelügyeleti eljárások tapasztalatai alapján megfogalmazott szabályozási javaslatokról, 2003, pp 59-60.

⁹¹ Vj-126/2000 XV.; GVH, A kábeltelevíziós szolgáltatók műsorjelelosztó szolgáltatásával kapcsolatos versenyfelügyeleti eljárások tapasztalatai alapján megfogalmazott szabályozási javaslatokról, 2003, p 61.

In another case MATÁV Kábel TV Kft. was condemned for following the upgrading of its infrastructure and thus changing the programme packages to the detriment of consumers because its new pricing policy was not supported by a detailed and transparent cost calculation.⁹² The Competition Council imposed in both cases a fine of HUF 5 million.

The GVH also found restriction of customer switching in the practice of Magyar Telekom Ltd as illegal with regard to the removal of ADSL-modems when customers change their Internet providers. Magyar Telekom, in contrast to Invitel, tried to restrict customers in switching to other providers by subjecting such changes to detrimental conditions rather than by offering discounts. The GVH argued that pursuant to the findings of the investigation, the unreasonably lengthy service disruption in the case of a change of the provider cannot be justified either by technical or economic reasons.⁹³

In two other cases the GVH initiated proceedings against two mobile phone operators, T-Mobil Magyarország⁹⁴ and Vodafone Magyarország⁹⁵, concerning the operation of their voice-mail services. According to their practice the voice-mail service turned on automatically without prior warning. Consumers were therefore unable to avoid the charges of a service, not even with an immediate interruption of the call. Data underlined however that a great number of calls were terminated in the first few seconds of such calls and no messages were left for the addressee. The GVH found that such a practice was against consumer interest and qualified as an exploitative abuse under Article 21(a) of the HCA. The GVH gave 90 days for the operators to amend their system and to enable consumers, in case of such preference, to avoid the use of the voice-mail services. However, it also found that, having regard to the differing practice of the different mobile and fixed-telephony operators, the problem could not be solved through competition supervision proceedings and needed regulatory intervention.

The incumbent, Magyar Telekom, has also been subject to proceedings before the GVH for abusing its dominant position on different segments of the telecommunications market by imposing a unilateral contractual stipulation of the supplier for reviewing and amending the fee without the further justification under review of the consumers. Consumers are obliged to except this unilaterally fixed fee or they terminate the contract by which they exclude themselves from the service. The GVH argued that this practice amounted to unfair advantage for the dominant firm as defined under Article 21(a) HCA, however because the infringement was of a short-term it did not impose a fine.⁹⁶

⁹² Vj-61/1999.

⁹³ Vj-39/2005.

⁹⁴ Vj-80/2004/53.

⁹⁵ Vj-82/2004/57.

⁹⁶ Vj-87/2001, Magyar Telekom abused its dominant position by applying unfair contract terms.

In sum, these cases indicate that the GVH readily enforces Article 21(a) HCA successfully and actively in case of unfair contract terms concerning unilaterally established and non-transparent conditions but is less ready to do so when unfair/excessive prices are at stake.

In the mobile services market competition has been fierce from the very beginning and continues to be lively between the three network owner service providers, which often results in aggressive advertising practices. In the heat of competition mobile operators use commercial practices that mislead consumers such as advertisements locking in consumers by applying false statements.⁹⁷ Communication with clients is part of the competitive strategy of mobile phone companies. Apart from shaping and strengthening their image the providers offer consumers from time to time lower prices as a result of price competition. There is a huge variety of products and services. It is impossible for consumers to make an objective comparison between the different services. Between 2004 and 2007 the Hungarian Competition Authority (GVH) fined undertakings providing mobile phone services HUF 380 million as a total because they deceived consumers.⁹⁸

The market is characterised by the asymmetry of information. The choice for consumers is even further impeded by the fact that the tables of tariffs of service providers are impenetrable and subscriber contracts are long and inaccessible for an average consumer. Consumers have major difficulties to get objective and accessible information.⁹⁹

From the above the following summary and conclusions can be made. The liberalization of the Hungarian telecommunications market has taken off slowly and went through an initial period with inefficient regulation and weak enforcement and institutional setup. The result was weak with no real competition in the market with significant entry barriers and the incumbent dominant firm was able to maintain its market share and moreover to abuse its position. The effect of the liberalization was insignificant for consumers in this period. The main enforcement work has been focused on the enforcement of competition law and the consumer fraud rules of the HCA. The GVH has been actively and effectively enforcing these rules in this period but has also emphasized the need for proper sector regulation and sector regulator. From 2003 the new Telecommunications Act has partly filled in this gap. The NCAH has taken up its role as a sector regulator and enforcement agency. The division of enforcement areas and competences among the NCAH, the GVH and the Consumer

⁹⁷ Many consumer deception cases before the HCA provide evidence of this negative effect of fierce competition. For example, in Vj-6/2004 where the HCA has fined Vodafone for the advertisement of its 'VitaMAX Duo' price plan, which implied that consumers would be charged on the basis of network minutes. Vodafone has thereby deceived consumers and violated Art.8 (2) a, of the Hungarian Competition Act. Pannon GSM has also been fined recently for misleading consumers: Vj-191/2004, Vj-170/2004.

⁹⁸ GVH, 'Mobile phone companies often deceive consumers', Press Release, Budapest, 7 March 2007.

⁹⁹ G Fischer, 'Consumer rights, consumer protection problems after the liberalisation of the telecommunications market', National Association of Consumer Protection, VIII. Conference on telecommunications liberalisation, Budapest, 25 April, 2005.

Authority still remains problematic and would need a thorough revision and clear guidance. The GVH is still playing an active part both in the enforcement of competition rules mainly related to abuse of dominant position as well as on misleading and unfair trade practices. This latter represents still a high percentage of its caseload.

While consumers have benefited from lower prices and a substantial increase in service offers, their main problems are still related to information. These information failures are apparent in both cases concerning abuse of dominance as well as consumer fraud. One particular problem consumers have is related to unfair contract terms. Unfair contract terms should in principle be subject to private and individual enforcement on the basis of the Civil Code. However, several of the above mentioned cases demonstrated that the imposition of unfair contract terms by a dominant firm can be subject to competition law control under similar provision as under Article 82(a) EC. The difficulty of enforcing this provision lies in the establishing of what amounts to unfair prices or unfair trading conditions. The Hungarian GVH has partly relied on civil law principles when establishing whether the applied contract terms could qualify as unfair advantages. GVH readily enforces Article 21(a) HCA successfully and actively in case of unfair contract terms concerning unilaterally established and non-transparent conditions but is less ready to do so when unfair/excessive prices are at stake. These cases might indicate that some form of public and collective enforcement against unfair contract terms seems necessary. The question is whether such enforcement should take place on the basis of competition rules and by the competition authority or by other regulatory rules and institutions.

Another concern is that possible information failures on the market have neither been anticipated nor effectively dealt with until very recently. There are now some but not yet sufficient mechanisms to assist consumers to make an efficient choice, close a good deal or switch to a service provider whose offers are more advantageous. Moreover, they lack experience of exercising their choice and switching in other markets. This does not only lead to consumer protection frictions in the market but little consumer activity has also resulted in no or little pressure on incumbents and probably helped to keep entry barriers and thus lead to reduced levels of competition. At the moment a significant group of customers is tolerating the incumbent's prices being substantially above entrants' prices. As a result, the incumbent does not have an incentive to keep prices low and close to marginal costs and contestability of the market is less unlikely also because of substantial economies of scale.

The following section will describe a subsequent stage of liberalisation through the liberalisation of the Dutch electricity market. This example explains on the one hand, why disclosure of information is essential when markets are opened up for competition and, on the other hand, illustrates that even though information has been made available for consumers on a broad scale switching does not take place to the extent it has been previously expected.

6. LIBERALIZATION OF THE DUTCH ELECTRICITY MARKET

That the Netherlands would be one of the pioneers in the liberalisation process was considered almost evident, regarding its traditionally strong belief in the market and its open and active trade and business life. The process of liberalisation and privatisation began in the telecom, gas, water and electricity sectors, where networks play an essential role. These sectors used to be ruled by government monopolies and the new policy wanted to separate and liberalise the competitive segments of these sectors. In the electricity sector restructuring took place through separating network firms from production and retail supply firms. Networks remain regulated by the government, while the competitive segments are fully liberalized. The idea was that the liberalisation of these sectors would result in more innovation, lower prices and more choice for consumers. In order to guarantee that these benefits will indeed be realised independent supervising authorities were established to watch over their further development. Such supervisory authorities are the Netherlands Competition Authority (NMa), the Independent Postal and Telecommunications Authority (OPTA) and Office of Energy Regulation (DTe).

The demand side of the market has been liberalised in four steps, and liberalisation proceeds at a faster pace than the Second Electricity Directive (2003/54/EC) requires. Large users, representing about one third of demand, were given freedom of supplier in 1999 and medium consumers, again representing about one-third of demand, in January 2002. Where competition has been introduced this has led to a comparatively high proportion of large users switching suppliers, indicating that there are benefits to be captured from competition. Already 20 to 30% of large electricity users have switched suppliers. Immediately after liberalisation, some 30% of the middle segment switched supplier. In July 2001, the market for green electricity was opened for all consumers, and the entire market has been opened July 2004. Thus household electricity markets have been opened up to competition and fully liberalised. Since 1 July 2004 small users are also free to choose their supplier and prices are not regulated anymore.¹⁰⁰

The reform of the electricity and gas sectors was launched with the Electricity Act 1998 and the Gas Act 2000. The responsibility for implementing and enforcing these acts has been assigned to the DTe. Although DTe acts as a chamber within, and thus is organisationally subordinate to, the director general of the NMa, it acts independently and has its own enumerated powers, which were considerably extended in 2001. DTe's regulatory powers include, among others, the issuing of licences for the supply of electricity and gas to captive consumers; setting service quality standards; setting tariffs and conditions for network access; and determining supply tariffs for captive consumers. Since 2005 when the Intervention and Implementation Act amended the Electricity Act the rules for dispute settlements changed and the Director of the DTe may deal with customer and business complaints regarding the performance of network

¹⁰⁰E Van Damme, 'Pragmatic privatization: the Netherlands 1982-2002', TILEC Discussion paper 2004-07, June 2004.

operators. In accordance with Article 23 of Directive 2003/54 the Dutch consumer now can file a complaint to the DTe with regard to the infringement of information obligations of the network operator, complaints about tariffs or connection to the network.

Dispute settlements for customer complaints regarding the performance of electricity suppliers are handled by the Consumer Complaints Tribunal for Energy and Water within the Foundation for complaints commissions for consumers ('Stichting Geschillencommissies voor Consumentenklachten').¹⁰¹ Customer complaints reflect a series of concerns, relating, for instance, to information services (delayed notification, lack of information), tariffs and connections to the network.¹⁰²

Rules for consumer protection are to be found in the Electricity Act 1998 in Article 95m. These rules deal with misleading and unfair sales methods by regulating standard contract terms in delivery and transport contracts, information provisions on tariffs and conditions of delivery and transport. Moreover, Article 95b(5) states that General Administrative Order may further determine maximum tariffs or whether tariffs are unreasonable. For example in July 2005 the DTe maximised the cancellation fee of annual contracts to €50. In order to create a level of playing field and to force energy suppliers to operate cost-efficiently the DTe has introduced a so-called price cap regulation. This entails that tariffs have to be reduced with the inflation and have to be increased by a so-called efficiency component, the X factor. The DTe also regulates the quality of the network as well.¹⁰³ Moreover, Ministerial Orders regulate the termination of electricity transmission to customers as well as preventive measures to prevent such termination.¹⁰⁴ Further, policy guidelines regulate certain aspects of supply contracts such as reasonable termination fees or invoice terms. The DTe can impose an obligation subject to a penalty (Article 77h) as well as an administrative penalty up to 10% of the turnover of the transgressor (Article 77i 1 (b)).

After a considerable decline in the concentration on the retail market between 2004 and 2006, concentration has slowly increased since the beginning of 2006 due to mergers

¹⁰¹ <http://www.geschillencommissie.nl/>. For a comprehensive overview of how the Complaints Tribunals work in English see University of Leuven, 'The study on alternative means of consumer redress other than redress through ordinary judicial proceedings: National Reports – Netherlands', available at http://ec.europa.eu/consumers/redress_cons/adr_en.htm

¹⁰² The rules for complaints processing procedures are set out in the Policy Rule for the Settlement of Disputes/Energy (Beleidsregel Procedure geschillen Energie, 30 augustus 2004). Following an application for arbitration, DTe will pass judgment on how to interpret and implement the Electricity Act and the Gas Act in a particular case. DTe's decision should have practical implications, allowing parties to end the dispute. In principle, DTe will draw up a decision within two months after receiving the application. If a dispute makes clear that one of the parties infringes energy legislation, DTe may impose a sanction as part of its enforcement policy.

¹⁰³ E Van Damme, 'Kosten-batenanalyse liberalisering elektriciteitsmarkt gewenst', Economisch Statische Berichten, 90e jaargang, nr. 4464, 30 juni 2005 (datum).

¹⁰⁴ Regeling afsluiten elektriciteit en gas van kleinverbruikers, Staatscourant 1 december 2006, nr. 235 / pag. 8, and its amendments Staatscourant 7 maart 2007, nr. 47 / pag. 8, Staatscourant 25 oktober 2007, nr. 207 / pag. 8.

and acquisitions by large energy suppliers.¹⁰⁵ The NMa/DTe has recently concluded that the electricity market is still characterized by limited number of producers and high prices.¹⁰⁶ There are currently 23 market players on the market and there seem to be potential entrants interested in entering the Dutch market and who have required supply licences or indicated their future interest in requiring licences from the DTe.¹⁰⁷ Prices have also shown an increasing trend since the beginning of 2006 due to high oil prices. The Netherlands is still among the first five countries with the highest electricity prices in the EU.¹⁰⁸ The DTe has recently commissioned a report to identify the presently most significant barriers of entry into the Dutch electricity retail market. Concentration in the electricity market is partly due to the fact that large economies of scale are needed for the production of electricity. However, it is also due to the strategic choice of electricity firms by vertically integrating supply and production in order to avoid price fluctuations and bankruptcy. Moreover, concentration has increased due to mergers and acquisitions due to horizontal integration between suppliers as well as due to vertical integration between suppliers and producers. Both can restrict entry to the market. Nevertheless, one of the other barriers is the switching aversion of consumers and the fact that consumers can the electricity market.¹⁰⁹ The role of consumer behaviour in particular switching in the competitiveness of markets will be discussed below.

6.1 “You are stealing from yourself if you do not switch”¹¹⁰

The expected welfare effects of the liberalisation were significant. Consumers would first of all profit from lower energy prices. As has been mentioned above prices have shown an increasing trend since 2006. Still, the social costs and benefits of the liberalisation of the Dutch energy market are difficult to measure. Haffner and Meulmeester tried to give a quantitative evaluation of the costs and benefits of the liberalisation and the regulation of the electricity networks by DTe. In 2005 their conclusion was that there are substantial welfare effects in the middle term (around €1.1m in 2005 prices) but in the short term the welfare effects are expected to be lower.¹¹¹ In more explicit terms, consumers have seen little change on their energy bills in 2005 as compared to 2000. This is because of the annual inflation, higher transport costs and as a result of a court annulment of the DTe’s setting of the X factor in an inconsistent way with the Electricity Act 1998.¹¹² Altogether, they predicted that the

¹⁰⁵NMa/DTe (2007) p.10.

¹⁰⁶NMa: concurrentie Nederlandse elektriciteitsmarkt stagneert, Press release, 06.12.2007.

¹⁰⁷NMa/DTe (2007) p 12.

¹⁰⁸NMa/DTe (2007) p 35; Eurostat.

¹⁰⁹SEO, Toetredingsdrempels Kleinverbruikersmarkt energie, SEO-rapport nr. 2007-49, Amsterdam, oktober 2007, p 16.

¹¹⁰De Telegraaf 01.07.2004.

¹¹¹RCGP Haffner, P Meulmeester, ‘Evaluatie van de regulering van het electriciteitsnetwerk’, Economisch Statische Berichten, 90e jaargang, nr. 4472, 2005, pp 432-433.

¹¹²Haffner, Meulmeester, *ibid*, p 433.

liberalisation will lead to important benefits for consumers. The question is whether consumers are aware of these benefits and whether they are willing to take advantage of these positive effects.

After an initial survey of the Dutch Consumer Union, which was published in November 2004¹¹³ and examined what consumers knew about and expected from the energy market a couple of months after its full liberalisation the low switching percentage of Dutch consumers became a focus of the regulatory activities of the DTe as well. It has conducted and published its own market monitoring reports in 2006 and 2007. The results of the survey are summarised in Table 1.

TABLE 1 CONSUMER SWITCHING IN THE ELECTRICITY MARKET SINCE 1 JULY 2004

	New electricity supplier since 1 July 2004	Reasons
Switched	14 %	Lower tariff
Consider Switching	10%	Price, contract terms, more favourable conditions of the supplier
Not at All	40%	Minor price benefits, high switching costs, administrative burden, low interest product, costs of acquiring comparative information

source: NMa/DTe (2006) (2007)

As of November 2007, 14% switched to a new electricity supplier and the most important reason for switching was a lower tariff.¹¹⁴ The most relevant reason given by consumers for not switching is that financial benefits of switching are too low. Shestalova and Pomp calculated that 30% of the respondents would switch when the price difference was between €75 and €100.¹¹⁵ Besides prices consumers make their choice on the basis of the contract terms offered by the supplier and the quality of services. One more aspect that plays a role in switching is the source of energy: green or grey.¹¹⁶ The barriers to switching can be mainly found in the administrative troubles and the time and costs of accessing comparable information that is necessary for switching and choice of supplier.¹¹⁷ In 2006 34% and in 2007 27% of the consumers considered switching in the near future. Consumers, however, do not expect to

¹¹³ Consumentenbond, 1-meting, Liberalisering energiemarkt, 24 November 2004.

¹¹⁴ NMa/DTe (2007).

¹¹⁵ V Shestalova, J M Pomp, 'Overstapkosten en welvaart', Economisch Statistische Berichten, 90e jaargang, nr. 4464, pagina D7, 30 juni 2005, p 10.

¹¹⁶ NMa/DTe (2006) p 30, NMa/DTe (2007) p 48.

¹¹⁷ NMa/DTe (2006) p 30, NMa/DTe (2007) p 48.

continue an active switching behaviour probably due to the fact they are satisfied with their present supplier.

Despite the fact that electricity is a low interest product there is substantial product offer in the form of contracts with fixed terms and fixed tariffs besides that standard contracts with undetermined term and variable tariffs. The alternatives vary on the basis of contract terms and tariffs offered. Most of the consumers (59%) still choose for a standard contract of undetermined period and variable tariffs.¹¹⁸ Moreover, there is an increasing range of product bundling such as gas and electricity (dual fuel contract), where consumers may expect discounts. But while this has been a real stimulant of switching in the UK, in the Netherlands this product bundle has been traditionally offered and thus had little impact on consumers' switching. There are also many consumers who choose green instead of grey energy. Some energy companies try to attract consumers by offering to pay for the switching fee for consumers' old supplier.¹¹⁹

In markets characterised by repeat consumption consumers who have previously purchased a good or a service from one firm would incur certain costs if they purchased the competitor's product. In order to avoid these costs consumers remain loyal to their previous supplier and as a result firms retain a certain degree of market power over repeat-purchasers.¹²⁰ Switching from one supplier to another costs money and time. Switching costs can be financial, psychological or they can be related to time. Actual or perceived switching costs maybe a reason for consumers' immobility as they remain locked-in to one supplier. Switching costs also influence firms' behaviour. They form the basis of a trade-off firms face: charging low prices in order to attract new customers or maintaining high prices in order to exploit captured customers.¹²¹ This trade-off depends on a number of factors such as the threat of new entry and market growth rates. When firms cannot discriminate between new and old consumers in the presence of switching costs they have an incentive to keep their prices high and exploit their old customers instead of attracting new customers through lower prices. When new markets are opened to competition in the early stage of competition, before consumers have developed switching costs, competition is aggressive to gain market share. This explains price wars.¹²²

The role of consumer switching behaviour in the dynamics of competition and to what extent consumer switching acts "as a competitive constraint"¹²³ on firms and in particular on the dominance an incumbent is not unambiguous. High switching

¹¹⁸NMa/DTe (2007) p 39.

¹¹⁹NMa/DTe (2006) p 31, NMa/DTe (2007) p 41.

¹²⁰P Klemperer, 'Competition when consumers have switching costs: an overview with applications to industrial organization, macroeconomics, and international trade', (1995) 62 *Review of Economic Studies* 515-539.

¹²¹Klemperer, *ibid.*

¹²²Klemperer, *ibid.*

¹²³M Harker, C Waddams Price, 'Consumers and antitrust in British deregulated energy markets', in 'The pros and cons of antitrust in deregulated markets', Swedish Competition Authority, 2004, pp 29-50.

percentage is not necessary for dynamic competition as the mere contestability of the market suffices. The absence of switching can, in theory, also be a sign of perfect competition.¹²⁴ It could also be inherent in the process of transforming a market from state monopoly to free competition, where awareness of the change might not be widespread as well as the fact that energy is a low interest product. Energy markets are characterised by low demand elasticity and little product differentiation. However, low percentage of consumer switching is a barrier for firms who want to enter the market and expand their business activities. Moreover, switching consumers provides incentives for firms to lower their prices and to improve quality of their products and services. The condition for this is, however, the possibility of choice namely that there is range of products or services to choose from.

Giulietti, Waddams Price and Waterson present a 2 stage model of switching behaviour: awareness of the ability to switch is the first stage and searching and switching itself is the second stage. When consumers are aware of the possibility of switching they will search and depending on the ratio of their expected costs and gains they may switch. Giulietti, Waddams Price and Waterson modelled switching suppliers in the UK natural gas market, which has been fully opened to entrants between 1996 and 1999. They found that the main factors of awareness of switching were the stage of competition, prepayment meter use and household tenure. There were some positive effects of previous switching experience for example in the telecom market. For those who could provide information of their bill size (12% was unable) the relevant factors of switching were long-term savings as they believed that the incumbent would be reluctant to match entrants' lower prices. However, price sensitive consumers were more likely to switch than consumers who consider supplier reputation.¹²⁵ With regard to search costs previous experience with similar products e.g. telecom had a strong positive influence on the likelihood on switching.

They consider switching suppliers as a consumer investment decision from which they draw conclusions about the incumbent's (British Gas) market power, the development of the British gas market and propose regulatory policy responses.¹²⁶

In the Netherlands problems on the consumer side are related, on the one hand, to consumers being discouraged by misleading information and aggressive sales methods

¹²⁴'Over transparantie en vertrouwen', Marktmonitor, ontwikkeling van de Nederlandse kleinverbruikersmarkt voor Elektriciteit en Gas, juli 2006 – juni 2007, NMa/DTe, Den Haag, oktober 2007, p 46.

¹²⁵Giulietti, Waddams Price & Waterson, op cit, n 2, pp 960-961.

¹²⁶They concluded that the majority of British consumers were not likely to switch to a new gas supplier, however, the energy market was opened to competition six years ago and thus switching has been possible for that period of time. Although consumers were aware of the possibility they perceived the search and switch costs as too high compared to the benefits they can identify. The main barriers of switching thus lie in the cost of searching and in the perceived switching costs in terms of time and ease of switching. This means that a majority of the British gas consumers do not switch because they perceive search and switch costs higher than they are and therefore they tolerate the incumbent's prices being above the entrants' prices. The incumbent's entrenched position is therefore not being challenged and the incumbent continues to have an incentive to keep its prices high. Giulietti, Waddams Price & Waterson, op cit, n 2, pp 966-967.

of suppliers. The recruitment of customers is still not adequate and often qualify as aggressive and misleading. The recruitment of new customers by energy companies is essential if the market is to work well as it is key to consumer confidence. However, the use of direct recruitment methods, such as telephone sales or door-to-door selling put consumers under pressure to switch suppliers. Such unfair and misleading advertising significantly undermines consumer confidence in the energy market. They discourage switches and provide incorrect information that form major obstacles to the proper functioning of the energy market. The energy companies have to eliminate these problems themselves and therefore the DTe has called upon all energy companies to cease misleading and unfair recruitment practices. The DTe asked the companies to draw up a joint code of conduct in the short term.¹²⁷ Another factor that improves consumer confidence is effective dispute settlements. Dispute settlements with and by the energy suppliers have improved in the last two years. Most of the complaints are still related to metering and energy bills and consumers are dissatisfied with the time a complaint handling takes as well as with the compliance of the firms with the agreements.¹²⁸

On the other hand, as the reports also show consumers have major difficulties in figuring out what the exact benefits of switching are and how the procedure of switching takes place. Shortly after the liberalisation consumers who wanted to switch faced a number of problems. They had administrative problems with processing switching, the bills were often unclear and they incurred high cancellation fees and other switching costs. These problems have formed part of the reasons for small customers not to switch. However, these problems have now partly been dealt with as a result of the actions of the DTe. Other problems persist. Transparency of prices is not guaranteed or price comparisons are not objective. Possible savings from switching remain limited, 100 euro being the difference between the most expensive and the cheapest supplier.¹²⁹

It has to be added that Dutch consumers are provided a decent amount of information about the possibilities available on the electricity market. Both the government and industry have set up several websites to assist consumers.¹³⁰ Consumers are provided with comparative information through websites about the different suppliers, but the question is whether they can make rational and optimal choices? The way information is transmitted and presented to consumers is essential for sufficiently screening markets and to make optimal decisions. Oversupply of information may be counterproductive and this problem can be aggravated if price and other product and service feature

¹²⁷ Moreover, the NMa invited consumers to give notification of any malpractices in relation to recruitment. NMa Demands That the Energy Sector Solve Customer Recruitment Problems 05-19 / 10-21-2005

¹²⁸ NMa/DTe (2007) pp 42-43.

¹²⁹ NMa en Dte, 2004, p 105.

¹³⁰ A website jointly set up by the Ministry of Economic Affairs, the NMa, the Telecommunications Authority (OPTA) and the Consumer Authority for informing consumers is the Consuwijzer (www.consuwijzer.nl)

comparisons are not satisfactory. This may deteriorate market transparency and be the reason behind the lower pace of switching of consumers than expected.

Actual and perceived switching costs play an important role in consumers' decisions. But high switching costs also make it harder for entrants to gain market share after entry and increase the price gap between incumbents and entrants. Consumers who are not switching are actually tolerating this price gap between the incumbent and the lower price of the entrants. High switching costs can benefit the incumbent who will be able to enjoy its position on the market as well as keep prices high.

6.2. Standard contract terms

Switching has been very much the focus of the Dutch energy regulator's attention and finding mostly incentive based measures and remedies to cure this problem. However, considerable legal problems arise in relation to standard contract terms applied by energy suppliers where active enforcement of the DTe seems justified.

In the Netherlands the standard contract terms of energy suppliers are based on model standard contract terms that are agreed on and promoted by bilateral agreements within the Energy and Water Coordination Group for Self-regulation of the Dutch Social and Economic Council (SER).¹³¹ The Coordination Groups are set up in order to promote negotiations between business and consumer organizations and to come to balanced standard contract terms.¹³² These model standard contract terms concern among others supply of and connection to energy and gas to the retail market. Since the Liberalization Act of 2004 entered into force and amended the Electricity Act of 1998 electricity is a moveable asset and electricity supply contracts qualify as consumer sale contracts under Article 7:5 of the Netherlands Civil Code (BW). Accordingly, on the basis of Article 7:6(1) BW in consumer sales contracts there may be no limitations on or exclusions of the rights and actions which the law grants to the buyer for failure in the performance of the obligations of the seller.¹³³ Moreover, consumers can claim compensation, damages on the basis of Article 6:74 BW. In other words the electricity supplier cannot limit or exclude his liability in case of malperformance of the supply agreement

¹³¹ Established in law by the 1950 Industrial Organisation Act (Wet op de bedrijfsorganisatie), the SER is the main advisory body to the Dutch government and the parliament on national and international social and economic policy. The SER is financed by industry and is wholly independent from the government. It represents the interests of trade unions and industry, advising the government (upon request or at its own initiative) on all major social and economic issues. In addition, the SER helps the government to enforce the Works Councils Act (Wet op de ondernemingsraden).

¹³² <http://www.ser.nl/sitecore/content/Internet/nl/Taken/Zelfregulering/Consumentenvoorwaarden/Praktische%20Informatie/Consumentenvoorwaarden.aspx#energie>

¹³³ Article 7:6 BW – 'In a consumer sale, there may be no derogations to the detriment of the buyer from sections 1 – 7 of this title, and in such sale there may be no limitations on or exclusions of the rights and actions which the law grants to the buyer for failure in the performance of the obligations of the seller'. For example Art. 7:11 (transfer of risk), Art. 7:18 (conformity in consumer sales), Art. 7:24 (nonconformity and product safety), Art. 7:25 (redress) and Art. 7:28 (limitation period). P.P.C. Haanappel, E.Mackaay, *New Netherlands Civil Code*, Kluwer, Deventer 1990.

concluded with a consumer.¹³⁴ Any limitation of the statutory right to damages in the standard contract terms of electricity suppliers is null and void. The model standard contract terms agreed on in 2006 between the Dutch Consumer association and the representative of the electricity suppliers, EnergieNed and VEWIN, does include in Article 17 several limitations that conflict the provisions of consumer sale as explained above. The DTe has declared that it is not intending to take action against this standard term as it sees no conflict with the law and will only act in case electricity suppliers regularly act in conflict with reasonableness and fairness.¹³⁵ The DTe has declared that it shall assess the justification of the exemption clauses in concrete situations and it shall together with the Ministry of Economic Affairs consider whether the limitation of this exemption clause is necessary from a policy point of view.¹³⁶ The recently established Consumer Authority could in this case take up its role of supervisory authority which is otherwise subsidiary to the sector specific authority. On the basis of Articles 2.5 and 2.6 of the Act of Consumer protection enforcement of 2006 the Consumer Authority can enforce civil law provisions of consumer law such as unfair contract terms when consumers' collective interests are at stake.

6.3. Remedies

As mentioned above the DTe in its market surveillance role has focused on consumer switching and the improvement of consumer activity in the Dutch electricity market. The following steps have been already undertaken by the regulator and by the energy suppliers. Some of the administrative backlogs were taken care of by the energy companies themselves.¹³⁷ Furthermore, the DTe has required the draft of a code of conduct, which regulates the most important matters in the area of switching to a different supplier (from recruitment to cooperation with regard to switching). This code, drafted by EnergieNed for energy suppliers entered into force in September 2006 and the DTe monitors compliance with the code of conduct closely. If DTe receives reports that a company has infringed the code of conduct, it will intensify its regulation and conduct an in-depth investigation. Where the law is infringed, DTe will take action to enforce the law. In the case of energy companies which adhere to the code of conduct, the code will serve as a 'mark of quality' for good recruitment practices.¹³⁸

¹³⁴M Loos, Verboden exoneraties in energieleveringsovereenkomsten en vernietiging van met de wet strijdige bindende adviezen (Forbidden exemption clauses in contracts for the supply of energy and the avoidance of third party decisions contrary to mandatory law), *Tijdschrift voor Consumentenrecht en Handelspraktijken* 2006/1, pp 3-6.

¹³⁵M Loos, *Reactie op consultatie Consumentenautoriteit*, September 2006.

¹³⁶*Algemene Voorwaarden 2006 voor de levering van gas aan kleinverbruikers AV CZ/59 april 2006.*

¹³⁷On the basis of its investigation the NMa concluded that the six large energy suppliers (Essent, Eneco, Nuon, Delta, Greenchoice and Oxxio) had managed to eliminate their administrative backlogs for the period prior to January 2005 with regard to the processing of changes of address and switches. This is in line with agreements which the suppliers reached with the Minister of Economic Affairs at the beginning of this year.

¹³⁸NMa Demands That the Energy Sector Solve Customer Recruitment Problems 05-19 / 10-21-2005.

However, despite this code of conduct complaints about recruitment have increased during the last year.¹³⁹

Moreover, the DTe publishes a scorecard on its website every three months as part of its investigations into the administrative processes of the large energy companies. This scorecard gives consumers structural insight into the performance of individual energy companies. The scorecard shows what the situation of the company is with regard to the timeliness with which invoices are sent following a change of address or a switch.¹⁴⁰ The scorecard, as well as recent investigations, show that the energy companies have improved their administrative processes. If, contrary to expectations, the performance of the energy companies deteriorates the DTe will request a thorough plan of action and will monitor its implementation closely.¹⁴¹

Measures could also be taken in order to reduce firms' costs to acquire switchers. Switching costs as has been mentioned above are not only costs for consumers but also for suppliers. The amount and the framing of information is essential in order to help consumers. When information is provided, but consumers have difficulty in getting access or to process the available information, they might still make irrational choices. Wilson and Waddams Price found evidence of three types of consumer switching decision errors within the UK electricity market: consumers who do not switch despite substantial available savings, consumers who switch from a cheaper to a more expensive supplier and consumers who switch to a cheaper, but not the cheapest available supplier. They found, moreover, that consumers make more efficient decisions in markets with fewer competitors. Thus consumer confusion and 'information-overload' are rather the reasons for these mistakes than other 'rational' explanations of consumer mistakes such as perceived differences in firm quality or uncertainty over consumers' own demand.¹⁴² The lack of consumer switching might be also the result of the bounded rationality of consumers that exists even in fairly competitive markets.

How to deal with these psychological hurdles? In the long run more surveys have to be conducted in order to get to know more about consumer behaviour. These cases imply that the behaviour of consumers is often the source of frictions in markets. Switching

¹³⁹NMa/DTe, 2007, p 44.

¹⁴⁰The timeliness with which the annual invoices are sent is also stated. By means of the scorecards on the website, the performance of the energy companies with regard to their administration is made transparent and this enables consumers to take this performance into account when choosing their energy supplier. The scorecard contains the percentage of invoices dispatched on time (within two months) to customers who indicated in June that they wished to switch or change address.

¹⁴¹The scorecard was developed in cooperation with EnergieNed and includes all the electricity and gas suppliers with more than 10,000 customers. The performance of the grid managers has not yet been included in the scorecard. It has since been agreed with the grid managers that they will take the necessary steps of their own accord to ensure that their performance can be compared. DTe will then include the performance of the grid managers on the scorecard in December of this year. As of today, the scorecard can be found on DTe's website (www.dte.nl).

¹⁴²Wilson & Waddams Price, *op cit*, n 2.

only takes place when consumers are aware of the possibilities and when they are willing to switch. Their motivation, capacity and opportunity to switch have to be further analysed. The quality and cost of information should be reviewed and improved if necessary through intermediaries and independent platforms. Although we know little about the process of consumer choice these cases make it clear that understanding how consumers search and choose products and services is the key to protect consumers and at the same time to activate competition. This calls for information that de-frames decision-making. Consumers need tips and tools and functional information to make efficient decisions in terms of swift, easy and effective choice and eventually switch.

In summary, the Dutch market exhibits similar problems though not identical problems as the Hungarian telecommunications market. The liberalization of the Dutch electricity market went more smoothly both in terms of regulation and enforcement including the setup of an institutional framework. Still, the NMa/DTe has just recently concluded that competition in the electricity market stagnates and that it is still characterized by limited number of producers and high consumer prices compared to other EU Member States.¹⁴³ The focus of attention with regard to consumer protection has been on switching behaviour. Introducing competition and eliminating entry barriers as well as controlling unfair trade practices such as misleading recruitment methods are the foremost ways to protect consumer welfare and increase their confidence in the market. While considerable progress has been made in both fields, entry barriers still exist preventing new firms from entering the market and offering lower prices and better products or services. Unfair trade practices and problems with administrative processes as well as dispute settlements have been dealt with by both the sector as well as by the regulator. Improvements have been reflected in increased switching and expressed confidence of consumers.

One area where the DTe has been reluctant to enforce its powers is standard contract terms of the energy suppliers that seems to conflict with consumer rules of the Civil Code. Even though there is, since January 2007, a new administrative agency, the Consumer Authority that can also enforce civil law provisions such as unfair contract terms in the collective interest of consumers, it has a subsidiary position. This raises both a substantive as well as an institutional question. The substantive question is how sector regulation concerning consumer protection relates to general contract law provisions of consumer protection and whether primarily private law provisions that are to be enforced by private and individual agents should be complemented by public enforcement for the collective interests of consumers on the basis of civil law provisions. The institutional question is which administrative or private agency has the responsibility or obligation of enforcement to enforce these civil law provisions. It seems to reflect an unfortunate institutional situation where several agencies can enforce the same law. Coordination and consistent application among different

¹⁴³NMa: concurrentie Nederlandse elektriciteitsmarkt stagneert, Press Release, 06.12.2007.

regulatory measures and various enforcement institutions should be revisited and redefined.

7. IMPLICATIONS FOR POLICY AND LAW MAKING

It has to be acknowledged that liberalisation needs not only framework laws that specifically target competition issues of the sector but it also needs legislative and policy measures that help consumers to make efficient choices and accordingly activate competition. While this insight seems to gain sufficient support both at EU as well as at national level, there are three specific points that summarize the research of this paper.

First, empirical surveys and research challenge traditional modes of regulation and enforcement. They demonstrate that information problems consumers face cannot be effectively solved by regulatory approaches based on classical and neoclassical economics. These approaches stipulate more and better information to remedy market failures, for example, in the form of mandatory disclosure and enforcing fair trading rules. Recent findings of behavioural economics explain recorded consumer behaviour as the result of inertia; the incapacity to process the available complex information. In these cases more information leads to ‘confusopoly’ i.e. information overload when consumers are limited in their ability to make comparisons between the different bundles of offers from utility firms.

Second, the relationship between sector regulation and consumer law as well as between competition law and consumer law should be analysed. Unfair trade practices, unfair contract terms and abuse of a dominant position have traditionally belonged to one single piece of legislation and generally has been enforced by either private or public agents. The demarcation lines seem to have become more hazy between private and public law, between private and public law enforcement and institutions. It is in the first place, the role of the legislator to reconsider the existing law and spot eventual conflicting provisions or add where necessary cross-references between the different bodies of the law.

Third, enforcement and institutional framework has to receive more emphasis. There are several layers of enforcement, EU and national, sector specific, competition law and consumer law. Further layers are formed by private, public or alternative enforcement methods combining the two, for example, in case of dispute settlement. Accordingly, remedies and sanctions can differ significantly. There are, moreover, several institutions enforcing similar or the same rules. There is often no clear guidelines on the division of competences and powers, no overview of the ultimate effect of the different enforcement methods and institutions even if they are complementary to each other.

Caution should be taken when choosing and proposing policy measures in order to avoid regulatory tools that ultimately diminish the very competition that increases consumer choice. Highly complex systems of information disclosure originally aimed at lowering information costs will obviously restrict competition and will have counterproductive effects. Consumers unable to make informed choices are forced to employ expensive intermediaries and business has to bear the costs of the ineffective

disclosure. Some consumer protection measures create barriers to entry that limit the freedom of sellers and might eventually lead to higher prices for consumers. Interventions, therefore should be evidence-based, focused and evaluated to ensure that it is not unnecessarily applied. It should be examined why the market-based solution does not work or why that solution might be socially sub-optimal.¹⁴⁴ It also has to be demonstrated why government regulation is going to be better than markets in providing low-cost information. Even where a relevant market failure has been identified, government should only act when this is feasible and it is cost-effective to do so. The costs and benefits of particular forms of intervention and alternatives thereto should be examined and represented. Consumer regulation will only make consumers better off if it either improves consumer estimates of the value of information or reduces the cost of information to consumers.

These three points boil down to two conclusions. On the one hand, a new method of regulation has to be considered and, on the other, guidelines for governance of enforcement and institutional set-up are necessary.

A new method of regulation could make use of insights from behavioural economics, which suggests that intervention should be imposed with a 'lighter hand'. It suggests remedies aimed at framing effects and thus steer consumers' choices towards welfare enhancing options. Paternalistic guidance towards certain options through framing the way information is provided could assist consumers to de-bias their decision-making and to channel their decisions to socially beneficial options.¹⁴⁵

In the light of these theoretical and empirical results the Commission as well as Member States should reconsider their measures for the assistance of consumers. Regulatory approaches should not only take account of the fact that some regulation can be ineffective because of poor assessment of its impact, or worse, is costly in terms of imposing high compliance costs on firms. Regulation could actually reduce or simplify consumer choice by providing more effective information and certain options that frame the way information is presented or propose 'tailored provisions' like codes of conduct. They should encourage measures such as model standard term contracts, that frame decisions for consumers without being mandatory to follow for firms, or set up systems that provide tips and tools and functional information that is easy to access and understand. Consumers need tips and tools and functional information to make efficient decisions in terms of swift, easy and effective choice and eventually switch.

Guidance on governance among the various layers of enforcement and institutional framework has received little attention so far. However, taking a closer look at the work and experience of national enforcement agencies this is needed. This might be a concern for the Member States in the first place, but the EU can take the role of

¹⁴⁴ These are self-correcting mechanisms that are based on private law norms of tort, contract and property rights that they are the result of government action. Hadfield, Howse & Trebilcock, *op cit*, n 26, p 155.

¹⁴⁵ OECD Roundtable discussion on private remedies: class action/collective action; interface between private and public enforcement, United States of America DAF/COMP/WP3/WD(2006)34, p 18.

initiator and mediator by providing guidelines, best practices or recommendations. Imposing another layer of enforcement at the central EU level does not seem to be justified nor efficient.