Empowering Consumer-citizens
Changing rights or merely discourse?

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Abstract

Where in the past the orientation of the internal market was always on economic growth through removing trade barriers, the 21st vision seems to be more impact driven, guided by consumers’ and citizens’ needs, not just from an economic perspective but also in terms of satisfaction of citizenship norms and values such as solidarity, inclusion and sustainability. The re-orientation also reflects on the role of the consumer and the citizen: they should be more active through participation in both the design and the enforcement of economic regulation. A parallel reflection of the re-orientation can be found in the EU ‘empowerment’ discourse linked to the consumer and citizenship concepts, as deployed by the Europe 2020 Strategy. The basic question that feeds this paper is what kind of social and economic governance model is behind the new empowerment tools and strategies? The paper is an initial attempt to explore this new consumer citizen centered governance model and its effects on law making and law enforcement. Arguably, putting citizens and consumers in the driving seat differs from the traditional way of decision-making through elected representatives and the traditional perception of consumers and citizens as passive receivers of rights and benefits.
Introduction

Even though there are distinct periods in the development of the European single market (Gormley 2006), the role the single market had throughout its evolution remained similar: that of instrument instead of objective, namely an instrument to enhance social welfare (spread out over a number of objectives that increased with each Treaty modification).

Documents leading up to the Single Market Act of 2011 (European Commission 2011a), together presented as “the Reform Package” (European Commission 2007a, 2007b, 2007c), suggest that there is a re-orientation on the role of the single market. Where in the past the orientation of the market was always on economic growth through removing trade barriers as this was believed to contribute to the general aims of welfare in the Union, the 21st vision seems to be more impact driven, guided by consumers’ and citizens’ needs, not just from an economic perspective of more products at better quality for lower prices, but also in terms of satisfaction of citizenship norms and values such as solidarity, inclusion and sustainability. The re-orientation also reflects on the role of the consumer and the citizen: they should be more active through participation in both the design and the enforcement of economic regulation. Empowerment through legislation on ADR and by establishing fast and affordable out-of-court procedures should strengthen citizens’ confidence in the single market. A parallel reflection of the re-orientation can be found in the EU ‘empowerment’ discourse linked to the consumer and citizenship concepts, as deployed by the Europe 2020 Strategy (European Commission 2010a).

The basic question that feeds this paper is what kind of social and economic governance model is behind the new empowerment tools and strategies? The paper is an initial attempt to explore this new consumer citizen centered governance model and its effects on law making and law enforcement. Arguably, putting citizens and consumers in the driving seat differs from the traditional way of decision-making through elected representatives and the traditional perception of consumers and citizens as passive receivers of rights and benefits.

The paper is structured as follows. First, we have a closer look at the policy documents’ use of ‘empowerment’ and ‘active citizens and consumers’, to see
whether we can distill definitions from the discourse. Second, we look at empowerment in the establishment and functioning of the market through participation in agenda setting and designing legislation (citizens’ initiative and public consultations). Next, we look at the Electricity Directive as an example of how empowerment tools are integrated in a legislative act. And fourth, we will scrutinize empowerment through new ways of enforcement of legislation. We attempt to conclude with some remarks on the validity of the empowerment discourse and its possible results for the social and economic model of the EU.

**Active citizens, active consumers and empowerment**

In the EU context, the concept of Active Citizenship was developed as ‘a way of empowering citizens to have their voices heard within their communities, to have a sense of belonging and a stake in the society in which they live, to appreciate the value of democracy, equality, and understanding different cultures and different opinions’ when developing proposals for the Lisbon 2010 Strategy (Hoskins and D’Hombres 2008: 389). Hoskins (2009: 5) formulates it as follows: ‘Although Active Citizenship is specified on the individual level in terms of actions and values, the emphasis in this concept is not on the benefit to the individual but on what these individual actions and values contribute to the wider society in terms of ensuring the continuation of democracy, good governance and social cohesion’.

The Active Consumer is not mentioned in, but certainly underlying the EU’s Consumer Policy Strategy 2007-2013 (European Commission 2007d, Davies 2011: 52-58). The document underlines the greater responsibilities of consumers to manage their own affairs (p. 3), has as one of its objectives to put ‘consumers in the driving seat’ (p. 5) and sees ‘equipping the consumer with the skills and tools to fulfill their role in modern economy’ as a response to the challenges of growth, jobs and the need to re-connect with the citizens the EU is currently facing (p. 2). The Commission has emphasized that confident, informed and empowered consumers are the motor of economic change as their choices drive innovation and efficiency. But empowerment is also a means for the EU to directly connect to the daily lives of its citizens and demonstrate the benefits of the EU. In EU’s long-term growth strategy Europe 2020, the Commission stated that citizens must be empowered in order to play a full part in the single market, which requires strengthening their ability and confidence to buy
goods and services cross-border. Along the way, the citizen and the consumer are merged into the consumer-citizen model. And the place of the empowered consumer citizen is at the heart of the next phase of the single market.

Several actions outlined in the Consumer Policy Strategy 2007-2013 can be linked to this empowerment: on a collective level, the “Consumer Policy Network of senior consumer policy officials will provide a forum for policy coordination and development”, and on a more individual level, information and education of consumers who can make changes in lifestyle and consumption patterns contributing to public interests such as protection of the environment. Furthermore, effective mechanisms to seek redress must make consumers confident in shopping outside their own Member State and contribute to their active attitude. These actions correspond to what we see as the formal and the substantive side of consumer citizenship: active participation in policy making on the one hand and consumption motivated by public interest at the other. The formal and substantive side are present in the definition of consumer citizenship that can be found in consumer education projects within the context of the Socrates scheme:

Consumer citizenship is when the individual, in his/her role as a consumer, actively participates in developing and improving society by considering ethical issues, diversity of perspectives, global processes and future conditions. It involves taking responsibility on a global as well as regional, national, local and family scale when securing one’s own personal needs and well-being (Thoresen 2002: 22).

In a similar vein, involvement in policy-making through a forum for policy coordination and development brings to mind the notion of citizenship. The way consumer organizations are taken into new governance structures of consultation and networking turns (representatives of) consumers into active participants in policy making and this seems to correspond to the citizen who by his actions contributes to the wider society in terms of ensuring the continuation of democracy, good governance and social cohesion. These governance structures turn the instrumental market citizen depicted by Michelle Everson (Everson 1995) into an active participant.
Again, a similar discourse can be found in the Europe 2020 Strategy for smart, sustainable and inclusive growth (European Commission 2010a). The Strategy at several instances indicates that a more active role is expected from citizens. Notably, the European Parliament is presented as driving force to ‘mobilize citizens’, and under one of the priorities (the Flagship Initiative “A Digital Agenda for Europe”) the Commission is supposed to promote Internet access and ‘take-up by all European citizens’ (European Commission 2010a: 4, 12). Furthermore, in the identification of missing links and bottlenecks the Strategy signals that citizens still face bottlenecks to cross-border activity and ‘must be empowered to play a full part in the single market’ (European Commission 2010a: 19). Finally, the Strategy proposes that European institutions, Member States and regions explain ‘what contribution they are looking for from citizens, businesses and their representative organizations’ to help implement the strategy and recognizes that by bringing the priorities of the Union closer to the citizens ‘the ownership needed to deliver the Europe 2020 strategy’ is strengthened (European Commission 2010a: 27-28).

Several Union documents are more explicit on what is meant by empowerment. The proposed Regulation on a consumer programme 2014-2020 (European Commission 2011b), that again shows a fusion of the concepts of citizen and consumer in its preamble, describes empowerment as follows:

Empowerment is not only a question of consumer rights but of building an overall environment that enables consumers to make use of those rights and benefit from them. It means building a framework wherein consumers can rely on the basic premise that safety is assured and that tools are in place to detect failings in standards and practices and to address them effectively across Europe. It means building an environment where consumers through education, information and awareness know how to navigate the Single Market to benefit from the best offers on products and services. Finally empowerment requires that consumers can confidently exercise their EU rights across Europe and that, when something goes wrong, they can count both on the effective enforcement of those rights and on easy access to efficient redress.
In brief, the EU is providing individuals in their role as consumer citizens with instruments to participate actively in the establishment and functioning of the European market in order to obtain smart, sustainable and inclusive growth. The instruments aim at active participation in the development of rights, the exercise of rights and the enforcement of rights. The empowerment discourse is however not neutral on what type of active consumer citizen is expected. A Eurobarometer survey on consumer empowerment (Eurobarometer 2011) is more explicit. It examined ‘knowledge, capacities and assertiveness’ of consumers to measure to what extent they are empowered consumers. The survey identified the most vulnerable consumers as those who have no computer skills, those low on the social staircase and retired persons. Unsurprisingly, the survey concludes they show least empowered consumer behaviour. It is something to keep in mind during a more close examination of the empowerment tools given to consumer citizens for their participation in design, exercise and enforcement of their rights.

Empowering consumers and citizens: the design of legislation

The Lisbon Treaty has provided a new instrument of empowering citizens to make their voices heard, notably the citizen’s initiative (article 11-4 TEU). Furthermore, Article 11 TEU obliges the institutions to give citizens and representative organizations the opportunity to make known and publicly exchange their views in all areas of Union action, and makes public consultations a compulsory part of the Commission’s work. The Treaty lists Article 11 under the ‘Provisions on Democratic Principles’. This suggests that these instruments imply equality and accountability.

Below, we will look briefly at how these participatory measures are deployed to analyze their capacity as empowerment mechanisms. The next section gives a short analysis of the citizens’ initiative, which arguably is not limited to economic regulation. Nevertheless, as a new form of public participation in Union policy shaping (including economic regulation), it deserves attention. The subsequent section examines examples of public consultation, in particular a general consultation on citizenship policy and several specific consultations on proposals for legislative acts.
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Citizens’ Initiative

In February 2011, a Regulation was issued on the basis of Article 24 TFEU that gives conditions and procedure for a citizens’ initiative.1 Organization of the initiative is in the hand of a citizens’ committee of at least seven persons who are residents of at least seven different Member States (article 3). The Commission has to register the initiative first, provided it fulfills a number of substantive conditions: the initiative may not manifestly fall outside the framework of the Commission’s powers of initiative, it may not be manifestly abusive, frivolous or vexatious and it may not be manifestly contrary to the values of the Union (article 4). After registration, the organizers can start to collect signatures. They have one year to collect one million signatures from at least one quarter of the Member States, with a minimum number of signatures per Member State, this in order to guarantee the ‘Union interest’. Subsequently they may submit the proposal to the Commission, and the procedure for examination starts. First the Commission receives the organizers to explain the initiative and it then organizes a public hearing in the European Parliament (articles 10 and 11). Within three months after reception of the initiative, the Commission shall ‘set out in a communication its legal and political conclusions on the citizens’ initiative, the action it intends to take, if any, and its reasons for taking or not taking that action’ (article 10-1 (c)). The Commission is the gatekeeper of citizens’ initiatives. However, there are no clear guidelines in the Regulation according to which the Commission should act (Emmanouilidis and Stratulat 2010).

According to the explanatory memorandum of the proposal of the Regulation (European Commission 2010b), the citizens’ initiative is an opportunity to foster greater cross-border debate about EU policy issues. It is agenda setting and obliges ‘the Commission, as a college, to give serious consideration to the requests made by citizens’ initiatives’ (European commission 2010b: 2). The citizens’ initiative provisions thus establish a direct link between citizens and Commission, whereas according to Article 14-2 TEU, the European Parliament is composed of representatives of the Union’s citizens. As a result, two institutions might be competing for securing the public’s favors, albeit in a distinct way. The Commission will have to look at single issues brought to it by citizens’ initiatives, whereas the

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MEPs will more generally try to steer decision-making in the directions as promised to their voters. The relationship between institution and public is different in the two settings: the Commission has to react to demands from the citizens, the MEPs are elected on the basis of election programs proposed by the political parties - with the citizens’ initiative one million citizens are at the steering wheel, in the traditional decision-making, the political parties are at the steering wheel.

The link between citizens and the two institutions might be problematic whenever a citizens’ initiative touches upon an issue that has been subject of a political compromise between Council and European Parliament. How can the Commission give ‘serious consideration’ to the initiative without harming a compromise that has been reached and which the European Parliament supported, probably because it was in the best interest of the voters? Whose claim is more important? That of one million citizens who actively signed an initiative or that of the EP, which represent 500 million citizens even though quite a large number of them choose to not actively vote in European elections?

The website the Commission created for citizens’ initiatives, and in particular the frequently asked questions section, gives some insight in the ‘active’ role citizens are supposed to perform under the new mechanism. The citizens’ initiative is clearly agenda setting, but does not affect the Commission’s right of initiative. In that sense, it is not truly ‘participatory’ in decision-making, but the activity of citizens can be described as ‘asking for action’. It seems to fit in the discourse the Commission uses in its latest EU citizenship report: to bring concrete benefits to citizens, to ‘deliver on the commitment to build a Citizens’ Europe and a well functioning Single market which matches citizens’ needs and expectations’ (European Commission 2010c: 4). In the same report the Commission refers to ‘participatory tools to involve citizens in policymaking. Such tools can bring more depth and a qualitative aspect to understanding citizens’ concerns’. The language is more that of seeking benefit instead of that of community building.

The European Parliament refers to both the aim of providing citizens with an instrument to be heard and of fostering cross-border discussion and sees a role for itself in order to ‘contribute to the achievement of these goals by making use of all the means in its power to support the Citizens’ Initiatives of its choice, notably through the organisation of public hearings or the adoption of resolutions’ (European Parliament committee on constitutional affairs 2010: 49).
How much empowerment is there in the citizens’ initiative, is it providing the citizens with a true possibility to act? Is it, as Dougan has argued, a relatively weak instrument, more in the character of a popular petition (Dougan 2011: 1844) or is it partial empowerment (Trzaskowski, 2010)? According to Article 3 of the Regulation, the decision not to register an initiative can be challenged, and the Commission will inform the organizers of the reasons and of all possible judicial and extra-judicial remedies available to them. But as the Commission explains on the Citizens’ initiative registration website (FAQ 42), it feels the decision not to act on a citizens’ initiative, and in particular the political analysis on the substance of the initiative cannot be subject to an appeal procedure. The General Court in the end will have to decide on admissibility of an appeal (De Witte et al. 2010: 30). Even if it does accept admissibility, it is hard to imagine the Court would force the Commission to act upon a successful initiative. Furthermore, the result would be involvement of the Court in a political process, and further judicialization of politics (Kelemen, 2012: 59). If the Court would not accept admissibility, the political influence of a citizens’ initiative seems exhausted once the Commission decides not to act upon it – other than in a traditional decision-making context where citizens may decide to vote or someone else if (lack of) decisions are against their wishes. Supposedly there could be a role for either the European Parliament or the European Ombudsman, to act as a watchdog and guard against arbitrary decisions of the Commission (De Witte et. al 2010: 30).

This very brief analysis leads to the conclusion that the citizens’ initiative empowers citizens to a very limited extent only. When compared with traditional public decision-making by Parliament and Council, representativeness and accountability are less present in the Citizens’ initiative. The promises hidden in the discourse of active citizenship in reality stop at the agenda setting stage. Admittedly, the instrument can instigate more debate on cross-border Union issues, and can be used to put new things on the agenda outside the political establishment. It thus provides an instrument for citizens to act in a collective way and for community building. But once the initiative is submitted, decisions are beyond the reach of the active citizens that signed a citizens’ initiative, they are forced back into a passive

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role. The first proposal of the Regulation for the Citizens’ Initiative gave already rise to the qualification of a misleading instrument, ‘paradoxically contributing to the suspicion of the European Union’s non-willingness to truly enable citizens to take part in the decision making process at European level’ (De Witte et al. 2010: 31).

At the time of writing, the registration website shows 9 initiatives open for signature, and we will have to wait till summer 2013 to see how this empowerment tool develops in practice. Nevertheless, we have good reasons to be critical. The Citizens’ Initiative enhances the link between the citizens and the executive, thereby giving more leverage to the executive, at the expense of the European Parliament. The executive is the gatekeeper, and in the end determines who has influence and who has not. This is problematic for an empowerment instrument that is supposed to imply equality and accountability. On a broader level, the Citizens’ initiative, with a focus on single issues, puts the decision-making authority in a responsive position as opposed to the more steering position it has in traditional public decision-making.

Public Consultation

Public consultation can be considered to be part of new governance structures, like representative and expert network structures, which empower consumers to influence and change law and policy (Davies 2011: 90). Do consumer citizens ‘actively participate in the establishment of the market’ through public consultations? The Commission refers to consultation procedures in the explanatory memorandums that accompany the proposals for Union acts. The literature identifies several problems with respect to these consultations: the way issues are framed, the (lack of) representativeness and the (lack of) transparency of how the Commission weights the different contributions (Kohler-Koch 2010, Dawson 2011).

The consultation on the 2013 EU citizenship report, open from 9 May till 9 September 2012 may serve as an example of a rather suggestive framing of the questions. The category ‘Your daily life as a citizen’ ranges 17 questions on free movement, justice and political rights. There are 2 factual questions (have you ever studied/worked in another EU country), and more than half of the remaining questions ask whether the participant to the consultation experienced obstacles, difficulties and problems in exercising free movement rights. Clearly, the questions are designed in support of the idea that citizens still face problems in cross-border
activity and that something must be done about that. To put it differently, the consultation is looking for support of the Europe 2020 Strategy without questioning how citizens value both that Strategy and the emphasis on cross-border economic activity in itself. As a result, the citizen is not at the steering wheel or at the heart of the Strategy, but citizens’ responses can be used to provide more legitimacy to already decided policies and programs.

Representativeness is problematic, as show the number of responses in consultations. The consultation on the Citizens’ initiative, gave rise to 329 replies, including 160 individual citizens, 133 organizations and 36 public authorities. The Commission qualifies this as ‘satisfactory’ and ‘comparable to that received of other Green Papers (Sauron 2011). In cases of more technical issues the result is even lower. In the public consultation leading to the Mutual Recognition Regulation 135 replies were received, of which 30 % were citizens/individuals, and the Commission comments that this ‘seems to be the average number of replies for a consultation on a technical issue’ (European Commission 2007e: 2). Still, the Commission uses these responses in a general fashion to give more legitimacy to its proposals. In the presentation of the outcome of the consultation and impact assessment accompanying the proposal for the services directive, the Commission uses phrases like ‘the consultation showed that…’ or ‘contacts with interested circles show that…’ (European Commission 2002: 15, 68). These are used to sustain statements such as ‘lack of transparency, lack of confidence, divergent rules (…) prevent consumers (…) from enjoying the full benefits of the Internal Market and from playing their full role’ (European Commission 2002: 7).

There are instances where public consultation on more technical market legislation yielded more responses, such as for the Electricity directive (1680 responses, 1287 of individual members of the public). The Green Paper including the results of this consultation gives an overview of the responses, but not their respective weight. One could question whether the response from an individual participant should weigh equally to that of a civil society organization or an organization representing the affected industry. Furthermore, accountability is problematic. Stakeholders signal that the Commission seems to be at liberty to reject, use partially or accept answers that come out of the public consultations (DG SANCO 2007: 9, 10).
The lack of accountability and of clarity who is represented make it in our view questionable whether consultations may be presented as an instrument to translate public participation in the establishment of the single market, and as an empowerment instrument. As long as it is not clear whose participation it actually is and how it is taken into consideration, there is no safeguarding of an equal and efficient opportunity to have a say in policy-making. The problem is similar to what has been identified in studies on the OMC (Dawson 2011), though one might argue that in single market legislation procedures the problem is less pressing due to the fact that legislative proposals are subject to co-decision by the European Parliament. Still, the discourse that presents consultation as a participatory mechanism for citizens and consumers is misleading. Even though consultation is about having a voice, but not a vote, the presentation and selection of these voices as providing legitimacy to policies and proposals should respond to criteria of representativeness and accountability that are currently lacking.

**Empowerment in Union legislation: the Electricity Directive**

Several legislative acts of the European Union refer in one way or another to citizens or consumers as contributors to the market. Examples include the preambles of the Mutual Recognition Regulation 764/2008, the Services Directive 2006/123, the Directive on Patients’ rights 2011/24 and Regulation 66/2010 on a Community Ecolabel. More in general, consumer citizens are ‘empowered’ to influence the functioning of the market through knowing and using their rights, complaining, switching and ethical buying. The Electricity Directive 2009/72 may serve as a concrete example of how empowerment tools are integrated in a legislative act.

The objective of the Electricity Directive is the establishment of a competitive, secure and environmentally sustainable market. The Directive lays down common rules for generation, transmission, distribution and supply of electricity. The Directive also contains provisions on universal service obligations, and though a universal service obligation is important from a social model perspective it is not specifically linked to the empowerment of consumers and citizens this chapter focuses upon. The rights of electricity consumers and provisions on consumer protection are more important from a consumer-citizenship perspective. The directive obliges Member States to set up single points of contact that must give
consumers information on their rights, on applicable legislation and on dispute settlement mechanisms. Annex I to the directive further specifies the rights consumers have and what sort of information energy suppliers should give to them. In the annex, there is one provision that shows a more active role of the consumer. Indeed, the consumers must be properly and frequently informed about their energy consumption in order ‘to enable them to regulate their own energy consumption’. Furthermore, according to article 3, paragraph 9 of the directive, electricity suppliers must specify to final consumers the contribution of each energy source of the overall fuel mix and must give information on the environmental impact. As a result, the consumer is able to take environmental values such as the use of renewable energy into consideration when ‘regulating his own energy consumption’. Thus, the directive is an empowerment instrument in giving energy consumers the tools to take public concerns –environmental protection, climate change – into account when consuming. The consumer becomes consumer-citizen. Or, as Micklitz (2012: 21) writes, the circumspect consumer who opts for the lowest price should become a responsible consumer who also considers ecological, social and political values.

The empowerment of the consumer-citizen relies heavily on providing sufficient information, which should enable consumer citizens to act responsibly. However, this is not the ‘acting together’ characteristic for citizenship that is referred to, but still a rights and benefits based conception of the individual. The discourse of empowerment of consumer citizens promises a more positive and active picture of individuals acting together – when compared to that of the passive Market Citizen or consumer. But the instruments provided focus foremost on the individual benefit that can be gained from informed choices and looking for the best opportunities. These are instruments that nowhere take into account the more vulnerable, less informed and less educated individuals. They should be taken into account if the empowerment tools are to contribute to what the Single Market Act presents as the a human dimension of the ‘social’ market economy that is supposed to put Europeans at the heart of the internal market and restore confidence. The Eurobarometer survey on consumer empowerment sets out to identify these vulnerable consumers and states they are the least empowered. It is questionable whether empowerment tools can help them as well as protection guaranteed through law can. Meanwhile, the 2012 Commission Staff Working Document on the State of Play of the Single Market act (European Commission 2012) still emphasizes the opportunities for individuals
and the importance of access to information. Whether enforcement mechanisms related to the empowerment discourse equally favour individual rights and benefits over a more protective attitude towards consumer citizens is one of the questions dealt with in the next paragraph.

Empowering consumers and citizens: the design of law enforcement

In the EU’s consumer empowerment policy, enforcement receives a distinctive role in realizing the goals of competitive and innovative markets: ‘[E]mpowered consumers who complain and assert their rights are the most effective consultants in helping businesses to innovate and improve’ (European Commission 2011c:2). Consumer redress is, in fact, perceived as one of the preconditions of consumer empowerment, which is, to be realized through legislation on ADR and by establishing simple fast and affordable out-of-court procedures (European Commission 2011c:3). The Commission’s definition of consumer empowerment also relies on effective institutions: consumer organizations and public authorities are seen as intermediaries helping consumers to make better decisions.

In the following recent EU legislation on consumer law enforcement will be analysed in order to establish what kind of procedural rules and institutional arrangements form the basis of the EU’s empowerment model. Besides the general industry neutral rules, the legislative developments in the liberalized network industries will be analysed because sector-specific regulation well illustrates the role of successful law enforcement in empowering consumers. Consumers’ access to adequate dispute settlements, procedures for handling complaints and to other forms of redress is an essential component of realizing substantive consumer rights in the internal market. Moreover, the most recent legislative packages (electricity, gas, telecoms) address enforcement of consumer law in a more pronounced way than the earlier legislation.

The aim of this analysis is to understand whether these empowerment tools could be more effective than traditional tools of consumer law enforcement. After mapping out recent EU legislation on consumer law enforcement the new empowerment tools will be tested with the help of three recent ECJ cases.
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Consumer empowerment through procedures

Consumers’ access to justice and consumer redress has been part of the Union’s policies since 1975 but it has only been reinforced in soft law documents. A specific legal basis for consumer redress is absent in the EU Treaties. Although EU consumer protection is established as an independent legal area the European Commission does not have a supervisory competence in the field of consumer law and thus the Member States retain almost exclusive competence in the way they enforce EU consumer rules. The enforcement of substantive rules has been left to the Member States in accordance with the so-called national procedural autonomy. This autonomy means that the private law consequences of European law infringements fall within the competence of the Member States. Hence, the enforcement of EU consumer law is fragmented by the separation of harmonized substantive rules from decentralized procedures, remedies and institutional design and is further challenged by a multi-level system composed of vertical (European and national law) and horizontal (general and sector-specific rules) layers of legal sources.

This is evidenced in the EU directives on consumer protection that generally do not foresee remedies and sanctions for infringements of consumer rights (Micklitz 2012). While the influence of EU law on national procedures and remedies of law enforcement has been gradually growing since 1992 (de Moor-van Vugt 2011) the institutional autonomy of the Member States has remained largely untouched by the EU.

Consequently, there used to be a general lack of guidance from the EU on how to enforce EU law and what kind of institutional design is optimal for law enforcement. This changed with the adoption of Directive 98/27 EC on injunctions, Regulation 2006/2004 on consumer protection cooperation and later the 2008 Green paper on collective consumer redress. Since 2007 the enforcement of consumer law has become one of the key priorities of the Commission (European Commission 2007d).

With regard to judicial enforcement the Commission has launched two proposals: on voluntary dispute resolutions schemes and collective actions and it has

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3 See Article 169 TEU, which in fact copy-pasted Article 153 EC.
also briefly addressed the combination of these two models. The Commission has
promoted the development of ADR schemes by adopting two Recommendations on
minimum quality criteria for the establishment and operation of ADR schemes.\textsuperscript{5}
Finally, the European Consumer Centres Network (ECC-Net) provides consumers
with information and assistance in accessing an appropriate ADR scheme in another
Member State.

In 2009 the Consumer Enforcement Package (European Commission 2009)
raised two core issues of consumer law enforcement: finding effective means of
collective redress and the deterrent effect of available remedies and sanctions. The
question was whether besides injunctive relief\textsuperscript{6} and fines remedies should be
extended to damages claims.

In 2008 a Green paper on collective redress has been published, which
addressed compensation through damages claims and offered interesting options for
consumer empowerment such as collective ADR schemes and enabling public
consumer authorities to require traders to compensate consumers or to skim off the
profit of the traders.\textsuperscript{7} In 2011 a new public consultation was published, which is a
coherent EU approach on collective actions aiming to identify common legal
principles among the Member States on injunctions and damages claims (European
Commission 2011d). It also re-launched the discussion to resolve consumer disputes
via collective consensual dispute resolution.

Simultaneously a public consultation was opened on ADR (European
Commission 2011e) with similar questions on extending its coverage, involvement of
business and suppliers, awareness of consumers, online dispute resolution and
funding.

Beyond these general economy wide instruments the Commission has been
extending its influence on law enforcement in the newly liberalized sectors, such as
financial services, transport, telecommunications and energy. Besides laying down
obligations for the Member States to establish independent regulatory authorities to
monitor markets and compliance with consumer laws, the EU Directives, such as the

\textsuperscript{5} Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to
the bodies responsible for out-of-court settlement of consumer disputes [1998] OJL115/31,
bodies involved in the consensual resolution of consumer disputes [2001] OJ L109/56,

\textsuperscript{6} Directive 98/27/EC has been substantially modified several times for example new
Directives have been added to the annex, Directive 2009/22 codified by changes.

\textsuperscript{7} European Commission 2008a, p.11;
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E-commerce Directive\(^8\), the Postal Services Directive\(^9\) and the Markets in Financial Instruments Directive (MiFID)\(^10\) encourage Member States to establish ADR schemes. The EU legislative frameworks regarding the telecom sector\(^11\) and the energy sector\(^12\), the Consumer Credit Directive\(^13\) and the Payment Services Directive\(^14\) require that adequate and effective ADR schemes are put in place.

While sector-specific regulation granted fundamental economic rights to individuals in order to actively participate in these new markets, however, sufficient enforcement of those rights were late coming. This is why the most recent legislative packages addressed enforcement in a more pronounced way than the earlier legislation.

As already noted, in the electricity market the so-called third legislative package established an Agency for the Cooperation of Energy Regulators and Directive 2009/72/EC concerning common rules for the internal market in electricity\(^15\) obliges Member States to create so-called single points of contact to provide information concerning consumer rights, legislation and dispute settlements as well as creating an independent mechanism (energy ombudsman or consumer

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body) to deal with consumer complaints and out-of-court dispute settlements. 16

Annex I includes among others the obligation for electricity providers to set up transparent, simple and inexpensive procedures for dealing with their complaints. In particular, all consumers shall have the right to a good standard of service and complaint handling by their electricity service provider.

From this brief overview we can see that consumer empowerment through law enforcement is characterized by a noticeable shift from the state to individual consumers and their collectives to enforce the rules. The legislative and institutional framework of law enforcement has also been subject to a shift from traditional judicial (private) enforcement to less traditional forms of soft enforcement such as the voluntary dispute resolutions and a shift from judicial enforcement to administrative enforcement. With regard to institutions of law enforcement, this concerns a shift from the courts to regulatory agencies but also from the courts to alternative dispute resolution bodies.

Consumer empowerment through institutions

As mentioned above the Commission regards consumer organizations and public authorities as intermediaries who help consumers to make better decisions. However, the Commission has not respected this institutional balance between private-public divide in its earlier legislation.

The fact that effective law enforcement also depends on its institutional setting has been analyzed by several scholars in the academic literature (Stiglitz 2002: 164, Klein 2000, Coase 1937, 1960)  17 In practice regulators have come to realize that a body of economic regulation is only as good as the institutions entrusted with their implementation (OECD 2010, ICN 2012). Establishing new regulatory authorities and re-designing old ones served as a significant opportunity to consider the institutional prerequisites for the effective implementation of economic laws. The respective

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17 New Institutional economics incorporates a theory of institutions into economics has developed as a movement within the social sciences, especially economics and political science, that unites theoretical and empirical research examining the role of institutions in furthering or preventing economic growth. It includes work in transaction costs, political economy, property rights, hierarchy and organization, and public choice. Most scholars view the work of Ronald Coase as a central inspiration for the field.
institutional contexts will each shape decisions in their own ways, and these will often lead to very different roles for legal rules (Gerber 2009).

There is presently a wide diversity of institutions enforcing consumer laws: some Member States have predominantly private enforcement like the Netherlands, others rely predominantly on public bodies like the Scandinavian and Eastern European countries. There has been no specific obligation for the Member States to establish independent consumer authorities. This is in accordance with the principles of national procedural and institutional autonomy. Institutional autonomy is the Member States’ competence to design their own institutional infrastructure and allocate regulatory powers to public administrative agencies that enforce EU law\(^\text{18}\) (Verhoeven 2010). Accordingly, the Member States were free to entrust public agencies or private organizations with the enforcement of consumer laws as well as to decide on the internal organization, legal competences and powers of public agencies.

However, Regulation 2006/2004 on trans-border cooperation between consumer authorities indirectly intervened with national institutional arrangements by imposing conditions under which national authorities responsible for enforcing consumer rules must cooperate with each other.\(^\text{19}\) By prioritizing public enforcement the Regulation clearly tilted the national institutional framework towards public authorities.\(^\text{20}\) Similarly, in the liberalized network industries the EU gradually extended the EU principles of effective, dissuasive and proportionate sanctions as formulated in the European courts’ case-law\(^\text{21}\) to a broader set of obligations and criteria for national supervision in EU legislation. This process of Europeanization of supervision (Ottow 2012) obliged Member States to establish independent national regulatory agencies with core responsibilities for monitoring markets and safeguarding consumers’ interests (Micklitz, 2009) through ensuring effective consumer law enforcement and complaints processes (Davies and Szyszczak 2011).

\(^{18}\) Joined cases 51-54/71 International Fruit Company II [1971] ECR 1107, para. 4.
\(^{20}\) See Article 3c on the definition of a competent authority: “competent authority’ means any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers’ interests;”
\(^{21}\) Case C-68/88 Greek Maize [1989] ECR 2965.
In the following the implications of Regulation 2006/2004 on national enforcement schemes will be discussed.

**Priority of public authorities**

Regulation 2006/2004 on consumer protection cooperation has set up an EU-wide network of national enforcement authorities enabling them to take co-ordinated action for the enforcement of the laws that protect consumers’ interests and to ensure compliance with those laws. The Regulation requires public enforcement mechanism for a set of 15 directives that mostly concern private law rules. The Regulation imposes public enforcement for the consumer *acquis*, however it does not regulate sanctions.

While the Regulation was to coordinate at EU level the enforcement activities of the Member States in cross-border infringements and to raise the standard and consistency of enforcement, it also had a major impact on the domestic institutional structure of consumer protection in the Member States. This can be illustrated by the establishment of the Dutch Consumer Authority and creation of a dual system of public and private enforcement based on a subsidiarity principle. While the Commission has acknowledged the essential role consumer organizations play in the enforcement of consumer law, it has unfortunately not involved them in the process of achieving effective and uniform enforcement EU wide.

The way the public-private divide of consumer law enforcement is managed in the Member States and steered from the EU has a relevant impact on consumer empowerment. We use findings in law and economics literature to support this argument. The law and economics literature confirms that public agencies with investigative powers can better detect law violations as final consumers may not optimally enforce the law due to lack of information, rational apathy and free-riding (Veljanovski 1981, Polinsky and Shavell, 2000, Van den Bergh and Visscher, 2008). However, not all parts of consumer law are fit to be enforced by a public agency as most of consumer rules are private law rules and thus drafted for private enforcement (Scott, Black, 2000). In the law and economics literature information

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22 On the basis of Article 4 each Member State was obliged to designate the competent authorities and a single liaison office responsible for the application of the Regulation.

23 *Wet handhaving consumentenbescherming. 18 Memorie van Toelichting Whc, Kamerstukken II 2005/06, 30 411, nr. 3.*
asymmetries form the most valid economic reasons to intervene in markets and serve as a rationale for regulation in order to protect consumers. Transaction costs, information deficits and cognitive dissonances are accepted arguments to justify intervention in the otherwise unrestricted market processes (Van den Bergh, 2007). Consumer protection is regarded merely as a subsidiary solution to market failures in case the private law system of individual enforcement fails and competition control is exhausted (Ramsay, 1985).

Accordingly, public enforcement is justified when there is serious risk of adverse selection in the market place, when consumers face difficulties to discover the infringements and when the size of the total harm significantly exceeds the individual damage suffered (Van den Bergh, 2007). Information deficit on the consumer side is usually connected with consumers’ uncertainty about the quality of products, which cannot be assessed at the moment of purchase. The markets of experience and credence goods form priorities for intervention.

For example, standard contract terms where the problem “signing without reading” involves the risk of adverse selection (de Geest, 2002), unfair commercial practices such as misleading advertising or aggressive form an area where consumers individually lack the incentives to complain and take action. Financial services such as consumer credit are typical credence goods where uninformed consumers even after purchase cannot evaluate the quality of the goods and services and thus cannot distinguish between poor and good quality goods. In these cases consumers are often not aware of the harm.

But many consumer problems are of individual nature and large part of consumer law is private law and as such was intended to assist consumers to make use of their protected rights by solving their dispute with business or by initiating other actions. Private individual enforcement overcomes government failures of enforcement such as lack of resources and capture. Individuals also have the best knowledge of the harm suffered and they have the incentive and motivation to take action (Scott, Black, 2000). For example, in case of package travel, timesharing or price indications consumers have better information about the law violations and eventual harm occurred. Rational apathy to complain and take action seems also less of a problem. Doorstep selling, distance contracts are parts of consumer law where cooling-off periods apply and thus consumers have enough time to avail themselves of the necessary information to conclude the deal or refrain from it. Accordingly, the
Regulation overregulates the role of public authorities and makes public enforcement costly in areas such as doorstep selling, package travel and timesharing where private enforcement can be effective.

Public authorities are indispensable institutions to enforce consumer laws, but their role in the public-private divide of consumer law enforcement is more nuanced than the Commission has acknowledged so far. Their role in judicial enforcement through lodging collective or public interest actions can grow into an important contribution to consumer empowerment. Similarly, their role with regard to ADR schemes, either as operators of merely as advocating such schemes can be relevant tools to increase consumer empowerment. This issue has been subject to preliminary rulings by the ECJ and will be reviewed below.

The role of public authorities could also be changing through sector regulatory schemes, where regulatory agencies were set up as representatives of citizen-consumers in order to monitor markets. The exact role of national regulatory agencies in the EU for consumer empowerment is well illustrated by the 2007 White Paper on services of general interest:

‘The capacity of consumers and users, including vulnerable or disabled persons; to take up their rights, especially their right of access, often requires the existence of independent regulators with appropriate staff and clearly defined powers and duties. These include powers of sanction, in particular the ability to monitor the transposition and enforcement of universal service provisions. These also require provisions for the representation and active participation of consumers and users in the definition and evaluation of services, the availability of appropriate redress and compensation mechanisms, and the existence of a review clause allowing requirements to be adapted over time to reflect new social, technological and economic developments. Regulators should also monitor market developments and provide data for evaluation purposes.’ (European Commission 2007b:10)

So far there is no EU obligation on NRAs to look after individual rights of the citizen consumers (Davies and Szyszczak, 2011) (Micklitz, 2009). However, involving consumers in the decision-making processes through for example consultation as it has been laid down in the telecom sector by Directive 136/2009 has
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generally not been endorsed or institutionalized by EU or national law. And therefore it is far from corresponding to the ECJ’s approach that instrumentalizes private individuals to foster EU integration process by granting individual rights and remedies.

Consumer empowerment tested

The effectiveness of the above outlined empowerment strategies can be tentatively tested by taking a look at empirical evidence on consumer redress and recent ECJ cases. Empirical evidence shows that most of the consumers make directly a complaint to the traders and try to resolve the dispute through direct negotiation instead of turning to a third party (Eurobarometer no. 342: 40). This shows that consumers are in the first place interested in actual solutions such as apology, repair, replacement or refund for the products or services. However, while EU consumers appear to be willing to complain in fact, only 16 % turns to public authorities or consumer organisations (Eurobarometer no. 342: 41). This confirms earlier research results that claim consumer complaints are the most frequent and most important means of problem solving as consumers seek resolution of their disputes rather than legal redress (Stuyck et al. 2007: 27-28, 44, 46.).

The barriers of consumers’ access to justice are well-known. Litigation before courts takes excessive time and money when compared to the small value of the dispute at stake. Moreover, civil procedures are often not geared to the institution of mass procedures and in the courts adjudication rather than mediation or conciliation is arrived at. Besides these factors, there are also barriers of a psychological nature, unfamiliarity with the legal language and lack of information about the actual harm and the infringement combined with the lack of investigatory tools to detect these. Consumers discover harm when it has already taken place and thus are not interested in avoiding the future harm. When individual consumers face substantial costs that are disproportionate to the amount of their complaint they will decline to seek redress and resolve disputes (Van den Bergh and Visscher, 2008).

Two major ways to increase the number of consumers, i.e. to empower them to bring claims is alternative dispute resolution and some kind of aggregate,

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collective consumer actions. The well-known Italian motor car insurance cartel case,\textsuperscript{25} \textit{Manfredi} demonstrated that if the objective is to provide compensation for final consumers and to encourage them taking action to enforce the law then consumers will choose only the redress avenue that provides them optimal conditions to have their claims adjudicated in a swift, flexible and effective way. This case shows that if claims are small and there is no possibility to consolidate and aggregate the separate claims then consumers’ lawyers prefer small claims judges where procedures are less formal and less demanding in terms of evidence and burden of proof.

The Commission has in fact recognized these points. In its Staff Working Paper accompanying the White Paper collective ADR is put forward as a means for early resolution of disputes to encourage settlements (European Commission 2008b). The Commission’s earlier Discussion Paper on consumer collective redress recommended collective ADR in combination with judicial collective redress as presently available in Sweden and Finland for consumer disputes. The Member States have also been experimenting with legislative solutions that would simplify consumers’ use of collective actions. Either by introducing rules of thumbs to make proving evidence easier\textsuperscript{26} or involving public authorities by filing collective actions on behalf of consumers\textsuperscript{27}.

At the same time two recent preliminary rulings of the ECJ in \textit{Alassini}\textsuperscript{28} and in \textit{Volksbank Romania}\textsuperscript{29} discussed relevant questions of the effective judicial protection of consumers with regard to the role of ADR and its interplay with access of consumers to courts and consumer authorities. In \textit{Alassini} the ECJ ruled on the

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\textsuperscript{25} Joined cases C-295/04 to C-298/04 \textit{Manfredi v Lloyd Adriatico Assicurazioni SpA and Others} [2006] ECR I-6619.

\textsuperscript{26} In Hungary a legal presumption of 10 % overcharge when calculating damages for hard-core cartels has been laid down in the competition law. In Bulgaria a flexible procedural rule has been implemented providing that all legal and natural persons, to whom damages have been caused, are entitled to compensation even where the infringement has not been aimed directly against them. Petrov (2009): 44.

\textsuperscript{27} See recent case C-472/10 \textit{Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt} [2012] OJ C 174/7 and the Swedish Market Act that provides the Consumer Agency standing to file individual or collective actions on behalf of consumers.


\textsuperscript{29} Case C-602/10 \textit{Volksbank Romania v Autoritatea Națională pentru Protecția Consumatorilor}, judgment of 12 July 2012.
procedural question whether Article 34 of the Universal Service Directive\(^{30}\) requiring that Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users’ complaints, and the general principle of effective judicial protection were compromised by the Italian law which made mandatory an initial out-of-court dispute resolution procedure before a dispute was admissible in the ordinary court process. In *Volksbank Romania* one of the questions was whether Directive 2008/48 can prevent a Member State within its broad discretion for implementing the Directive to regulate the detailed procedure of out-of-court resolution of disputes concerning consumer credit agreements in such a way that it permits the widest possible access of consumers to public bodies specially set up to defend their interests.

In *Alassini* the Court ruled that the only criteria applicable for out-of-court settlements in consumer disputes were those set out in Article 34 of the USD: the principles of effectiveness, legality, representation and the principle of liberty from the preamble of Recommendation 98/257. The Court held that none of these principles limited the power of the Member States to create mandatory out-of-court procedures for the settlement of telecoms disputes between consumers and providers.\(^{31}\) The only requirements are the maintenance of the right to bring an action before the courts for the settlement of disputes and for ensuring that the Directive remains effective.\(^{32}\) On the question of satisfying the principle of effectiveness, the Court accepted that making the admissibility of legal proceedings conditional upon prior implementation of a mandatory out-of-court settlement procedure affects the exercise of rights which derive from the USD, but various factors revealed that the mandatory procedure did not in practice make the exercise of individual rights impossible or excessively difficult.\(^{33}\) In fact, the Court’s line of

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\(^{32}\) Article 34(1) USD is now amended by art.1(24) of the new Directive 2009/136 and provides an explicit legislative requirement that out-of-court procedures “shall not deprive the consumer of the legal protection afforded by national law.”

\(^{33}\) This was because the outcome of the settlement procedure is not binding on the parties and does not prejudice their right to bring legal proceedings; the settlement procedure does not normally result in substantial delay for the parties to bring legal proceedings; for the duration
reasoning is in sharp contrast with the line of argumentation that on the basis of the same elements of ADR emphasize their advantages and effectiveness to solve consumer disputes. For example, the fact that ADR decisions are not binding were always considered as drawback of this procedure while here the Court accepts it as an advantage. While in Alassini the Court set out the main conditions that mandatory dispute resolution process must fulfill in order to comply with the principles of effectiveness and the Court has set out the conditions prescribing how ADR may be used to settle disputes on EU law, the Court has failed to communicate the advantages of these procedures for consumer disputes.

In Volksbank Romania the Court was asked among others to interpret the consumer credit Directive regarding the interplay between ADR schemes and consumers’ direct access to consumer authorities. The Court ruled that the Member States’ discretionary power under the Directive allows them to implement national law regarding disputes on consumer credit to provide consumers direct recourse to a consumer protection authority, which may subsequently impose penalties on credit institutions for infringement of that national measure, without having to use beforehand the out-of-court resolution procedures provided for by national legislation for such disputes. 34

What is significant for consumer empowerment is the endorsement of the advantages of ADR over traditional judicial enforcement before courts.35 The Court’s judgment does not reflect the idea that ADR can be a significant way to resolve consumer disputes. In fact, ADR has now been considered as a relevant preliminary step in judicial enforcement of consumer interests and especially before collective actions for compensation is opted for. In other words, the Court’s judgment does not

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34 Case C-602/10 Volksbank Romania v Autoritatea Naţională pentru Protecţia Consumatorilor, judgment of 12 July 2012, nyr., paras 98-99
35 For example, an important element of the Italian mandatory mediation process that persuaded A.G. Kokott and the Court was that the Italian procedure pursued "legitimate objectives in the general interest" and satisfied the principle of proportionality because the Italian Government believed that, “an out-of-court dispute resolution procedure that is merely optional is not as efficient as a mandatory one that must be conducted before any legal action can be brought.” Opinion of Advocate General Kokott delivered on 19 November 2009 in Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA [2010] ECR I-02213, paras. 45-47
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reflect the Commission’s discourse that considers ADR as a significant enforcement tool to achieve consumer empowerment.

Conclusions

Our analysis leads us to conclude that there are serious gaps between the empowerment discourse and its translation into legislative instruments. Consequently, the empowerment discourse can be qualified as misleading and in the end, not helping to restore confidence in the Single Market.

With respect to the design of legislation the decision-making authority is put in a responsive position as opposed to the more steering position it has in traditional public decision-making. That alone does not have to be problematic. However, it becomes problematic when we take into consideration principles of equality and accountability as they function in representative democracy. As long as it is not clear whose voices are actually taken into consideration, and which mechanisms safeguard an equal and efficient opportunity to have a say in policy-making or what principles determine a response from decision-making authorities, the empowerment instruments merely provide an opportunity for arbitrary responsiveness. Furthermore, the empowerment discourse tends to put the focus on the individual, at the expense of cohesion, collective action and community building through economic regulation. Even though the discourse of empowerment of citizens and consumers promises a more positive and active picture of individuals acting together – when compared to that of the passive Market Citizen or consumer –, the instruments provided focus foremost on the individual benefit that can be gained from informed choices and looking for the best opportunities. Where the emphasis is on what rights and benefits assertive individuals can have in the single market, it might in the end have consequences for social protection or our conception of the welfare state.

With regard to the empowerment tools of law enforcement there has been a noticeable governance shift from judicial enforcement to alternative dispute resolution, mediation, small claims and to more administrative enforcement. While the EU does not have a competence in regulating procedural and institutional matters in the laws of the Member States, the EU legislator has followed a sector and substantive law related approach to introduce EU standards to guide and at times constrain the Member States’ enforcement framework. These EU standards mostly
impose goal-driven (effective enforcement-effective judicial protection) obligations on the Member States and they are characterized by a high level of generality without providing practical or financial guidance on building institutions and designing procedures. Empirical evidence and recent preliminary rulings of the ECJ show that simple, fast and cheap procedures have the potential to empower consumers.

Our paper has thoroughly discussed the role public authorities can play in consumer empowerment. We found that the strong prioritization of public enforcement and public authorities cannot be reconciled with the Commission’s consumer empowerment strategies. While public authorities play a vital role in enforcing and monitoring the enforcement of consumer laws, their role is more nuanced. First, consumer empowerment needs strong civil society and strong private organizations as well. They cannot be excluded from the operation of an effective institutional system. Second, the investigated ECJ cases show that there are in the Member States relevant questions on how public authorities can better guide consumers to effective enforcement tools such as collective actions or ADR. These new mixed models building on public authorities should be better explored in the coming years both in industry neutral and sector-specific settings.

References


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