

CHARACTERISTICS OF CONSUMER PROTECTION AND PUBLIC MANAGEMENT IN LATVIA

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Abstract

The rapid, diverse and complexity of current economic development has led to a need for a high level of consumer protection. This is emphasised both in the regulations of European Union law (including the provision of consumer protection as on one of two sectoral rules to be taken into account in the implementation of European Union policies and activities), both in the European Union case law and in the Member States, including the Latvian regulatory framework. The topicality of the research is justified by the facts and indications that testify that the competent authorities of Latvia cannot effectively ensure a high level of consumer protection. In turn, it distorts the European Union internal market, in particular the Latvian market, competition and aggravates the state's economic situation. The aim of the research is to evaluate the effectiveness of the competent authorities of Latvia in the field of protection of unfair commercial practises and to make recommendation for its improvement. In order to achieve the aim, the author will analyse the European Union and Latvian regulatory framework, scientific literature, the practice and statistics of the European Union and Latvia. As a result of the research, the author concludes that the legislator has to assess the need to expand the rights of the competent authorities, while the competent authorities should consider the possibility of examining current practices. The results of the study can be used in practice for improving the efficiency of public management in protecting consumers in the field of unfair commercial practices.

Key words: Latvia, unfair commercial practices, management, consumer, public management

JEL code: K42, P46, H83

INTRODUCTION

Over time, the market economy has become even more complicated. On the one hand, the modern market provides consumers with a wide range of opportunities, but on the other hand, it is difficult for consumers to understand it. The average consumer is no longer able to trace the market development process and innovations; hence, it has led to imbalances between the trader and the consumer. Over the years' consumer protection policies and regulations have developed, because of need for an effectively and fairly functioning market, which works as a benefit to all members of society and the economy of the state.

The European Union (EU) and its Member States have also introduced a strong consumer protection regulation, which should ensure a high level of consumer protection in the European single market. Previous practice shows that there are problems with the application of a high level of consumer protection regulation in Latvia. Namely, the competent national authorities of Latvia are not able to effectively ensure a high level of consumer protection in the field of unfair commercial practices. It significantly reduces the competitiveness of the Latvian economy in the European single market, distorts the single market, and causes losses to consumers, traders and the state. The topicality of the article problem question is confirmed by the statistical data analysed in the article and the practice of state administration institutions and courts. For example, the number of consumer complaints in state institutions and courts has recently grown significantly. Only 23 percent of the applicants could have obtained help from the Consumer Rights Protection Centre of Latvia (CRPC) to resolve the dispute. Consumers are consulting very little about commercial practices, e-commerce and advertising issues, compared to other types of counselling. Consumers actively use alternatives to protect their rights, such as mass media, rather than turning to authorities for help or defending their rights in court.

The aim of the article is to evaluate the effectiveness of the competent state administration institutions in the field of protection of unfair commercial practices, as the hypothesis is nominated follows: the competent Latvian authorities are not able to effectively ensure a high level of consumer protection in the field of unfair commercial practices. Consequently, by failing to meet the requirements of the EU as set out in the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive). In order to achieve the goal, the author will analyse the EU and Latvian regulatory law, scientific research literature, the EU Courts and the Latvian courts case law, as well as authorities practice and statistics. Consequently, a wide range of scientific research methods will be used, including analytical, comparative, grammatical, teleological, systemic, inductive and deductive methods. Within the framework of the work, conclusions and recommendations for possible solutions to the problem in the article will be presented. The results of the research can be used in practice, with aim to improve authorities – public management efficiency of protection of consumers in the field of unfair commercial practices.

RESEARCH RESULTS AND DISCUSSION

The beginnings of the consumer culture are sought back in time before the era, but as Benöhr (2013, pp. 10–11) points out consumer protection as a systematic

policy goal is a recent phenomenon that began globally, only in the middle of the twentieth century. Urgent needs of consumer protection appear with scandals that have increased in mass production and health fields. Today's economic development is very fast. The market is complex and rich with information. This is one of the reasons that caused imbalances between traders and consumers. Consequently, today the market is no longer able to function without a specific regulation that creates an equal relationship between the consumer and the trader.

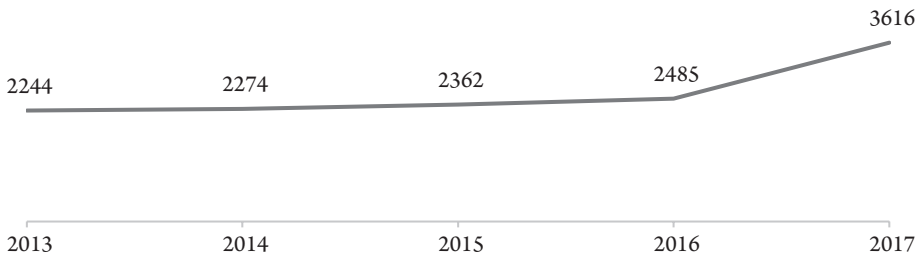
Also, the public regulation of the market in Europe has developed incrementally for many centuries now under a rich variety of motivating forces, therefore, EU policies and activities must be conducted with due respect for a series of EU fundamental values. Groups such as consumers and workers must be protected from imperfections and inequities of unregulated markets (Weatherill, 2017). Over time, the EU has developed several documents that emphasise the need to ensure a high level of consumer protection. It is the basis for the development of an efficient, fair and right European single market. Article 12 of the Treaty on the Functioning of the European Union stresses in particular the protection of consumers by providing that “consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”. Namely, only two areas (environment and consumer protection) in EU law have sectoral protection, which points to the sensitive nature of these areas, the need for special protection and the importance of society. In addition, Article 38 of the Charter of Fundamental Rights provides that “Union policies shall ensure a high level of consumer protection”. This reaffirms the particular role of consumers in the legal system, which points to the fact that some of the consumer rights edges have human rights features. For example, Benöhr (2013, p. 46) states that consumer rights of access to justice are recognised as new generation of human rights. Summarising the above and looking at consumer rights in terms of unfair commercial practices, it can be concluded that the overarching objective of the Unfair Commercial Practices Directive is to introduce and ensure a high level of consumer protection throughout the Member States. Weatherill (2017, pp. 160) states that “the commitment to a high level of protection has played a prominent role in the Court’s interpretation of relevant legislative texts, sometimes in the form of remarkable ambitions. Consumer protection is one of several vividly illustrative areas”. The Court of Justice of the European Union (ECJ) has also reiterated its strong position on a high level of consumer protection on several occasions. In the case of *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország Kft.* (2015), the ECJ noted that, in relation to a trader, the consumer is in a weaker position, especially with regard to the level of information, in that the consumer must be considered economically weak and less experienced in legal matters than the other party to the contract.

The author concludes that with strict regulation and requirements for a high level of consumer protection, it is not enough, as it is also necessary to

provide effective application in practice. The ECJ in the case of Köck (2015) and Sánchez Morcillo and Abril García (2014) have assessed the implementation of the principle of effectiveness in individual cases. The importance of principle is also highlighted in Recitals 18 and 22 in the Preamble to the Unfair Commercial Practices Directive, which states that it is appropriate to protect all consumers from unfair commercial practices. Persons or organisations considered to have a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices either in a court or in an administrative authority, which is competent to decide on complaints or to initiate appropriate legal proceedings.

The adoption of the Unfair Commercial Practices Directive enabled Member States to exercise freedom of choice in order to adapt remedies to the needs and characteristics of a particular country. In Latvia, persons who have a legitimate interest in combating unfair commercial practices can do this in three ways. First, under the Article 15 of Unfair Commercial Practice Prohibition Law (UCPP) persons may propose investigation of unfair commercial practices in the CRPC or in the Health Inspectorate (HI). Secondly, it is possible to bring a claim in court in accordance with Article 1 of the Civil Procedure Law. Thirdly, to bring a claim of damages in the court in accordance with Article 4.¹ of the UCPP. From the systemic and practical point of view, considering these three possibilities, it is concluded that this is incomplete and difficult for the average consumer. For the CRPC or the HI to initiate a case of unfair commercial practices, the competent authorities shall take into account the criteria set out in the UCPP. Namely: 1) the supervisory priorities of the institution; 2) the impact on consumer collective interests and 3) the balance of supervision. These criteria are very general; there are no publicly available guidelines about it, statistical or other sources that would meet the criteria for the application of the system to assess the relevance and validity of specific cases. Consequently, criteria (especially the first two, that is, the authorities in their supervisory priorities and impact on the collective interests of consumers) are the basis of failing unfair commercial practice case, despite the fact that in this case is recognized direct evidence of the fact of unfair commercial practices.

The statistics of the CRPC shows that the number of complaints submitted to the institution increases year by year (Figure 1). However, despite the fact that unfair commercial practices are one of the most common and complicated violations of consumer law, only 9–11% of applications received in the CRPC (in the period from 2013 to 2017) were about unfair commercial practices and only 1–2% of the CRPC consultations (in the period from 2013 to 2017) have been about unfair commercial practices. The correlation between these statistics makes the facts ascertained in practice even more complicated and more controversial. For example, in the decision of September 7, 2017 No. 22-pk the CRPC concludes that at least 3000 consumers have been affected by the unfair commercial practices of a particular trader, but only 44 applications have been received in the CRPC for this trader. Consequently,



Source: author's construction based on CRPC statistical data

Fig. 1. **Number of applications and complaints received by the CRPC in 2013–2017**

it can be concluded that at least 2956 consumers have not tried to go to the institution to defend their rights.

In the period from 2013 to 2017, the CRPC has been able to help the applicants find a positive solution in 17–23% of cases. 2016 and 2017 the CRPC has not adopted any individual consumer-friendly decision. In turn, the HI is evaluated commercial practices only within the framework of the advertising of medicinal products, although the institution's competence for narrow interpretation in practice does not have a regulatory basis. Consequently, it can be concluded that the activities of the authorities are not aimed at assessing and providing assistance to individual consumers in cases of unfair commercial practices. Authorities only deal with general unfair commercial practices that are part of the list of supervisory priorities of the institutions or have a significant impact on the collective interests of consumers. Such management is in contradiction with EU consumer policy and the requirements for a high level of consumer protection, in which all consumers should be protected from unfair commercial practices. Partially it can be interpreted as violation of human rights to a fair trial. In particular, this is worth considering in the context of the ways of protecting persons who are entitled to fight against unfair commercial practices in Latvia. Namely, effective defences in the area of unfair commercial practices of competent authorities reveal significant weaknesses and problems. Consequently, in this situation, it is particular important for consumers to provide an effective alternative to the possibility of protecting their interests. In Latvia this alternative way is court, but there the question arises – is a court in Latvia an effective way for consumers to protect their interests? If answer is no, then effective public management of competent authorities becomes particularly important.

For the average consumer to sue a trader in accordance with Article 1 of the Civil Procedure Law (for example, a claim for termination of unfair commercial practices) or to bring a claim for damages in the face of unfair commercial practices in accordance with Article 4.¹ of the UCPP is very complicated. Namely,

disputes of this kind are settled in a civil – general procedure, where one of the basic principles of the process is the adversarial principle. This means that the consumer (the economically weaker party compared to the trader) must prove unfair commercial practices, which is a very complicated legal institution. Even lawyers often misunderstand unfair commercial practice. Namely, the consumer needs to be specialised in law, needs to draw up a legally grounded application, needs to be able to obtain and submit evidence for the court, pay court's costs and state's fees. Consequently, it can be concluded that the judicial protection of court is not effective for protecting consumers from unfair commercial practices, in particular where the harm done to a particular consumer is negligible compared to the likely costs and risks of litigation. In practise, there have been cases where one consumer loss is some euros, but the trader has done unfair commercial practice not only to one consumer, but also to hundreds of consumers. Therefore, total loss for consumers and the traders' benefit is several thousand euros, which affect the Latvian economy and market enough in a negative way.

Considering, that judicial court protection for consumers in the area of unfair commercial practices is not effective, the effectiveness of public administration in protecting consumers from unfair commercial practices must be recognised as being of paramount importance and vital to create stability and equilibrium in the single market. It should be concluded that for many years the effectiveness of this public administration has not been consistent with the successful development of the national economy of Latvia. It has a lot of problems and consequences. Firstly, consumers are not defending their rights in the field of unfair commercial practices because they are not aware of their rights and do not recognise unfair commercial practices which are directed against them. At the same time, consumers do not see the results of defence, because there is no practice and there is a lack of culture to "break for their – consumers' rights". Consumers are passive market players. The complicated and expensive legal – court process also contributes to this issue. Secondly, this creates for traders a sense of impunity that encourages the launching and continuation of unfair commercial practices, as the actual finding of litigation for unfair commercial practices is insignificant, especially compared to the trader's economic benefits of making unfair commercial practices. In practice, there are cases where unfair commercial practices are implemented not by small market participants, but also by large, publicly respected and important traders in the Latvian economy. In particular, these traders are those who continue to pursue unfair commercial practices, ignoring consumers' complaints and penalties imposed by the supervisory authority, since the economic benefits of unfair commercial practices outweigh all fines. A striking example is the Air Baltic case (2007), in which the trader in the airline ticket system commissioned consumers on trader's web site (and thus with active consumer activity) to deactivate the trader's automatic activation option for the purchase of additional services along with the airline ticket. In this way, consumers wishing to buy only an airline ticket,

eventually purchased additional services such as a flight date/time exchange guarantee, which they did not want to buy. The trader's profits from consumers in the practice of unfair commercial practices against them were so motivating that the trader for several months did not comply with the CRPC decision, but paid after each seven days a compulsory cash for non-execution of the decision. The pressure of society, politicians and the mass media caused the suppression of unfair commercial practices by traders. Thirdly, unfair commercial practices pose significant losses to consumers, distort the market, undermine fair competition, and undermine the state's economic position and the effective functioning of the single European market. Consumers do not trust to the European internal market, therefore, consumers of other countries refuse to buy goods and services in Latvia.

Allowing unfair commercial practices is undervalued damage to the Latvian economy. Consequently, it can be concluded that effective management of the public sector in this field is one of the most appropriate and main means to prevent unfair commercial practices in Latvia. The current functioning of the supervisory authorities has not been effective enough to ensure a high level of consumer protection. Thus, the hypothesis in the article is confirmed. In order to tackle the protracted problem of combating unfair commercial practices in the public sector, it is encouraged to extend the supervisory authority and monitor past practices.

At present, the Consumer Rights Protection Law and the UCPP are translated and adapted so that the supervisory authority has the power to make binding decisions in the event of unfair commercial practices only if unfair commercial practices are part of the supervisory priorities or have a significant impact on the collective interests of consumers. Consequently, supervisors should be given the power to make binding decisions even if only one consumer is affected. At the same time, the need to monitor supervisory practices should be considered, bearing in mind that supervision should not be based solely on the institution's priorities and on the collective interests of consumers, but the criterion "impact on collective consumer interests" should be used to determine severity of penalty rather than initiating/not initiating a case. If the authority does not make a decision on consumer claim, the authority should give a first (non-binding) assessment of the compliance of commercial practice. This would provide the consumer with an opportunity to assess his or her ability to pursue his or her defence in court. At present, consumers without specific knowledge cannot understand whether they are generally exposed to unfair commercial practices. In turn, HI should review a narrow view of unfair commercial practices, as well as clearly delineate the competences of the HI and CRPC.

The above-mentioned suggestions to improve institutional efficiency can be taken in the short term and do not ask for a substantial increase in funding. In addition, those improvements do not need to match with EU institution and some of them do not need for amendment for Latvian law. Therefore, the results

of the research can be used in practice, with aim to improve public management efficiency of protection consumers' rights in the field of unfair commercial practice.

CONCLUSIONS, PROPOSALS, RECOMMENDATIONS

1. Some of the consumer rights boundaries have human rights features, therefore consumer law enforcers must be particularly careful and correct with such sensitive rights.
2. In Latvia, persons who have a legitimate interest in combating unfair commercial practices can do this in three ways: 1) may propose investigation of unfair commercial practices in the CRPC or the HI; 2) may bring a claim in court in accordance with general procedure; 3) may bring a claim of damages in court in accordance with UCPP. These ways are incomplete and difficult for the average consumer.
3. To initiate a case of unfair commercial practices, the competent authorities (the CRPC and the HI) shall take into account the criteria set out in the UCPP: 1) the supervisory priorities of the institution; 2) the impact on consumer collective interests; 3) the balance of supervision. These criteria are very general and there are no publicly available guidelines about it, therefore there is no clear system of applying criteria. Consequently, criteria are the basis of failing unfair commercial practice cases, despite the fact that in this case is recognised direct evidence of the fact of unfair commercial practices.
4. The correlation between authorities' statistics and practice makes it even more complicated and more controversial. The activities of the authorities are not aimed at assessing and providing assistance to individual consumer in case of unfair commercial practices. Authorities only deal with general unfair commercial practices that are part of the list of supervisory priorities of the institutions or have a significant impact on the collective interests of consumers. Such management is in contradiction with EU consumer policy and the requirements for a high level of consumer protection. Partially it can be interpreted as violation of human rights to a fair trial.
5. A court in Latvia is not effective way for consumers to protect their interests (it is because of adversarial principle, which is too complicated to realise by the average consumer), therefore effective public management of competent authorities is particularly important.
6. The competent authorities of Latvia are not able to effectively ensure a high level of consumer protection in the field of unfair commercial practices.
7. The ineffectiveness of the authorities has produced the following consequences: 1) consumers are not defending their rights; 2) traders experience a sense of impunity; 3) unfair commercial practices pose significant losses to consumers, distort the market, undermine fair competition, undermine the

state's economic position and the effective functioning of the single European market; and 4) consumers do not trust to the European and Latvian internal market.

8. To resolve the Latvian problem of ineffective authorities: 1) supervisors should be given the power to make binding decisions even if only one consumer is affected; 2) the criterion "impact on collective consumer interests" should be used to determining a penalty severity rather than initiating/not initiating a administrative case; 3) if the authority refuse to make binding decision on consumer claim, the authority should give a non-binding assessment of the compliance of commercial practice; and 4) HI should review a narrow view of unfair commercial practices, as well as clearly delineate the competences of the HI and the CRPC.

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