

Empowering consumers through law?

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SUMMARY

This study on EU consumer empowerment is driven by the concern that the prevailing, static definitions of the EU consumer empowerment concept are too narrow and that interdisciplinary insights on the empowerment concept from other fields can offer more nuance for understanding empowerment in the EU consumer law context. At this juncture it is becoming increasingly important to engage in a renewed debate on the concept of EU consumer empowerment. In policy, the consumer empowerment agenda is moving from strength to strength, secondary legislation is becoming increasingly reorientated towards empowerment ends and the Commission's narratives are in flux regarding what it means to empower consumers and to what ends consumers are to be empowered for. However, despite the growing centrality of the EU consumer empowerment agenda in consumer policy and law there has been, to date, no systemic analysis that focuses on the question of how this concept can or should be understood in the EU consumer law context. The central question that this study then sought to answer was how the concept of EU consumer empowerment from consumer policy and secondary legislation can be rethought through the lens of empowerment theory. This is a complex question addressed from several perspectives throughout this study, which will be summarised briefly in the following.

CHAPTER 2: DEFINING EMPOWERMENT

Empowerment is a widely used but highly contested concept. The contested nature of this concept arises from the multitude of (conflicting) perspectives regarding what this concept should mean. In other words, the essentially contested nature of the empowerment concept stems from disagreement as to what empowerment should mean as opposed to the inability of defining the concept empirically. Another problem that compounds the contested nature of the empowerment concept lies in the fact that empowerment is not simply a term used in philosophical, political, social and legal discourses but is also practice. Empowerment is often an agenda that is adopted by one actor in society (such as an individual, an organisation or a government institution) with the intention of empowering another disempowered actor or group of actors. Whether the aim is to empower consumers in the EU context or to empower women for greater gender equality in society, the questions that follow are always the same. Why is this actor or group of actors (such as consumers or women) considered to be disempowered? When we begin to unpack this question, it becomes clear that the concept of empowerment cannot be divorced from another contested concept, power. How power is construed, such as agency or as structure, determines whether an actor is disempowered and also what the empowering entity will claim must be done to remedy

this disempowered position in society. Once this is established, what concrete actions should then be taken to empower? How do we know when the disempowered actor is no longer disempowered but empowered? What was the process behind this transition? Or is it the case that the empowerment agenda simply perpetuated the underlying relations and structures of power that it sought to combat?

In light of these questions, the discussion in Chapter 2 developed an analytical, theoretical framework consisting of two parts. The first part of this framework approached the puzzle of the concept of empowerment as a value orientation that gains meaning based on underlying and often implicit understandings of the concept of power for gaining meaning. The aim of the framework in Chapter 2 was to provide the theoretical and conceptual blueprint for analysing the concept of empowerment in the EU consumer law context. It was therefore important to adopt a theory of power that was broad enough to explore the several ways in which the concept of power permeates the empowerment agenda in EU consumer law. Therefore, a holistic model of power as a four-dimensional cluster of concepts was integrated as the theoretical foundation of the theory of empowerment developed in Chapter 2. The second part of this framework then focused on the concepts of empowerment that constitute empowerment as a practice. The approach in the second half of Chapter 2 then aimed to build a set of conceptual categories layered over the four-dimensional model of power that could then be used to explore the meanings and implications of EU consumer empowerment as a practice. These conceptual categories consist of subjective and objective disempowerment, empowerment as a subjective and objective process and empowerment as an outcome. In conclusion, the purpose of analysis in this chapter was to build a framework that would be used to guide the subsequent analysis of EU consumer empowerment in the subsequent chapters of this study.

CHAPTER 3: DEFINITIONS OF EMPOWERMENT IN CONSUMER LAW SCHOLARSHIP

Having established the theoretical framework and the conceptual categories that will guide the analysis of EU consumer empowerment in this thesis, Chapter 3 considered the meanings and theoretical frameworks have already been adopted in consumer law scholarship to contour the discipline specific definitions of EU consumer empowerment. There are several, legitimate reasons as to why consumer law scholarship has ascribed meaning to the concept of EU consumer empowerment through the lens of the average consumer concept and unboundedly rational *homo economicus* from economic theory. There are several legitimate reasons as to why the EU consumer empowerment agenda has become situated in scholarship on the information model in EU consumer law and consequently that the Commission's empowerment approach is considered to undermine the goals of consumer protection. The conclusion that is

generally drawn by scholarship on EU consumer empowerment is that the EU Commission should desist in pursuing an agenda of empowerment because the pursuit of this agenda undermines the interests of the consumers. The analysis in Chapter 3 explores and acknowledges the reasons behind each of these understandings of empowerment in the EU consumer law context and the critique of EU consumer empowerment that current prevails in scholarship on this concept. It was shown that (neo)liberal political and (neo)classical economic frameworks are primarily employed as the (implicit) theoretical frameworks that give meaning to the concept of EU consumer empowerment in the prevailing discourses. The lineage of these frameworks was traced to the Court's development of the benchmark average consumer in free movement case law and the adoption of this standard into both consumer policy and secondary consumer law. It was also shown that the body of consumer law scholarship that adopts behavioural insights to critique the information paradigm in consumer law and the average consumer standard have also critiqued the consumer empowerment agenda through these behavioural frameworks. The perspectives generated by this scholarship on EU consumer empowerment represent the prevailing and established understandings of empowerment in the EU consumer law context as an approach that is restricted to empowering the rational consumer through information duties to achieve the ends of the liberalised internal market based on a linear model of economic ordering.

Having established and explored the reasoning behind the prevailing meanings ascribed to the concept of consumer empowerment in the EU context, the discussion in this chapter concludes with the argument that several dimensions of consumer empowerment in the EU consumer law context remain underexplored as a consequence of the theoretical frameworks that support the prevalent perspectives on EU consumer empowerment in consumer law scholarship. It is not claimed that these established perspectives are invalid or incorrect but rather that the application of the theoretical framework on empowerment developed in Chapter 2 shows that such perspectives are too narrow to fully engage with and explore the complexity of the empowerment concept in EU consumer law and what it means when law is used as a tool to both objectively and subjectively empower consumers. The concluding discussion in Chapter 2 applies the framework developed in Chapter 2 to the prevalent understandings of empowerment in consumer law scholarship and consequently several of the underexplored aspects of the EU consumer empowerment concept are made visible.

CHAPTERS 4 & 5: DEFINITIONS OF EMPOWERMENT IN POLICY AND LAW

A central finding from the theoretical framework developed in Chapter 2 illustrated that it is important to consider the meanings of empowerment that are adopted by the empowering actor or institution. In the case of EU consumer empowerment, it is the

EU Commission that first adopted the empowerment agenda in consumer policy in 2007. This means that any discussion of what empowerment means in the EU consumer law context requires a thorough analysis of what empowerment means to the EU Commission, as the supranational entity that has adopted the empowerment agenda. There are two places that these understandings can be drawn from: the text of policy documents and the text of secondary legislation. This observation on the significance of secondary legislation as a site for establishing what empowerment means in the EU context comes with the acknowledgement that while the text of legislative proposals is drafted by the Commission, these documents can be amended and are ultimately finalised through the co-legislative procedure that involves both the EU Parliament and the Council. Nevertheless, this does not negate the importance of the texts of adopted legislation as a site for exploring what legal rules are adopted with the aim of empowering consumers. It is therefore important to consider not only what the EU Commission has to say about empowerment in policy but also to explore the process of empowering consumers through law, which requires setting out exactly which rules have an empowerment objective.

Two key areas were selected for developing insights into the concept of empowerment that is developed by the EU Commission. The first was strategic, horizontal consumer policy and the corresponding body of horizontal consumer law that intersects several consumer markets. The second was energy policy and energy law with a consumer element. Energy policy and the corresponding legislative instruments were chosen to compliment the study on empowerment in horizontal consumer policy for two reasons. The first is that the Commission has consistently developed a strategy that the EU citizen in their role not only as the consumer in several consumer markets but also as the consumer in the energy market should be empowered to participate in and become drivers towards a decarbonised and circular model of economic ordering. The second reason is that from 2016 onwards in the energy sector four directives that impact energy consumers were recast. Crucially, these directives were recast to achieve several aims, one of which was consumer empowerment. In each of these directives, consumer empowerment is then cited not only in the recitals of these legal instruments but is also inserted into the text of legal provisions. This is an indicator that consumer empowerment is becoming more deeply embedded not only in policy but also in the legislative framework that regulates the market. This is a signal for scholarship on empowerment in the EU context that it is time for a renewed debate on how we can understand empowerment in the current EU context that moves beyond what empowerment meant when it was introduced more than fifteen years ago.

The discussions in Chapters 4 and 5 then carried out a narrative analysis of the text of consumer policy and of secondary legislation to build a picture of what consumer empowerment means to the Commission as the empowering entity. The approach that was adopted in both of these chapters is as follows. First, several of the Commission's narratives on consumer empowerment in consumer policy and energy policy were

constructed. Second, the latter half of the analysis in each chapter builds on these narratives by exploring the text of secondary legislation that is explicitly qualified by the Commission as having an empowerment aim. The analysis of the text of these legislative instruments aims to offer novel insights into the empowerment ends that secondary legislation is becoming reorientated towards. In summary, the central findings in these chapters offered an alternative perspective on the Commission's narratives surrounding the concept of EU consumer empowerment and a novel view on the horizontal and vertical consumer legislation that the Commission is using as a tool to empower consumers in practice.

CHAPTER 6: RETHINKING THE CONCEPT OF EU CONSUMER EMPOWERMENT

The discussion in Chapter 6 answered the primary research question on how the concept of EU consumer empowerment from consumer policy and secondary legislation can be rethought through the lens of empowerment theory. In doing so, the findings in this chapter offer a rethinking of the established discipline-specific theories of the concept of EU consumer empowerment, which were outlined in Chapter 3. Through the theoretical lens of Haugaard's four-dimensional model of power and through the conceptual categories of subjective and objective disempowerment – empowerment as a subjective and objective process, and empowerment as an outcome – a more nuanced and complex framing of the EU consumer empowerment concept emerged.

Through the lens of subjective disempowerment, a hidden dimension of the consumer empowerment agenda in policy and law was revealed that is founded on the subjective causes of consumer disempowerment. Most overtly, in policy consumer disempowerment is considered to result from a consumer's lack of confidence and trust in businesses and in the market. Less visibly, it was shown that the empowerment agenda considers subjective disempowerment to also arise from consumers' internalised narratives that prevent empowerment outcomes.

Rethinking EU consumer policy through the objective dimension of consumer disempowerment resulted in three types of consumer harm that the EU empowerment agenda is focused on remedying through the regulatory framework. To achieve this, the disempowered consumer concept rather than the rational consumer offered a novel starting point and a broader perspective on the conditions that disempower consumers that moves the discussion beyond framing consumer empowerment as a response to information asymmetries. These categories of objective conditions that disempower consumers include (1) market structures and market conditions, (2) the B2C relationship and (3) the personal conditions of the consumer.

The objectives (desired outcomes) of the empowerment strategy in policy were also reframed and connected to the ends of the Green Transition, which entails

rethinking what types of consumer behaviours can be thought of as ‘empowered’. Such behaviours include consumers making the ‘green’ choice or vulnerable consumers participating in the clean transition by joining renewable energy communities.

Haugaard’s four-dimensional model of power offered a framework for the exploration of the ways in which power becomes manifest through the secondary legislation that pursues the empowerment objectives set out in policy. Through this broad lens, it was shown that in a myriad of nuanced ways, the concept of power that threads the approach of empowering consumers through law cannot be fully comprehended by a framework that defines power as agency. Instead, from the perspective of this four-dimensional model of power it was proposed that when law is used to empower consumers this is done so not only through enhancing consumer agency but also through mediating the structural biases in the market, through a complex interaction with the interpretive horizons and practical consciousness of consumers and through an equally complex interaction with the identity formation and ontological security of consumers. The process of empowering EU consumers through law is then far more complex than remedying information asymmetries that disempower consumers but is instead a multifaceted process that occurs through the structural ordering in the marketplace, through the process of consumer socialisation and through the construction of consumer identities and the maintenance of ontological security.

CHAPTERS 7: THE IMPLICATIONS OF RETHINKING THE CONCEPT OF EU CONSUMER EMPOWERMENT

In Chapter 7, the implications that arise from the rethinking of the concept of EU consumer empowerment throughout this study and more specifically the discussion in Chapter 6 were considered. The first finding suggested that the concept of EU consumer empowerment should be reframed through the lens of regulated autonomy. The second finding illustrated that the concepts of EU consumer empowerment and of consumer protection are not mutually exclusive but are rather two distinct regimes that have the potential to complement one another. The third set of findings in this chapter explored several of the implications that arise through a reconceptualising of the concept of power in EU consumer empowerment that goes beyond consumer choice and agency and the implications of using law as a tool for empowerment. It was proposed that the legislative tools that the Commission has orientated towards empowerment ends are more expansive than information duties that obligate the disclosure of information to consumers, that the cause of consumer vulnerability/disempowerment in EU consumer law can be defined more broadly than information asymmetries and that secondary legislation with an empowerment objective has the practical effect of regulating several of the 2-D structural biases in the marketplace. The fourth set of findings in this chapter illustrated that if academic debate is to fully engage with the subjective dimension of the

EU consumer empowerment agenda then a constitutive, rather than an instrumental perspective, on the role of consumer law in society is necessary. It was argued that through a constitutive perspective on the relationship between consumer law and society, the underexplored dimension of subjective consumer empowerment can be considered. This is especially the case with regards to the role of consumer law in the construction of consumer identities, which are an integral part of the subjective empowerment process. It is proposed that scholarship on EU consumer empowerment should not ignore the subjective dimension of the empowerment process and the hidden role that consumer legislation has to play in the subjective (dis)empowerment of consumers.