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Editorial Letter

Dear Readers,

Welcome to the fifth issue of the Partnership and Cooperation Journal (PCJ) published by the team of the EU TACIS project "*Support to National Coordinating Unit (NCU) and Partnership and Cooperation Agreement (PCA) Implementation in Azerbaijan "*.

The Partnership and Cooperation Journal started to be published in December 2006 and it became a tradition to publish this Journal quarterly. It was first published by the TACIS Project with the aim to inform the readers about specific topics of legal and economic interest related to the Implementation of the Partnership and Cooperation Agreement (PCA) between European Union and Azerbaijan in particular and legal approximation process.

From March 2008 a new TACIS project has started, named "Support to the NCU and the PCA implementation in Azerbaijan" with the aim to strengthen further relations between European Union and Azerbaijan under the new environment of the European Neighborhood Policy and the decentralization of the EU Assistance with the support of the EC Delegation in Azerbaijan and to continue legal approximation of the national legislation in most important and strategic areas.

Working in cooperation with the NCU, the Project decided to continue the publication of the Partnership and Cooperation Journal which will be dedicated to the wider scope of information on the issues of common interest, relationship between Azerbaijan and European Union, legal approximation and European legislative practices.

This issue of the Journal consists of a number of articles written by the long term and short term experts of the Project. This issue is dedicated to the most important and interesting issues related to consumer protection, intellectual property, regulatory impact assessment and others which can be quite new for the country.

It should also be noted that, starting from the second edition, the PCJ received international registration and ISSN number (1993-6141).

With the present publication we start the second period of the Partnership and Cooperation Journal hoping to reciprocate your expectations. The Journal will be a field of an opened dialogue and your contributions and remarks will be a precious support to our common efforts of building of a space of peace and prosperity among European Union and Azerbaijan in which all of us will share the same common values.

Sincerely,

Anastasios Mantelis
The project team leader

The Role of the Regulatory Authorities in the Markets of the Network Industries

By Anastasios Mantelis, Project Team Leader

The transformation, in European Union, of the previous state monopolies of the network industry, as communications, energy and transportation, to competitive markets was based on an innovative administrative function, the Regulatory Authorities, which were granted with the duty to regulate the under transformation markets and monitor the compliance of the market stakeholders with the relevant primary and secondary legislation with such an efficient way so as: a) to promote competition, avoiding any distortion; b) to protect the rights and interests of the consumers; and c) to safeguard the provision of the appropriate services of general economic interest.

The Regulatory Authorities reciprocated positively to that challenge and formed the adequate conditions for the opening of the markets. Without using rules of hierarchy they achieved to implement their duties in all the European Union member-states in a coordinated and harmonized way such as to ensure the creation of a single market. At the same time they established a close cooperation with the competition authorities of the member-states avoiding any conflict or confusion that could create obstacles and abnormalities in the function of the markets.

The Necessity of the Establishment of the Regulatory Authorities

The transformation of the state monopolies is not only a matter of legislation but also of the creation of a different administrative environment able to carry out efficiently the transformation and to give signals to all market stakeholders of a transparent function, without any discrimination, with objectivity and equality for all. The current administrative structure, according to which the detailed supervision and in many cases the detailed management of the state monopolies is assigned to the ministries, cannot ensure the achievement of such objectives. Transforming only the state monopolies but keeping the same administrative environment, traditions and behaviors encloses the danger of the failure of the whole endeavor.

The current administrative structure also provides the involvement of more than one ministry or other state agencies in the supervision and control of the various activities of the state monopolies, which may incur delays, conflicts, objections and confusions. Such situation may impede the efficient function not only of the under transformation state monopolies but also of the whole relevant market. The necessity of one authority able to regulate, monitor and solve problems is obvious for avoiding administrative obstacles and achieving efficiency.

Further more the main principle for the development of any competitive market is the less involvement of the state in the matters of the market. This principle is extremely difficult to be ensured by the current administrative structure which has close relations with the under transformation state monopolies concerning the institutions, the management, the personnel and the decision making process. In many cases and in many member-states of the European Union the state monopolies were departments of the relevant ministries, as the postal services or the railways.

An administrative environment clear from mentalities and traditions of the state monopolies functions, the efficient regulation and monitoring of the opening markets, without conflicts and

delays and the less state involvement in the market's matters are the necessary tools for the transformation of the state monopolies upon which the establishment of the Regulatory Authorities is based.

The Independency of the Regulatory Authorities

The establishment of a new administrative structure for regulating and monitoring the open markets of the previous state monopolies is not enough. Sine qua non condition for regulating any competitive market is that the regulator should act impartially, objectively and without any discrimination. That one who owns or controls stakeholders or assets of the market cannot act impartially and cannot be the regulator of the market. The regulator of the market should be independent from any person or entity, public or private, which owns or controls stakeholders or assets of the relevant market. This principle should be in force even for the state if owns or controls such stakeholders or assets. Ministries or other state Authorities, responsible for the function, the development and the protection of the interests of market stakeholder, have a real conflict of interest taking decisions against or in favor of such stakeholders.

The principle of the independent and impartial regulator confirms the necessity of a new administrative structure, the Regulatory Authorities, the main characteristic of which should be the independency from any person or entity, public or private, which owns or controls stakeholders or assets of the relevant market, even from the state. This independency should be structural, operational, financial and in the decision-making process. The Regulatory Authority should be in possession of all necessary sources in terms of staffing, expertise and financial means in order to be able to perform its tasks.

In a democratic regime the parliament set the legislation of the establishment and the main rules of operation of the Regulatory Authority, safeguarding its independency. The executive power, President of the Republic and Government, respecting this independency ought to set the secondary legislation of the Regulatory Authority function and appoint the appropriate persons as head and member of the board of the Regulatory Authority, who cannot be recalled or replaced but only for certain important and well justified reasons, defined and provided in advance. The term in office is concrete and can be renewed as usual for one more time.

The head and the members of the board are responsible for the well function and the day-to-day management of the Regulatory Authority. They select the necessary personnel, staff and experts, who are able to carry out the duties of the Authority, ensuring their professional status and evolution. No influence from the Government or any other market stakeholder, direct or indirect, is acceptable in the decision-making process. The decisions of the regulatory Authority are executable acts without any further consideration or accreditation by the Government or any other executive body or administrative service.

The Regulatory Authority should have its own financial sources and budget, not pended from the state budget but derived from the contributions of the market. Such contributions may be a limited and small percentage on the annual turn over of all the market stakeholders, a limited amount on the authorizations granted or a minimal fee for certain services offered. These contributions should be rational and justified on the basis of the operational cost of the Regulatory Authority which should be the absolutely necessary one in order to carry out efficiently its duties. Profits or over-cost services are not acceptable and any market stakeholder has the right to appeal before a court for the imposition of such contributions claiming their annulment or constraint to the necessary measure. Also the budget of the Regulatory Authority should not be audited by the Government or any other administrative service but by an

independent auditor and after that to be submitted to the Government without any further approval from its side.

In conclusion the Regulatory Authority should act following the rule of Law, promoting the competition, safeguarding the smooth and efficient function of the relevant market and monitoring the application of the legislation. The only one who may intervene in its acts is the justice which has the jurisdiction to control the right implementation and interpretation of the law. For this reason any user, any consumer, any market stakeholder and generally anyone who has a legal interest and been affected by any decision of the Regulatory Authority has the right to appeal against such decision to the court, which may decide to annul or to keep in force the decision. Pending the outcome of the appeal court, the decision of the Regulatory Authority should stand, unless the appeal court decides otherwise.

The Relations with the Antimonopoly Authorities

Regulatory Authorities should have all necessary authorizations for facing all the issues of the market promptly and fairly, such as the involvement of many other authorities to be avoided; equal terms in all country for the interpretation and application of the law to be established; and the stability of the market to be gained. This principle does not mean that any other Authorities are not permissible to supervise the relevant market but that the duties of the existing Authorities should be well defined such as to avoid confusions and conflicts among them and the creation of an unstable administrative environment among the market stakeholders.

In the European Union the Regulatory Authorities have the duty to regulate and monitor each relevant market of the previous state monopolies vertically, supervising all the aspects, operational, technological and economical of the sector concerned. At the same time there are also Authorities, supervising and monitoring the implementation of horizontal policies intervening in all the sectors of the economy as competition, consumers' protection, protection of personal data, environmental protection and other. The key-point in such cases is the well definition of the duties of each of the involved Authorities, which gives the ground of a close and efficient cooperation among them that is quite necessary for harmonizing and achieving the objectives of all.

Among the Authorities implementing horizontal policies the most important for the economy is the Antimonopoly Authority which has the duty to promote competition and to protect the market from any distortion of competition. The operation of a Regulatory Authority should not restrict in any case the field of action of an Antimonopoly Authority and the opposite. Both the above Authorities have their own specific mission and role and they are acting supplementary to each other. Only the function of both may guarantee the transformation of the monopolies to competitive markets and in the same time the application of the principles and rules of competition in these under transformation markets.

The core duties of an Antimonopoly Authority are to regulate horizontally all commodity markets, including the markets of the previous state monopolies, controlling the compliance of all the market players to the principles and provisions of the law on competition. This mission is broader and different in objectives and content from that of Regulatory Authorities which are responsible for the implementation of the specific legislation on the specific markets of the previous state monopolies, supervising vertically the specific sector of the economy. This combination of Authorities implementing horizontal and vertical policies is applied successfully in European Union, where the Antimonopoly Authorities, controlling the compliance to the competition rules by all markets stakeholders, together with the National Regulatory Authorities,

regulating according to the specific legislation the markets of the previous state monopolies, have successfully accomplished to promote effective competition and in the same time to transform state monopolies to competitive markets in member-states, which have deep differences among them in interests, structure, tradition and experience.

There are also two other practical but quite important reasons that advocate for the complementary action of Antimonopoly and Regulatory Authorities. First, the implementation of the competition law in all commodity markets includes a huge volume of activities that the Antimonopoly Authorities around the world hardly carry out and only by the continuous increase of the specific knowledge and experience of the persons involved in this duty, who ought to be ready to face at any moment the evolution in the markets and the unexpected variations of practices that their stakeholders may use. Adding to these activities those of regulating the under transformation markets of state monopolies is extremely difficult if not impossible. It requires the significant growth of personnel and its specification in other directions, so many as the different sectors of the state monopolies. Antimonopoly Authority will be changed to a bureaucratic inflexible giant with more and more state involvement, unable to control the markets and to guarantee their efficient operation.

Second, the cases of anticompetitive behaviour and violation of the law on competition are so many and have so many variations that the Antimonopoly Authorities are attempting to face them with difficulties. There is an increased demand ways to be find in order these cases to be reduced. If Antimonopoly Authorities will undertake also the duty to control the implementation of the specific legislation of each sector of natural monopolies, then the number and the variation of cases will be multiplied to such levels that the controlling mechanism will be insufficient and perhaps after a period of time will be paralyzed.

Antimonopoly Authorities should be organized and prepared to control the compliance of the operation of the market of the previous state monopolies to the law on competition, as it happens with all other commodity markets. The fields on which the Antimonopoly Authorities should be focused are: a) to avoid not permitted concentrations; b) to preserve the markets from the abuse of dominant position; c) to protect the consumers from illegal horizontal or vertical agreements and combined practices; d) to control the public procurements procedures; e) to blockade the illegal State Aid.

As already mentioned Antimonopoly Authorities should have close cooperation with the Regulatory Authorities of the previous state monopolies and on matters of common interest to have essential consultations. In such cases the principle of separating the scope of the two Authorities should be respected and the Authorities ought not to be involved in the activities of each other. They may exchange information about the situation of the markets and define all the unclear matters through the consultations procedures that ought to follow.

The Duties of the Regulatory Authorities

The Regulatory Authorities performing their duties ought to respect certain principles and their decisions and acts be directed to the achievement of certain objectives. In particular they ought to:

- Aim at the effective competition, avoiding any distortion or restriction of the competition and removing any remaining obstacles, especially the administrative ones, for the development of the relevant markets.
- Ensure efficient investments in the infrastructure, encouraging the innovation and taking the utmost account of the technological neutrality.

- Promote the interests of the citizens safeguarding the universal access to the services of general economic interest and covering the needs and confirming that users, including disabled, derive maximum benefit in terms of choice, price and quality.
- Protect the consumers' rights, in particular by the availability of simple and inexpensive dispute resolution procedures, covering the needs of specific social groups, as disabled users.
- Protect the privacy and the personal data of the citizens and promote the policies of cultural and linguistic diversity.
- Avoid any discrimination in the treatment of the market stakeholders in similar circumstances, applying the law and the regulations in a transparent and cooperative manner.
- Provide clear and accurate information for the transparency of tariffs, the terms of using publicly available services, the conditions for access and interconnection to the network, facilities and infrastructure.
- Develop the Trans-European networks and the interoperability of pan-European services and end-to-end connectivity.
- Maintain the integrity and security of the public networks, ensuring the safety of the used infrastructure.
- Monitor the security of supply taking all the appropriate measures for covering peak demand, dealing with shortfalls and managing congestion situations.

The first core duty of the Regulatory Authorities is to regulate the markets of the previous state monopolies setting the necessary rules, regulations and other nominative acts for the smooth and efficient operation of these markets. They ought to define in details the terms and conditions under which the market stakeholders are authorized to perform their activities. They ought to elaborate and impose obligations to the market stakeholders with dominant or significant market position and to the operators of the various types of networks (electronic communications networks, postal networks, electricity transmission and distribution networks, high and low pressure gas pipelines and railways infrastructure) for the third party access to these networks, ensuring the right of access and interconnection among all undertakings. They ought also to provide and charge the market stakeholders with the appropriate obligations for the protection of the users' and consumers' rights and for the provision of a guaranteed quality and quantity of services to all citizens under affordable prices, in other words for the provision of the services of general economic interest. This duty is an ongoing process continually evolved according to the needs of the citizens, the technological and economical progress and the situation of the market.

Regulatory Authorities also have the core duty to monitor the compliance of the market stakeholders' behaviour to the relevant legislation, primary and secondary. They control whether the various undertakings follow up the terms and conditions of their authorizations and whether the market stakeholders apply the obligations imposed to them. Performing this task they have the right to take measures necessary to ensure the application of the law and the efficient implementation of the conditions and obligations imposed.

In the most of the member states of the European Union Regulatory Authorities have also the duty to issue the provided authorizations and to grant relevant licenses. They ought to control the existence of the provided requirements and after that to issue specific authorizations or to receive the announcements of starting activity and to issue the declarations concerned. If an open and competitive procedure is provided they ought to set the terms of this procedure, to make the public invitations and to evaluate and select the most suitable tenderers. They ought to appraise the necessity of the unbundling of activities and to take measures in order to implement the proper administrative or accounting or legal unbundling and to avoid impermissible cross-subsidizations among the various activities.

For the implementation of the above provisions Regulatory Authorities have the authorization to impose appropriate measures, sanctions and financial penalties. The penalties provided for should be effective, proportionate and dissuasive. The nature of such penalties should not be of a criminal law but to be adjusted to the character and the function of the relevant market. In setting the amount of a fine, regard should be had to the gravity of the failure to comply. These sanctions, penalties and measures, and any subsequent amendment affecting them as well, should be notified to the European Commission without delay in order to be ensured the unified application of the law in all member states and the objective of the single Market to be promoted. Important for the function of the market is the possibility of resolving promptly and fairly the disputes arisen among the market stakeholders. For this reason Regulatory Authorities have the jurisdiction to settle the disputes among the various undertakings of the market concerned in the shortest possible time. The decisions of the Regulatory Authorities are binding and ought to aim at achieving the objectives of the development of the market and the promotion of the fair competition. The above procedure does not preclude either party from bringing the case before the courts. Also the cross-border disputes are resolved by the Regulatory Authorities of the member states concerned, which ought to coordinate their efforts in order to bring a resolution according to the objectives of the single European market.

Of the same importance is also the resolution of users' and consumers' complains. The Regulatory Authorities have the jurisdiction either to solve such complains by themselves or to assign an independent body charged to carry out this duty. The procedure should be in any case simple, prompt and inexpensive for the user or consumer. The decisions of the Regulatory Authorities or the assigned independent bodies are binding and may provide, where appropriate, additionally the compensation or the reimbursement of the user or consumer. Such decisions are in any case subject of an appeal before the court.

Tools Used by the Regulatory Authorities

A crucial element of the necessary power that Regulatory Authority needs in order to regulate the market, is the availability of the appropriate information. Without such information the regulation of the market is impossible and as better is the information provided as more efficient is the function of the market. The Regulatory Authorities have the right to request, from any market stakeholder, the information which is necessary in order to perform their tasks. The request of information should be proportionate and objectively justified, mentioning the purpose for which is going to be used. The information provided may be publicly available ensuring the transparency among all undertakings. Even if the requested information is confidential the undertaking concern ought to provide it and the Regulatory Authority ought to ensure its confidentiality.

A quite useful practice for achieving the smooth regulation of the market is the public consultation. Before taking any measure or deciding any rule, Regulatory Authorities ought to follow a transparent public consultation in order to take into account the interests and the opinion of the parties affected by such measure or rule. It is desirable, if possible, the agreement of the affected parties to be ensured. The consultation procedure is published with an invitation to the affected parties to commend on the draft measure or rule within a reasonable period of time. Any party interested has the right to express its opinion and to commend on the draft measure or rule. The results of the consultation are also published except of course of the confidential information. Measures affecting the trade between member states of the European Union or creating barriers to the single market or imposing obligations to undertakings with significant market power should be prenotified to the European Commission and the Regulatory Authorities

of the other member states and their comments should be taken, the utmost possible, into account.

The role of the tariffs and prices is the most decisive for the function of a competitive market. On one hand prices should be formulated freely according to the balance of the demand and offer, on the other hand it is necessary prices not to be monopolistically high harming and exhausting users and consumers or not to be monopolistically low distorting the market, destroying other competitors and impeding the entrance of new players in the market. Regulatory Authorities have the right to develop methodologies and to use accounting systems different from those used by the state or the undertakings of relevant markets in order to calculate the cost of the provision of the various kinds of services. Regulatory Authorities have the right to impose terms, conditions and obligations in order to be ensured that the tariffs are objective, transparent, non-discriminatory and cost oriented. Available prices in comparable competitive markets should be also taken into account. Cost recovery, investments made, reasonable rate of return on adequate capital employed and risks involved should be taken into account. The burden of proof, that prices are derived from costs including a reasonable rate of return on investment, lies with the market stakeholder concerned. Any cost recovery mechanism or pricing methodology should serve efficiency and sustainable competition and maximize consumer benefits. Regulatory Authorities may require from market stakeholders full justification for prices or the prices to be adjusted, especially in cases where cause of the lack of effective competition undertakings sustain prices at an excessively high level or apply a price squeeze to the detriment of end-users. Regulatory Authorities have the right to control the prices, requesting the allocation of the cost in categories, avoiding not only the cross-subsidization but also the accounting of the same cost to many categories or services. Compliance to the terms, conditions, obligations and methodologies imposed by the Regulatory Authorities is verified annually by qualified independent auditors, whose the relevant statement should be published.

Concluding, the Regulatory Authorities constitute a best and successful practice which renewed the administrative environment and gave opportunities for innovative administrative solutions. The experience gained from their function should be presented and exchanged in order to be used, enriched and improved further.

Anastasios Mantelis is the team leader and chief advisor of the project. He is also lawyer at the Supreme Court and the State Council of Greece and international legal consultant. He was Member of the Greek Parliament and Minister. In the public administration he possessed high level positions as Secretary General, among which of the Cabinet of Ministers, and Chairman of important organizations. He is married and has two children.

Revisiting Plain Language

Joao Salis Gomes, International Short-Term Expert, Professor of the University of Lisbon

[From the May 2000, Vol. 47, No. 2, issue of Technical Communication, the journal of the Society for Technical Communication; reprinted with permission of STC.]

What is plain language? Actually, defining it is not unlike defining information design. Ask 10 people and you'll get 10 different answers. Yet just as with information design, there is a common thread.

For example, one definition states that plain language is "language that reflects the interests and needs of the reader and consumer rather than the legal, bureaucratic, or technological interests of the writer or of the organization that the writer represents" (Steinberg 1991, p. 7). Martin Cutts, research director of the Plain Language Commission in the United Kingdom, defines plain language as "The writing and setting out of essential information in a way that gives a cooperative, motivated person a good chance of understanding the document at the first reading, and in the same sense that the writer meant it to be understood" (1998, p. 3).

Plain language also has in common with information design both a broad and a narrow definition (see Ginny Redish's commentary in this issue). Some definitions, such as Cutts' above, suggest the broader goal of plain language that involves both writing and "setting out" language so that the reader understands it. Other definitions refer more to the origin of the term plain "language" or plain "English." (In this article, the more generic term "plain language" is used unless a cited work specifically refers to plain English.) For example, Berry notes that the "goal of the plain-language movement is to produce language (particularly written English) which is clear, straightforward expression, using only as many words as are necessary, and which avoids obscurity, inflated vocabulary and convoluted sentence construction" (1995, p. 48). This latter definition and others like it are common for those, such as Berry, who approach plain language from the goal of producing plain language in legal documents.

Understanding plain language is more than a philosophical discussion though, for on 1 June 1998, U.S. President Bill Clinton issued a memorandum to the heads of U.S. federal executive departments and agencies directing them to begin using "plain language" to make government "more responsive, accessible, and understandable in its communications with the public. . . . Plain language saves the Government and the private sector time, effort, and money" (Clinton 1998).

The Origins of Plain Language

Two good resources for the history of plain language are Redish (1985) and Schriver (1997). Both credit Stuart Chase as an original plain language proponent in the U.S.—in The power of words (1953), Chase complained about "gobbledygook" in texts. In 1971, the National Council of Teachers of English in the U.S. formed the Public Doublespeak Committee (Penman 1993). In 1972, U.S. President Richard Nixon created plain language momentum when he decreed that the "Federal Register be written in 'layman's terms'" (Dorney 1988). Industry soon followed. In 1973, Citibank converted a promissory note to plain language, a change that "brought great prestige to Citibank, which was seen as a leader in improving consumer relations" (Williams 1999, p. 3).

The next major event in the U.S. history of plain language occurred in 1978, when U.S. President Jimmy Carter issued Executive Orders 12,044 and 12,174. These were intended to make government regulations cost-effective and easy to understand by those who were required to comply with them. In 1981, U.S. President Ronald Reagan rescinded those orders. Nevertheless, many continued their efforts to simplify documents; by 1991, eight states had passed statutes related to plain language (Schriver 1997).

The plain-language movement has also been active outside the U.S. "In 1982, the British government issued a White Paper (a policy statement) ordering departments for the first time to count their forms, abolish unnecessary ones, clarify the rest, and report their progress annually to the prime minister" (Cutts 1995, p. 6). In the foreword to a book by the Plain English Campaign, a private company in the U.K., Chrissie Maher notes that they have "attacked unclear legal language for the last fifteen years" (1996).
Proponents of plain language have also been active in Australia since 1976 and in Canada since 1988 (Schriver 1997; Berry 1995). Other countries with plain language efforts include Sweden, South Africa, and New Zealand (Baldwin 1999).

Why Plain Language?

Proponents assert that documents created using plain language techniques are effective in a number of ways. A recent plain language resource (Baldwin 1999) lists the following reasons:

- Readers understand documents better.
- Readers prefer plain language.
- Readers locate information faster.
- Documents are easier to update.
- It is easier to train people.
- Documents are more cost-effective.

In writing about the Citibank promissory note mentioned above, Cheryl Stephens notes that cost-saving was a motive:
Citibank had spent a lot of time in Small Claims court trying to collect on their promissory notes. It had also spent a lot of time training staff to answer consumer questions about their complicated forms and contracts. After the adoption of the plain language note and other plain language forms, there was a measurable savings in staff training time [and] in the reduction in small claims lawsuits. And a substantial increase in market-share. And the wording of the new form has not been challenged in court. (Williams 1999, p. 2).
Kimble (1996, 1997) cites a number of projects showing the benefits of plain language techniques. One study cited a project for the U.S. Department of Veteran Affairs in which a sample letter was revised. Benefits counselors estimated that 750 copies of the original letter had been sent in one year with over 1,100 calls as a result. After the letter was revised, 710 copies were sent with just under 200 calls as a result. Similarly, after Allen-Bradley revised their documentation using plain language techniques, their phone center call volume reduced from 50 calls a day to 2 calls a month (Jereb 1991).
Perhaps more importantly, plain language is credited with increased comprehension as well as being preferred by readers. For example, using his own guidelines, Cutts revised a document (1993) and later tested it against the original. The result was that 87 percent of the law students tested preferred the revision. More importantly, students using the revised version performed better on 9 out of 12 questions (Cutts 1998).

Criticism of Plain Language

However, plain language has been the target of considerable criticism. In this article, I will review some of this criticism while examining past and current plain language literature. In doing so, I will avoid for the sake of brevity many resources cited by plain language proponents (for example, Strunk and White's Elements of style) and concentrate on those specifically about plain language.

What is Plain Language Anyway?

In response to plain language criticism, Baldwin asks "But what are they criticizing? There is no single, world-standard definition" (Baldwin 1999, p. 17). This in and of itself has been a long-time problem for the movement. In a critique of plain language, Penman cites Charrow's 1979 work What is plain English anyway? and notes that since then "the movement has, if anything, become even more varied in its understandings of what is plain English" (1993, p. 122).

For example, as mentioned earlier, Kimble cited a study regarding the benefits of a revised letter for use by the U.S. Department of Veteran Affairs (VA). The implication is that plain language techniques were used to revise the letter. But were they? In reviewing the original citation, the author does not mention plain language explicitly, but notes that she

. . . produced research-based guidelines for VA, building on work in psycholinguistics and cognitive psychology, document design, and reading and information processing theory. The guidelines cover audience analysis, organization, document design, style, syntax, supplements, and graphics. Furthermore, I specified that the process of developing letters had to include iterative cycles of drafting, review, testing with representative readers, and revision based on the testing. (Daniels 1995)

So, was this plain language?

The answer is yes if you consider the above to be an example of a "reader-oriented" approach to plain language. This is the second of three "tendencies" to plain language identified by Coe and cited by Penman, which include text-based, reader-oriented, and collaborative. Text-based approaches place "the major focus on the document, not the reader per se" (1993, p. 122). Penman notes that neither he nor Coe had come across any examples of the last approach, which involves having "representative readers involved from the beginning [being] actively allowed to determine what is written and how it is written to suit them as readers" (1993, p. 126).

Current information design practice would appear to have us placed rather firmly in the middle category as well, with occasional calls for movement into the third category. But there appears to be no real text-based counterpart in the information design/document design world (in fact, some might argue that document design actually moves away from the text-based focus of "traditional" technical writing).

Plain Language Is Just About Text—Shortening It, Dumbing It Down.

The majority of plain-language resources do not advocate shortening and dumbing down documents. In fact, many plain language proponents seem to share a similar respect for the user with their information design counterparts. For example, one resource notes, plain language ". . . does not mean always using simple words at the expense of the most accurate words or writing whole documents in kindergarten language" (Cutts 1995, p. 3).

This same philosophy can also be found in plain language resources for lawyers.

Some people think that because plain language is simple, it must be simplistic—a kind of baby-talk. [But simple] in this sense doesn't mean simplistic. It means straightforward, clear, precise. . . . What is appropriate in one context may be inappropriate in another. And it takes time to develop the necessary sensitivity to the problems of your readers. (Asprey 1991, pp. 11.12)

The U.S. Securities and Exchange Commission notes that plain English ". . . does not mean deleting complex information to make the document easier to understand. For investors to make informed decisions, disclosure documents must impart complex information. Using plain English assures the orderly and clear presentation of complex information so that investors have the best possible chance of understanding it" (1998, p. 5).

Some plain-language resources do instruct writers to shorten sentences. However, even when such instructions are given, there can be an interesting information design parallel. For example, Wydick directs lawyers to "omit surplus words" by removing "glue" words and concentrating on

the "working" words. The example given shortens the sentence "A trial by jury was requested by the defendant" to "The defendant requested a jury trial" (Wydick 1994, p. 8). Wydick's working words are strikingly similar to Edward Tufte's concept of data density.

Plain Language Doesn't Concern Itself With Visual Design.

Some plain-language resources do tend to be predominantly about writing, particularly those directed at lawyers. Plain English for lawyers provides seven chapters covering topics that are predominantly text oriented (Wydick 1994). In Plain language pleadings, the main focus is on plain language in specific instances such as pleadings, legislation, and forms (Wilson 1996). In Legal writing, writers are admonished to follow seven text-based rules, such as 'choose clarity' (Mellinkoff 1982). And unfortunately, President Clinton's memo (1998) is a target of this criticism, since it notes that plain language documents, while having "easy-to-read design features" use:

- Common, everyday words, except for necessary technical terms
- "You" and other pronouns
- The active voice
- Short sentences

In some plain-language resources, there is at least a mention of visual design. In The plain English approach to business writing, Bailey notes that his "audiences usually consider layout to be the most important topic I cover." His Chapter 4 is titled "Layout: Adding visual impact," and while it, like some other plain-language resources, is short on specific typographic and visual design instruction, it does cover the basic "white space" instructions in terms of paragraph length, headings, and lists (Bailey 1990, p. 37). Writing user-friendly documents (no date), the resource available from U.S. Vice President Al Gore's Plain Language Action Network (part of the U.S. National Partnership for Reinventing Government) likewise covers these topics somewhat sparingly.

However, many plain-language resources do address the visual aspects of document design in considerable detail. For example, the Document Design Center's Guidelines for document designers (Felker and others 1981) is considered one of plain language's foundational documents. Written in 1981, this impressive resource includes two sections related to visual design: one on typographic principles, the other on graphic principles.

A more recent (and graphically sophisticated) plain language resource is the 1998 Plain English handbook from the U.S. Securities and Exchange Commission (SEC), a must-read for those interested in plain language. While it is targeted primarily at those who must adhere to SEC regulations, this resource contains a wealth of information. In particular, it includes some strong statements about the importance of design:

A plain English document reflects thoughtful design choices. . . . In a plain English document, design serves the goal of communicating the information as clearly as possible. (p. 37)

Finally, a new plain language resource goes a step further and incorporates concepts from Edward Tufte and Robert Horn to emphasize "visual language" in the form of "information design displays." In fact, the author recommends that writing and editing begin only after questions about document design ("defining the look, navigation features; deciding where and how to use visual language; creating the headings") and information display ("creating the tables, charts, infographics, and other graphical elements") are answered (Baldwin 1999, p. 21). Baldwin suggests that most writers have been conditioned to use a "piles of paragraphs" approach. In other words, we still create documents as if our only tool is the typewriter.

Plain Language Uses Readability Formulas of Questionable Validity

Schriver reports that by the mid-1980s, researchers had "abandoned" plain language studies because of doubts of the efficacy of the approach (1997). One major concern was the reliance on techniques such as readability formulas. Rudolf Flesch's How to write plain English was perhaps the strongest proponent of this method. In it, the average number of words in a sentence and the average number of syllables in a word are related using a scale. The lower the two variables, the higher the "readability" of the document (1979). Plain language proponents such as the Document Design Center, however, were arguing against readability formulas as far back as 1980. In current literature, very few plain-language resources promote the use of this type of readability measure. Those who do mention them do not recommend their use. For example, the SEC takes this approach:

Readability formulas determine how difficult a piece of writing is to read. However, you should be aware of a major flaw in every readability formula. No formula takes into account the content of the document being evaluated. In other words, no formula can tell you if you have conveyed the information clearly. . . . The final test of whether any piece of writing meets its goal of communicating information comes when humans read it. (1998, p. 57)

Plain Language Tests Document at the End of the Design Process, If at All.

Another criticism about plain language is that, while information/document design has moved forward in support of user-centered design throughout the design process, plain language has not. If plain language proponents test, they do so only at the end of the process. However, if this objection was true at one time, it certainly appears to have changed in recent years.

The resource Plain language online notes that a "crucial feature of plain language is testing the writing to determine whether it adequately conveys to the targeted reader the writer's intentions. . . . This definition of plain language is 'reader-based' and not [a] 'text-based' analysis of a writing style." Plain language online also makes an interesting point that testing the original document may prove helpful and refers to a standard usability text for more information (1996).

In Plain language for lawyers, Asprey notes

You need to begin testing (or at least test once) early in the drafting process before your ideas have become fixed and you've gone too far to turn back. If you test early, you'll be more receptive to suggestions, more open to changing strategy, and have more time to incorporate changes. If you test early, you'll find out early if you have any fundamental misunderstandings about how the document works in practice. (1991, p. 228)

The inability to implement (or get a client to pay for) a fully iterative approach for every project is something that plain language has in common with information design. Perhaps more plain language proponents are pragmatists who are willing to accept that while involving readers at all stages is the ideal solution, it is not practical for every piece of writing that is done. This appears to be particularly true in the legal community (Kimble 1994, 1995).

Plain Language is not Backed up by Research

The major criticism of plain language is that its guidelines do not have sufficient research to back them up. This essentially translates to "does plain language work?" A complete review of this question is outside the scope of this article and is certainly worthy of a follow-up article. But there are two points to consider in this area.

The first is whether guidelines are based on empirical research. It is true that the majority of plain language resources do not cite research since the majority of them are directed toward the general public. If research is mentioned, it is generally without specific citations. However, of the resources I reviewed, the Document Design Center's Guidelines for document designers has no peer in this area. For each of their 25 guidelines, they provide a section titled "What the

research says." One such guideline is the suggestion to "avoid whiz deletions." A whiz deletion is the absence of introductory text for subordinate clauses. The Guidelines offer the comparison between the sentence "The director wants the report which was written by the Home Office." and "The director wants the report written by the Home Office" (Felker and others 1981, pp. 39-40). This guideline was based on direct research done by Charrow and Charrow (1978). In their extensive study of jury instructions, these authors found that whiz deletions made jury instructions harder to understand (Felker and others 1981).

The second issue regarding plain-language guidelines and research is that actual practice does not appear to follow the guidelines. For example, a group of researchers asserted that the Document Design Center's guideline about whiz deletions was not valid, since whiz deletions were a common occurrence in (presumably) well-written documents (Huckin, Curtin, and Graham 1991). This discrepancy between guidelines and practice was also illustrated by van der Waarde's study in Technical communication (1999). A review of 330 documents found that the majority did not follow standard guidelines with regard to typographic dimension (x-height and line spacing). Does this mean that the guidelines themselves are invalid? Perhaps. But among other possible explanations for this finding, van der Waarde considered that "legibility and attractiveness are not the criteria that are most often used in practice" and that criteria such as cost, standardization, or production deadlines might have more impact on document choices. Or as Redish and Rosen suggest, "Real-world documents are compromises" (1991).

Plain Language is about Inviolate Rules

The last criticism I'll address is the rules versus guidelines issue. With the exception of some older plain language resources such as Flesch (1979) and Mellinkoff (1982), many plain language proponents point out that guidelines are not rules; their observance requires judgment:

- "I say guidelines, not rules" (Cutts 1995, p. 2).
- "Don't make Plain Language guidelines into rules" (Baldwin 1999, p. 19).
- "As with all the advice in this handbook, feel free to tailor these tips to your schedule, your document, and your budget. . . . Pick and choose the ones that work for you." (SEC 1998).

Redish and Rosen provide an interesting discussion on guidelines. First, they begin with a definition: "A guideline is a suggestion that helps writers achieve the goal of communicating clearly with their readers." They also note that "guidelines are a necessary part of any heuristic" and argue that many writers have essentially internalized guidelines that are used as they write.

The authors interviewed 30 people to find out whether they used guidelines in their writing. Those who were professional writers said that they did not use guidelines at this stage in their career (although many had used them earlier). Those who were recent graduates of technical writing programs had "mixed feelings" about guidelines. Some thought they were useful reminders, while others thought this was information they had already learned in school. The last group consisted of professionals in fields other than writing. For this group, 9 of 10 "reported that they rely on guidelines in their writing" (Redish and Rosen 1991).

The important point here is that guidelines are useful tools for those who write as a secondary activity rather than as their primary profession. And this is exactly the audience for whom plain-language guidelines are usually written.

Conclusion

Plain language today has been and is being informed by the work of information and document designers. Of the resources I reviewed, I would recommend the SEC's Plain English handbook, Asprey's Plain language for lawyers, and Cutts' Plain English guide as worthwhile resources

(Guidelines for document designers is no longer in print). Baldwin's Plain language and the document revolution also deserves a look. It takes plain language to a new playing field, some of which is intriguing and some of which is curious. For example, although it provides a lengthy discussion of information displays that hold considerable promise for future documents, it lacks all but a cursory discussion of actual usability testing.

Today's plain language proponents clearly need more contributions from the academic and research organizations that provided much of its foundation. Both the Communications Design Center at Carnegie Mellon University and the Information Design Center (and its predecessor, the Document Design Center) at the American Institutes for Research are no longer in operation, but their principals, Karen Schriver, Ginny Redish, and Susan Kleimann, continue to be very active in both information design and plain language.

What is necessary for plain language to succeed? Redish (1985, p. 136) suggests that we need to:

- Increase awareness of the problems that traditional documents cause.
- Understand what causes the problems.
- Develop ways to solve the problems.
- Apply the solutions.
- Teach others how to apply the solutions.

In nearly 15 years, the essence of the issue remains the same. Our job as information designers should be to stay current with plain language, help inform it, and to make sure that others who are interested in plain language understand its breadth.

The momentum for plain language is definitely growing . . . at least outside of our own field. Recently, the American Bar Association passed a resolution that states ". . . That the American Bar Association urges agencies to use plain language in writing regulations, as a means of promoting the understanding of legal obligations . . ." (1999).

Information designers take very seriously our obligations to users. While some criticisms may validly be laid against various manifestations of the plain language movement, the movement can only benefit from attention and assistance from the information design community.

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Exhaustion of Trademark Rights

By Rahima Guliyeva, Local long-term legal expert

Introduction

Trademark as a publicity tool makes it possible to identify the quality basis and guarantee of a product or a service. Due to globalization and developments based on the new world order, it has become crucial to restructure the legal grounds and means of protection of trademarks as well as to establish a balanced system through free movement of goods worldwide. Trademarks amongst other intellectual and industrial property rights confer several rights to their proprietor through recognition and registration. In the event trademarks are well-known or registered, it is possible to prevent unfair use of any kind without permission of the proprietor. In addition to having control over use of the trademark on the goods, the proprietor of the trademark also has a one-time right to supervise the stage of entry to the market. Accordingly, the proprietor of the trademark reserves control over entry in the market of the goods bearing his trademark. This right vanishes upon entry in the market; conclusively movement of such goods in the market can not be controlled by the proprietor of the trademark. Hence, parallel imports, or the entry into market of the goods under the same trademarks purchased from licensed producers in different countries would become possible for that market.

A basic premise of the European Community is freedom of movement of goods and services. This has led to the doctrine of exhaustion of rights, which has become enshrined in Community jurisprudence. As the basic right of proprietor of a trade mark includes offering or exposing for sale and import or export under a sign identical or similar to the trade mark, there is ample opportunity for a trade mark proprietor to interfere with further exploitation of his goods even after he has parted dominion with them. These and other aspects of trade marks are discussed in the further chapters.

A. What is "Exhaustion of Trademark Rights"?

The doctrine of exhaustion of rights in trade mark law concerns the rights of a trade mark holder and to what extent the rights of the trade mark holder extend over his trade mark after he has made a first sale of his trademarked product. Particularly, the doctrine provides that the trade mark holder has an exclusive right to control the first sale or use of his trademarked product but once such a first sale or use has occurred, and the holder has recouped the financial reward due to him for his trademarked product, his right to control the future sale or use of that product is exhausted. In other words, a trade mark confers upon the proprietor an exclusive right to use the trade mark and to prohibit the use of a trade mark by a third person. Because of the interests of the free movement of goods, this right of the proprietor is not guaranteed without any limits. So, once a product has been placed on the market by the trade mark owner or with his consent, trade mark protection in relation to that product is deemed to have been exhausted.[1]

The simplistic view of exhaustion is that once a product has been put on the market with the consent of the right owner, the product can be sold or transferred free from further conditions. Within Community law this doctrine has been developed by the European Court of Justice. As a result it has an important role in overcoming the constraints of national systems of intellectual property law.

[1] Vivian Roth, Intellectual Property Law, The Doctrine of Exhaustion in trade mark and in copyright law, page 2 (http: / /www.juridicum.su.se / jurweb / utbildning/ma s ter / ec_commercial_law/as signments /Vivian%20Roth.pdf)

B. Types of Exhaustion of Trademark Rights

The question when the exhaustion takes place for the goods entered into market with trademarks will be answered in connection with the exhaustion principle adopted by the subject country.[2]Accordingly, we deem necessary to explain three different types of exhaustion. There are several variants of the doctrine, namely International Exhaustion, National Exhaustion, Regional Exhaustion and Modified International Exhaustion.

The International Exhaustion interpretation of the doctrine of exhaustion provides that a first sale of the trademarked product by the trade mark owner in any jurisdiction exhausts the trade mark owner's rights to the trademarked product in all other jurisdictions. Hence, once sold, the trademarked product may move freely anywhere in the worldwide market. In other words, it's a direct application of universality principle[3]: "if the trademarked product legally entered the market somewhere, reselling the product anywhere in the world is not infringement".

The Domestic or National Exhaustion interpretation of the doctrine mandates that the trademark owner's rights in his trademarked product are deemed to be exhausted only by a first sale by the trademark owner in the same jurisdiction as his trademark rights[4]. By this interpretation of the doctrine of exhaustion, a trademark owner's rights in a first jurisdiction are not affected by a sale by the trademark owner of his product in another jurisdiction. That means- "Trademarks are national affairs, therefore, the trademark is legal only in the country where it is registered"-this position is governed by territoriality principle.

The Regional Exhaustion interpretation requires first a collection of jurisdictions (a region) which have agreed to abide by community laws with regards to specific issues, the most definitive example of which is the European Union. According to this interpretation of the doctrine, a trademark owner's rights are exhausted throughout the region if the first sale was made in any one of the jurisdictions comprising the region, but are not exhausted by a first sale made in a jurisdiction outside of the region.[5] As mentioned above, the EU follows the concept of regional exhaustion - parallel trading is allowed within a particular group of countries, but banned from countries outside. In case of regional exhaustion, trade mark owner who put branded goods on the market inside the Community would not have been able to rely on the trade mark rights to prevent those goods being imported into the Community, except where there were "legitimate grounds for opposing importation". The decision for regional exhaustion meant favouritism to trade mark proprietors and small retailers at the expense of consumers and discounters. It offers the trade mark proprietors a protection from so- called parallel imports. The consequence of the proprietors ` enhanced ability to partition markets is an ability to maintain price differentials, or rather the inability of traders to exploit price differentials between markets and pass on benefits to consumers in the form of lower prices. The regional exhaustion rule has been codified in the harmonization directive. Article 7 of the the First Council Directive 89/10 4 /EEC of 21 December 1988 provides that "the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trademark by the proprietor or with his consent" except under the provisions of Article 7(2), which exempts altered or damaged goods.

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[2] ARKAN, Sabih; Marka Hukuku; V: I; p:45

[3] Vincent Chiappetta, "The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a few other things", (Spring 2000) 21 Michigan Journal of International Law 333, at 341

[4] Ibid

[5] Tait R. Swanson, "Combating Gray Market Goods in a Global Market: Comparative Analysis of Intellectual Property Laws and Recommended Strategies, (Winter 2000) 22 Houston Journal of International Law 327, at 343-344

I. Parallel Importation

Parallel importation refers to the import of goods outside the distribution channels contractually negotiated by the trade mark owner. Based upon the right of importation that a trade mark right confers upon the owner, the latter may try to oppose such importation in order to separate markets. If, however, marketing of the product abroad by the trade mark owner or with his consent leads to the exhaustion of the domestic right, also the right of importation is exhausted and can thus no longer be invoked against parallel importation.

Lastly, the Modified International Exhaustion interpretation of the doctrine is in almost all respect identical to the International Exhaustion interpretation except for the allowance of the restriction of the extent of exhaustion.

C. Exhaustion of Trademark Rights in the European Community: Cases Overview

One of the essential objectives of the European Community is a customs union, allowing the free movement of goods between Member States. Articles 30 to 36 of the Treaty of Rome are the major instruments for ensuring that Member States do not impede trade, through the use of tariffs, quotas and other restrictions. These efforts to provide a single market would be impeded if private parties could freely re-partition the Community along national lines. In direct contrast, an essential feature of intellectual property is the exclusive right to control distribution and to prevent or deter potential competitors from producing similar products. The cost and time involved in developing new products or creative works, combined with the often ease of reproduction and piracy provides legitimate reason for demanding restraints on competition.

Article 30 provides that;

'Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.'

However the Community's ability to use this to restrict abuse of intellectual property rights is restricted by the Treaty itself. Article 36 states that Articles 30 to 34 will not preclude prohibitions on import or export which are justified on grounds of 'the protection of industrial or commercial property'. This was reinforced by Article 222, which provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property ownership'. Further more these provisions were assumed only to be addressed to Member States and not to be directly applicable. This amounts to a domestic, rather than international exhaustion, as national rights subject to this limitation can still be used to prevent the importation of goods sold abroad by the national right-owner or goods from an associated undertaking.

This issue is far more widespread than his choice not to export to a State offering no protection at all. It is also open to far more abuse as a result of national policy. In effect the ECJ, as conversely with the doctrine of exhaustion, are providing a Community-wide period of protection.

Trade marks serve two purposes, namely to protection of goodwill associated with the marked product, and they display to the consumer that the product is of a specific kind as opposed to a copy.

The Community policy in the area of the compatibility between national trade mark law and Community law was originally formulated in cornerstone case Centrafarm BV v Winthrop BV [6] where the Sterling Winthorp group held the trade mark Negram in the UK and the Netherlands, and Centrafarm parallel imported the drug from the UK into the Netherlands and the Dutch subsidiary of Sterling Drug invoked its trade mark to keep out of goods. The Court concluded that since Negram had been lawfully marketed in the UK with the consent of the trade mark holder, the trade mark holder's rights had been exhausted. This decision has been confirmed by Article 7 (1) of Directive 89 / 104 on the approximation of law of the Member States relating to trade marks, whereas Article 7 (2) stipulates the non-application of exhaustion in case there are legitimate reasons for the proprietor to oppose to the further commercialization of the goods.

In the case of trademarks, the ECJ defined the specific subject-matter as 'the guarantee that the owner of the trade mark has the exclusive right to use that trademark, for the purposes of putting products protected by the mark into circulation for the first time'. [7]Hence Winthrop could not rely on its Dutch mark to prevent imports from the UK, where the products had been marketed by a company in the same group. Once again consent is a key issue to the exhaustion of rights. It is clear now that the consent principle will only apply where the owners of the trade mark in the importing and exporting states are the same, or where they are different, they must be economically linked.[8]

In accruing the doctrine of exhaustion in relation to trade-marks, the Court made a little by-pass in case HAG I, conceiving the doctrine of common origin, which is in certain instances contrary to the doctrine of exhaustion. The doctrine of common origin means that where similar or identical trade marks having a common origin are owned by different trade-mark holders in different Member States, neither could invoke its trade mark to prevent the importing of goods lawfully marketed under the mark by its owners in other Member States. This doctrine was however quickly defeated by the Court itself, and in HAG II the Court returned to the original principles concerning the exhaustion of IP rights. It is very important to mention that the key argument of the Court to revert to the application of the doctrine of exhaustion was to emphasize the specific subject matter of the trade mark: they realized that trade marks are indicators of quality and they also guarantee the product's origin. The Court's decision in Ideal Standard is also very important, stipulating that when the ownership is separated voluntarily (e.g. assignment), the doctrine of exhaustion cannot be invoked due to the lack of control over the product under the trade mark.

Further cases decided by the ECJ highlight problems and complications in this area. In particular where an imported repackages or alters the packaging of the goods. This occurred in Hoffmann-la Roche v Centrafarm[9].

In this case, Centrafarm repackaged drugs obtained in the UK in order to meet the German packing before exporting them. Even though Hoffman had not consented to the mark applying to the repackaged goods, the ECJ held that if the use of the trade mark would have the effect of artificially partitioning the market then it cannot be relied on. This is conditional on the fact that the repackaging has no adverse effect on the original condition of the goods and as long as users will not be misled or confused by it. While the first part of Article 36 would protect the mark owner from non consensual packaging, the second part of Article 36 can be enforced to prevent

[6] Case 16/74[1974] ECR 1183
[7] Catherine Colston, Kirsty Middleton "Modern Intellectual Property Law" 2nd edition 2005 Chapter 17.
[8] Case C-9/93 IHT Internationale Heiztechnik GmbH v Ideal- Standard GmbH [1994] ECR I-2789
[9] Case 102/77 [1978] ECR 1139

disguised restrictions on trade. There is also the requirement that the trade mark owner is notified of the repackaging.[10]

When the case returned to the national courts, the German Supreme Court held that there was no artificial partitioning of the market. The degree to which a mark owner would be held to restrict trade is not precise, depending to an extent on the interpretation given by a national court.

In Centrafarm BV v American Home Products Corp.[11] drugs were bought under one mark and exported unaltered under a different mark to another Member State. Both marks in question were owned by the defendant. The doctrine of exhaustion could not be applied in this situation. The ECJ were aware that often it was necessary for a company to use varying marks across the Community. Under these circumstances AHP could prevent import based upon the guarantee of origin, however this was not possible if the marks were being used to intentionally partition the market. Then the second part of Article 36 would come into effect. This case has been criticised, as it introduces a subjective standard, where as Article 30 is interpreted in regard to the intent of the mark owner. By accepting that trade mark owners have a right to market the goods in this way does suggest a way to circumvent the exhaustion of rights. Although there is protection from intentional partitioning of a market, this may be disguised by claims of necessity and marketing. It may have implications for the consumer with regard foreign marks for the same product being less appealing. An owner holding 15 separate trade marks on legitimate grounds of national inference and identity with the product due to differences in language/culture would in real terms hold a monopoly over the Community. Although the product could be imported from another Member State, because it bears the trade mark of the other country it would not have the same market recognition or consumer value as the established trade mark. Of course this is an over simplification, avoiding economic costs of obtaining a mark and the costs related to launching an unknown mark on a country, but it does highlight certain discrepancies with the Community principles of free movement of goods.

ECJ interpreted Article 7(1) of the Directive in the case of Silhouette v. Hartlauer : the trademark owner is able to rely on the trademark rights granted to him under national law to prevent the importation of goods bearing that trademark, which have been first placed on the market outside the EEA by him or with his consent. [12] In case Sillhouette v. Hartlauer the ECJ affirmed in 1998 the single market intent of the EC Trade Mark Directive by ruling that the directive excludes a member state opting for international exhaustion. [13] A brief summary of this case is: Silhouette concerned a superior range of spectacle frames, manufactured and sold internationally under the mark “Silhouette” by the Austrian claimants. A batch of the previous season’s “Silhouette” spectacle frames were offloaded in Norway and sold on into Bulgaria on condition that marketing would occur only in Former East Bloc countries. Through further deals, however, the frames wre imported into Austria by the defendant and sold through its chain of outlets, which were no part of Silhouette’s distribution system there. If the former Austrian law still applied, an extensive rule of international exhaustion would have protected the defendant. But the ECJ considered the case and decided that the Art.7 of the Trade Mark Directive has a priority over the Austrian legislation.[14] National rules providing for international exhaustion were therefore

[10] Case 1/81 [1981] ECR 2913
[11] Case 3/78 [1978] ECR 1823
[12] International Trademark Association , Parallel Imports: Summary of EC Law and its Application in the EU Member States Report prepared by The EU Subcommittee of the Parallel Imports Committee 2004 – 2005, (http: / /www.inta.org/downloads / repor t_EC law. pdf), page 6
[13] AIM Position paper, Parallel trade – consumer benefit or consumer loss?, page 3 (AIM position on parallel trade site)
[14] Cornish and Llewelyn “Intellectual Property: Patents, Copyright, Trademarks and Allied Rights” 5th edition .pp.729

contrary to Article 7(1) of the Directive and Silhouette could prevent sale in Austria of the sunglasses first marketed in Bulgaria.[15]

The principle of exhaustion is articulated in Article 7(1) of the Trade Mark Directive, which provide that: The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with its consent. Since the Silhouette case, the law has been developed further, especially in relation to the issue of "consent" and the meaning of "put on the market."

I. Consent

In Sebago case, the crucial problem concerned the conditions under which the trade mark proprietor's consent may be deemed to have been given. ECJ said that the fact that the trademark owner had consented to the marketing in the EU of products identical to those in relation to which exhaustion was being claimed was not sufficient. The fact of consent had to be proved for the actual products in question.

In Davidoff case , the main question was whether consent to the placing of the trade mark products within the EEA, if the same products had first been marketed outside the EEA, may be implied as well as express and if so, in which situations it may be implied. [16] ECJ considered that:…consent must be expressed positively, and… the factors taken into consideration in finding implied consent must demonstrate that the trade mark proprietor has renounced any intention to enforce his exclusive rights. It follows that it is for the trader alleging consent to prove it and not for the trade mark proprietor to demonstrate its absence. The ECJ also said that consent could not be implied from the following:

- the fact that the trademark owner has not warned all subsequent purchasers of
- the products of his objection to marketing within the EEA;
- the mere silence of the trademark owner;
- the fact that the products do not carry a warning notice;
- the fact that the original sale by the trademark owner was not subject to
- contractual restrictions or that the national law applicable to the sale includes in
- the absence of such restrictions an unlimited right of resale.

II. The Burden of Proof – Van Doren Case

In van Doren case the ECJ considered that, although the burden of proving exhaustion is placed on the defendant (parallel importer), where the result of bearing this burden would result in a real risk of the partitioning of national markets, then the trademark proprietor should have the burden of showing that the products were first placed on the market outside the EEA by the proprietor or with his consent. Once this has been established, the evidential burden would pass to the parallel importer to establish that the proprietor had consented to the subsequent marketing of the products in the EEA.[17]

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[15] Lionel Benthly, Brad Sherman "Intellectual Property Law" 2nd edition.pp.611

[16] Vivian Roth, Intellectual Property Law, The Doctrine of Exhaustion in trade mark and in copyright law (http: / /www.juridicum.su.se / jurweb / utbildning/ma s ter / ec_commercial_law/as signments /Vivian%20Roth.pdf), page 5

[17] International Trademark Association , Parallel Imports: Summary of EC Law and its Application in the EU Member States Report prepared by The EU Subcommittee of the Parallel Imports Committee 2004 – 2005, (http: / /www.inta.org/downloads / repor t_EClaw.pdf), page 6 and 7

III. Meaning of "Put on the Market"

In Peak Holding case the ECJ was asked to consider whether trademarked goods should be regarded as having been "put on the market" in either of two circumstances:

(1) where the trademark proprietor had imported them into the EEA with a view to selling them and/or had offered them for sale to consumer s through its shops, but where the goods had not actually been sold;

(2) where the goods are sold in the EEA to a third party under a contractual prohibition on resale within the EEA.

The Court said (first question) that, until the goods are sold to a third party, the trademark rights are not exhausted. On the other hand, (the second question) the fact of the sale is sufficient to exhaust the trademark rights; the territorial restriction is a private matter between the parties and does not affect the right of a subsequent purchaser to resell the goods. The rationale behind this decision is that a sale which allows the trademark proprietor to realize the economic value of his trademark exhausts the rights in it. This decision will have an influence on those trademark owners who use entities based in the EEA for the distribution of their goods outside the EEA. If such distributors fail to observe a contractual prohibition on re- sale within the EEA, then the only recourse for the trademark owner will be to take action for breach of contract. The potential effect of Peak Holdings is that trademark owners will avoid EEA- based distributor s for the distribution of their goods outside the EEA, which is not desirable from the point of view of trade within the EEA. There may be scope for maintaining an element of control over the grey market in goods first sold in the EEA, but intended for distribution elsewhere, by varying the distribution arrangements and contractual terms to ensure that:

1. the distributor does not take possession of the goods while they are in the EEA;
2. the distributor does not acquire legal title or the right to dispose of the goods while they are in the EEA;
3. the trademark owner or his sales agent does not receive the relevant purchase price or royalty until the distributor has taken possession and acquired legal title to the goods outside the EEA.[18]

D. Legitimate Reasons for the Trade Mark Holder to Oppose to the Application of the Exhaustion Doctrine under Article 7 (2) of Directive 89/104

Article 7 (2) provides an exception to the principle of exhaustion.
….where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market. These legitimate reasons are the following:

a) repackaging

In examining whether the repackaging of the products under trade mark by the parallel importer may involve the non-application of the exhaustion doctrine, the Court again had recourse to balancing between the first and second sentence of Article 30 (right of the IP holder – restriction

[18] International Trademark Association , Parallel Imports: Summary of EC Law and its Application in the EU Member States Report prepared by The EU Subcommittee of the Parallel Imports Committee 2004 – 2005, (http: / /www.inta.org/downloads / repor t_EClaw.pdf), page 7 and 8

on trade). In the spirit of the above the Court elaborated the Hoffmann – La Roche test in case Hoffmann – La Roche[19] . According to this test the Court permits repackaging if : 1) it is established that the use of the trade mark right by the proprietor will contribute to the partitioning of the markets between the Member States, 2) the repackaging cannot adversely affect the original condition of the product, 3) the proprietor receives a prior notice on the repackaging, 4) it is stated on the packaging by whom the product has been repackaged. As for the first requirement, repackaging is permitted if it is objectively necessary (national rules and practices require so) and not merely to secure commercial advantage. Much controversy was around relabeling the product instead of repackaging it, in Merck v. Paranova [20] the parallel importat lawfully had recourse to repackaging, since the mere labeling would have been rejected by the pharmaceutical community. The requirements have been developed and clarified in case-law, for instance in Bristol-Myers Squibb[21] . The Court provided guidance as to what types of repackaging are permitted, period of the notification etc.

b) affixing a new trade mark

As for the conduct when the parallel importer sets a new trademark to the imported product the Court is following its practice very similar to the edifications in Hoffmann- La Roche, developed in cases AHPC [22], and Upjohn [23] . In those cases it is permitted to affix a new trademark when it is objectively necessary, solely for commercial reasons however it is not permitted. In Frits Loendersloot[24] , the Court extended this approach to all products, not just pharmaceuticals.

c) advertising

The question whether, and to what extent the parallel importer may use the trade mark of the proprietor for advertising purposes, first arose in Christian Dior[25] , where Dior was claiming that the advertising did not correspond to the luxurious image of the Dior products. In this context, the Court proved to be more lenient with the importer, since it contended that the proprietor may only prevent the import if the advertising seriously damages the reputation of the trade-mark. The Court refined this approach in BMW[26], where the claimant car-maker sought to object to the use of its Benelux "BMW" mark by a Dutch garage owner – not being a member of BMW's distribution network - used the BMW mark in advertising his services.[27] The Court stated, that unless the advertising suggests any economic connections between the importer and the proprietor the use of the trade mark is permitted in the advertising. The use of the trade mark must not suggest though that there is any commercial connection between the two parties.

Conclusion

How the doctrine of exhaustion of rights in trade mark law is interpreted determines the extent of a trademark owner's rights in controlling the sale and use of his trademarked product, and more importantly, how and when his rights will be exhausted. The doctrine hence significantly influences a trade mark owner's ability to segregate markets in which his product is being sold and hence the returns he could expect to receive from the sale of this trademarked product. The

[19] Case 102 / 77
[20] C-443/99
[21] C – 427, 429, 436 / 93
[22] C – 3/78
[23] C- 379/97
[24] C-349/95
[25] C- 337/95 Parfums Christian Dior v Evora
[26] C- 63/97 Bayerische Motorenwerke AG v Ronald Karel Deenik
[27] David Bainbridge "Intellectual Property" 5th edition 2002 p 724.

principle of exhaustion represents a compromise between a respect for national rights and an attempt to ensure that those rights are not used to restrict trade across borders. To reach this compromise, the jurisprudence relies on the notion of the "specific subject-matter" of a trade mark.

In the Community's view, the essential purpose of a trade mark is to guarantee that the owner has the exclusive right to use that mark for the product for the first time. The trade mark owner can therefore, prevent competitors form taking unfair advantage of the status and reputation of the trade mark by selling products illegally bearing the mark, However, once the products are placed on the market with the proprietor's consent, the trade mark has done its job. As such, "a specific subject matter" of the trade mark is exhausted.

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Protection of Consumer's Rights; Distance Contracts

By Jamil Feyzullayev, Long-Term Legal Expert

Introduction

At present, with the rapid development of information and telecommunication technologies, it becomes necessary to regulate the contractual relations arising as a result of a distance selling. Thus any purchases made from home are also considered as 'distance selling'. Such purchases also include purchase made by e-mail, fax, telephone, internet and mail. In other words, "distance selling involves communication between a supplier and a consumer where they are not in each other's physical presence".[28]

I. Definition of a distance contract

A long distance contract is a contract concluded via any communication without personal contact made between the trader and a consumer. Thus, any purchase made by distance communication (telephone, radio, computer, facsimile or television or the delivery of addressed or unaddressed printed matter, including a catalogue or a standard letter, to a consumer, or press advertising with an order form) falls within the meaning of a distance contract.

In EU legislation the meaning of the distance contract is established by the **Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts** (hereinafter the Directive) which states that **"**distance contract` means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded".

II. Consumer's rights with regard to distance selling

The provisions of the Directive apply to all distance transactions. The rights granted to consumers under national law transposing the Directive cannot be waived by the consumer. These rights cannot also be excluded by the choice of law of a non Member State where the contract has a close connection with the territory of one or more Member States. So, e.g., a US-based supplier cannot circumvent the provisions of the Directive when entering into contract with consumers based in Europe.[29]

a. Prior Information

The Directive provides consumers with rights to information and a cooling-off period when they make distance contracts. According to the Directive when concluding a distance contract the consumer must be provided with prior information before conclusion of a contract. According to the Directive the consumer must be provided with the following information:

[28] See "Shopping from home" at http://www.citizensinformation.ie/categories/consumer-affairs/consumer-protection/consumer-rights/distance_selling

[29] Ioannis Iglezakis, Regulatory Needs Analysis of the Consumer Protection and the Sanito-Phyto-Sanitary Sectors.

(a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;

(b) the main characteristics of the goods or services;

(c) the price of the goods or services including all taxes;

(d) delivery costs, where appropriate;

(e) the arrangements for payment, delivery or performance;

(f) the existence of a right of withdrawal, except in the cases referred to in Article 6 (3);

(g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;

(h) the period for which the offer or the price remains valid;

(i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

b. Written Confirmation of Information

Thus, upon conclusion of a distance contract, but before its performance, the consumer must be provided with the following written information concerning the supplier:

- written information on the conditions and procedures for exercising the right of withdrawal, within the meaning of Article 6, including the cases referred to in the first indent of Article 6 (3),
- the geographical address of the place of business of the supplier to which the consumer may address any complaints,
- information on after-sales services and guarantees which exist,
- the conclusion for canceling the contract, where it is of unspecified duration or a duration exceeding one year.

c. Right of Withdrawal

According to the provisions of the Directive the consumer has a right for any distance contract to withdraw from the contract within of at least seven working days without penalty and without justifying any reason. The only charge that may be made to the consumer is the direct cost of returning the goods
However, the right of withdrawal does not apply in respect of contracts:

- for the provision of services, if performance has begun, with the consumer's agreement, before the cancellation period,
- for the supply of goods or services the price of which is dependent on fluctuations in the financial market that cannot be controlled by the supplier,
- for the supply of goods made to the consumer's specifications or clearly personalized or which cannot be returned because of their nature,

- for the supply of audio or video recordings or computer software, which were unsealed by the consumer,
- for the supply of newspapers, etc.,
- for gaming and lottery services.

d. Performance of the Contract

According to Article 7 of the Directive "unless the parties have agreed otherwise, the supplier must execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier". If the supplier is not able to comply he must inform the consumer. In this case the consumer has a right to a refund within 30 days or "supplier may provide the consumer with goods or services of equivalent quality and price provided that this possibility was provided for prior to the conclusion of the contract or in the contract".

e. Prohibition of Inertia Selling

Inertia selling i.e. a practice in which goods are sent to a consumer without having been ordered. Thus, according to Article 9 of the Directive it is prohibited the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment. Member States shall take necessary measures to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent. In other words, if unsolicited goods are supplied, the consumer's failure to reply does not constitute consent (supplying unsolicited goods is regarded as an unfair commercial practice according to EU legislation).

f. Payment by Card

In case of distance selling there is a possibility for consumer to become the victims of fraud. For the purpose of protection of consumers the Directive has a special provision. Thus, Member States shall adopt appropriate measures to allow a consumer to request cancellation of a payment where fraudulent use has been made of the payment by card. Furthermore it shall be ensured that in case of a fraudulent use, the sums paid are to be re-credited or refunded to consumer. However, the Directive does provide who is responsible in this case. This issue shall be settled by national legislation.[30]

g. Appeal Procedures

Public bodies, consumer organisations and professional organisations may take action before the courts or contact the competent administrative bodies in the event of disputes. Member States must ensure the availability of judicial or administrative redress so that customers are not deprived of protection where the law of a non-member country is applicable.

III. Distance Selling in Azerbaijan

[30] Supra note 2.

At present a lot of contracts in Azerbaijan are concluded via internet and telephone, but the rights of the consumers in respect of such distance contracts are not protected. In case of a non-execution of the seller's obligation the consumer does not have a legal protection.

In Azerbaijan the consumers are not legally protected against the non-execution of the obligation of the trader regarding the distance selling. Thus, if distance contract is concluded, he does not have a remedy in case if the product provided by the trader is defective, does not correspond to the characteristics described by the trader, etc.

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Consumer Protection Law in Germany

By Otto Kammerer, Long-Term Legal Expert

1. General introduction

The idea to present some basic features of German consumer protection law stems from the fact that the area *consumer protection* plays an important role in the frame of the PCA implementation project. Amongst others it has been selected as one out of five top priority areas for legal approximations. Actually, an international legal expert together with NCU and government specialists in this field is working on amendments on the existing national Consumer Protection Law.

Before approaching fundamental questions of how best reforming consumer protection law – which covers a broad field of different legal subject matters - in Azerbaijan it is certainly of interest to have a look "over the fence" and contemplate how this difficult matter is regulated in one of Europe's biggest economies.

For the ease of understanding this – German - legal subject matter is presented as a general overview and its components are considerably shortened in order to not overload the reader with information he will most certainly have difficulties to understand and "digest" without an intimate knowledge of German law.

However the idea is to show a model case of how consumer protection is regulated without being codified in one sole legal codification. . The idea is certainly not to want to praise the German model of consumer protection as an all encompassing model to follow. Certainly, this refers to all kinds of models of legal reform, one has always to respect national idiosyncrasies, experiences and aspirations.
However, it might well be that the one or the other legal expert charged with reform the present national consumer protection law gets some inspirational ideas for his work in reading this article

In reading this article, please keep in mind that – especially with regards to institutional aspects – Germany is a federal state with neatly defined constitutional competencies for the sub-federal entities, called "*Laender*".

So in this special respect, one could only draw a limited use for transposing German solutions to Azerbaijan which is not as we know a federal state.

However, the important lesson we can draw from a look on German consumer protection law is to acknowledge that such a manifold legal area like consumer protection has so many ramifications that it can not be codified in one single law.
Now let us have a closer look:

Consumer protection laws are designed to ensure fair competition and the free flow of truthful information in the marketplace.

The laws are designed to prevent businesses which engage in fraudulent or specific unfair practices from gaining an advantage over competitors and they are intended to provide additional protection for the weak and those unable to take care of themselves. Consumer Protection laws are a form of government regulation which protects the interests of consumers.

For example, a government may require businesses to disclose detailed information about products—particularly in areas where safety or public health is an issue, such as food. Consumer protection is linked to the idea of "consumer rights" (that consumers have various rights as consumers), and to the formation of consumer organizations which help consumers make better choices in the marketplace.

Consumer interests can also be protected by promoting competition in the markets which directly and indirectly serve consumers, consistent with economic efficiency, but this topic is treated in Competition law.

Consumer protection can also be asserted via non-government organizations and individuals as consumer activism.

"Consumer protection law" or "consumer law" is considered an area of public law that regulates private law relationships between individual consumers and the businesses that sell those goods and services. Consumer protection covers a wide range of topics, including but not necessarily limited to product liability, privacy rights, unfair business practises, fraud, misrepresentation and other consumer/business interactions.

Such laws deal with credit repair, debt repair, product safety, service contracts, bill collector regulation, pricing, utility turnoffs, consolidation, personal loans that may lead to bankruptcy and much more.

2. Germany's Consumer Protection Law:

2.1. Overview

The Federal Republic of Germany is a member state of the European Union and is bound by the consumer protection directives of the European Union. Thus a large part of German consumer protection law has been enacted pursuant to European Directives (e.g. the directives on door-to-door sales, consumer credits, distance selling, package tours, product liability, etc.) In 2002, a large part of this legislation was integrated into the German Civil Code ("Bürgerliches Gesetzbuch").

A minister of the federal cabinet is responsible for consumer rights and protection (*Verbraucherschutzminister*).

When issuing public warnings about products and services, the issuing authority has to take into account that this affects the supplier's constitutionally protected economic liberty (article 12 Basic Law, see Bundesverwaltungsgericht (Federal Administrative Court)Case 3 C 34.84, 71 BVerwGE 183

2.2. Organisation of the Consumer Protection

The policy of the federal government protects consumer interests in various policy areas. Fundamental principle of this policy is the idea of precautionary protection of health and safety, of economic interests as well as the strengthening of self-determination and self – responsibility of the individual citizen.

The Federal Ministry for food, agriculture and consumer protection combines both matters consumer policy and consumer protection. The philosophy in this context is to identify and pinpoint at the most early stage eventual risks and consequences thereof for the consumer, thus enabling this authority to take with preventive action in order to be able to react quickly and efficiently once the danger materializes.

In order to achieve this objective two independent institutions were created:

The *Federal Agency for Risk Assessment* and the *Federal Agency for Consumer Protection and Food Security*. (for details on tasks and responsibilities see below)

Over and above that there is general cooperation between all *Laenders,* the EU Commission and institutes like the *Federal Agencies for Scientific Research* and various consumer protection associations. This collaboration also includes financial support for various associations. The general philosophy in this respect is to inform the consumer on important subjects of the consumer protection.

Federal Agency for Risk Assessment is an independent scientific institution which elaborates scientific opinions and comments to questions of food security, toxic ingredients and consumer goods. The identification of toxic ingredients which possibly represent a danger for the consumer is the main task of this institute.

One of the main tasks of the *Federal Agency for Consumer Protection and Food Security* is risk management in order to minimize and eliminate risks. It acts as early warning system with respect to risks for human health being threatened toxic ingredients in food or animal fodder. Other responsibilities are the registration (license) of plant protection and animal fodder products.

The federal *Laender*: They are responsible for the implementation of the protective laws. The control is executed by supervision state agencies which are also acting as contact point for the citizen. Their control mainly concerns foodstuff.

The *Federal Association of Consumers* (Verbraucherzentrale Bundesverbande.V.):

This umbrella organisation represents the political, economic and social interests of consumers at national level. Here the interested citizen can find current information on consumer policy.

The consumer centres in the 16 German federal states (*Laender)* offer advice and information on issues of consumer protection, help with legal problems and represent the interests of consumers at the federal state level. For information and advice contact the citizen addresses the consumer centre in his federal state.

3. Codification and Implementation of Consumer Protective Rules and Procedures in Common German Law by Examples:

(In the following the author mainly refers to a general view on examples of legal subject matters referred to below without referring to the content of articles and paragraphs of those laws; this being judged to be too confusing for the reader without intimate knowledge of German civil law)

3.1. The Law on Standard Business Conditions (AGB, §§305 ff BGB = Civil Code)

This law mainly refers to the use and validity of pre-formulated contractual stipulations which in many cases are detrimental to one of the contractual parties (consumer).

Without going too much into details it is important to take into account that this law contains numerous consumer protection clauses. Those clauses mainly refer to purchase contracts and concerns the validity warranty promises made by the seller.

In this context it is important to know that the above referred to *consumer centres* are according to their statutes legally entitled to file collective law suits (= kollektivrechtliche Verbandsklage) against ineffective general contractual conditions.

Other cases concern guarantee delays in the case of delivery of faulty goods in the frame of purchase contracts (§§433-437 BGB = civil Code).

3.2. Legal Regulation of E-Commerce

Also this matter, in former times regulated in a special law (Fernabsatzgesetz) is now regulated by the civil code in its paragraphs 312 ff.

The newly created Teledienstgesetz (Teleservice law) regulates and defines the duties of persons running commercial internet sites.

Especially in the case of purchase contracts done electronically it is often the case that the country of origin of the buyer, of the seller or of the person who runs the server are different. In this case we speak about e-commerce as being a typically cross-section area. In those cases the International Private Law (EGBGB) will be applied.

3.3. "Door to Door" (Doorstep) and Similar Contracts

This concerns mainly cases when commercial agents urge you on your door step, in the street, in public transport vehicles and other public places to sign a contract and e.g. subscribe to a magazine, buy a hoover etc.

In those cases the civil code (BGB) gives you are right of rescission from contract or a right to return the purchased good within a certain delay.

3.4. Law Applicable to Works and Services

Those cases mainly concern issues as incorrect invoices to be paid to construction builders and give the consumer the right to refuse to pay a certain quantity of the invoice once he can proof that the work delivered with quality defects (§§631 BGB = Civil Code).

3.5. Services on Telecommunication

The issues mainly covered are legal relations between subscribers of mobile telephone contracts e.g. cases when the amount of the invoice for telephone calls is contested by the subscriber.

Those issues are regulated by the BGB (=Civil Code) and the Law on General Contract Conditions.

3.6. Product Liability Law

Generally speaking the Law on the Liability for Product Safety (Produkthaftungsgesetz) regulates the liability of the entrepreneur issuing a product on the market. It is noteworthy to keep in mind the regulations of the BGB (Civil Code) and of the above mentioned law give parallel legal protection.

The difference being that in the case of the BGB we need a sales contract for a seller to be liable. However in the case of the Product Safety Law the entrepreneur is responsible without intent or negligence once he brings a faulty product on the market, so called risk liability. So in this case we do not need a contract.

4. Summary

Generally speaking consumer protection and consumer protection policy a necessary requirement of a free market economy based on competition.

In a system of market economy there always tend to be an imbalance between the players in such a system: on one side there is professional financial potent supplier, n the other hand weak, non - professionally organized consumers. Acknowledging this imbalance, consumer protection also means protection of inferior market participants.

Generally, consumer do not dispose of the same level of knowledge of products than the producer itself nor do they have a similar strong lobby as big companies. In this context there also exists an imbalance of information..

Consumer protection serves the purpose to protect the autonomy of individuals who enter the market without any purpose of making benefits. Such an individual can also be called *homo oeconomicus passivus*.

These are opposed to companies actively involved on the market. In establishing various consumer protection measures, like information, consultation and education etc. the consumer protection law tries to bridge the gap between the interests of consumers and suppliers.

On the other hand it is evident that a matter like the legal construction of the consumer protection is often subject to criticism. The main argument forwarded is that consumer protection as it exists actually in Germany does affect the acknowledged principle of contractual freedom.

A particular interesting and practical important issue is the case of sales of second hand cars.

As a means for protection of the consumer, the German legislator introduced in the Civil Code a stipulation establishing a liability of the car dealer even in the case of the sale of second hand cars. The seller can not exclude the right of the buyer to renounce on his right for compensation if the car has quality defects.

As professional car sellers pretend that the inherent risk of such a liability is not bearable they try to appear as mere sales agents between a private seller and a private buyer.

The Federal Court of Justice has not yet decided definitively how to treat legally this kind of evasive contracts.

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Cost Benefit Analysis in Conducting RIA

By Chingiz Orujov, Long-Term Expert

Economists have long been intrigued by the problem of how to decide whether one outcome is better than another one from society's point of view. Ideally, we would like to find decision-making rules which give consistent outcomes, that is outcomes which are the same when applied in the same circumstances. There was a need for a method which would be democratic and practical; and which can be shown to be consistent with economic theory.
The area of research known as "welfare economics" developed out of search for such a method. CBA eventually emerged out of welfare economics as a practical application of a decision-making rule. It allows analysts to consider not only financial implications of impacts but also externalities, environmental changes and health impacts. Hence, CBA looks at the social cost and benefit –cost and benefit to society as whole rather to particular group of society. As such it becomes very useful technique for policy makers.

Unique valuation methods of CBA made it appealing for Regulatory Impact Analysis (RIA). For, CBA provides opportunities for analyst to monetize the environmental, health and social impacts which would not be possible to obtain by financial project analysis. Values for these impacts are crucial to determine benefits and cost of policy. Following features of CBA make it applicable for policy makers:

- It addresses important social concern (efficiency of resource allocation) and is applicable in wide range of circumstances
- A wide variety of impacts can measured and compared in the same measurement units
- CBA can be used in both public project and policy appraisal as a device for allocating scarce public money across competing options.
- CBA allows analysts to emphasize both the economic value of environmental protection, as well as opportunity cost of protecting the environment

CBA has been a tool for analyst to conduct RIA in OECD countries since late 70s. It has been employed as economic tool to determine cost and benefits of each alternative for regulatory change by valuing benefits and costs. The decision makers should make a best use of CBA in evaluating policies and projects.
Following are guidelines proposed in the literature for maximising the benefit of CBA for regulatory impact assessment:

1. Decision-makers should not be precluded from considering the economic costs and benefits of regulation ;
2. CBA should be an essential part of major regulatory decisions, since such decisions involve a significant opportunity cost to taxpayers;
3. Benefits and costs should be quantified wherever possible, but uncertainties should be explicitly set out. In many cases economists will only be able to produce a likely range for benefits and costs.
4. CBA should be subject to external review, to keep up the standards of good practice and even-handedness
5. A core sets of economic assumptions should be established, which should be established, which should be uniform across agencies. These include the discount rate, the economic value of a life and the economic value of health.

6. The CBA analysts should also present information on the distributional impacts of government regulation: whilst CBA does not employ fairness as a measure of outcomes, it can be used to show who gains and who loses.

The cornerstone of CBA is to calculate consumer surplus as project or policy impact benefit. For this purpose CBA estimates demand curve for goods or service impacted by policy. Depending on availability of data it can be quite complex and complicated process and may require a lot of resources.

Application of CBA analysis in Azerbaijan seems plausible. In public administration sector of Azerbaijan there are qualified personnel able to carry out good CBA analysis. With huge public investment share in the state budget CBA has a significant role to play to weight pros and cons on every manat spent for such purpose. With strong commitment of Azerbaijan for European integration and its legal approximation efforts CBA can be powerful tool for appraising impacts of legal changes or even making new laws. Project team at TACIS would be delighted to provide assistance for public offices of Azerbaijan in conducting RIAs with application of CBA.

Chingiz Orujov is long term local expert Regulatory Impact Analysis. Chingiz holds master degree form the University of York in UK. He has broad experience in conducting project economic analysis accumulated at international organizations.

Better Regulation

By Ioannis Inglezakis, Short-term International Legal Expert, Greece

1. Introduction

Regulation is essential to achieve the aims of public policy in many areas, and better regulation is not about unthinking removal of such regulation. Rather, it is about ensuring that regulation is only used when appropriate, and about ensuring that the regulation that is used is high quality. Improving the quality of regulation is a public good in itself, because it enhances the credibility of the governance process and contributing to the welfare of citizens, business and other stakeholders alike. High quality regulation prevents the imposition of the unnecessary burdens on businesses, citizens and public administrations that cost them time and money.

It helps avoid the damage to firms' competitiveness that comes from increased costs and market distortions (particularly for small firms). Indeed, studies from various sources have estimated the burden of regulation to fall in the range 2-5% of GDP in Europe. Whilst these figures can only be estimates, nonetheless they do indicate the importance of this issue to European economies. High quality regulation assists in the restoration of confidence in government and is better able to accomplish its desired purpose. Implementation of such regulation is also less problematic for public administrations and compliance is easier for citizens.

For all these reasons it is strongly in the public interest to improve the quality of regulation at both national and EU levels. Better regulation needs high-level and cross-governmental political support and appropriate resources to be successful. It must address the whole life cycle of policy (inception, design, legislation, implementation and review) across all fields of public policy. A little by little approach has the risk that it could be ineffective and therefore, an overall strategic approach is essential. It should seek to involve both the executive and the regulatory authorities, using tools such as impact assessment, simplification, consolidation and consultation and promoting a change in culture. And it must be underpinned by appropriate administrative and organisational structures: both within national governments and the EU Institutions such structures should co-ordinate, support and monitor the programme and, additionally in the EU, promote mutual learning between its Institutions and with the Member States.

Better regulation is a drive to improve the policymaking process through the integrated use of effective tools, not an attempt to impose further bureaucratic burdens on it. Its effective use will deliver welfare gains far in excess of any costs of governing in such an efficient way.

2. Key Areas of Better Regulation

The seven key areas that result from the aforementioned considerations are:

- **Policy implementation options**. National policymakers should always consider the full range of possible options for solving public policy issues and choose the most appropriate for the circumstances: though regulation is often the most appropriate option it should not be automatically the only choice in all circumstances.

- Impact assessment. Regulatory impact assessment (RIA) is an effective tool for modern, evidence-based policy making, providing a structured framework for handling policy problems. RIA should be an integral part of the policy making process at EU and national levels and not a

bureaucratic add-on. It does not replace the political decision: rather it allows that decision to be taken with clear knowledge of the evidence.

- **Consultation**. Consultation is a means of open governance, and as such early and effective consultation of interested parties by EU and national policymakers is an important requirement. This does not undermine the role of civil servants, Ministers or Parliamentarians in the policymaking process, but supplements the information they have to supply. Correctly done, consultation can avoid delays in policy development due to late-breaking controversy and need not unduly hinder progress.

- **Simplification**. There is a constant need to update and simplify existing regulations. But simplification does not mean deregulation. It is aimed at preserving the existence of rules while making them more effective, less burdensome, and easier to understand and to comply with. This entails a systematic, preferably rolling and targeted programme of simplification, covering the regulation that impacts on citizens, business and the public bodies that have to implement it. Such programmes need to be established at both EU and
national levels.

- **Access to regulation**. Those affected by European or national regulation have the right to be able to access it and understand it. This means the coherence and clarity of regulations must be enhanced through consolidation (including codification and recasting) and access improved by better practical arrangements (especially using ICT). The former should be achieved through EU and national level programmes of consolidation and the latter through provision within each Member State and at European Union level of a public access service (either free or for a small fee).

- **Structures**. Better regulation needs the appropriate supporting structures charged with its promotion to be successful. The best arrangement at EU or national level will depend on the relevant circumstances and charging a single unit at or near the centre with this should certainly be considered, but an effective solution must be found for each.

- **Implementation of European regulation**. High quality regulation forms a chain from the earliest stages of its preparation through to its implementation. More attention should be paid at European level to implementation concerns to ensure that the full consequences are understood and considered. Member States should accord implementation of European regulation higher priority.

3. The Basic Principles of Better Regulation Are the Following:

Any legislative initiative should attain to implement the following principles:

Necessity

This principle demands that, before putting a new policy into effect, the public authorities assess whether or not it is necessary to introduce new regulations in order to do this. This would for example involve comparing the relative effectiveness and legitimacy of several instruments of public action (regulation, but also the provision of information for users, financial incentives and contracts between public authorities and economic and social partners) in the light of the aims they wish to achieve.

Effectiveness

Effective regulation requires clear, achievable objectives and ensuring that these policy goals remain to the fore throughout the regulatory process. An objective-led approach to regulation places greater emphasis on performance and outcomes. However, the assumptions underlying the stated objective must also be clear. These are the important events, conditions or decisions outside the regulation that must nevertheless prevail for the objective to be attained.

Proportionality

This principle means the regulation should be lightly as possible given the circumstances, and that more alternatives are used. Further, that both the burden of complying and the penalty for not complying are fair. And that Regulatory Impact Analysis is appropriately used when making regulations.

Transparency

In order to improve the quality of regulation by being more effective in identifying unforeseen effects and taking the points of view of the parties directly concerned into consideration, the drafting of legislation should not be confined within the narrow bounds of the public administration bodies. Participation by and consultation with all parties who are interested or involved prior to the drafting stage is the first requirement of the principle of transparency. This participation should itself satisfy the transparency criteria. It should be organised in such a way as to facilitate broadly based and equitable access to the consultations, the constituent elements of which should be made public.

Accountability

The authorities responsible for regulation should give consideration to the question of its applicability. All parties involved should be able to clearly identify the authorities that originated the policies and the regulation applying to them. Where appropriate, they should be able to inform them of difficulties with the implementation of policies or regulation, so that they can be amended.

Consistency

Consistency addresses the questions: will the regulation give rise to anomalies and inconsistencies, given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?

Consistency in the regulatory process is important as it gives a degree of predictability and legal certainty to individuals and groups within society and the economy. Ad hoc approaches, whereby similar situations are treated differently, tend to add to transaction costs associated with particular activities. They can also create unnecessary bureaucratic layers to social and economic processes, and ultimately diminish respect for the regulatory process.

4. Alternatives to Regulation

There are alternatives to regulation, which should be taken into consideration before starting any legislative project. These are the following:

a) **Do nothing**. Not acting when faced with a given problem may be necessary and should be considered as being a possible alternative. It is a way of placing confidence in existing regulations whilst avoiding implementing a solution too early which might turn out to be untimely.

b) **Incentive mechanisms.** These may be in the form of information campaigns to make citizens and companies aware of their rights and obligations. They may also be in the form of educational or preventative campaigns intended to have an effect on behaviour enabling the effective implementation of regulations which are known but have not been put into practice. Lastly they may also be financial incentives (bonuses or surcharges) encouraging people to change their behaviour (for example differential taxation of unleaded petrol).

c) **Self-regulation**. This instrument of self-regulation is unique to the private sector. In the form of quality standards, certification, codes of conduct, groups of economic players can seek to improve their technical quality and/or their commercial performance. This form of regulation can contribute to the general interest by the simple benefits (price, safety, etc) that it provides for the consumer. It may also include wider interests (in particular by taking into account the demands of environmental protection associations). In as much as user satisfaction can be achieved using this method, the public authorities do not need to intervene in the domain covered by self-regulation.

d) **Contractual policies.** Contractual regulation can link public authorities to players in the private sector (companies, associations, individuals). These can be financial rewards given in return for complying with quality standards (for example environmental protection) or activities contributing to the public service (particularly in the social domain). The same methods can be used to link different public authorities (for example to implement European structural funds or for relations between States and decentralised levels of authority). Finally, this form of regulation can involve private sector players. The conclusion of a contract establishing rules common to partners with different interests (for example employers' representatives and employees unions) shows that some of the objectives which are characteristic of regulation (the general interest) have begun to be taken into account without the automatic intervention of the public authority.

e) **Mechanisms to ensure the assumption of responsibility.** For the implementation of public policies it may be desirable to introduce mechanisms guaranteeing that, even in the absence of regulation, the players involved effectively assume their responsibilities and fulfil their obligations. Setting up compulsory insurance systems (such as civil liability or motor vehicle insurance) provides a non-contentious guarantee that risks will be taken care of by a third party. Legal or arbitration procedures are also a way of applying civil or criminal law sanctions where these responsibilities have not been met.

f) **Mutual recognition**. In Europe a relevant example of an alternative to regulation can be found in the mutual recognition of national rules even when these differ from one country to the next. This is particularly the case when validating professional qualifications or diplomas. Lastly, with regard to alternatives to regulation at the European Union level, it is worth underlining the benefits of the "open co-ordination method" which allows Member States to work towards common objectives together with the help of methods implemented at the national level and the mutual exchange of information.

g) **Improving existing regulation**. In some cases, the implementation of new regulations is the result of not applying existing regulations. It is worth studying the methods which would enable

the rules either to be implemented effectively (by resolving the specific problems which prevent them from being applied) or revised (in particular by periodically revising regulations).

5. Law Drafting Procedures

The actual drafting of legislation (i.e. the preparation of the legislative text which converts a policy into legally enforceable normative rules) is somewhat more expert work than is generally recognised. It cannot be assumed that it can be undertaken by every lawyer; the skill usually has not been acquired as part of legal education and in the course of legal practice. Law drafting is a type of specialist legal practice (for which some have more talent than others) which demands special skills and relevant experience. Expert understanding of the work is also desirable in those required to carry out verifications of legislative text, whether for Government or Parliament.
Law drafting may be undertaken by officials in a ministry (or in Parliament) who are principally engaged in legal work. Alternatively, and much less commonly in continental Europe, they can be provided as a central resource upon which individual ministries may draw. By either means, good quality drafting calls for a resource of skilled and experienced officials.

The Five Stages of the Drafting Process are the following:

1. Understanding the project.
2. Analysing the project.
3. Designing the scheme.
4. Composing and developing the draft.
5. Scrutinising and testing the draft.

Furthermore, the principles of Legislative Design that have been established in practice are the following:

1. Related provisions should be gathered together in the same part of the bill, and distinct groups of related provisions should be created as separate Parts of the bill.
2. Groups of provisions, and Parts, should be ordered according to the same principles that govern individual provisions.
3. Primary (or basic) provisions should come before those subsidiary provisions that develop or expand or depend upon them.
4. In particular, general propositions should come before a statement of exceptions to them.
5. Provisions of universal or general application should come before those that deal only with specific or particular cases.
6. Provisions creating bodies should come before those that govern their activities and the performance of their functions.
7. Provisions creating rights, duties, powers or privileges ("rules of substance") should come before those that state how things are to be done ("rules of administration or procedure").
8. Provisions that will be frequently referred to should come before those which will not be in regular use.
9. Permanent provisions should come before those that will be in force or have application for only a limited time (e.g. during a transitional period).
10. Provisions affecting a series of related events or actions should be set out following the chronological order in which those events or actions will occur.
11. The objectives of the bill should be stated at the beginning, since they set the context in which the provisions that follow must be read.

12. Any definitions provided for terms used in a bill should be set out before the terms are used; in any case, the way in which a bill is using a term should be self-explanatory from the first occasion that the term is used.
13. The application or coverage of the bill (i.e. the statement of general cases dealt with and not dealt with) should come before the provisions that apply to those cases.
14. Provisions setting out the scope of powers to make secondary legislation should be dealt with after the substantive provisions of the legislative scheme.

Finally it is recommended to take into account of the following principles of Legislative Composition:

1. Express normative rules as prescriptions rather than in narrative form.
2. Express norms directly, avoiding circumlocution, and include only those norms that perform a necessary legal function.
3. Avoid long sentences.
4. Follow word order in conventional usage.
5. Use expressions in every day usage, wherever possible; avoid unnecessary
legal jargon, but use legal terms to express legal concepts.
6. Omit unneeded words.
7. Use terminology consistently throughout a bill and in all secondary legislation implementing it; use the same term for the same case, and a different term for a different case.
8. Avoid ambiguous expressions and terms that are vague and lack clear definition.
9. Limit cross-referencing to other norms as a method of providing the content to norms.
10. Make amendments to other laws by express alteration of specified provisions.

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From Beneficiary to Participatory Monitoring
Why and How

By Christina Wredberg, Long-Term Expert Programming and Monitoring

Background

Participatory Monitoring and Evaluation is increasingly viewed, among donors, as a tool leading to the strengthening of projects and programmes in terms of *accountability, transparency, impact and sustainability*. In addition, it contributes to building the capacity of those stakeholders who participate in the monitoring process and enhances the latter's ownership of the project or programme. Another key element is related to the learning aspect of taking in the monitoring process. The approach is based on the concept that those who are directly affected by a project should take regular and direct part in its follow-up and assessment.

The principle inherent to the Participatory Monitoring (PM) process consists in involving the project beneficiary and other project stakeholders in the regular assessment of project progress through systematic and regular consultations. This joint approach should improve the project's ability to:

- identify opportunities;
- deal with problems;
- address absence of involvement of beneficiary and other stakeholders in the project implementation process;
- improve the feedback and follow-up process through the development of joint recommendations;

The 2005 *Paris Declaration on Aid Effectiveness** puts forward the concept of mutual accountability as one of the key factors contributing to increasing the effectiveness of external assistance. Among the elements of the shared accountability between donors and partner countries is the latter's commitment to "reinforce participatory approaches by systematically involving a broad range of development partners when formulating and assessing progress in implementing national development strategies". Among the key factors linked to improving the decision-making process leading to better results should be the donors' commitment to:

- "link country programming and resources to results and align them with effective partner country performance assessment frameworks, refraining from requesting the introduction of performance indicators that are not consistent with partners' national development strategies";
- "work with partner countries to rely, as far as possible, on partner countries' results-oriented reporting and monitoring frameworks;
- "harmonise their monitoring and reporting requirements …with partner countries to the maximum extent possible on joint formats for periodic reporting";
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In other words, the alignment of donor assistance with the partner countries' national development strategies and programmes should be accompanied by an effort in the direction of developing and making use of joint tools for the monitoring and assessment of the results and outcome of the assistance. This includes not only the definition of joint parameters or criteria for assessing performance but equally the joint evaluation of the actual impact of donor assistance on the sectors to which it is targeted.

*Paris Declaration on Aid Effectiveness, March 2005

The introduction of Sector Budget Support (SBS) under the European Neighbourhood and Partnership Instrument (ENPI), beginning with the Energy Sector Reform Programme (ERSP) of the 2007 Action Programme (AP) signals a new era in the cooperation between the European Commission and Azerbaijan, based on the same principles as those contained in the *Paris Declaration*, as follows:

a) alignment with the partner country's national development strategy in a specific sector;*

b) use of the partner country's own system, through the channeling of SBS through the national treasury of Azerbaijan, which should, by the same token, lead to a strengthening of the system and contribute to enhancing the capacity of the partner country's institutions;

There is therefore increasing scope for introducing joint monitoring and assessment tools aligned, as far as possible, with the partner country's national priorities. This is particularly the case for sector budget support where, apart from the main sector beneficiary, an important number of national and international stakeholders are involved to varying degrees. In the case of ERSP, for example, apart from the main beneficiary, the Ministry of Industry and Energy of Azerbaijan (MIE), national level stakeholders include the Ministry of Ecology and Natural Resources, the Ministry of Transport, the Ministry of Taxation and the Ministry of Justice as well as the principal state companies in the energy sector. International stakeholders include other donor programmes active in the field of energy.

The Azerbaijan National Coordinating Unit (NCU) plays a key role in the process of EU-Azerbaijan cooperation notably in relation to the programming of EU assistance activities on the territory of Azerbaijan. Its factual responsibilities include:

- the coordination and facilitation of the dialogue between the European Commission and the government of Azerbaijan in relation to the development and signature of the multi-annual National Indicative Programme (NIP) including the joint definition of priority areas for EU-Azerbaijan cooperation;
- the dialogue with line ministries and potential project beneficiaries in the framework of the development of the yearly Action Programmes (AP) and the facilitation of the dialogue with the EC Commission in relation to the final agreement on the Action Programme;
- the coordination of information and feedback to the EC Commission in the development of the Country Strategy Paper (CSP);
- the facilitation and support to the EC Commission and its experts in relation to the drafting of project Terms of Reference;
- the follow-up and coordination of the activities of EU assistance projects on the territory of Azerbaijan;

Through its role as a coordinator and facilitator of the dialogue between the European Commission and the Government of Azerbaijan, on the one hand, and its role in the coordination of EU assistance activities, on the other hand, the NCU is very well positioned to assume a key role in the development and operation of the follow-up and assessment of EU assistance activities on the territory of Azerbaijan. This relates both to the remaining project activities under the Tacis programme and to the new mechanisms under the ENPI, notably in relation to the SBS. In view of this a system for the monitoring by the NCU of EU assistance activities was developed, aimed, in the first place to assist the NCU in following up and regularly assessing the activities of the ongoing Tacis projects coming under Azerbaijan's National Programme. As the

*.AP 2007 Energy Sector, AP 2008 Justice Sector, AP 2009 Agricultural Sector

NCU already follows up on the activities of these projects, the monitoring system constitutes an additional tool the main purpose of which is to:

- strengthen the communication and feedback process with the projects and their beneficiaries;
- intervene in case of problems, both with the project beneficiary and with the EU project partner;
- ascertain that the beneficiaries understand the project implementation mechanisms and is familiar with the main tenants of the project cycle;

The Role and Purpose of the NCU Monitoring System

In the Charter of the Azerbaijan National Coordinating Unit (NCU) it is stipulated that the NCU shall have the right to "identify the efficiency of assistance; to participate in project assessment together with potential beneficiaries", to" request information on projects' relevance and anticipated efficiency from ministries, state committees, associations, enterprises, institutions and other entities", and to "participate in monitoring of EC technical assistance programmes and projects' implementation and to request appropriate reports, financial papers and other documents from beneficiaries".*

In other words, the NCU has the right and obligation to carry out monitoring and assessment of EU assistance activities on the territory of Azerbaijan, and should do so in the framework of a constant dialogue with the project beneficiaries.

As the beneficiary constitutes the focal and starting point of any participatory monitoring approach, the assessment of EU assistance projects by the NCU should begin with the follow-up of those projects with specific focus on the viewpoint of the project beneficiary. In addition, the regular monitoring and follow-up of the projects in question by the NCU should sustain and strengthen the dialogue and feedback process between the NCU and the project beneficiaries.
According to the World Bank, beneficiary assessment, i.e. the focus on the beneficiary in the monitoring process "involves systematic consultation with project beneficiaries and other stakeholders to help them identify and design development activities, signal any potential constraints to their participation, and obtain feedback on reactions to an intervention during implementation".**

The strengthening of the capacity of the project beneficiary is a key component of the NCU monitoring system and is based on the following elements:

- focus on the beneficiary's viewpoint;
- improve the beneficiary's understanding of the project cycle;
- an instrument for skills transfer;
- improve the beneficiary's understanding of and involvement in project management;
- helps the beneficiary understand what a project can do and cannot do;
- early warning signal in case of problems;
- a communication and feedback tool between the NCU and the project beneficiaries;
- a communication and feedback tool between the NCU and the Azerbaijan government;
- a potential communication and feedback tool between the NCU and the EC Commission;

*.Decree Number 46 of the Cabinet of Ministers of the Republic of Azerbaijan dated 8 April, 2003 "On the approval of the Charter of the National Coordinating Unit for EU Technical Assistance in Azerbaijan"
**.http.worldbank.org

For the NCU, the system constitutes a tool that they use as a means to identify and act upon possible problems in the project implementation process with a minimum of delay. It is also to be seen as a complement to the monitoring undertaken by the EC Monitoring Unit. The comparative strengths of the NCU beneficiary monitoring system can be qualified as follows:

1. The presence of the NCU on the ground will be make it easier to follow up on possible problems by involving the project partners and other stakeholders in a dialogue;

2. The proposed three-monthly sequence of the monitoring will increase the likelihood of a rapid follow-up and action in case problems are identified as a result of the monitoring activity;

3. In view of the NCU's role in the programming process the likelihood exists that the results and conclusions of the monitoring of individual projects may be applied to future programming and strategy development;

During meetings with beneficiaries the latter pointed out that they, in many cases, will feel more at ease talking to monitors from their own government. This may lead them to be more open in speaking of possible problems or their lack of understanding of specific items linked to the project implementation process. Another element is linked to the beneficiary's understanding of what a project can do or cannot do. The NCU monitoring visits can be used to clarify in more detail the limits and constraints faced by the project partner in carrying out the wishes of the beneficiaries.

The process linked to building the capacity of the project beneficiaries should be the main element in any monitoring activity undertaken by the NCU and should be complemented by training in aspects linked to project management, to be carried out either during the course of the monitoring activity in the framework of the dialogue taking place on the different aspects linked to the implementation of the project, or during separate training sessions during which the project beneficiaries will be coached in the principal aspects of project cycle management and basic monitoring techniques.

The Basis for a Participatory Monitoring Approach

As mentioned above, the new cooperation mechanisms under the ENPI seek to align assistance in line with the partner countries' own development priorities, with the principal aim of strengthening the partners' institutional capacity to implement reform. This is specifically the case for the SBS and the accompanying Twinning instrument the main purpose of which is to strengthen the partner's administrative capacity. The increase in the number of stakeholders involved in this process also calls for a coherent and joint effort in the process of following up and assessing the results of the introduction of these instruments.

The development of performance assessment mechanisms by the partner countries themselves will not only contribute to strengthen the latter's institutional capacity but should equally reinforce the element of ownership by the partner country of this process. The Paris Declaration's call for donors to "work with partner countries to rely, as far as possible, on partner countries' results-oriented reporting and monitoring frameworks" should pave the way for the development of joint assessment and follow-up mechanisms of the results of donor activity.

One important aspect of the participatory monitoring approach is the learning component, in other words beneficiaries and stakeholders go from being only recipients or sources of information to becoming active participants in the follow-up any activity and to take part in the development of any resulting corrective measures.

The proposed beneficiary monitoring system for the NCU has the elements of a participatory monitoring system in that:

- it engages the beneficiary in the monitoring process through regular consultations;
- it provides the beneficiary with the tools necessary to carry out monitoring of the project;
- it provides the framework for the development of project documentation, such as regular project reports, by the beneficiary;
- it assists the beneficiary, through feedback and follow-up procedures, to influence the implementation of the project;
- it supports the beneficiary in the analysis of the results of the monitoring activities through a regular dialogue with the NCU;
- it provides the tools necessary for the NCU and the beneficiary to engage, if deemed necessary, in an active dialogue with other project stakeholders;

The development of a truly participatory monitoring system consisting in the active participation of all the project stakeholders in the follow-up and assessment process, requires considerably more resources than are at present available to the NCU. However, the cooperation and dialogue with project beneficiaries in the framework of the existing monitoring process can lay the basis for a more inclusive approach in relation to the joint follow-up and assessment of the proposed sector budget support mechanisms that are presently developed by the Government of Azerbaijan.

This process should include the development of specific performance indicators in relation to the activities that will be undertaken for the purpose of fulfilling the so-called policy reform conditions attached to the disbursement of each successive budget “tranche” of the SBS. In this context there should also be scope for undertaking this activity in close cooperation with the European Commission. One of the main ‘added-values’ of such a joint monitoring of the SBS would obviously be the capacity building component at the level of the partner government.

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ABBREVIATIONS

EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
ENP	European Neighbourhood Policy
ENP AP	European Neighbourhood Policy Action Plan
ERSP	Energy Reforms Sectoral Program
EU	European Union
GMO	Genetically Modified Organism
MED	Ministry of Economic Development
MFA	Ministry of Foreign Affairs
NCU	National Coordination Unit
PCA	Partnership and Cooperation Agreement
REA	Renewable Energy Sources
RIA	Regulatory Impact Assessment
SBS	Sectoral Budget Support
TACIS	Technical Assistance to CIS
TMA	Trade Marks Act