

PATERNALISM IN CONSUMER LAW

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Abstract

When carried out by the state, paternalism was often decried as coercive, questioning in itself the liberty of the individual and always alluding to the latter's presumed incapacity to decide and to choose. Paternalism claims that most individuals are not capable to decide for themselves and argues that authority should take much of this burden off their shoulders.

At its most basic level, consumer law is a special area of law dealing with protection of a universal status and that is why many of the protective measures can be seen as paternalistic, although even a kernel of truth couldn't resist to a real analysis.

The paper starts from the observation that both opponents of the idea of protection, and ardent followers of paternalism extended to the widest possible area, has the same tendency to wrongly generalize the paternalistic qualification of almost any element of protection.

The paper addresses three issues: paternalism – coercive and non-coercive, libertarian paternalism and paternalistic libertarian nudges, consumer law and its specific protection with special regard to consumer status, and the crossing area between consumer law and paternalism.

The main purpose of this study is to convey an objective clear method to distinguish this crossing area between consumer law and paternalism and what exactly in this area is actually of a real paternalistic substance and what is not genuine.

Keywords: consumer protection, paternalism, freedom to choose/ of choice, free will, incentive.

1. Introduction

This paper starts from an observation justified by the need to understand the importance of clearly establishing the meaning of paternalism, from the perspective of consumer protection.

As a rule, no clear distinction is made between the paternalistic or non-paternalistic nature of a protection measure, the tendency being always to extend the qualification, for instance of considering as paternalistic some acts or policies that cannot be included in this category.

A paradox is that the same tendency to wrongly generalize an extended paternalistic qualification of almost any element of protection, belongs to both opponents of the idea of protection itself, detractors of paternalism and the principle of equity, and ardent followers of paternalism, expanded to the widest possible area, who claim that this would provide the strongest possible protection.

Thus, the supporters of libertarian ideology¹, or those who consider any idea of protection unnecessary, but also those who want to denigrate protection, otherwise of a completely different nature, conferred by consumer law, show an interest in qualifying any policy or act as paternalistic in nature, precisely in order to

compromise the idea of paternalism itself, to present it as an exaggeration, either as a violation of individual freedom or as something simply out of place.

Proponents of paternalism², on the other hand, wishing to emphasize how useful such widespread protection would be, end up ignoring the real significance of paternalism, its well-defined role, and probably not intending, puts it into the very hands of the opponents of paternalism, deriding the precise importance of this ideology.

Given that elements of paternalistic ideology have penetrated consumer law, the importance of the approach lies in following the true sense of paternalism, so that it fulfills its purpose properly, without being unnecessarily extended for either praise or denigration, keeping the purpose of consumer protection clear.

Paternalistic protection should not be confused with the protection specific to consumer law, as they refer to dangers of a different nature.

This paper compares an ideology and a branch of law both having in common the ideal of protection.

As paternalism is concerned, this ideal comes with a price. It can be the price of free choice of the one who is protected. Free will is the "starting point" of law, and freedom represents the "substance and determination" of law and the determination of will.³

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¹ A reference work for the ideology that the state is not entitled to impose hierarchies of values on individuals is Friedrich A. Hayek, *Drumul către servitute*, [The Road to Serfdom], translated by Eugen B. Marian, fourth edition, (București: Humanitas, 2014).

² For example, the phrase „libertarian paternalism” was coined in Richard H. Thaler, Cass R. Sunstein, *Nudge: Cartea ghionturilor pentru decizii mai bune legate de sănătate, bogăție și fericire* [Nudge: Improving Decisions About Health, Wealth, and Happiness], translated by Smaranda Nistor, (București, Publica, 2016), 19.

³ Georg Wilhelm Friedrich Hegel, *Principiile filosofiei dreptului sau Elemente de drept natural și de știință a statului* [Elements of the Philosophy of Right], translated by Virgil Bogdan and Constantin Floru, (București: Univers Enciclopedic Gold, 2015), (my English translation), 28.

The legal science was qualified as “a part of philosophy”⁴ and the philosophy of consumption must search and define the justification and nature of protection provided to the consumer.

The paper is structured in three chapters.

The first chapter (no. 2) deals with paternalism, intending, in its first part, to identify the basic features of this ideology, both when it comes to coercive paternalism and “recommendation” paternalism, and to explain libertarian paternalism in its second part. Also, the libertarian paternalism section contains brief considerations on libertarianism, an explanation of the concept of libertarian paternalism, and in particular a detailed examination and also a classification of libertarian nudges, as exemplified in the reference doctrine.

The second chapter (no. 3) is dedicated to consumer law, dealing with its fundamental institutions and considerations concerning the consumer, in order to highlight the latter’s relationship with two different types of protection.

The third chapter (no. 4) defines the crossing area between consumer law and paternalism, pointing out the need for a clear distinction between the protection specific to consumer law and that specific to paternalism, and the criteria that consumer paternalism must meet in order to be considered genuine and beneficial.

2. On Paternalism

2.1. Paternalism and its main features

Paternalism is a land of perpetual non-emancipation. The individual placed in the group targeted by paternalistic policies is always thought to be incapable to take proper choices, just because in that group there are, indeed, many individuals who cannot decide. Therefore, the rule of majority applies to this individual, remaining of too less importance how capable to decide he might be.

The basic feature of paternalism is the protection of the individual from himself.

I use the term “authority” as a general concept meant to represent the party in power, who can retrieve somebody’s freedom of choice, decide for the latter and impose its decision. This authority can be a public institution or a private entity or simply a person in a leadership position entitling it to decide for other people. The act of authority materializes in paternalistic policies or acts which either dictate certain behaviours or influence towards them.

Paternalism is an ideology that claims that, in certain circumstances, an institution, public or private, a person in power, could and should either decide and

choose instead of other individuals placed under its influence, on the grounds that the latter would not be able to take appropriate decisions for themselves, or try to influence, to persuade them to take decisions that are considered favourable, without depriving them of their freedom of choice.

The first type of paternalism is therefore more brutal, when the authority takes over the freedom of choice of those under its power, in order to protect them from the likelihood of acting wrongly about themselves.

In the second form of paternalism, the freedom of choice stays with the individual, but the authority claims the power to influence him to decide in a certain way. In this regard, it has been noticed that „paternalism is no longer a political or a moral issue, it is an element of individual deliberation.”⁵

Regardless of the type of paternalism, the premise on the one hand is the individual not being able to take the right decisions, to discern what is good for himself and, on the other hand, that the authority is considered more rational than him, more qualified to realise how he should act.

When referring to paternalism, we must establish why is the authority the one that always knows better, why the paternalistic policy or act should be applicable to individuals otherwise perfectly responsible just because there are many others who are not, what exactly is the reason of the incapacity to take the right decision, what is the significance of a right decision, what is the protected interest and whose interest is protected, when paternalism is genuine, when it is good or bad. Three elements are concerned: the authority, the individual and the decision.

The fundamentals of paternalism are based on the assumption that, in certain circumstances, people prove not to be so rational and mature as they should, and consequently either their freedom to choose needs to be confiscated, or they simply ought to be guided, but not coerced, towards the most favourable choice. But in exchange to their liberty, the authority should return something even more valuable, as an expression of a principle of fairness and ethics.

The coercive paternalism could be summarized in an old sentence: „Try and convince them, but do act even against their will, when the reason of justice demands it.”⁶ Therefore, it is the mere interest of the individual that compells the authority to limit his liberty of choice and to assume taking decisions on his behalf. The choice belongs to an authority that is entitled to impose it on others. The reason why the authority chooses is that it would be too dangerous for the protected person to decide for himself, and, on the other hand, the consequences could be harmful to others.

⁴ Idem, 22.

⁵ Christophe Salvat, *Is Libertarian Paternalism an Oxymoron? A Comment on Sunstein and Thaler (2003)*, <https://hal.archives-ouvertes.fr/hal-00336528>, 2.

⁶ Marcus Aurelius, *Gânduri către sine însuși [Meditations]*, translated by Cristian Bejan, bilingual edition, (București: Humanitas, 2018), (my English translation), 199.

The presumed lack of discernment in taking decisions, stemming either from the experience of observing the numerous cases in which individuals could not properly decide for themselves, or from the consequences generated by their unthoughtful behaviour, lays the foundation of paternalism. Therefore, the authority is thought to be more rational, more responsible than the individual, just because in so many cases the latter couldn't prove himself diligent enough. In other words, somebody needs to be considered mature enough to decide and to impose that decision. It was assumed that the one who exercise paternalism over others is the one who knows well enough the „ends, values and interests” of the one who is paternalized.⁷ Paternalism is a materialization of the prediction that people and humanity as a whole will have to be protected from the dangers entailed by their own power.⁸

We already know that the protected party is presumed incapable to decide what is favorable to him. The choice is made for the paternalized and the result of this choice is imposed on him. In coercive paternalism, the protected person cannot choose to disobey what the authority had decided for him.

It was observed that people do not know what they want or what is good for them, that they cannot create a legislative system and that they have to be taught what to desire.⁹ But what is the significance of a right decision, and what makes a decision right or wrong? Is it imperative for the paternalistic policy or act to be understood as good and useful for the one whose liberty to choose was taken away, or only the mere compliance will do? When talking about what can be considered good or bad for someone, we must admit that the notion is relative. What a certain person would consider as good for himself, another individual could see it as not so good, or even bad. The kind of benevolence that could be accepted in paternalistic matters is the one that keeps the individual safe, not necessarily happy, because happiness is relative, but safe, safe from injuries, from sickness or from poverty.

It is generally accepted that the role of the state, for „as much as it is able”, is to ensure a good life for all citizens and to create the material conditions for it.¹⁰ The state was thought to be a product of art, compared to Leviathan, an „artificial man”, of superior strength, designed to protect man, and invested with an artificial soul, namely sovereignty.¹¹ Its duty is to ensure safety

for the people.¹² The state has an obligation to protect citizens from accidents.¹³ The state is not allowed to abdicate from the call of giving its citizens the best protection, and this duty cannot fall into abeyance.

Self-advertised as paternalists, certain authors emphasized that the state has a duty to promote the best ways of life among the people, beyond their preferences or beliefs.¹⁴

As for the individuals, they must help each other in choosing right from wrong.¹⁵ But what if a coercive paternalistic policy or law comes to be imposed on individuals otherwise perfectly rational and precisely informed in respect to a certain problem targeted by the paternalistic measure? They will have to accept the measure just because it provides protection to other individuals, not so responsible. The responsible individual will take advantages from the behaviour imposed on others, since, if they had been left free to choose, they might have compromised the efficacy of the responsible individual's decision.

It may be considered incorrect by some people to be unable to reach their goals or sometimes to even abnegate their hopes, because there are some who would not exhibit self-discipline and realism and then they should be protected from the consequences of their own faults.¹⁶ The individual's inability to choose should derive not from the very misinformation by the authority, but only from natural human limits. Anyway, even these limits are doubtful and relative, if we are to consider the long-standing process of infantilizing adult consumers.

For a policy or law to be considered genuinely paternalistic, the protection must be channeled primarily to the individual's best interest, and secondly to others' interests. In other words, it must be in the best interest of the individuals to follow an advantageous path, even dictated or suggested by someone else. Authority's best interest is to ensure that individuals do not go astray.

One should not smirk about paternalism, for sometimes it could be of essence. To analyze it deprecatingly would mean ignoring the evidence of the individual's natural inclination to act to his detriment, to ruin good occasions in a moment of aberration. An intelligently oriented policy could help in abating and alleviating the negative consequences of a chaotic and uninspired freedom of choice.

⁷ Christian Coons and Michael Weber, *Introduction: Paternalism – Issues and trends in Paternalism. Theory and Practice* (New York: Cambridge University Press, 2013), 14.

⁸ Yuval Noah Harari, *Homo Deus: Scurtă istorie a viitorului*, [Homo Deus: A Brief History of Tomorrow], translated by Lucia Popovici, (Iași, Polirom, 2018), 25.

⁹ Jean-Jacques Rousseau, *Despre contractul social sau Principiile dreptului politic*, [On the Social Contract; or, Principles of Political Right], translated by Lucian Pricop, (București: Cartex, 2017), 58-59.

¹⁰ Robert Skidelsky, Edward Skidelsky, *How Much Is Enough?: Money and the Good Life*, (London: Penguin Books, 2013), 168-169.

¹¹ Thomas Hobbes, *Leviatanul*, [Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil], translated by Alexandru Anghel, (București: Herald, 2017), 5.

¹² Idem, 6.

¹³ John Stuart Mill, *Despre libertate*, [On Liberty], translated by Adrian-Paul Iliescu, (București: Humanitas, 2017), 142-143.

¹⁴ Robert Skidelsky, Edward Skidelsky, *op. cit.*, XiX.

¹⁵ John Stuart Mill, *op. cit.*, 113.

¹⁶ John Rawls, *Political Liberalism*, expanded edition, (New York: Columbia University Press, 2005), 186.

Also, to ignore paternalism's dark side, and to accept uncritically an authority's coercive act, would mean to abjure the principles of individual liberty and freedom of choice.

One can be taken aback by the apparent contradiction between the two perspectives, but an abiding theory calls for strong, although perhaps not apodictic arguments.

One opinion highlights that, when the understanding capability of an ordinary adult is not enough „for a healthy decision”, legal paternalism can be seen as acceptable.¹⁷ In this regard, another argument states that „most people have not yet reached maturity to be independent” and the degree of emotional development is much lower than the degree of technical and intellectual development.¹⁸

A balanced, moderated opinion concluded that it is wrong not to interfere in individual choices at all, but the interference must be performed with caution, doubt and a critical sense.¹⁹

Some laws and policies, as those mentioned below, are considered paternalistic, and therefore are regarded as controversial.²⁰

Thus, a law that requires motorcyclists to wear helmets or passengers in cars to wear seatbelts is, indeed, an example of genuine paternalism. On the other hand, taxes on cigarettes could not be considered paternalistic, because high taxes never apply only to harmful products. Taxation policies cannot be examples of genuine paternalism, higher taxes being based, in fact, on pragmatic reasons, mainly targeting reliable sources. It applies arbitrarily to alcohol as to common fuels. Nor bans on trans-fats could be considered paternalistic because the consumer can always choose between the products present on market and is able to freely consume unhealthy food. Regulations on prescription of medical drugs could be considered paternalistic because consumer can be misled in their use. Regulations on recreational drugs are not paternalistic, because their use is always harmful, both to the consumer and to others.

2.2. Libertarian Paternalism

2.2.1. Brief considerations about libertarianism

To narrow the debate on the subject of paternalism to a mere sentence, libertarianism is an utterly distinct ideology, abhorrent to coercive paternalism and

abhorrent from any restraint on the individual liberty of choice.

The consequences entailed by state interference with individual freedom of choice, would lead, in libertarian view, to an encroachment upon the very essence of human existence.

If state and individual interests fight for supremacy, each party conceitedly claiming its superiority with lack of clairvoyance and a merely obstinate determination never to concede defeat, the social landscape would encompass just the accumulated frictions and is never to improve.

Libertarian „*laissez-faire*” ideology means that the common man is allowed „to choose and act freely” without being subjected to an external, dictatorial will.²¹ In this regard, it has been asserted that man must be free to pursue his interest.²² He must, also, receive useful advice in his choices, but the final decision must belong to him.²³ Therefore, this „useful advice” must be a proper instrument to make it possible for the individual to realize his own interest. But what if, despite following this useful advice, his interest still remains unfulfilled? Can the individual blame the adviser for not giving him the proper counsel or we'll have to establish the duty of the counselor as a mere gesture of generosity or, at the most, as an obligation of diligence? It can be noticed that, even the libertarian ideology admits the importance of appropriate counseling of individuals, to ensure achieving the goal of their full freedom.

On the other hand, if society encourages the infantilization of man, it is to blame for the consequences of its policy.²⁴ This opinion asseverates that the authority can easily take advantages from the individual's gullible nature, all the more naive as the state himself finds appropriate to cultivate this state of perpetual childhood of the mind.

Furthermore, when the authorities offer help recklessly and without balance, accustoming individuals to always count on others, and never on themselves, the authorities contribute to the abandonment of morality and the accentuation of neglect.²⁵

The state must make people „no longer need its help”²⁶, must cultivate the independent spirit in his citizens. Also, the state must not discriminate his citizens, must not dictate a certain hierarchy of values

¹⁷ Russell Blackford, *The Tyranny of Opinion. Conformity and the Future of Liberalism*, (London and New York: Bloomsbury Academic, 2019), 28. The author offers here, as an example, the need, in certain cases, to regulate the validity and content of medical prescriptions.

¹⁸ Erich Fromm, *Fuga de libertate*, [Escape from Freedom], translated by Cristina Jinga, (București: Ed. Trei, 2016), 16.

¹⁹ Russell Blackford, *op. cit.*, 27.

²⁰ Christian Coons and Michael Weber, *op. cit.*, 1.

²¹ Ludwig von Mises, *Planificarea libertății și alte eseuri*, [Planning for Freedom: And Other Essays and Addresses], translated by Gabriel Mursa, (Iași: Ed. Universității „Alexandru Ioan Cuza” Iași, 2012), 62.

²² Adam Smith, *Avuția națiunilor*, [The Wealth of Nations], translated by Monica Mitarcă, (București: Publica, 2011), 340.

²³ John Stuart Mill, *op. cit.*, 114.

²⁴ Idem, 122.

²⁵ Benjamin Constant, *Despre libertate la antici și la moderni*, [The Liberty of Ancients Compared with that of Moderns], translated by Corina Dimitriu, (Iași: Ed. Institutul European, 1996), 211.

²⁶ Alexis de Tocqueville, *Despre democrație în America*, [Democracy in America], translated by Magdalena Boiangiu, Beatrice Staicu, Claudia Dumitriu, (București: Humanitas, 2017), 602.

and impose them upon individuals, thus favoring some of them.²⁷

A controversial libertarian idea is that when individual harm is only probable, and not certain, he is to decide whether or not to face the danger of such harm, so he must only be warned, but not prevented from exposing himself.²⁸

Therefore, the common denominator of these two ideologies, paternalism and libertarianism, is the individual's need for guidance, even though the solutions to this need are utterly different.

2.2.2. The concept of "libertarian paternalism"

As far as we can admit that paternalism can exist without restricting the individual freedom of choice, the concept of libertarian paternalism could be accepted as a part of the paternalistic ideology.

Libertarian paternalism was created as a happy medium between two opposite ideologies: paternalism and libertarianism.

The proponents of libertarian paternalism ideology set forth their theories from the ideas that the influence on people's choices cannot be avoided²⁹ and that paternalism does not always involve coercion³⁰.

As for the individual, this ideology highlights that „in many domains, people lack clear, stable, or well-ordered preferences”³¹ and consumers should not feel abashed by their need of help. Thus, „[w]e're more likely to need help choosing the right mortgage than choosing the right bread.”³²

Man was said to be „a creature of strong and irrational drives, credulous, untutored, ritualistic.”³³ In this angle, paternalism was seen as a logical response to man's natural incapacity to act with a proper degree of caution; „Paternalism is not morally good or wrong, it is a logical consequence of individuals' bounded rationality.”³⁴

It has been asserted that „paternalism” exists when the choice is influenced in such a way that it helps those concerned „to live better, according to their own assessments”.³⁵ The authors recommend libertarian paternalism, which they describe as „relative, diffuse, malleable, and non-intrusive”³⁶, the choice residing

with those influenced by the paternalistic policy and being not restricted by the person in power.

Libertarian paternalism does not constrain individuals to act in a certain way, and only guides them to take the best decisions. Individuals do not constrainedly comply with the rules dictated by some authority, planner or person in power, but they are invited to consider options that could grant them a frame of reference in acting more rationally.

The suggestion made by the planner should not be an abasement for the consumer, the latter being perfectly free not to follow the planner's nudge.

In paternalistic libertarian view, the planner is always benevolent and always unselfish. It has been observed that being benevolent is just the choice of the planners, paternalism being just one option among others³⁷ and, consequently, we should distinguish between the choice that is made by a person as a planner and the choice that is made by a person as a person.³⁸ The authority does not have to be presented as someone who gives of its selfless care to help the individual, because some interest must always be the cause of any act.

The libertarian paternalism does indeed constitute the perfect way to understand how paternalism penetrates consumer law and how probably it becomes to mistake the genuine for the false paternalism.

Comparing the nudgee with a novice chess player playing against someone more experienced and losing because of his inferior choices, without the helpful hints³⁹, it could be relatively uninspired if we help ourselves regarding sellers and suppliers as consumers' opponents, even enemies. Chess players are opponents, rivals in a fair game, but we could not state the same about the relationship between a seller or a supplier and a consumer, where the latter should aim to satisfy consumer's expectations, not to defeat him. Consumer is not playing games with every seller or supplier he meets, he buys things not to compete with anybody, but only because he needs products and services, for which he pays, therefore he is entitled to be treated with respect.

A mandatory cooling-off period for door-to-door sales was offered as an example of libertarian

²⁷ Friedrich A. Hayek, *op. cit.*, 88.

²⁸ John Stuart Mill, *op. cit.*, 143.

²⁹ Richard H. Thaler, Cass R. Sunstein, *op. cit.*, 26.

³⁰ *Idem*, 28.

³¹ Cass R. Sunstein, Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, The University of Chicago Law Review, Volume 70, Fall 2003, Number 4, 1161.

³² Richard H. Thaler, Cass R. Sunstein, *Nudge: Cartea ghionturilor pentru decizii mai bune legate de sănătate, bogăție și fericire*, [Nudge: Improving Decisions About Health, Wealth, and Happiness], translated by Smaranda Nistor, (București, Publica, 2016), (my English translation), 123-124.

³³ Robert L. Heilbroner, *The Worldly Philosophers. The Lives, Times, and Ideas of the Great Economic Thinkers*, 7th edition rev., (Penguin Books, 2000), 246. The author refers to the ideas of Thorstein Veblen, who emphasized the predatory character of businessmen towards the naivety of the common men.

³⁴ Christophe Salvat, *op. cit.*, 4.

³⁵ Richard H. Thaler, Cass R. Sunstein, *op. cit.*, (my English translation), 19.

³⁶ *Ibidem*.

³⁷ Christophe Salvat, *op. cit.*, 8.

³⁸ *Idem*, 9.

³⁹ Cass R. Sunstein, Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, The University of Chicago Law Review, Volume 70, Fall 2003, Number 4, 1163.

paternalism.⁴⁰ Actually, this time frame, was not granted to the consumer to think if he really needs the product he just bought, but personally and peacefully to check the quality and the features of the product. A paternalistic measure would have meant the possibility for the consumer to simply change his mind, completely unrelatedly to the assessment of the product.

If libertarian paternalism is, indeed a form of paternalism, then it should keep intact its basic principle of protecting individual from himself.

For libertarian paternalism to fulfill its guiding function, the information offered to the individuals must be abundant and relevant and the options must be numerous. Thus, when information is limited, „countless options increase the costs of decisions without increasing the likelihood of accuracy”, and „when choosers are highly informed, the availability of numerous options decreases the likelihood of error and does not greatly increase decision costs”.⁴¹

Libertarian paternalism was said to have „made the mistake of making rational people pay for the irrational” by guiding their choice.⁴²

It was also shown that the most adapted to the real needs of the people is „the doctrine of the well-understood interest”.⁴³ Exactly this kind of understanding is the essence of ideologies such as paternalism, libertarianism and libertarian paternalism.

2.2.3. The libertarian paternalistic nudges

The instruments recommended and used by the libertarian paternalist ideology are called nudges⁴⁴, namely suggestions issued by an authority, acting as a planner, meant to guide the choice of somebody that can be subjected to this influence, towards a self-advantageous and always free decision. Libertarian paternalistic nudges are instruments meant to protect the individual from himself, by guiding his choice, with or without indicating to the latter what exactly to choose, in matters in which he can always decide what is best for him.

Although the authors of libertarian paternalism are displaying a wide range of examples as nudges, other opinion tends to narrow the sphere of libertarian nudges, so only choice-independent nudges can be truly called libertarian nudges, when the person in power, the choice builder, increases the rationality of the person’s decision, providing useful information, „while

remaining agnostic about what choice should be made”.⁴⁵

At the same time, the choice-dependent nudges, meaning nudges that seek to steer decision in particular ways, should allow an easy escape of the choice favoured by the authority or the person in power.⁴⁶ A choice-dependent nudge is when the nudger, by taking advantages on the irrational tendencies, drives the nudgee „toward a particular outcome”.⁴⁷

According to this opinion, choice-independent nudges do not favour a particular choice and „are agnostic” as to the „right” choice to make. Their goal could be, for example, to provide consumers with nutritional informations, favouring individual rational choice.⁴⁸ A choice-independent nudge is designed to reduce costs, to provide more comprehensible informations or that encourage care when choosing.⁴⁹ In this opinion three types of nudges are acceptable, being choice-independent nudges: „educative, simplifying, and deliberative”.⁵⁰ Only deliberative nudges could raise „epistemic paternalism concern”.⁵¹ This opinion is questioning the libertarian character of nudges created to indicate the way to follow to the nudgee. A libertarian nudge cannot, according to this opinion, hide any suggestion as to how the individual should act.

It is perfectly true that selfless proper information is the most elegant and correct way to guide somebody towards rational behaviour, without suggesting a certain choice, but libertarian paternalism claims the very legitimacy of the planner’s right to influence the nudgee, starting from the premise that this kind of influence cannot be avoided. It is about the right of the nudger to indicate the best choice for the nudgee, so as the latter to come to enjoy a better happier existence.

In fact, all ideologies are fighting a perpetual battle to influence and to guide, and we should allow for it when objectively analyzing their purposes. In any ideology, informing, no matter how important and essential it would be for the individual, cannot be other than a tool to facilitate influence, an excuse meant to legitimate a subtle orientation of some people towards something.

Not only libertarian character should be questioned in certain examples, but mostly the paternalistic character of some nudges.

⁴⁰ Idem, 1187-1188.

⁴¹ Idem, 1197-1198.

⁴² Muriel Fabre-Magnan, *L’institution de la liberté*, [Institution of Liberty], first edition, (Paris: PUF – Presses Universitaires de France, 2018), (my English translation), 207.

⁴³ Alexis de Tocqueville, *op. cit.*, (my English translation), 614.

⁴⁴ After Richard H. Thaler and Cass R. Sunstein’s book called *Nudge: Cartea ghionturilor pentru decizii mai bune legate de sănătate, bogăție și fericire*, [Nudge: Improving Decisions About Health, Wealth, and Happiness], translated by Smaranda Nistor, (București, Publica, 2016).

⁴⁵ Gregory Mitchell, *Libertarian Nudges*, Missouri Law Review, Vol. 82, Iss. 3, 2017, Art. 9, 697.

⁴⁶ Idem, 698.

⁴⁷ Idem, 701.

⁴⁸ Ibidem.

⁴⁹ Idem, 702.

⁵⁰ Ibidem.

⁵¹ Idem, 707.

The examples of nudges founded in the reference work on this topic, must be carefully analyzed and classified according to the alleged danger that the individual must avoid.

Nudges destined to protect individual from lack of self-control:

An example of alimentary lack of self-control regards the design of the school cafeteria. Promoting the consumption of foods considered healthier and displaying them in places where they can be more easily observed, is made while placing foods considered less healthy in places that are more difficult to access and more difficult to observe.⁵² At the same time, banning food with additives is presented not to be a nudge.⁵³ Another observation in this regard is that people buy more muffins than yogurt.⁵⁴ Therefore, people's otherwise well-known self-control issues related to what they are usually craving for, generates an impressive emotional response from the nudgers who aim to educate them towards a healthy lifestyle. For this purpose, another nudge is given by the municipality that encourages people to exercise.⁵⁵

The cafeteria school example is not relevant with respect to the paternalistic nature analysis, because the nudges are children and paternalistic ideology regards adults treated as incapable.

Nevertheless, it is undisputable that the planner can organise the food presentation as he sees fit, but, in such matters, as eating and selecting food, it is nor wise or mature to waste money and, under any circumstances, public money. A very useful nudge would be the mere advice not to exaggerate with food, but this nudge is avoided, and is never not to consume. The very idea, that it is too hard for a person not to be greedy or to choose food with care, is childish, and nudgers should show maturity.

Another category of lack of self control nudges is about people inclination to spend too much on useless things. For example, an unintentional employer nudge by half month salary payment instead of monthly payment, which helps with better savings.⁵⁶ It is, indeed an example of genuine nudge, that can be either intentional or unintentional, as a consequence and a compensation for small wages policy.

A bitter example is the bank account deposited all year round which one cannot withdraw, so to have money for holiday gifts.⁵⁷ This sad example shows how poor consumers are manipulated to refrain from consuming even essential goods as to meet their purpose in the high holiday sales, under the pretext of mandatory compliance with a deliberately fabricated

habit of offering holiday gifts, as the only way to feel honorable and satisfied. Such a bank account is more an expression of the sellers and suppliers needs to stimulate trade, than to protect consumers from themselves.

Nudges meant to stimulate common sense:

The urinal engraved with the image of a fly⁵⁸, is, in fact, just an innovation based on the conjecture that this object is supposed to better serve the man. Innovation is not necessarily paternalism. It is not about a choice of begriming a public place, but an approach to the lack of common sense, which should not be an option. It can also be interpreted as an offensive allusion, being more than disrespectful to an animal species.

The campaign discouraging road littering⁵⁹ using commercials with personalities, can only serve trade purposes and can be a "good" occasion to waste money. Apart from not being a genuine libertarian paternalistic nudge, because a person is never allowed to litter, never has this choice, so there is no point to be convinced not to do it, such a campaign is not meant to protect the individual from himself. By littering, he hurts the environment and the others, and the only thing it could nudge him, would be civic education and an appropriate penalty. A real nudge could never recommend wasting money for the mere hope to convince no common sense individuals to turn elegant and clean.

The example of the teenagers having a child who receive a dollar for each day they are not pregnant⁶⁰ cannot be a paternalistic nudge because teenagers are minors, not adults to be subjected to paternalism in the real sense of the term. Moreover, teenagers get pregnant, usually not because they choose so, but because a lack in education, or morality, or the inherited way of life. They can be, also, confused by authority's double speech suggesting that something forbidden at sixteen becomes absolutely commendable and even rewardable at twenty. It is not very inspired, moral or equitable to pay someone to do act normal, just because in the past she acted otherwise.

In this category, informing that the degree of compliance in filling out tax returns forms is high, that is suppose to make individuals less inclined to cheat⁶¹ is a good thing, only that individuals were never entitled to cheat, they were all the time constrained to abide by the law, so there was no place for a nudge.

A nudge for not wasting energy is intended by smiling or frowning emoticons attached to power

⁵² Richard H. Thaler, Cass R. Sunstein, *op. cit.*, 13-17.

⁵³ *Idem*, 20.

⁵⁴ *Idem*, 85.

⁵⁵ *Idem*, 101.

⁵⁶ *Idem*, 27.

⁵⁷ *Idem*, 83.

⁵⁸ *Idem*, 17.

⁵⁹ *Idem*, 101-102.

⁶⁰ *Idem*, 337.

⁶¹ *Idem*, 112.

consumption information.⁶² This is a bit infantile but welcome and perhaps amusing method to convince. The little globe that flashes when the person consumes too much electric energy⁶³ is an example of how, in many cases, such awareness campaigns end up to be just another incentives to consume more, instead of consuming less, especially if we consider the energy and resources wasted on such totally useless objects.

In the case of stimulations to less polluting⁶⁴, the consumer who is allowed to harm the environment would be asked to refrain as much as possible from doing it and is rewarded for not doing the harm he is allowed to do. It is a case of genuine paternalistic nudge.

The reminder nudges form another category applicable, for example, to those who have forgotten to renew their private health insurance. In these cases the employee's presumed choice is not to cancel the employer-subsidized insurance, so it must be kept as it was.⁶⁵

Also, when setting up a "flexible expense account" with a salary retention, it will be assumed that the default option is to no longer withhold money.⁶⁶ These are situations in which it is considered that the employee does not have to end up spending money simply because he neglected some details.

The alarm clock that hides to force the owner to wake up⁶⁷ could be considered to be more like an amusing innovation.

Light admonitory nudges to giving up vices:

An example is the advertising message that most students do not exceed four alcoholic drinks a week, supposed to discourage alcohol abuse in educational institutions.⁶⁸ In other words, the authors of the message grant that four alcoholic drinks a week is perfectly alright, so you shouldn't miss four drinks a week.

Including a screen with pressure sensor in the urinal to connect with driving under the influence⁶⁹ is another urinal example, displaying an innovation. This is not a paternalistic nudge, because nobody can choose

to drive while intoxicated, this being rightly forbidden by the law.

Many examples indicates too much indulgence towards vices. In this regard, some organizations helping people quit smoking advise smokers to put unspent cash on an account and to withdraw it when scheduled.⁷⁰ The same goes with refraining from gambling⁷¹.

Bitter nail polish to stop people biting their nails⁷² is another case of innovation with naive innocent purposes that could hardly be put as a paternalistic nudge.

Persuasion nudges:

Some relevant examples are automatic submissions to pension plans⁷³, or simplifying of the enrollment process⁷⁴. Also, informing that the vote participating is high, encouraged people to come to vote.⁷⁵

It was also considered as a nudge the technique of asking questions about people's intention to buy an object, to floss or to eat something, stimulating them to do so more often.⁷⁶

Those who were also given the place of vaccination and were asked to make a plan for the date of vaccination were more determined to go with it.⁷⁷

Other examples are asking people if they would like to donate to charities, and then commit to increasing their donations each year⁷⁸; debit card for donations and tax deductions, or to keep track of donations⁷⁹ could be a nudge, but then again is more like a mere innovation.

The simple innovations destined to ensure smooth operation of an object are not nudges. Relevant examples of such innovations presented as nudges are: the lock button of dangerous machine tools⁸⁰, the warning sounds for seat belt, petrol, oil change etc.⁸¹, the obligation to remove the card from the ATM first, so as not to forget it⁸², signs of looking to the right or left in the U.K.⁸³, feedback from digital cameras that reproduce the image or the sound of classic cameras, mobile phones that sound like landlines or the battery

⁶² Idem, 116.

⁶³ Idem, 300.

⁶⁴ Idem, 286.

⁶⁵ Idem, 30.

⁶⁶ Idem, 30-31.

⁶⁷ Idem, 78.

⁶⁸ Idem, 115.

⁶⁹ Idem, 140.

⁷⁰ Idem, 334.

⁷¹ Idem, 335.

⁷² Idem, 338.

⁷³ Idem, 177.

⁷⁴ Idem, 178.

⁷⁵ Idem, 112.

⁷⁶ Idem, 118.

⁷⁷ Idem, 119.

⁷⁸ Idem, 329.

⁷⁹ Idem, 330.

⁸⁰ Idem, 141.

⁸¹ Idem, 145-146.

⁸² Idem, 146-147.

⁸³ Idem, 149.

discharge warning⁸⁴, the paint that changes colour after it has dried so that those who use it do not leave uncovered parts⁸⁵, the red light reminding to change the air conditioning filter⁸⁶, the display of food that the user of a fitness device deserves, as an incentive to exercise more⁸⁷.

The instructions for use and prevention of mistakes when using a product is not paternalism, as it doesn't involve choice.

Privatization of marriage⁸⁸ cannot be a nudge, because marriage should not be seen as a mercantile institution, and should be based solely on love and respect.

Apart from the basic, coercive paternalism, that always compels, and does not recommend, the libertarian paternalism is suggesting the answer in the sense that the consumer seems to want to choose exactly what the one who suggests it wants, creating the impression that the consumer wants exactly that thing, but does not know how to express it.

3. Considerations on consumer law

3.1. Pillars of consumer law

Critics of consumer law view this branch of law as a form of paternalism⁸⁹. That is why it's of a great importance to show a clear distinction between the protection provided by paternalism and the protection conferred by consumer law.

The main function of law is to protect the individual from the harmful conduct of others. The aim of paternalism is to protect the individual from himself.

Consumer protection legislation covers four main themes: "prompt, fair and complete information to consumers", "the right balance of obligations [...] and the protection of consumers' economic interests against the abuse of economic power of sellers and suppliers, the prevention and rejection of unfair commercial practices and the liability of sellers and suppliers for damages caused to consumers by the products or services sold"⁹⁰.

The consumer protection against the abuse of sellers and suppliers' economic power could never be considered as a form of paternalism, because it shields the consumer against the disproportionately high power of the seller and supplier, who may impose abusive clauses on the consumer. Therefore, the protection is not meant to protect the consumer from something he might be tempted to do, but only from an external harm.

The unfair commercial practices are also forms of external harm, and it is perfectly normal for the law to protect any part in a contract from an incorrect practice of the other. The protection against the unfair commercial practices is not a form of paternalism.

The liability of sellers and suppliers for damages caused to consumers by their products or services is perfectly justified as it is, designed to compensate the harm caused by improper products, and it has nothing to do with paternalistic protection.

As for the consumer's right to information, it must be pointed out that a paternalistic measure could consist in providing information, but always independently by the seller or supplier's obligation to inform the consumer. The paternalistic information acts as a nudge meant to channel the individual's decision, at the same time protecting him against possible mistakes he might make due to lack of knowledge of some details, relevant for a good choice. The paternalistic information is a totally different thing from the professional's duty to inform the consumer.

Therefore, the fundamental pillars of consumer law are based on different reasons and principles than paternalistic ideology. The law is meant to protect from any external harm that could affect one party in a contract as a result of the other party's conduct. The protection granted by the law is not a result of the gullible or weak nature of the consumer, but is the consequence of the principles of fairness and equity.

3.2. About consumers

Consumers are not a class. They could never be a class, because everyone is a consumer.

We hear very often that the consumer is considered the weak part in a contract with a professional. In fact, whether a certain consumer is weak or not is totally unimportant, because a person, acting as a consumer, can be sometimes weak and, in other occasions, quite strong, this aspect being irrelevant from the point of view of consumer law. Consumer law is destined to protect the status of being a consumer in a relation with a seller or supplier, not a person or a class. It is the condition of consumer that is protected by consumer law, not classes or persons. When we say "consumer" in this context, we mean the person in the position of consumer, not a weak, ignorant or gullible person or class. What is always vulnerable is only everyone's status of consumer, the ever changing position exposing everyone in one way or another in relation to a professional. To be a consumer is to be in a vulnerable status.

⁸⁴ Idem, 150.

⁸⁵ Idem, 151.

⁸⁶ Idem, 337.

⁸⁷ Idem, 163.

⁸⁸ Idem, 307.

⁸⁹ Norbert Reich, *Principii generale ale dreptului civil al Uniunii Europene*, [General Principles of EU Civil Law], translated by Constantin Mihai Banu, (București: Ed. Universitară, 2014), 76.

⁹⁰ Gheorghe Piperea, *Protecția consumatorilor în contractele comerciale. Easy money. Despre irațional și oligo-rațional în contractele comerciale*, [Consumer Protection in Commercial Contracts. Easy money. About Irrational and Oligo-Rational in Commercial Contracts], (București: C.H. Beck, 2018), (my English translation), 5.

It would be utterly wrong to regard consumers as the always incapable or helpless class, always crying for help and always favored. Such insinuations belong to those who tend to discredit the protection conferred by consumer law and who would prefer sellers and suppliers to be exempt from any liability for the activity they carry out. So, all individuals, as producers, „are responsible to the consumer”, as a feature of the free market.⁹¹

4. The crossing area between consumer law and paternalism

4.1. The importance of a clear distinction between the protection specific to consumer law and the protection specific to paternalism

Consumer law is, in some cases, penetrated by paternalism, but in reality these cases are much smaller in number and scope than one might think.

Unfortunately, both those who support consumer rights and those who denigrate consumer protection tend to exaggerate, by suggesting that clarification, improvement, innovation etc., would be paternalistic. Even the normal protection against deception and abuse is presented as paternalistic by the opponents of consumer law, and of equity, in general. At the same time, ardent supporters of paternalism tend to say that no matter how much, and to what extent, paternalism is welcome, so that the individual can be better protected, even from himself.

Paternalism is basically a good theory, if used correctly and balanced, exactly where is needed.

The danger of over-extending the use of paternalistic policies is the infantilization of those protected, by preventing them to develop the capacity to think freely and take decisions for themselves.

The danger of misperception of some measures as paternalistic, when in fact they are something else, is the trivialization, the demonetization of the idea of paternalism, facilitating the activity of denigrating the very idea of protection, even protection of a completely different nature, such as that conferred by consumer law.

Consumer protection stands out as special from other branches of law, but this seemingly special character is justified by its concern with the universal status of consumer, which is the ever weaker side of every one of us.

The Romanian Supreme Court of Justice and Cassation had also rightly remarked in previous

decisions that it was wrong to consider as "clear and intelligible a contractual clause for the understanding of which no specialized knowledge is required, in the field of consumer protection things being different."⁹²

The interplay area between consumer law and paternalism must be very well known and understood, on the one hand, so as not to infringe on consumer protection, and, on the other hand, for the cases of paternalism to be genuine and useful to the consumer.

Both consumer law and paternalism have protection in common, but they should not be confused. They must be differentiated so that the normal protection the law must offer does not appear as a favor, an exaggeration springing from the generosity of an authority, and, on the other hand, so that the reason for the paternalistic act should not be diluted.

The protection conferred by law is continuous and applicable to all, while paternalism is an exception to the rule of freedom of choice and applicable to specific situations.

It has been said that advertising would be useful to consumers for making "better and smarter choices".⁹³ It is not paternalism the legal obligation incumbent on the seller and supplier to state within an advertising material regarding the provision of loans that a loan involves the obligation to repay and that, before contracting for a loan, the consumer must check his ability to repay.

We should also not mistake banning consumer deception for paternalism.

It has been remarked that people are often unable to assess the consequences of their own decisions.⁹⁴

In fact, transparency in lending⁹⁵ is not paternalism at all, but a mere elementary measure to ensure contractual balance and equity.

The idea that there should be fewer types of credit for consumers to make better choices⁹⁶ is inconsistent with the freedom of banks to offer any type of loan as long as they meet the appropriate requirements. The consumer does not choose better or worse depending on the number of types of loans offered, but on how correctly these offers are presented to him, how fairly the bank acts in his regard.

The fact that credit card companies are required to disclose to their customers the total of commissions and fees⁹⁷ is nothing but a fair and common sense requirement, to ensure a good evidence and permanent control of these costs.

⁹¹ Ludwig von Mises, *op. cit.*, (my English translation), 28.

⁹² Înalta Curte de Casație și Justiție, Secția a II-a civilă, [High Court of Casation and Justice, Second Civil Section], decision no. 3864/4 December 2014, [https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=125389](https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=125389;); (my translation).

⁹³ Richard H. Thaler, Cass R. Sunstein, *op. cit.*, (my English translation), 236.

⁹⁴ Yuval Noah Harari, *Sapiens: Scurtă istorie a omenirii*, [Sapiens: A Brief History of Humankind], translated by Adrian Șerban, (Iași: Polirom, 2017), 82.

⁹⁵ Richard H. Thaler, Cass R. Sunstein, *op. cit.*, 208.

⁹⁶ Idem, 215.

⁹⁷ Idem, 220.

4.2. Paternalism concerning the consumer: genuine or false, good or bad. The criteria for good consumer paternalism

The mechanism for assessing the opportunity and justification of a paternalistic measure applied to consumers must allow for the specific circumstances involved by the specifics of consumer law relationships. Thus, the status of consumer in itself places the consumer in a vulnerable position, as he is compelled to consume, and consequently he is always dependent upon the seller's honesty. No matter how informed a particular consumer may be in a particular regard, he will not be able to have equal knowledge of all aspects of his consumption, and even if, absurdly, he was, he would never have the time and energy to analyze each product he buys with the greatest accuracy.

It must be kept in mind that, if the state of vulnerability of the consumer is created by the very act of the seller or supplier himself, a protective measure of the former cannot be considered paternalistic and it will only be a legal protection against an external harm.

Paternalism protects only against the natural vulnerability which can make the consumer to act against his own interests, because of his own fallibility, and not because he was deceived by someone else.

Paternalism should not be confused with equity, the latter being the ultimate reason for any legal system. Equity replaces the arbitrariness of force, protecting the weak from the abuses of the strong, and the idea of justice.

Genuine paternalism either withdraws freedom of choice or guides the choice, with or without indicating the specific path for the consumer.

One may qualify a paternalistic measure as good, when it meets two cumulative criteria: to be designed to serve the interests of the consumer and to be really useful to the consumer.

The first criterion points out that this measure should only have been aimed to ensuring greater consumer protection and not other reasons, such as favoring certain sellers or suppliers or certain products.

The argument of the need to protect consumers was used for states to block access to certain foreign products. Thus, in the cause *C-178/84 Commission v. Germany (German beer)*⁹⁸, the German government motivated the refusal of access to the German market of beers containing ingredients not permitted by German law, with the intention to protect German consumers from being deceived. It was considered that the measure was disproportionate, as consumers could be protected by the information on the product label.⁹⁹

The second criterion in assessing the legitimacy of the paternalistic act is the consumer's benefit.

The consumer must have more to gain than if he had enjoyed full freedom of choice or, respectively, if he had ignored the planner's suggestions.

As a limitation of freedom for both the consumer and the seller or supplier, paternalistic measures must be proportionate to the legitimate purpose, to the interest pursued. Also, the paternalistic measure should last only as long as it is necessary.

An example of justified paternalism in consumer law is capping credit to avoid over-indebtedness. The control of the degree of indebtedness for the individual¹⁰⁰ it was also appreciated as an example of justified paternalism.

5. Conclusions

Notwithstanding the importance of comprehend the idea of protection as clearly as possible, confusion, which could sometimes be interpreted as intentional, continues to exist.

Paternalism, applied in cases where it is really necessary, is definitely a good thing.

Like any restriction of liberty, it must be justified, proportionate and limited to cases where it is necessary.

There are clear situations in which only through paternalism can adequate protection be provided to the consumer, so that it does not need to be extended to situations in which protection can be achieved otherwise, nor to claim that it exists when the protection comes from elsewhere. That is why we must always keep in mind the basic feature of paternalism, which is the protection of the individual from himself.

Regardless of the form of paternalism, coercive or exclusively "influencing", the authority is the one that always knows better and is entitled either to impose a certain decision, or to exercise influence on individuals, with or without indicating a precise choice to follow.

Paternalism starts from the presumed lack of discernment in decision-making, in the case of people with full legal capacity. It is important to be retained that the individual's inability to choose should not derive from the very misinformation of the authority, and can only be a result of the natural human limits.

A policy or an act can be qualified as genuinely paternalistic only if the protection is channeled primarily to the individual's best interest, and secondly to the others' interests.

Even the libertarian ideology admits the importance of appropriate counseling of individuals, to ensure achieving the goal of their freedom. Libertarian paternalism ideology starts from the ideas that the influence of people's choices cannot be avoided and that paternalism does not always involve coercion. Libertarian paternalism does not constrain individuals

⁹⁸ Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law. Cases and Materials*, second edition, (Cambridge: Cambridge University Press, 2010), 767. In this regard, art. 114 TFEU provides that consumer protection must benefit from a high level of protection.

⁹⁹ *Idem*, 768.

¹⁰⁰ Russell Blackford, *op. cit.*, 25.

to act in a certain way, dictated by planners, but only guides them to take the best decisions.

The libertarian paternalism is the ideal way to understand how paternalism penetrates consumer law and how probably it becomes to confound genuine and false paternalism.

Libertarian paternalistic nudges, which are instruments meant to protect the individual from himself, by guiding his choice, with or without indicating what exactly to choose, can be grouped into several categories, such as: nudges destined to protect the individual from lack of self-control, nudges meant to stimulate common sense, reminder nudges, nudges to giving up vices, persuasion nudges.

It is of a great importance to offer a clear distinction between the protection provided by paternalism in itself and the protection conferred by the consumer law. Without this clear distinction, it would be a great mistake and extremely dangerous to conclude that the protection afforded by law is a form of paternalism.

The main function of law, the enforcement of equity, protects the individual from the injustices he might suffer from others.

Paternalism, protecting the individual from himself, even if it penetrates the law, has a completely different nature and a different function.

Consumers are not a class, because every one of us is a consumer. It is the status of consumer that is protected by consumer law, not classes or persons. "Consumer", in this context, is the person in the position of consumer, not a weak, ignorant or gullible person or class.

Consumer law is, in some cases, penetrated by paternalism, but these cases are much fewer than usually presented.

In order to preserve both the beneficial effect that properly applied paternalism must have and the basic rationale of the law, namely the protection of the individual from the injustice caused by others, the interplay area between consumer law and paternalism must be rightly understood.

A paternalistic measure is good when it serves the interests of the consumer and is really useful to him.

Any misqualification as paternalistic of a consumer measure can lead to the dilution of the beneficial effect that this ideology must have, but also to the erosion in understanding the purpose of consumer law. Consequently, in order to prevent this misqualification, an objective and balanced analysis of each consumer protection measure is needed, so that the consumer status may enjoy due respect.

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