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Consumer rights – new tendencies Considerations about directive 2011/83/UE

Introduction

On the 25th October 2011, the European Parliament and the Council of the European Union have adopted the directive 2011/83/UE on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.¹ The Directive entered into force on the twentieth day following its publication. Member States have to implement the Directive into their national law by 13 December 2013. After being proposed by the European Commission in 2008, the legislation received 615 votes for, 16 against and 21 abstentions in election on 23th June 2011.²

Simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules are main aims of new regulation. EU want to rouse potential of the cross-border distance selling, which is not fully exploited.

The Directive strengthens the consumers' position on the market at the expense of entrepreneurs, what has already provoked many questions and doubts.

Historical development of consumer rights

¹ OJ L 304, 25.10.2011 ,p. 65.

² www.europarl.europa.eu/news/en/pressroom/content/20110622IPR22326/html/Consumer-Rights-Parliament-approves-new-EU-wide-rules-for-on-line-shopping.

The Treaty of Rome referred to the rights of the consumer only in the context of policies and it lacked provisions that would directly affect them. The community consumer protection policy started gradually developing in two directions - on the one hand it was shaped by the Court of Justice of the European Union, while on the other, appropriate legislative steps were taken.

In 1962, at the initiative of president Kennedy, consumer rights (the right to safety, the right to be informed, the right to choose and the right to be heard)³ were passed and became the basis for the consumer policy of the EEC Member States. The outlined rights were also the basis for the passage of the 1985 UN resolution enumerating the guidelines concerning consumer protection.

In the mid-1970s, European Institutions recognized the need for the harmonization and standardization of the consumer protection systems across the Union to enhance the exchange of goods and trade in services. The introduction of the harmonization procedures began in the fields connected with consumer protection and the exchange of goods. Particular interest was put in the issues like the legality of commercial transactions and product safety. In 1975 the Council adopted the first program of Consumer Protection and Information Policy, which outlined the 5 basic rights of consumers - the rights to protect the health and safety, protect the economic interest, information, education, and representation.⁴ The programme also announced the implementation of the Consumer Protection and the Information policies. The listed objectives have been developed in the second consumer protection programme of 1981,⁵ which put emphasis on the implementation of the planned informative and educational actions. The

³ www.konsument.org.pl.

⁴ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92, 25.04.1975, p.1.

⁵ OJ C 133, 3.06.1981, p.1.

Commission Communication on the new impulse for the consumer protection policy from July 4, 1985,⁶ characterized by its multi-directionality is thought to be the third consumer protection programme.

Another important act was the Council Resolution of 9 November 1989 on the future priorities for the improvement of the consumer protection policy.⁷ In response, the Commission developed a three-year plan for consumer policy in the EEC (1990-1992).⁸ From that moment the Commission started adopting three-years action plans. The Treaty of Maastricht of February 2, 1992 is considered to be the beginning of the autonomous consumer protection policy.⁹ In accordance with the amendments, Article 3 TEC named an additional area of Community action - "contributing to the strengthening of the consumer protection." Article 129 a, forming a separate title and specifying the Community's tasks and competences on the consumer rights protection, was also added. A special role, however, is assigned to the Treaty of Amsterdam¹⁰ and its annexed protocol. Article 153 TEC introduced the obligation to take account of the the consumer protection requirements in the implementation of other Community policies by EU institutions. Moreover, another aim of the common consumer policy was formed - the right to information and education and to organise themselves in order to safeguard their interests. In addition, the basic consumer rights discussed in 1975 were introduced to the primary law. Plans for consumer policy have been successively created and put into practice and following the plan for years 1990-1992, other were formulated for years: 1993-1995,¹¹ 1996-1998,¹² 1999-2001,¹³

⁶ COM (85) 314 final.

⁷ Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy, OJ C 294, 22.11.1989, p. 1-3.

⁸ COM (90) 98 final.

⁹ OJ C 224, 31.08.1992, p.61

¹⁰ C 340, 10.11.1997, p.1.

¹¹ COM (93) 378 final.

¹² COM (95) 519 final.

¹³ COM (98) 696 final.

2002-2006.¹⁴ Currently in effect is the consumer policy strategy for the years 2007-2013.¹⁵

Very diverse actions have been taken in the implementation of the consumer policy (e.g. creation of a database of contractual clauses deemed illicit or the establishment of the European Consumer Centers). In December 2005, a permanent working group of experts appointed by the Commission, developed a comparative analysis of directives applied in Member States. In 2007 the Commission issued the "Green Paper on the Review of the Consumer Acquis."¹⁶

Currently, the main instruments of the consumer protection policy in the EU are the commonly named consumer directives, implemented into the national legal systems. They include:

- Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 concerning misleading and comparative advertising,¹⁷
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'),¹⁸
- Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications, networks and services,¹⁹

¹⁴ COM (2002) 208 final.

¹⁵ COM (2005) 115.

¹⁶ COM (2006) 744.

¹⁷ OJ L 376, 27.12.2006, p.21.

¹⁸ OJ L 149, 11.06.2005, p.22.

¹⁹ OJ L 249, 17.09.2002, p. 21.

- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,²⁰
- Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety,²¹
- Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions concerning liability for defective products,²²
- Directive 98/6/EC of the European Parliament and the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.²³

Significant changes introduced European Parliament and the Council 2011/83/UE. The Directive introduces a dichotomous classification of distance contracts or off-premises contracts, and any other contracts.

Directive 2011/83/UE – adopted changes

The new Directive is revolutionary. The most important change is moving away from the minimum harmonization approach from the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspect, which form tendencies for consumer law in future. Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions that ensure a different level of consumer protection, unless otherwise provided for in this Directive (Article 4).

²⁰ OJ L 95, 23.11.1995, p. 29.

²¹ OJ L 11, 15.1.2002, 2002, p.4.

²² OJ L 141, 04.06.1999, p.20.

²³ OJ L 80, 18.3.1998, p.27.

The idea of minimal harmonization has not worked. Legal certainty for consumers has been at a low level because of the diversity of solutions accepted in the Member States. A good example is the withdrawal from a distance contract (the Directive allows to stipulate the term as 7 to 14 days). Eleven of the EU Member States already employed the 14-day period for withdrawal, but for example in Czech Republic and Germany consumers have had 7 days for withdrawal; in Slovakia and Lithuania – 7 days; in Poland – 10 days. Only consumers in Malta have had a longer period for withdrawal – 15 days. The Directive imposes a solution - 14 days for the right to withdraw from the off-premises contract. If the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period shall expire 12 months from the end of the initial withdrawal period. If the trader has provided the consumer with the information provided for, the withdrawal period shall expire 14 days from the day that the consumer receives that information.

The new regulation introduced various other interesting changes. The appendix provides model instructions on withdrawal from the contract and the model withdrawal form that consumers can use if after concluding the contract they change their mind and want to withdraw from a distance or off-premises contract concluded e.g. at home. Of course, the consumers are not obliged to use the form. They can withdraw from the contract in their own form, but using the one provided will facilitate the process of resignation.

The trader should give the consumer clear and comprehensible information before the consumer is bound by a distance or off-premises contract, a contract other than a distance or an off-premises contract, or any corresponding offer. Information requirements for entrepreneurs are important, especially in case of distance and off-premises contracts. Before the consumer is bound by these contracts, or any corresponding offer, the trader shall provide the consumer with

the set of information in a clear and comprehensible manner (according to the article 6), e.g. the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services. The directive's point "e", which does not have a counterpart in prior regulations states that a consumer has the right to information about the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot be reasonably calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot be reasonably calculated in advance, the fact that such additional charges may be payable. The information should also apply to the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated at a different than the basic rate. Furthermore, the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy should also be presented in a clear manner. The Directive eliminates hidden charges and costs on the internet and increases price transparency. In addition, it bans pre-ticked checkboxes on websites. Entrepreneurs will have to cease the practice of making the fields agreeing for Internet purchases automatically selected. It should be remembered that new regulation also provides the elimination of surcharges for the use of credit cards and hotlines (telephone lines shall not be able to charge consumers higher fees than the cost of basic tariffs for telephone calls).

Article 13 of the directive states that traders must refund all payments received from the consumer, within 14 days of the day on which the trader was informed of the consumer's decision to withdraw.

Article 14 defines obligations of the consumer in the event of withdrawal and introduces substantial changes. The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear and is liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods.

The directive also imposes obligation to mark digital products with information about their compatibility with hardware and software so consumers are better protected in relation to digital products.

Consequences of the introduction of a new standard of consumer rights

In 2010, 40% of EU consumers bought online goods and services over the internet. In 2006 it was only 26%. The internet is the most frequently-used distance-selling medium today. However, only 7% of internet users have placed cross-border orders within the EU.²⁴

New rules will enhance, in particular, the rights of online shoppers (they will strengthen the protection of shoppers, particularly by specifying rules on delivery and digital downloads, whilst cutting red tape for small and medium-sized businesses). Ultimately, regulations will protect consumers against rogue traders. "This is a good day for Europe's 500 million consumers. The new EU Consumer Rights Directive will strengthen consumer rights by outlawing Internet fraudsters who trick people into paying for horoscopes or recipes that appear to be offered for free. Shoppers will no longer be trapped into buying unwanted travel insurance

²⁴ www.europarl.europa.eu/news/en/pressroom/content/20110622BKG22276/html/Consumer-rights-what-the-new-rules-will-mean.

or car rentals when purchasing a ticket online. And everyone will have 14 days if they wish to return goods bought at a distance, whether by internet, post or phone"²⁵ said EU Justice Commissioner Viviane Reding after the approval of the directive by the European Parliament. C. Curneen of the European Consumer Center also speaks in a similar manner: "Online shopping has increased exponentially since the current rules were drawn up almost 15 years ago. This new legislation will increase consumer confidence in online shopping by enhancing their rights and protecting them from unfair practices."²⁶

The aims are clear. The Directive should: strengthen protection of online buyers so as to boost consumer confidence and cross-border on-line trade, considerably increase legal certainty for both consumers and traders, contribute to the attainment of a high level of consumer protection, eliminate the barriers stemming from the fragmentation of the rules and complete the internal market in this area. Lawmakers hope that common rules for businesses will make it easier for them to trade all over Europe and consumer rights will mean more transparent rules for making purchases over the Internet.

In order to avoid administrative burden being placed on traders, Member States may decide not to apply this Directive where goods or services of a minor value are sold off-premises. They may decide not to apply or not to maintain or introduce corresponding national provisions to off-premises contracts for which the payment to be made by the consumer does not exceed EUR 50. Member States have the right to define a lower value in their national legislation. It should be noted that where two or more contracts with related subjects are concluded at the same time by the consumer, the total cost thereof should be taken into account for the purpose of applying this threshold. The question arises, however, as to whether there will

²⁵ www.corporate.skrill.com/2011/06/eu-consumer-rights-directive-promotes-fair-practice/2115/

²⁶ www.eccireland.ie/news.php?article=108.

be no mass marginalization of the directive in local laws. The success of the directive would depend on the ability and willingness of EU nations to assimilate it into their national legislation.

The right of withdrawal in respect of specific goods such as e-books, which will probably be heavily used by consumers is also questionable.

Changes that take effect with the implementation of the Directive of the European Parliament and the Council 2011/83/UE of 25 October 2011 on consumer rights, would require companies to revise the existing rules of conducting business e.g. entrepreneurs should consider starting the website in a foreign language. The effect of the changes will significantly increase the cost of running a business. The new law will increase administrative burdens not only for small traders. The Directive is associated with many possibilities, but also responsibilities. The costs incurred by businesses will be passed on to consumers. We will simply pay much more for purchased goods.

Interesting changes will probably occur in the courier services market. Entrepreneurs will primarily depend on the quality, not price. Vendors should invest in an efficient courier service, based on companies with reputation recognized in Europe and in developing a permanent and stable cooperation with them.

At first sight, new rules seem beneficial only to consumers but traders will benefit as well, since the stronger protection of online buyers will boost consumer confidence and, consequently, increase cross-border online purchases.

After its entry into force, the Member States shall have two years to implement the Directive's provisions into their national law.