

PROPOSAL FOR A DIRECTIVE ON CONSUMER RIGHTS

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Abstrakt v rodném jazyce

Cílem tohoto příspěvku je představit a rozebrat některé významné aspekty „návrhu směrnice o právech spotřebitelů“ (KOM (2008) 614 v konečném znění), předloženého Komisí ES dne 8. 10. 2008. Záměrem Komise je skrze tuto směrnici harmonizovat smluvní spotřebitelské právo a vytvořit pro něj jednotný rámec. Formát příspěvku nedovoluje podrobně analyzovat návrh jako celek, a proto bude představena a analyzována celková povaha návrhu a změny v oblasti základních definic.

Klíčová slova v rodném jazyce

Evropská společenství, ochrana spotřebitele, harmonizace, smluvní právo, směrnice.

Abstract

The aim of this paper is to present and analyze some important aspects of the “proposal for a directive on consumer rights” (COM (2008) 614 final) which was presented by the Commission of the European Communities (EC) on 8. 10. 2008. The intention of the Commission is to harmonize consumer contract law and to create single framework for contracts concluded between consumers and professionals. It is not possible to analyze complete text of the proposal; therefore, only general characteristics of the proposal and amendments in the field of definitions will be examined and analyzed.

Key words

European Communities, consumer protection, harmonization, contract law, directive.

1. INTRODUCTION

In recent years, norms regulating consumer protection in EC/EU (the so-called consumer acquis) have been regarded as rather insufficient. Especially the Commission has repeatedly pointed out that rules on consumer protection differ across the Community and the level of consumer protection varies, depending on the will of each member state to grant its consumers a certain level of protection. The Commission (as well as a wide range of scholars and professionals) has seen minimum harmonization, on which directives regulating various aspects of consumer protection are based, as the main reason of this situation and has repeatedly been asking for revision of consumer acquis. As a result, on 8. 2. 2007 the Green Paper on the Revision of Consumer Acquis was presented. In the paper the Commission named main problems associated with eight directives on consumer protection¹ and proposed

¹ These included Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, Council Directive 90/314/EEC on package travel, package holidays and package tours, Council Directive 93/13/EEC on unfair terms in consumer contracts, Directive 94/47/EC of the European Parliament and the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts, Directive 98/6/EC of the European Parliament and the Council on consumer protection in the indication of the prices of products offered to the consumer, Directive 98/27/EC of the European Parliament and Council on injunctions for the

amendments aimed at improvement of consumer protection and full harmonization of level of consumer protection across the EC/EU. The Green Paper has been subject to response both by member states, organizations on protection of consumer rights and professionals (traders), the result of the response being the proposal in respect.

Unlike the Green Paper, the proposal is restricted only to contractual relations between consumers and professionals (traders). Therefore, the planned directive should apply only to relations now covered by four directives on consumer contract law - Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, Council Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts and Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees. Other aspects of consumer protection shall be regulated by current directives also in the future. Directives 85/577/EEC, 93/13/EEC, 97/7/EC, 2002/65/EC, 2005/29/EC, 2007/64/EC and 1999/44/EC are supposed to be repealed by the new directive.

The proposal provides for single set of basic definitions and offers single approach to basic legal institutions (such as right of withdrawal). It also lays down quite clearly duties of traders in relation to consumers and rights of consumers stemming from breach of traders' obligations.

As mentioned above, the directive is based on the principle of full harmonization. Therefore, member states may not diverge from the level of protection introduced by the proposal. At the same time they are obliged to ensure effective means of enforcement of the rights and duties laid down by the directive (respectively its proposal) including penalties. This paper tries to examine and analyze general nature of the proposal and some changes in the field of basic definitions.

2. GENERAL CHARACTERISTICS OF THE PROPOSAL

As mentioned above, the proposal is focused entirely on consumer contract law and therefore it primarily aims at repeal of directives on consumer protection in respect of contracts negotiated away from business premises (off-premises directive) and in respect of distance contracts, on unfair terms in consumer contracts and on certain aspects of the sale of consumer goods and associated guarantees. Apart from these, also directive 2002/65/EC concerning the distance marketing of consumer financial services, directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and directive 2007/64/EC of the European Parliament and the Council are supposed to be included in and repealed by the proposed directive.² When compared to the Green Paper, it is nonetheless a little surprising that directive 90/314/EEC, directive 94/47/EC and directive 98/6/EC have not been included in the proposal taking into consideration that they were (or were supposed to be) subject to revision and without doubt have relation to contracts concluded by consumers and businessmen (traders). The Commission claims in the proposal that areas covered by the above mentioned directives are so specific that it had been better to

protection of consumer interests, Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees.

² It is quite interesting that also directive 2005/29/EC shall be covered by the new directive as the Green Paper did not intend this directive to undergo revision.

maintain special rules set in said directives. This is surely true; on the other hand, contracts on package travel and package holidays and on time-sharing are concluded quite often and are a constant source of disputes between consumers and business. It is thus quite unclear why – when the ambition of the proposal is to create general set of definitions and principles for consumer contract law in general – those directives should be maintained and should keep their own specific rules. In my opinion, it is possible to agree with the Commission in so far that above mentioned areas of consumer law are specific; however, I would recommend to divide the scope of the directives in such way that general provisions of the proposed directive would apply also to current directives 90/314/EEC, 94/47/EC and 98/6/EC. Rest of the issues (specific provisions applying to particular issues of these directives) could be covered by current directives. Such solution could constitute a real general framework for the whole consumer contract law and at the same time respect specific nature of such institutes as time-sharing or package holidays.

As far as full harmonization is concerned, this concept is a clear result of problems caused by minimum harmonization. Full harmonization would in the point of view of the Commission ensure same level of consumer protection in the whole Community (EU) as the member states would not be allowed to adopt or maintain measures different from the ones in proposed directive. The motives of the Commission for full harmonization are quite clear. However, in the preamble of the proposed directive, the Commission declares that traders can grant consumers higher level of protection than the one envisaged in the proposal (subpar. 56 of the preamble). Naturally, it is more than probable that traders will happily maintain level of protection granted by the proposed directive. Nevertheless, two questions arise at this point. Firstly, what happens if traders in some member states decide to grant “stricter” protection (i. e. higher level of protection) to consumers than in other member states? Again, discrimination and different level of consumer protection would arise but this time it will not be the member states to blame. As it is inconceivable – and impossible by nature of Community and EU law - to impose obligations on private individuals by directives, such “actual” discrimination could not be satisfyingly solved by any directive or Community initiative. Secondly, member states could object full harmonization pointing out that their rules are stricter (or just opposite milder), their consumers already used to stricter/milder level of protection and it would be too difficult to adjust public and traders to proposed change. On the other hand, the Commission is right that only full harmonization is at least able to approach approximately similar level of protection.

3. NEW DEFINITIONS

3.1 CONSUMER

The proposal of the new directive defines consumer as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or craft or profession” (art. 2 par. 1). The definition leaves no doubt that any person who wants to enjoy rights conferred upon him under the new directive may not act within his business or – more generally – as a professional. What might contribute to clarification in the field of definitions is the fact that only natural persons can rely on provisions of the directive. This attitude is in compliance with judgement of the European Court of Justice (ECJ) *Cape Snc v. Idealservice Srl and Idealservice MN RE Sas v. OMAI Srl* in which the court ruled that only natural persons can be regarded as consumers in the sense of directive 93/13/EEC.³ However,

³ Judgement of the Court of 22. 11. 2001, joint cases C 541/99 and 542/99.

it is a little questionable whether this strict definition does not constitute discrimination towards legal persons which do not act within their business (or even never can – such as non-profit or charity organizations) and still are regarded as non-consumers whereas e. g. traders (who from the very nature of their profession definitely possess knowledge and skills much richer than average consumers) who in their free time enter into a contract on purchase of electronics (e. g. “home cinema” etc.) can rely on provisions of the directive.

3.2 TYPES OF CONTRACTS

Another novelty introduced by the proposal is the definition of particular agreements concluded by consumers. First of all, a sales contract is defined as “any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services” (art. 2 par. 3). The idea itself to protect consumers also in cases of mixed-contracts is certainly good. However, one must ask how it will be determined whether a contract concluded between a consumer and a trader on both supply of goods and services is a mixed contract when – for example – the contract is concluded on sale and (above all) installation of some devices in the home of the consumer. In such case, it might be quite difficult to determine the type of the contract. Such contract can be considered a mixed-one but it can also be considered contract on supply of services as the supply of the service “outweighs” supply of the good. This problem might not seem important as consumers are supposed to be protected also in cases of service contracts but in some cases (e. g. if traders grant commercial guarantee only for sales contracts, not for service contracts) the difference may play some role.

Another novelty concerning contracts is quite a broad definition of distant contracts and so-called off-premises contracts (i. e. contract concluded away from business premises). A distance contract is defined as “any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication”⁴ (art. 2 par. 6). In subparagraphs 12 and 13 of the preamble of the proposal the Commission noted that also a contract negotiated away from business premises face to face between the trader and the consumer shall be regarded as a distance contract if the following conclusion of the contract has been realised through means of distance communication (e. g. Internet or telephone). In the opinion of the Commission, such broad concept of distance contracts should simplify the matter for traders who should gain more legal certainty when negotiating with consumers. In my opinion, the proposal brings more confusion among not only traders, but also – and especially – consumers. Again, as a result legal qualification might not be too significant because both in cases of distance contracts and off-premises contracts the duties of the professionals (traders) remain the same.

As far as off-premises contracts are concerned, these are defined as “any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which the offer was made by the consumer in the same circumstances, or any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer” (art. 2 par. 8). At the same time, business premises are defined as “any immovable or movable retail premises, including seasonal retail

⁴ Means of distance communication are defined as „any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties” (art. 2 par. 7).

premises, where the trader carries on his activity on a permanent basis, or market stalls and fair stands where the trader carries on his activity on a regular or temporary basis” (art. 2 par. 9). What is rather alarming here is the broad concept of business premises and contracts concluded away from them. As we can see, not only “classic” premises such as shops etc. can be regarded as business premises, but also places where the trader undertakes his business temporarily. On one hand, it is true that if the trader does not possess any other premises for his business, also a market stall might be regarded as his business premises. On the other and, the question is whether a trader who runs a company with “normal” business premises (let’s say a shop) still concludes a contract within his business premises if the contract is negotiated and concluded at a stall during an exhibition. If yes, then one can argue that in such cases consumers can not rely on provisions on off-premises contracts. In extreme cases, one can imagine “evil” traders trying to elude their duties stemming from provisions on off-premises contracts declaring such market stalls their business premises. Such idea is naturally rather ridiculous; however, it seems to me that a more precise definition of business premises for the purposes of the proposed directive is necessary.

4. CONCLUSION

The idea to protect consumers when negotiating and concluding contracts (especially on supply of goods and services) with professionals can definitely be assessed as positive. However, the proposal does not cover all areas in which consumer contracts are concluded, which I see as a weak point of the directive. My recommendation is to include also services on package travel and holiday and on time-sharing in the new directive – if not as whole, than at least the general parts of it so that same legal institutes (including lengths of periods etc.) would apply. On the other hand, it is possible to maintain special regulation for e-commerce (as it is so specific) and financial services.⁵

As far as definitions of the proposal are concerned, the definition of “consumer” is in full accordance with judgements of the ECJ. There is not – in my opinion – a sharply clear difference between distance contracts and off-premises contracts; therefore I assume that some confusion might occur in practice. A better – and clearer – definition of business premises is necessary to prevent interpretation problems in future.

Literatura:

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⁵ The new directive shall partially apply also to contracts on financial services.

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