

NEW ASPECTS OF CONSUMER INFORMATION IN THE EUROPEAN UNION

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Abstract:

This contribution will focus on the latest drafts in the development of consumer protection in the European Union. The European Commission has summarized four consumer protection directives and i.a. listed the most important elements of consumer information. This list contains those core characteristics of products and services that mainly affect consumer decisions. After comparing the proposed solutions and the current rules, an overview of stakeholders' opinion will be given, as well.

Key words:

EU law, consumer protection, European Commission's proposal, consumer rights, requirements of consumer information

1. PROPOSAL FOR "STANDARDIZATION"

In the European Union numerous directives guarantee protection for consumer rights. These rules cover the following subjects: doorstep selling, unfair contract terms, package travel, timeshare, distance selling, price indication, injunctions and consumer sales. Surveys (such as Eurobarometer Nr. 224 and Nr. 298) have shown that despite of common framed rules, consumers rarely take part in cross-border selling. The European Commission has already realized that common steps should be taken in order to enhance consumers' confidence.¹

In 2008 the Commission launched its new proposal² about consumer rights. It proposes merger of four directives on consumer protection, including directive 85/577/ECC on contracts negotiated away from business premises³, directive 93/13/EEC on unfair terms in consumer contracts⁴, directive 97/7/EC on distance contracts⁵, directive 1999/44/EC on consumer sales and guarantees⁶. The Commission also suggests switching minimum harmonization into maximum harmonization besides laying down uniform rules on common themes of the revised directives. Thus, Member States should adopt the same rules as laid down in the directive.

¹ EU Consumer Policy Strategy 2007-2013; Empowering consumers, enhancing their welfare, effectively protecting them, COM (2007)99 final

² COM(2008) 614 final

³ OJ L 372, 31.12.1985, p. 31-33.

⁴ OJ L 95, 21.4.1993, p. 29-34

⁵ OJ L 144, 4.6.1997, p.19-27.

⁶ OJ L 171, 7.7.1999, p. 12-16.

This contribution presents the basic information, collected by the Commission that should be provided for consumers in case of conclusion contracts. The newly proposed directive on consumer rights has not got any effect on national legislation as long as it has not been adopted by European Parliament and European Council. In order to study the suggestions of Commission in details and understand the aims hidden behind the text, they should be compared with the existing rules.

2. GENERAL CONSUMER INFORMATION

All four consumer protection directives include special subjects and focus on a particular problem. Up to the present there has not been any provision that would have collected common requirements on consumer information in a contractual relationship, especially in the pre-contractual period. Nevertheless, the existing directives mention the compulsory elements of a contract and consumer information as well. Due to the close connections among the issues regulated by consumer protection directives, in some aspects these rules are dealing with the same questions. One example is the information obligation on conditions of rescinding the contract that appears in all four directives. Although traders are obliged to inform consumers about this issue in all four types of contracts, regulations do not meet the requirements of consistency. In distance contracts pre-contractual information should already involve the existing of the right of withdrawal. In off-premises contracts three temporal rules are applicable according to information requirements about right of withdrawal. Unfair contract terms directive also instructs about the misleading of consumers with regard to the expiry of a contract. In case of consumer sales, the existing directive imposes in details the parts of guarantee statements (that is, for instance the conditions of rescinding the contract).

One of the aims of the Commission is to remove such inconsistency among the directives. Therefore the proposal lists and simplifies general information that should be given to consumer in all sale or service contracts. These facts can be divided into the following groups:

- information about the object of sale (such as main characteristics of the product, price)
- information about the trader (such as address, identity)
- information about consumer's rights (such as right of withdrawal)
- information about performance (such as payment, delivery issues, complaints)
- information about duration issues (such question is whether contract is open-ended or not)
- information about the after-sale period (such as commercial guarantees, after-sales services)

Traders should provide consumers *at least with the above mentioned information before concluding the contract* if it has not appeared from the context, yet. The following rule guarantees consumers that they cannot be deceived by the traders: the given information should be the integral part of the sale or service contract.

There are cases when a third person steps into the relationship between consumer and trader. The duty of so called intermediaries is to act in the name or on behalf of another person

during concluding a contract. The proposal would oblige them to warn consumers that they will not contract in their own name but on behalf of a consumer. Therefore these contracts will regard to the two contracting parties (who are consumers). This case is one of the exceptions that could not enjoy the protection of the proposed directive. The sanction of missing notice is that the intermediary will be one of the contracting parties.⁷

3. SPECIAL INFORMATION REQUIREMENTS IN DISTANCE AND OFF-PREMISES CONTRACTS

Nowadays distance is not a hurdle in commerce any more. Products can be delivered to the doorsteps nearly everywhere in the world. Two major groups of contractual relationships can be divided in this area as the followings:

1. trader and consumer meet in person (for example off-premises contracts)
2. trader and consumer do not meet in person (for example distance sales contracts)

3.1 OFF-PREMISES CONTRACTS

Since 1985 the European Union has adopted common rules on this special theme that still exist. The main grounds for establishing a legal frame on off-premises contracts are the unequal positions of the contracting parties and the non-harmonized national rules. These engagements are made away from the shop of the trader. Usually the trader visits the consumer at home with offers. In most cases consumers are not prepared for the sale initiated by the trader at the doorstep. Lack of time (to consider and to compare the offered product with others) forces consumers into a defenseless situation against traders. Therefore the European legislator has strengthened realization of consumers' interests by two ways:

1. establishing strict rules on consumer information,
2. providing consumers with a 7-day-long right of cancellations.

According to the directive traders should give written information to the consumer about the right of cancellation, the period opened for exercising those rights, the name and address of a person against whom cancellation can be exercised. Term of informing is also fixed, namely it must be given before signing the contract. In special cases traders must fulfill the obligation of informing at least when they conclude the contract or the consumer made the offer. National legislators had the opportunity to establish appropriate legal consequences if information is not supplied by the trader.⁸

3.2 DISTANCE CONTRACTS

Distance sales include more risk than off-premises contracts. Consumers have any possibility neither to compare nor to examine the offered product. Therefore information issues are more important comparing with other cases. Distance communication devices "mediate" between

⁷ Chapter II of Commission's proposal, op.cit. supra note 2

⁸ See op.cit. supra note 3.

the contracting parties.⁹ Information should also be given even if the negotiation is made by phone-call. The directive sets strict rules on time-, content- and formal requirements regarding to distance contracts. The information should be provided before concluding the contract. Trader should introduce himself and tell the purpose of the call. In this “stage”, consumer has the right to end the conversation. The following list contains the most important elements of consumer information:

- information about the “professional” party (identity, address)
- information about the products (core characteristics)
- information about payment issues (price, the includes tax, delivery costs, cost of using distance communication, period of validity)
- information about the conditions of performance (delivery, payment)
- information about rescinding the contract (right of withdrawal)
- information about unaccustomed minimum duration of contract.

Traders should respect the principles of good faith and respect the interests of particularly vulnerable consumers, such as children.

Preliminary information should be composed in a clear, accurate and plain way. Consumers should receive all facts not only in words but also in a durable medium-based format completed at least with:

- details about exercising right of withdrawal,
- address where consumer can send complaints,
- information about post-contractual period,
- details about rescinding the contract if its duration is uncommon or more than one year.¹⁰

⁹ Examples for communication devices: unaddressed- and addressed printed matter, standard letter, press advertising with order form, catalogue, telephone with and without human intervention, radio, videophone (telephone with screen), videotex (microcomputer and television screen) with keyboard or touch screen, e- mail, fax, teleshopping.

¹⁰ See op.cit. supra note 5.

3.3 SUGGESTIONS OF THE COMMISSION TO UPDATE AND STANDARDIZE THE RULES

Special requirements will exist to the distance and off- premises contracts. The traders should give more details to consumers. In this case general information¹¹ should be completed with facts about:

- condition and process of exercising withdrawal right,
- address of place of trader, if it differs from geographical address,
- code of conduct, if it exists,
- opportunity to require amicable dispute settlements,
- a notion that according to the legal rules, the contract will fall inside the scope of the directive and therefore the consumer's rights are protected specially.

The proposal sets formal requirements for both types of contracts. Regarding to off-premises contracts the order forms should also contain information required by the directive and a standardized withdrawal form¹². Order form should disclose the information in plain and intelligible language and it should be clearly legible. If the order form is not signed by consumer, the off-premises contract will be invalid. Durable medium- based order form should be copied and given to consumer. The proposal orders full harmonization from member states. This rule will guarantee consumers that they will get the same order form no matter where the place of trader within the European Union is.

Distance contracts should be formed in a clearly way as well, keeping the three formal requirements of:

- plain wording,
- intelligible language and
- legibility.

The Commission has taken into consideration the special characteristics of disclosing tools such as phone-calls or other mediums. If the trader calls consumer on phone he should start the conversation with revealing his identity and the purpose of call. If the trader uses a non-endurable medium, it should contain at least the main characteristics of product completed

¹¹ See chapter II of present contribution

¹² See Annex B. of Commission's proposal, op.cit. supra note 2.

with price. The rest of information should also be given to the consumer according to the general rules of the suggested directive.¹³

4. INFORMATION ABOUT GUARANTEE IN SALES CONTRACTS

4.1 SALES OF CONSUMER GOODS

The chain of consumer information does not stop with ensuring fairly given facts and signed clauses. Characteristics of products should meet contractual expectations. European legislator realized that reasons of dispute are often the lack of conformity of performance with the contract. Therefore since 1999 common legal frames have ruled the relationship between contracting parties after concluding a contract.

Information matters arise in case of examining the existence of contractual conditions. The directive establishes a test to prove conformity. One of the requirements is that the purchased product must be in compliance with trader's description. The seller is liable for supplying goods appropriate to the arrangement generally for 2 years (Footnote: beginning of the period is delivery). In case of unconformity, consumer can choose in certain circumstances among the following levels of redress: repair or replacement and reduction in price or rescission of the contract. Traders' information obligation is supplemented with another element, namely the guarantee. The minimum- criterions of the data about guarantee i. a. are:

- notion that guarantee does not affect consumer rights under national law,
- information about the content of guarantee (conditions of exercising guarantee, durations, territorial scope, name and address of guarantor).¹⁴

4.2 DRAFTED DEVELOPMENTS OF THE COMMISSION

The Commission also clarifies consumer rights with regard to sales contracts. The fourth chapter summarizes the rules for instance on delivery, risk, conformity with contract or lack of conformity. Two issues can be mentioned having correlation to consumer information. Firstly, trader's performance should meet all requirements contained in the contract. Conformity with contractual clauses can be presumed if i. a. the good is delivered completely appropriate to trader's description. Secondly, consumer information is also important in case of commercial guarantee. Information about exercising guarantees should be also given to consumers. The Commission has also prepared the minimum-content of the guarantee statement:

- legal rights of consumer,
- contents of guarantee,
- conditions of making claims,

¹³ Chapter III. of Commission's proposal, op.cit. supra note 2.

¹⁴ See op.cit.supra note 5.

- if it is applicable, that the guarantee cannot be transferred to a subsequent buyer.

The three requirements on making the document easy to understand (plain, intelligible language, legible) exist in this area, as well. Consumer should have the opportunity to request the details of guarantee on durable medium.¹⁵

5. FAIR CONTRACTUAL CONDITIONS

5.1 UNFAIR CONTRACTUAL TERMS

The aim of the regulation on unfair contractual terms is the same as we have seen by the above mentioned directives: establishing fair frames of the relationship between consumers and traders. The European legislator has laid down the general characteristics of unfair terms used in contracts. Three major questions should be asked in case of examining a contract:

- Does it contain terms that were not negotiated by both parties?
- Does it respect the requirements of good faith and equity?
- Does it generate disparity between contracting parties' rights and obligations to the disadvantage of consumers?

The annex of directive gives examples of terms that are detriment to the interests of consumers.¹⁶ It should be noted that this list is only a suggestion to the national legislators of European Union. Member States are allowed both to enlarge and to tighten the range of forbidden contractual clauses. Only one rule should exist in all national legislations: the use of unfair contractual terms is prohibited by law. If the contract still involves such clauses, national rules should guarantee that the unfair term will not oblige the consumer.

Fair contractual clauses play important role in consumer information. They should mirror and pose the arrangements of the parties. Therefore consumer information in the phase of negotiation can not vary from the written and signed document. The contracts should also conform to the demand of principle of "clearness", i.e. their wording must be unambiguous and simple. Explanation of certain terms should be accomplished to the advantage of consumers in case of uncertainty.¹⁷

5.2 COMMISSION'S PROPOSALS FOR ESTABLISHING BETTER REGULATION SYSTEM

An own chapter of the Commission's proposal rules contract terms not drafted by both parties. Consumer can influence only some conditions of contract or has not got any power to compose the contract at all. The trader usually prepares the document and hand it over to the

¹⁵ Chapter IV of Commission's proposal, op.cit.supra note 2.

¹⁶ For example those contractual terms are unfair, which let the trader terminate the contract without waiting for the passing of the period of notice. (Annex, 1.g)

¹⁷ See op.cit.supra note 4.

consumer. This situation explains the importance of emphasized legal protection given to the weaker party of the contractual relationship. Therefore the common regulation on fair contract terms cannot be absent from the directive on consumer rights.

The proposal keeps the general clause of unfair terms and completes it with two lists of special cases to determine terms explicitly.¹⁸ Terms, that are contrary to good faith and generating imbalance between the parties' rights and obligation to the detriment of consumer, should be considered as unfair conditions. The Commission collected the most frequently occurred unfair conditions. These cases are divided into two groups:

- a so-called "black" list: it means that the terms involved by the list are regarded as unfair in all circumstances¹⁹ and
- a so-called "grey" list: it means that the terms involved by the list are regarded as unfair until the opposite statement is proven²⁰.

The ways of expression contract terms should be applicable to the principle of three requirements: simplicity, intelligible wording and legibility.²¹

6. REMEDIES IN CASE OF FAILURE TO COMPLY WITH INFORMATION REQUIREMENTS

The Commission's proposal is preceded by a more year-long preparatory work. An analytical report²² from 2007 presents the opinions of stakeholders about an important question with regard to consumer information. What kind of legal effect should be established in consumer protection law if the "professional" breach information requirements? The Commission recommended the following possible solutions:

- establishing a uniform remedy or
- establishing different remedies or
- remaining the existing system ("status quo").

Answers of stakeholders have strengthened the need of modification. More than 2/3 of contributors argued in favor of establishing a common remedy or different remedies. Between

¹⁸ Cf. 2005/29/EC directive on unfair market practices. The Commission's proposal on consumer rights adopts nearly the same construction of regulation: a general clause and its special cases annexed with a „black" list. (OJ L 149, 11.06.2005, pp. 22-39)

¹⁹ See Annex II. of Commission's proposal, Commission's proposal, op.cit. supra note 2.

²⁰ See Annex III. of Commission's proposal Commission's proposal, op.cit. supra note 2

²¹ See Chapter V of Commission's proposal, op.cit. supra note 2

²² Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis/GP Analytical Report, http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf (downloaded on 08.06.2009)

these two “winning” options, the latter was preferred rather than the former. The same final results were proved when Member States were asked to choose among the three solutions.

6.1 ARGUING FOR A UNIFORM REMEDY

It was mentioned that consumer protection directives ruled remedies differently. It does not strengthen consumers’ confidence in legal security and causes confusion. Thus, the extension of cooling-off period up to 3 months could be a proper solution. A contributor highlighted a problem that the distinction between cooling-off period and exercising the right of withdrawal is not stressed enough.

Another reason supports this option: time limits should bind consumers to decide the termination of the contract otherwise it will generate a dependent situation between the contracting parties. Traders’ representatives noted that regulation should also take into consideration technical developments and allow to fulfill the information requirements by using the latest versions of durable medium devices.

6.2 ARGUING FOR DIFFERENT REMEDIES

Contributors, who supported the idea of making distinction among remedies, commented that legal regulation should take into account the “different degrees of importance of consumer information”²³. They emphasized that remedies should be proportional to the importance of the missing information. The context should not be omitted in case of classifying the information. The contributors also gave explanation why the extension of cooling-off period would not be the proper solution. They thought that option Nr. 1 - if it would exist - would cause groundless difficulties for traders because even in not too serious breach of information obligation the consequence (termination of the contract) would be far more rigorous. These stakeholders believed that the appropriate sanction should be found regarding to the failure to give information to consumer. A comment drew the attention to the necessity of extending consumer rights in this area, for instance giving the opportunity for modifying the contract as a remedy. The scale of sanctions should also cover financial punishments, contesting the contract, exercising the right of withdrawal, extension of cooling-off period.

6.3 ARGUING FOR STATUS QUO

Stakeholders noted that establishing one general remedy seemed to be too strict and different types of remedies would initiate an unnecessary complicated system. Therefore existing regulation should not be modified. The contributors rose that issue of remedies did not generate as much problem as the technological developments. Thus, the task is to harmonize current rules with the new opportunities offered by the technical devices. These contributors highlighted also that consumer protection directives dealt with special cases. Therefore information requirements should also differ in each situation.

6.4 PROPOSAL’S SOLUTIONS

The Commission does not fix the consequences if trader breaches general consumer information requirements before concluding the contract. Therefore, Member States will be

²³ See op.cit. note 22. p.73.

allowed to adopt appropriate remedies in their national contract law without the “direction” of European Union. The Commission enhanced the situation if the trader would not inform the consumer about additional charges properly. In this case, demanding the payment of these additional fees could not be required from consumers.

The proposal lays down rules on the rights of withdrawal according to distance and off-premises contracts. Linked to the issue of consumer information, the Commission “punishes” the unfair trader with extending the withdrawal period from fourteen days up to three months.

Traders should also provide appropriate information about guarantee. If conditions of commercial guarantee are absent from the contract, the guarantor should fulfill his obligations according to the advertisement on the guarantee. The remedies in case of lack of conformity with the contract are also summarized in the proposal. The consumer should be able to have the opportunity to choose among the already known options if conditions are met:

- replacement or repair,
- reducing price,
- rescinding the contract.

The proposal does not prepare the system of consequences in details in the situation of using unfair contract terms. The Member States should make it certain that national law offer proper remedies for consumers who have been misled by unfair contractual conditions.

7. CONCLUSIONS

The aim of Commission’s proposal is to simplify, update the existing rules and summarize them into one, single directive. There is no doubt that the continuous review of consumer protection regulation in the European Union is necessary. Nevertheless, the European legislator is faced with new challenges generated by the technical development of 21st century. Mobile phone’s and PC’s screens supply different size of place to transmit information.

Consumers’ right to be informed is one of the common subjects appeared in most of the consumer protection directives. The Commission states that establishment of a single regulation could serve better consumers’ interests than “spread” rules. Clearly defined provisions serve the interests of fair traders because it would be easier to follow the legal expectations as well.

Consumers, before deciding purchase, are already provided with information by commercial instruments such as wide range of advertisements. Maybe it is worth dealing with the compliance of all directives consisting rules on requirements of reliable consumer information. For instance the directive 2005/29/EC on unfair market practices²⁴ has also established regulation about obligation of enterprises to give information about their offered

²⁴ See opt. cit supra note 18.

products. It should be noted that the Commission's proposal involves only four major issues and leaves out the rest of consumer law directives.

It has been proven that minimum harmonization in the field of consumer law has led to divergent national provisions. Full harmonization of some common aspects, as a solution to the above mentioned problem, may increase both consumers' and traders' confidence.

Regarding to the above mentioned report²⁵, contributors mostly agreed that common information requirements in the pre-contractual period would serve the consumer interests. The stakeholders mentioned some important issues that should also be in the focus of establishing these rules. One of them is the question of quality and quantity. It means that consumers should receive only the necessary information. Overloading consumers with facts would not improve consumer protection, expressed by some stakeholders.

The Commission in its proposal has worked together four directives that are dealing with special themes. If the European legislator accepted the drafts, those four directives would be repealed. It is not questionable that the Commission has widened and standardized the information requirements. It has lead the core elements of consumer information along the pre-contractual-, and contractual-periods consistently. The Commission has begun to fill the gaps among consumer protection directives, but this work has not been finished yet. The same clear concept should be followed and continued by reviewing consumer acquis.²⁶

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²⁵ See op.cit supra note 22.

²⁶ Cf. Micklitz, H.-W., Reich, N.: Crónica de una muerte anunciada: The Commission proposal for a „directive on consumer rights”, the Netherlands, Kluwer Law International, 2009, Common Market Law Review Nr. 46, pp. 471-519.ISSN 0165-0750

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