

ENFORCEMENT OF CONSUMER RIGHTS IN THE EC BEFORE COURTS¹

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Abstract in original language

Príspevok sa venuje súdnému vymáhaniu práv spotrebiteľů v ES. Predstavuje a zkoumá možnosti individuálního i kolektivního vymáhání, přičemž zvláštní pozornost je věnována směrnici o žalobách na zdržení se jednání v oblasti ochrany zájmů spotřebitelů (Úřední věstník L 166, 11. 6. 1998) a nařízení o spolupráci mezi vnitrostátními orgány příslušnými pro vymáhání dodržování zákonů na ochranu zájmů spotřebitele ("nařízení o spolupráci v oblasti ochrany spotřebitele", Úřední věstník L 164, 9. 12. 2004).

Key words in original language

Ochrana spotřebitele; Evropské společenství; individuální vymáhání; kolektivní vymáhání; soudnictví.

Abstract

The paper deals with judicial enforcement of consumer rights in the European Community. Possibilities of individual as well as collective enforcement are presented and examined with special regard to the directive on injunctions for the protection of consumer interests (OJ L 166, 11. 6. 1998) and the regulation on cooperation between national authorities responsible for the enforcement of consumer laws ("Regulation on consumer protection cooperation", OJ L 164, 9. 12. 2004).

Key words

Consumer protection; European Community; individual enforcement; collective enforcement; judiciary.

INTRODUCTION

When dealing with enforcement of consumer rights in the EC (no matter whether the enforcement takes place before courts or by means of alternative dispute resolution), it is necessary to define rights which should be subject to enforcement. Generally, basic "catalogue" of consumer rights includes right to protection of health and safety, right to protection of

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economic interests, right to compensation of damage, right to information and education and right to representation (right to be heard).² Consumer rights can be thus divided into two groups – one of them being economic rights of consumers, the other ones rights to protection of health and safety.

Effective enforcement of consumer rights in the EC is constantly being slowed down by the fact that there is no Community legislation creating single framework of enforcement of consumer rights. Most directives on consumer protection³ define individual consumer rights and possibilities of their enforcement or redress, but the enforcement is then realized by means of national legislation. The same applies to the most famous Community instruments of enforcement of consumer rights, namely the directive on injunctions for the protection of consumer interests⁴ and the regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).⁵ The question therefore is: can consumers in the EC enforce their rights before courts effectively?

There have been many attempts to answer the above mentioned question. In this paper, we will try to discuss the matter, too, while the state of EC means on enforcement of consumer rights will be presented and analysed.

1. LEGAL SOURCES OF CONSUMER PROTECTION AND CONSUMER RIGHTS ENFORCEMENT

1.1 CONSUMER PROTECTION IN PRIMARY LAW DE LEGE LATA AND DE LEGE FERENDA

The source of current EC consumer protection lies in art. 153 Treaty establishing the European Community (TEC) which lays down basis for the protection of consumers in the EC. However, the provision of art. 153 TEC only contains general competence of the Community – or more precisely said the shared competence with the member states - and means of EC consumer protection and in no way refers to procedural aspects of consumer protection.⁶ Nowhere in the Treaty (treaties) can we find provisions for

² Reich, N. – Micklitz, H.-W.: *Europäisches Verbraucherrecht*, Baden-Baden : Nomos Verlagsgesellschaft, 2003, 4. Auflage, 1268 p., ISBN 978-3-8329-0041-0, p. 16.

³ E.g. directive 93/13/EEC on unfair terms in consumer contracts („unfair contract terms directive“) or directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market („unfair commercial practices directive“).

⁴ Directive 98/27/EC.

⁵ Regulation 2006/2004/EC.

⁶ The whole provision of art. 153 TEC reads as follows: *1. In order to promote interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic safety of consumers, as well as promoting their right to information, education and to organize themselves in order to safeguard their interests. 2. Consumer protection interests shall be taken into account in defining and implementing other Community policies and activities. 3. The Community shall*

consumer rights enforcement. The reason for this is quite simple – lack of competence. Procedural law is in the powers of the member states, with the exception of some aspects of judicial cooperation in civil or commercial matters stated in art. 65 TEC.⁷ However, these provisions cannot be applied to consumer protection because they rule areas of civil and commercial judicial protection and even so have quite a restricted effect. Therefore, there is no exclusive power of the Community to regulate issues of consumer rights enforcement and as a result, the options of consumers to virtually fight for their rights differ across Europe.

The same applies to provisions of the Treaty on the functioning of the European Union (TFEU) or the Charter of fundamental rights of the EU. Article 12 TFEU establishes duty to take high level of consumer protection into account when proposing and implementing other EU policies and activities.⁸ It is obvious that provision of art. 12 TFEU is of quite a general character and its practical impact on consumer protection in practice or especially on the possibilities of judicial enforcement should not be exaggerated. The wording of art. 169 TFEU is practically the same as that of art. 153 TEC,⁹ i. e. it leaves the main responsibility for consumer protection

contribute to the attainment of the objectives referred to in paragraph 1 through: a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; b) measures which support, supplement and monitor the policy pursued by the Member States. 4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt measures referred to in paragraph 3 (b). 5 measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

⁷ Provision of art. 65 TEC read as follows: *Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include: (a) improving and simplifying: — the system for cross-border service of judicial and extrajudicial documents, — cooperation in the taking of evidence, — the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.*

⁸ Exact wording of Art. 12 TFEU reads: *Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.*

⁹ The whole provision of art. 169 TFEU reads as follows: *1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. 2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States. 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b). 4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State*

on the member states while the EU is supposed to *contribute to the protection of health, safety and economic interests of consumers, as well as to support of their right to information, education and right to associate to protect their interests*. As far as Charter of fundamental rights is concerned, its art. 38 states that *Union policies shall ensure a high level of consumer protection*. However, this provision can in no way be interpreted as a right, but merely as a principle of EU law and therefore as unable to establish basis for consumer rights enforcement.

1.2 CONSUMER RIGHTS PROTECTION AND ENFORCEMENT IN SECONDARY LAW

Various individual and to some extent also collective consumer rights stem from directives on consumer protection; however, as directives are unable to constitute direct effect, consumers must rely on provisions of national law which not only grants them rights, but also sets means of their protection. Needless to say that only in cases of wrongful or late implementation consumers could rely directly on provisions of directives – but even in that case more conditions, especially the requirement for a sufficiently clear provision establishing some kind of consumer rights, would have to be fulfilled. It is not too difficult to imagine a directive on consumer protection which contains such precisely defined rights that can be relied on even without an action from the member states – in my opinion a good example is directive on general product safety¹⁰ which in art. 3 obliges producers to place only safe products on the market while it at the same time lays down quite precise description of a safety product.¹¹ As such, provision of art. 3

from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

¹⁰ 2001/95/EC

¹¹ The whole provision of art. 3 reads: *1. Producers shall be obliged to place only safe products on the market. 2. A product shall be deemed safe, as far as the aspects covered by the relevant national legislation are concerned, when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty, and in particular Articles 28 and 30 thereof, and laying down the health and safety requirements which the product must satisfy in order to be marketed. A product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the Official Journal of the European Communities in accordance with Article 4. The Member States shall publish the references of such national standards. 3. In circumstances other than those referred to in paragraph 2, the conformity of a product to the general safety requirement shall be assessed by taking into account the following elements in particular, where they exist: (a) voluntary national standards transposing relevant European standards other than those referred to in paragraph 2; (b) the standards drawn up in the Member State in which the product is marketed; (c) Commission recommendations setting guidelines on product safety assessment; (d) product safety codes of good practice in force in the sector concerned; (e) the state of the art and technology; (f) reasonable consumer expectations concerning safety. 4. Conformity of a product with the criteria designed to ensure the general safety requirement, in particular*

could seem as having direct effect, but we shall bear in mind one of general principles of EC law, i. e. that directives cannot impose obligations upon individuals. Therefore, as mentioned above, cases when consumers can rely directly on provisions of Community legislation, do not – also due to the duty of the member states to implement directives properly and in time – occur very often and actually should be considered as exceptions.

Two pieces of secondary legislation aim directly on the enforcement of consumer rights – directive 98/27/EC on injunctions for the protection of consumer interests and regulation 2006/2004/EC on cooperation between national authorities responsible for the enforcement of consumer laws (“CPC regulation”). Both the directive and the regulation seek to protect collective consumer interests and can be therefore regarded as means of collective protection of consumer rights.

The aim of directive 98/27/EC (hereinafter referred to as “directive”) is according to its art. 1 *approximation of laws, regulations and administrative provisions of the member states relating to actions for an injunction in the sense of art. 2 in order to protect collective interests of consumers included in the directives listed in the annex.*¹² This aim shall be reached by several steps. First of all, each member state designates courts or administrative bodies entitled to rule on proceedings which shall stop or prohibit the infringement, ensure that possible continuing effects of the infringement are eliminated and possibly ensure some kind of redress to the damaged party. At the same time, the above mentioned proceedings shall be initiated by qualified entities (i. e. organisations on consumer protection, consumer associations etc.) entitled to bring an action before courts or administrative bodies. Member states are also obliged to enable access to their judicial or administrative proceedings to qualified entities from other member states. As a result of the directive, a list of qualified entities entitled to defend consumers before courts all across the EC is created and published in the Official Journal.

Ideally, in practice the directive should lead to more confident and informed consumers and thus – whenever there occurs an infringement of rights of consumers protected by one of the directives in the annex (implemented quite naturally in the law of the member states) – to more proceedings across Europe. Undoubtedly, the list of qualified entities published in the Official Journal helps consumers learn which bodies can defend their rights before courts, no matter where they are. On the other hand, the same problems which were causing insufficient level of consumer protection

the provisions mentioned in paragraphs 2 or 3, shall not bar the competent authorities of the Member States from taking appropriate measures to impose restrictions on its being placed on the market or to require its withdrawal from the market or recall where there is evidence that, despite such conformity, it is dangerous.

¹² Current list of directives to which directive 98/27/EC applies includes 14 directives – for precise information see the annex to directive 98/27/EC.

before the directive still persist – especially in the field of cross-border infringements qualified bodies do not use the chance to protect consumers' rights abroad. One of the main reasons are the costs of proceedings and limited impact of the rulings of courts of one member state in other member states or even on other cases in the member state itself. The European Commission informed in the report on the application of the directive¹³ that the Office of Fair Trading (Great Britain) was the only qualified body from all over the EC which filed several actions abroad. To sum up, the impact of the directive is – due to reasons stated above - not as high as the Commission rather optimistically expected. This state of affairs will in my opinion continue as it is extremely difficult for consumers' organisations to participate in proceedings abroad, not only due to costs, but mainly due to insufficient knowledge of "foreign", i. e. different law. As there is lacking EC (EU) competence in the field of civil procedural law (which will be lacking also in the future, or at least so it seems from the Lisbon treaty), the only possible way how to increase the activity of bodies on protection of collective consumer interests is to create a detailed information network which would provide consumers as well as consumers' organisations and associations with information on relevant national law.

The second means of collective enforcement of consumer rights, the so-called CPC regulation 2006/2004 (hereinafter referred to as "regulation") aims at cooperation between national authorities responsible for the enforcement of consumer protection laws. Ratione materiae of the regulation is to a great extent similar to the one of directive 98/27/EC. Similarly to the directive, the annex of the regulation lists directives and regulations on consumer protection which shall be – within the meaning of the regulation – regarded as "laws on consumer protection"¹⁴ and thus subject to enforcement in accordance with the regulation. However, even though most of the directives are mentioned in the 98/27/EC as well as in the regulation, the list is not identical which can cause troubles in case when a consumer association brings an action before court in one member state and such court cannot require cooperation from a court or public authority of a different member state because the case does not fall within the scope of the regulation. As a result, the directive and the regulation are not hundred per cent linked together which leads to restricted application of one or another legal instrument. It is then a little surprising that the Commission which is well aware of this fact is not going to propose an amendment of neither the directive nor the regulation.¹⁵

¹³ Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and the Council on injunctions for the protection of consumers' interests, available online at: http://ec.europa.eu/consumers/enforcement/docs/report_inj_en.pdf, pp. 5 - 8.

¹⁴ For detailed list, see the annex of regulation 2006/2004/EC.

¹⁵ See Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and the Council on injunctions for the protection of consumers'

As far as practical functioning of the cooperation between public authorities is concerned, the regulation lays down conditions under which responsible authorities exchange information and realise enforcement measures if asked so by an authority from another member state. It also obliges the member states to cooperate not only with each other, but also with the Commission in the field of mutual exchange of information. As a result, a network of responsible bodies was created and according to the Commission, good mutual cooperation and assistance have developed – there were total 317 requests for mutual assistance in 2007 and 384 requests in 2008.¹⁶ It seems that the desired effect of the regulation – enhancement of cooperation between responsible national authorities and thus stronger and better enforcement of consumer rights in the EC before courts – has been reached. The absence of a closer linkage to the injunctions directive nevertheless prevents effective cooperation not only between public authorities themselves, but in a wider sense also between consumer associations and public authorities.

CONCLUSION

The aim of this paper was to present and analyse means of enforcement of consumer rights before courts in the European Community. It proved that core problem which prevents from effective enforcement is lack of competence of the Community (or – in close future – of the European Union). Absenting powers in the field of civil procedural law together with shared competence in the field of consumer protection (and resulting harmonisation of consumer acquis by directives) directly cause several phenomena which together make enforcement of consumer rights in the EC difficult. First of all, individual enforcement lies entirely in the hands of member states which undoubtedly discourages consumers from one member state to sue elsewhere. Secondly, means of collective enforcement are insufficient because injunctions directive is not completely linked with the CPC regulation and so far no amendments are on the horizon. It seems that the only way how to improve current state of affairs while maintaining powers where they are is to create a public database of material as well as procedural legislation on consumer protection of all member states and hope that consumers and their associations will feel informed and confident enough to defend their rights all over the EC.

interests, available online at:http://ec.europa.eu/consumers/enforcement/docs/report_inj_en.pdf, pp. 8-9.

¹⁶ Enforcement package, on-line text, MEMO/09/312, Brussels 2. 7. 2009, available online at: http://ec.europa.eu/consumers/docs/consumer_enforcement_package_MEMO_en.pdf, p. 6.

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