



CONSUMER PROTECTION IN THE EUROPEAN UNION: CHALLENGES AND OPPORTUNITIES

DIRECTION & COORDINATION

Cayetana Santaolalla Montoya

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PREFACE

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PREFACE

This collective work is the result of the research carried out by a team of European legal experts. It is one of the results of four years of work that began in 2018 when the project JUST/2017/CONS/PR/CO02/0059 - Updating consumer and marketing law content for the consumer law section of the e-Justice Portal was awarded by the European Commission, in a competitive public tender to Mainstrat SL. The Mainstrat team has coordinated and managed team leaders, managers and correspondents from the Member States (our dear "core members"), working tirelessly together with the legal team, comprised of professors, doctors and researchers from three Spanish universities: the University of the Basque Country, the Public University of Navarra and the University of Deusto.

One of the challenges by the European Commission for Mainstrat was to maintain a public database containing information accessible to all. The European e-Justice Portal is designed to be a one-stop shop in the field of justice, making life easier for legal professionals and citizens, offering them information on the legal systems of all its Member States, in 23 different languages. Within the project implemented during these four years (2018-2022), the 31 experts have worked with rigour and methodology, complying with a precise time frame.

To this end, work has been carried out on the main European Directives that regulate the protection of consumers and users, analysing their transposition into national laws in the different Member States. A thorough analysis has been carried out, not only of the Court of Justice of the European Union case law, but also of the different national courts in each Member State, respecting their jurisdictional hierarchy. National administrative practice has been analysed. And it has been based on well-founded doctrinal developments, written in different languages, but adapted to e-Justice in accurate English, which has been the language of the project. At all times, the team has ensured harmonisation of legislation, maximum consumer and user protection and accessible information for all: consumers, businesses, legal professionals and enforcement authorities.

With these words I would like to thank all the people who made this project possible. In particular, to all the European correspondents and the members of the legal team. Thank you to the management team, who have worked with excellence to coordinate the team of experts to achieve the project objectives. Finally, special congratulations to the European Commission for the creation of this section in the e-Justice portal, and for believing in us in the implementation of this European project, which culminates in this collective work as the completion of four years of joint effort.

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CONSUMER PROTECTION IN THE EUROPEAN UNION REGARDING PLANNED OBSOLESCENCE AND THE RIGHT TO REPAIR

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Summary

Planned obsolescence is a practice that anticipates the entropy cycle of a product from an objective point of view or just from the consumer's perspective. Recent practices, especially in the electronic goods market, add a second type of obsolescence, caused after the goods are in the consumer's possession and long after the legal warranty has expired. The present study focuses on the framing of this practice of obsolescence, on the offence of the right to repair, and seeks to find the legal response within the European Union Law, in terms of consumer protection.

Keywords

Planned obsolescence, provoked obsolescence, right to repair, consumer protection.

[Tyrell explains to Roy why he can't extend his lifespan]

[Tyrell] (...) You were made as well as we could make you.

[Roy] But not to last.

Blade Runner (1982). Scott, R. (Director)

I. PRELIMINARY REMARKS

Planned obsolescence is not directly mentioned in the European legislation, nor in the laws of several Member States. The absence of a unified concept certainly contributes to this. As a commercial practice, planned obsolescence refers to the *planned, scheduled, and projected* loss of the usefulness of a thing, usually a product. However, it has various dimensions, including the modern induced type, which is particularly harmful when the product is in the consumer's possession and occurs after the warranty period has expired.

The present study analyses the legal framework inherent to this practice, in particular the direct and indirect interference with the utilities of a given product, by limiting its ability to be repaired by the consumer himself or by a third party indicated by the latter.

As is readily apparent, there is no common response (or at least a satisfying one) at a *supranational* level to this issue: consumer protection must be found in the dogmatic frameworks provided by each legal system, with France occupying the forefront in the reform spectrum, as we shall see.

In this study, we take as reference the market for electronic products. This market is characterised by having *consumer goods* as its object and remains, in its various dimensions, profoundly deregulated and lacking in terms of consumer protection. The reformist impetus has been filling the regulatory gap, but there are open fields. In fact, commercial practices are continually moving from a model based on *instantaneous effects* (contractual and *in rem*, such as payment of the price, delivery of the good, as well as transfer of the *right in rem* over the product) to one that prioritises ongoing business relationships, forcing a *functional dependency* (through, for example, the preference for commercial business via subscription models)[3].

In this context, the concern regarding the durability of products, which is against the producer's best commercial interest, is abandoned and the material control of equipment by the manufacturer is extended. Several reasons are invoked for this transition, namely (i) not to hinder the *technological development*, which is not compatible with the concern of durability, (ii) *design evolution*, (iii) the guarantee of *equipment safety* and, finally, (iv) the *protection of copyright and industrial rights*. Notwithstanding, we detect a set of commercial practices that limit, from the consumer's point of view, the possibility of repairing the product: on the one hand, (i) the interference by reference to the moment of acquisition of the good, as well as, on the other hand – this being a true novelty of modern times – (ii) a *supervening interference*, in relation to the moment of acquisition or of transfer of the ownership of the product, as to the initial aptitude of the product to be repaired, limiting or excluding it at all.

Limitations of this type have arisen paradigmatically through the so-called *software updates*, which substantially modify the operating system of the product and consequently the experience of the end user of the product.

There is no reason, therefore, not to qualify this second type of practice (*supra*, ii) as an *immediate* and *provoked* type of obsolescence, as opposed to the classic, *planned* type (corresponding to the first type indicated above, i). These practices – and this point is decisive, as indicated above – escape the scope of existing liability, occurring after the warranty periods have expired. Let us then explore the response of the legal systems, after a brief contextualization of the problem at hand.

II. THE RIGHT TO REPAIR. BASIC NOTIONS

2.1. From *planned* obsolescence to *provoked* obsolescence

Obsolescence is related to the artificial interruption of the life cycle of a product, either in *objective* terms (limiting its capabilities), falling short of existing technological means, or *subjective* (in the perception of the consumer). The economic advantages[4] are clear, particularly regarding consumption, generally translating into an overall increase in sales and thus a reduction in the risk of overproduction. Its price is also indisputable, particularly in terms of harming consumer rights and the environment through the growing production of waste. However, this notion of obsolescence must be clearer, as it is not reduced to the outright destruction of a product's properties. On the contrary, this survives in a *spectrum*, in which it can be gradually contemplated.

Expressively, Clifford Brooks Stevens stated that the product's obsolescence aims to «[p]rovide the consumer with a desire to own something a little newer, better, and sooner than necessary»[5].

Obsolescence can be viewed from two main vectors, namely by (1) its *object* and, on the other hand, by reference to (2) the *moment* in which it operates. Let us see in what terms.

a. Object

Firstly, obsolescence can be seen as a removal of the product's abilities or it can be aimed directly at consumers, influencing their consumption patterns. It soon becomes apparent that the second type of obsolescence, the *subjective* or *psychological* one (*subjective obsolescence*), is more costly (*e.g.*, in advertising costs[6]) than the mere alteration of the properties of the product (meaning an *objective* type of obsolescence)[7].

Let us focus, therefore, on this last indicated form of *objective* and *programmed* obsolescence. This can be synthesised, in turn, although not exhaustively, in two new ways, namely: through (1) a *direct interference* with the objective qualities of the product; through, to a new degree, (1.1) the *anticipation of the entropy cycle* that any product is condemned to (*e.g.*, through the use of fragile materials, by reducing the tolerance in wear zones, by transforming the products into consumable ones, preventing their reutilisation, *etc.*)[8] or by creating (1.2) *artificial obstacles to its performance* while maintaining its normal qualities (for example, programming printers to refuse printing, although the ink level is still sufficient, forcing the consumer to replace the cartridge). Furthermore, the possibility of (2) *indirect interference* with the

product's properties should also be acknowledged, namely by limiting the right to repair the product.

b. Moment

Secondly, and with reference to the *timing* of that interference, traditionally those of an *objective* type and in a *direct* manner occur in a constitutive way, that is, prior to the transfer of domain to the consumer, via, as seen, the *design, manufacturing process, and distribution*. In other words, obsolescence is *incorporated* in the product itself. This moment is reflected in the *criteria* that generally presides over the consumer protection system, in which the point of reference for the traditional guarantees granted to the consumer is the *moment of the delivery of the good*[9]. We are here in the realm of planned obsolescence and the legislator seeks to prevent the practices functionally intended to do so.

The novelty of our times is to enable a different type of interference, meaning the direct interference with the qualities of the product *after* the transfer of domain, and often after the traditional periods of guarantee have expired, *i.e.*, when the product is in use, changing its objective qualities[10]. It should be noted – and this point is relevant – that this interference is not to be confused with the moment in which the planned obsolescence takes place: in this second hypothesis the interference occurs *ex novo* at that moment. It does not constitute, therefore, a mere expression (gradual or total) of other *planned* obsolescence[11]. The fraudulent intent is also evident, although in both cases there is nothing to prevent an assessment of *negligent obsolescence (fahrlässiger Obsoleszenz)*[12]. Thus, new practices aimed at imposing direct or indirect restrictions on the aptitude of products are emerging, by means of:

- i) *the refusal to grant access to new features*, despite the equipment's clear ability to do so[13];
- ii) *changing peripheral tools*, without aiming to improve product quality and/or making it harder to access existing peripherals (*e.g.*, changing the type of charger, connection protocols, *etc.*)[14];
- iii) *supervening restrictions on usage*[15] (*e.g.*, banning the use of a product because of a production defect or a safety risk, removal of information needed for repairs);
- iv) *the supervening limitation of the capabilities of the product*, by reducing its performance without rendering the product useless (*e.g.*, artificial impediment to access for unauthorised repairs, implementation of mechanisms for rejecting accessories, non-original or non-approved spare parts[16], artificial restrictions of the product's features, such as, in the case of electronic products, the limitation of the battery capacity, the power of the processor, *etc.*).

The first practice can be justified by the absence of the consumer's right to access *new* functionalities or, on the other hand, by the right of only being updated the existing ones, if it is guaranteed access to the functionalities existing at the time the product was made available. The *warranty of performance* is not, in these terms, a *guarantee of updates*, except, as we have

seen, when this is necessary to ensure the current performance of the product at the level guaranteed in the past. In this sense, the recent reform of the German Civil Code is clear, consecrating a duty to update digital products and the goods on which they depend (§§ 327f, 475 BGB). In any case, this maintenance of functionalities is also debatable, except when it is the supplier itself who exclusively controls such access. On the other hand, the reform of peripheral devices (*e.g.*, by the adoption of a new standard) and legal restrictions are in most cases beyond the control of either the manufacturer or the dealer and are not attributable to them or (in the former case) justified by the scope of the innovation[17], which should not be restricted. These phenomena are therefore entrenched in the sphere of the consumer's risk.

Contrary to the first three practices listed above, it is the last practice (that of limiting current aptitudes) that raises most concerns, especially since it is designed, with relative success, to circumvent the existing prohibitions on unfair and abusive commercial practices, especially by frustrating the reason underlying the product warranty period[18]. Let us look at this practice in greater depth.

As mentioned, planned obsolescence is traditionally linked to the physical characteristics of products (commonly known as *hardware* in what concerns technological equipment). A second method emerges among us, as opposed to the former, related to elements without physical support (commonly known as software). Now, in the era of new technologies, it is through this latter interference that the product's aptitudes are limited (*a*) *unexpectedly*, (*b*) *at a distance* and (*c*) *en masse*; a prototypical example of which is the modification of the product through the respective operating system update. Bad practices in this field include, among others and regarding direct and objective obsolescence, (*i*) limitative upgrades of the equipment's performance, which impair its use, and the (*ii*) removal of access to existing features.

In the *Batterygate case*, the Apple company was accused of slowing down older mobile phones in its portfolio by remotely updating their operating systems without informing consumers in advance. In the United States of America, the event quickly caught the attention of the U.S. Department of Justice and the SEC (Securities and Exchange Commission). Several class actions were quickly filed (more than thirty in 2018), and a million-dollar settlement was reached to settle the dispute. In Europe, consumer law associations also quickly took legal action. In Portugal, the initiative is more recent, with the Portuguese Association for Consumer Protection (DECO) taking legal action in 2021: it followed the model of recent actions filed in fellow countries and by the respective consumer protection associations, namely in Italy by *Atroconsumo* and, in 2020, in Belgium by *Test-Achats* and in Spain by *OCU*.

But the record goes back further: in 2017, the Apple company agreed with the French Public Prosecutor's Office to pay a fine of twenty-five million euros following the complaint made by the French Directorate General for Competition, Consumption and Repression of Fraud (*Direction générale de la concurrence, de la consommation et de la répression des fraudes*; DGCCRF).

Let us see, within the aforementioned cases, the Italian situation in more detail[19].

On 25 September 2018, the Italian Competition and Market Authority (*Autorità Garante della Concorrenza e del Mercato*; AGCM) found that the operating system update (iOS 10), as well as

subsequent updates (iOS 10.2.1) of mobile phones (*iPhone* 6, 6plus, 6s, 6splus), were carried out in a misleading manner, decisively influencing the performance of the devices and not allowing consumers to restore their original functionality. This commercial practice was found to infringe Articles 21-22 and 24 of the Italian Consumer Code (*Codice del Consumo*), which implemented the 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[20] – note that the first provisions relate to unfair commercial practices (*pratiche commerciali scorrette*) and Article 24 to aggressive commercial practices (*pratiche commerciali aggressive*) – aimed at the replacement of equipment through the purchase of newer ones. The lack of information on the characteristics of the batteries of the devices was also assessed[21]. Each of the two infringements of the consumer code was fined five million euros, combined in the end. The decision was confirmed by the regional administrative court of Lazio (Rome) on 20 May 2020[22].

III. THE RESPONSE FROM SEVERAL EUROPEAN UNION MEMBER STATES

This *supervening* and *direct* interference of a product's abilities is being vigorously tackled by several European countries, and rightly so. Let us see to what extent, albeit briefly.

3.1. Germany

The German Civil Code (BGB) provides a sufficient basis for consumer protection, having been amended the second book (Law of Obligations), section eight (particular obligations), title one (purchase, exchange) implementing Directive 1999/44/EC of the European Parliament and of the Council of 25 May. In the context of the purchase contract, a defect of the good, outside an agreement as to its the quality, is understood to mean (i) its *inadequacy for use* or (ii) for the *customary use of things of the same type* or, in the same way, a *lack of quality*, having regard to the legitimate expectations of the purchaser (§§ 433(1), 434(1), 1. and 2. BGB). Liability for material defects (*Sachmängel*) include the right to claim for repair (*Nacherfüllung*) of the good (§§ 437, 1., 439 BGB), whose claim is generally statute-barred after two years (§ 438, (1), 3. BGB), without prejudice to the period being extended in special situations (*e.g.*, in the case of real estate, whose limitation period is five years, § 438, (1), 2. BGB). This period may be further extended by a conventional guarantee, including one for durability, whereby it is presumed that defects in the thing that arise in the meantime are covered by it (§ 443, (2) BGB). By not taking as a reference the moment of transfer of risk (reserved for the quality agreed upon by the contracting parties), the protection of defects is time-barred by the statutory warranty periods, to which the lack of suitability of products in the context of planned obsolescence can be referred to.

In a forefront area lies the most recent amendment of the German Civil Code in 2022, limited to consumer contracts for digital products (*Verbraucherverträge über digitale Produkte*). In implementing the latest European Directive on digital products, §§ 327 to 327u BGB were added effective as of 1 January this current year as far as the supply of digital products (both digital content and services of this kind) is concerned. However, the amendment does not apply to the purchase of certain goods which are functionally dependent on digital products, such as

the purchase of a smartphone with respect to its operating system (§ 327a (3) BGB). For such cases, the also recently enacted Paragraph 475b BGB applies[23].

3.2. France

A law on the energy transition has been approved in France. This law, in addition to the French consumer code (*code de la consommation*), defines and punishes planned obsolescence (No. 2015-922 of 16 August 2015)[24]:

[Art. L.213-4-1[25]] Planned obsolescence is defined by the use of techniques whereby a market operator deliberately aims to reduce the lifespan of a product in order to increase its replacement rate.

The provision has since been repealed and replaced by the law against waste and the circular economy, enacted on 10 February 2020. There are two new definitions, increasing the universe of responsible parties, although the associated sanctions are the same[26]:

1) Firstly, the definition that was in force until 17 November 2021,

[Art. L.441-2[27]] The practice of planned obsolescence, defined as the use of techniques by which the person responsible for placing a product on the market deliberately aims to reduce its life in order to increase its replacement rate, is prohibited.

2) Secondly, the definition in force from 17 November 2021 to the time-being,

[Art. L.441-2[28]] The practice of planned obsolescence, which is defined as the use of techniques, including software, by which the person responsible for placing a product on the market deliberately aims to reduce its lifespan, is prohibited.

The definition put forward clearly does not restrict the period in which the use of the technique is prohibited; this proves to be advantageous. In fact, when considering any practice that reduces the *product's life span*, it naturally includes those that take place during its expected life cycle, long after the product is in the consumer's possession, or the warranty period (legal or conventional) has been exhausted. Furthermore, and this is to be commended, the loss of usefulness of goods is prevented by the obligation of information regarding the availability of indispensable spare parts, and the respective period of availability (Art. L111-4 *code de la consommation*[29]).

3.3. Italy

In the Italian legal system, a bill was proposed in June 2018 to combat planned obsolescence (S.615/2018)[30]. The proposal was not successful. Others have followed (C.73/2018, C.872/2018 and C.1512/2019), also unsuccessful. The legislative decree of 24 2002, which transposed the Directive 1999/44/EC, was repealed by the Italian consumer code (Article 146/1, s)). The current consumer code does not regulate the matter at hand. In any case, and as we have seen, the AGCM considered, in a decision confirmed by the courts, that the commercial practice inherent in the previously described *Batterygate* qualifies as unfair, even when it occurs outside the warranty timeframe.

3.4. Spain

There is no express provision in Spanish law directly prohibiting planned obsolescence. The practice may be considered unfair under the general law for the protection of consumers and users[31] (see Articles 8/1 (b) and 49/1 (l)) or on competitive terms[32]. In 2018, there was a draft law on climate change and energy transition with proposals to improve information on the susceptibility of repair for products and to promote their durability[33].

3.5. Belgium

In Belgium, the Senate expressly recognised the problem in 2011: through the draft resolution to combat the planned obsolescence of energy-related products[34] it recommended the Belgian government the adoption of a law to combat the practice, as well as display labelling indicating the useful life of products on packaging.

Between 2012 and 2018, five bills to combat planned obsolescence were put forward, without success[35]. In 2019, a new draft resolution in favour of the circular economy and for combating planned obsolescence was adopted[36]. Consumer protection is restricted, as in the Italian case, to classifying the practice as unfair under the Belgian code of economic law (Articles VI 93 *et seq.* of the *code de droit économique*[37]).

3.6. Portugal

In Portugal there is no direct prohibition of provoked obsolescence. This does not occur because there is no legislative willingness to do so. Simply put, all the legislative initiatives that have existed, seeking a regulated solution, have failed[38]. Notwithstanding, the practice is banned by specific regulations, which do not allow, even so, to bring it out of the case-by-case basis, apart from which a lack of a direct prohibition of the practice is felt.

In one example, the Portuguese management regime for *specific waste streams*[39] states that electrical and electronic equipment must be manufactured with sustainability in mind. Specifically, producers of this equipment must «design and manufacture sustainable products taking into account issues such as (...) durability, including in terms of lifetime and the absence of premature obsolescence, reusability, upgradeability, and reparability (...)» (Article 55/3).[40].

There are other examples. It remains to be seen, however, whether they allow an overall judgment to be made against these practices. The most recent legislative initiatives[41], at the risk of being unnecessary from the outset, counter such understanding.

The need for a detailed regulation, not limited to those devices, continues to be felt. However, the obsolescence of the second type, of a supervening and indirect one, in which the offences may be linked to the right to reparation, has escaped the limelight. Let us look, in greater detail, at the treatment of the *right to repair*.

IV. THE PROTECTION OF CONSUMERS' RIGHT TO REPAIR

As we have attempted to show, the practices involved in planned obsolescence, in its multiple facets, tend to unavoidably damage the consumer's rights. On the other hand, from the perspective of the owner of the good in question, the practice also calls for irreversible damage to the utilities of his property, even by simply limiting the means of combating the avoidable loss or deterioration of the good. Let us focus, for the moment, on the right of consumers to prolong the life of their products and equipment, as one of the most economically and environmentally sustainable measures.

There is a drive in several countries, supported in tandem citizens' movements such as the Electronics right to repair, or the German “*Schraube locker?!*” (whose slogan is “Right to repair”, *Recht auf Reparatur*), which are supporting the paradigm shift. Historically, the establishment of the consumer's right of repair has only gained ground within the specific environments in which it exists: this is the case of the automobile industry in the United States of America [42].

In a broad sense, we can summarise the various practices aimed at directly limiting the consumer/owner/user's individual right of repair, such as:

- (i) making tools and components intended for repair excessively onerous for third parties;
- (ii) preventing or artificially hindering the repair of certain components by invoking reasons of security (such as batteries, fingerprint, and user-face reader modules) or the protection of one's own rights (particularly industrial property rights);
- (iii) programming the equipment not to accept repairs outside the circuit of authorized repairers or authorized repair centres;
- (iv) using specialized tools that are difficult to access, making conventional repairs difficult without apparent justification (*e.g.*, the use of specialized bolts or screws that are not commonly used);
- (v) refusing to produce or supply spare parts or components which would permit the repair of the existing equipment;
- (vi) removing or restricting access to equipment repair and maintenance manuals, schematics, and diagrams.

4.1. The role of European Union law

European Union legislation has played a prominent role in this field. On 17 October 2013, a proposal was drafted by the European Economic and Social Committee, called “*Towards more sustainable consumption: The life cycle of industrial products and consumer information for the sake of restored confidence*”[43]. And subsequently, on 9 June 2017, by the European Parliament on the report on products with a longer lifespan: benefits for consumers and

businesses drafted by Pascal Durand [44]. Based on this report and on 4 July of that year, the European Parliament adopted the resolution on products with a longer lifespan: benefits for consumers and businesses (2016/2272(INI)), where it urges, among other things, the Commission to promote the reparability of products. The issue has also been raised several times by Members of the European Parliament directly with the European Commission[45], and is also included in several Directives[46].

The European Green Deal, promoted by the Commission led by Ursula von der Leyen, should also be considered. In this, an express reference to planned obsolescence was made:

«The circular economy action plan will also include measures to encourage businesses to offer, and to allow consumers to choose reusable, durable and repairable products. It will analyse the need for a ‘right to repair’, and curb the built-in obsolescence of devices, in particular for electronics».

On 25 November 2020, the European Parliament adopted the resolution on a more sustainable single market for businesses and consumers (2020/2021, INI), which encourages production and consumption models that are compatible with sustainable development, to combat planned obsolescence. As regards the right to repair, specifically, it calls firstly for (1) full and clear information to be made available, (1.1) at the time of purchase, concerning, *inter alia*, the availability of spare parts, software updates and the reparability of a product, the average price of spare parts at the time of purchase, approximate recommended delivery and repair times, as well as (1.2) product documentation together with a summary of frequent faults and how to repair them. Secondly, it calls on (2) the Commission to recognize and regulate the consumer's right to repair, based on the measures put forward by the *EcoDesign* Directive, namely (2.1) to ensure *free access* to repair information to all parties (including independent repairmen), (2.2) to encourage standardization of spare parts, (2.3) to define the minimum mandatory period for the supply of spare parts after the end of production as well as reasonable maximum delivery times according to the product category, (2.4) to ensure that the price of spare parts is reasonable, (2.5) to ensure fair access to necessary spare parts for all repairers (independent and authorised) and consumers, (2.6) to extend warranties or reset periods for consumers who choose to repair products, (2.7) to assess the possibility of creating a legal guarantee for parts replaced by a professional repairer and finally (2.8) to encourage Member States to create incentives for repairs.

Other approaches, tested in European law, such as the possibility of increasing the former statutory minimum warranty period of two years (under Directive 1999/44/EC) were successful: under Directive (EU) 2019/771 (art. 10/1), as was the case in Portugal (Article 12/1 of Decree-Law 84/2021 of 18 October).

France is at the forefront of these changes with the aforementioned Law 2020-105 of 10 February 2020 on the fight against waste and the circular economy. On 1 January 2021, a set of measures aimed at protecting the consumer's right to repair were implemented, we would highlight, from a non-exhaustive list, in particular the creation of a reparability index, from 0 to 10, with decimal points and on a coloured scale, placed on the product or packaging directly at the point of sale (Article 16)[47].

4.2. On the self-sufficiency of the existing legal framework; in particular, the Portuguese case

The apparent omission of protection calls to mind, firstly, the constitutional approach. In fact, the first paragraph of Article 60 of the Constitution of the Portuguese Republic protects consumer rights regarding «*quality of the goods and services consumed, training and information, protection of their health, safety and economic interests as well as compensation for damages*». Although the *right to quality* does not imply the absence of defects, which are naturally inherent to any product acquired[48], the aim is to protect consumer trust by meeting the consumer's legitimate expectations. On the other hand, if the durability does not correspond to that which was expected, nor to that which is legally required, the consumer is entitled to be reimbursed for the damages he has suffered. This second aspect – the protection of damages – , which is also constitutionally protected, is highly important.

At the infra-constitutional level, there are several provisions that enable consumer protection, namely the Portuguese *Consumer Protection Law* (Law no. 24/96 of 31 July). This law does not benefit from an express provision on the matter, although this has not prevented various Authors from framing the prohibition of the practice under it. In short, the offence of the right to repair may be viewed through the prism of compensation (Articles 3/f), 12). The principle of good faith – set in Article 9/1 of the Consumer Protection Act – is called upon to intervene, especially in the field of *post-contractual liability*. For Carlos Ferreira de Almeida the legal theory of the consumer law itself imposes a special relevance of post-contractual duties, when a *durable* consumer good is involved[49]. It also includes after-sales assistance services, outside the warranty periods: having as object “maintenance or repairing care, even if paid for”[50], as a secondary obligation, the non-performance of which gives rise to civil liability[51]. Similarly, and based on the provisions of paragraph 5 of article 9 of the aforementioned law, Jorge Morais de Carvalho defends the existence of a *subjective right to post-sales support* [52] and this is where the Author finds the consumer protection comes into play in cases of planned obsolescence[53].

Secondly, the sale of consumer goods regime, approved by Decree-Law no. 84/2021, of 18 October, should be called into question. Under the terms of this regime, the consumer is protected for any lack of conformity that becomes apparent within three, five or ten years from the date of delivery of the goods (Articles 12/1 and 23/1 of the respective regime). This regime protects the consumer when obsolescence occurs within the periods mentioned, qualifying this loss of utility as a lack of conformity (Articles 6 to 9), presumed to exist on the date of delivery of the good (Articles 13/1,2, 23/4). However, the regime centralizes the moment of delivery as the point of reference and the limit for the events affecting the good. For this reason, the relevant behaviour of the parties that takes place after the period is not covered directly. Moreover: the right of repair is, as we have seen, a mechanism to protect the consumer against the lack of conformity manifested under the terms of this law. It is, therefore, only an option, alternative to the others (Article 15.1 of the aforementioned law), for the consumer to be protected in the face of non-compliance by the seller. The repair is intended, in short, to restore the conformity of the good, attributable to the professional. It is not surprising, therefore, that

it is the professional himself who must repair the good or bear the respective costs. The regime is silent when this lack of conformity is not attributable to the trader, nor is there any mention of the consumer's right to repair the good himself, outside the typical situations of lack of conformity. Finally, and this aspect causes major difficulties, the subjective scope of application of the regime does not apply in other situations, also in need of protection, namely sales between consumers (C2C), between professionals (B2B) and from consumer to professional (C2B).

Mention must be made of the regime that regulates producer liability for defective products (under Decree-Law 383/89, of 6 November, in its current wording), as the notion of defect allows it (Article 4) [54].

Far from doubt, the regime that offers the greatest prospects for the proper framing of the matter at hand is the regime applicable to *unfair commercial practices* (Decree-Law No. 57/2008 of 26 March), that transposed Directive 2005/29/EC of the European Parliament and of the Council of 11 May, concerning unfair business-to-consumer commercial practices in the internal market^[55].

This Decree-Law regulates the commercial practices of the company in its relations with consumers in direct connection with the sale or supply of a good to the consumer (Article 3,d)), including those – and this aspect is determinant – occurring after a commercial transaction regarding a good or service (Article 1/1). On the other hand, there are no doubts as to the framework of the practice described in the general clause prohibiting unfair commercial practices (Article 5/1), namely when prohibiting commercial practices (i) *inconsistent with professional diligence* that (ii) *affect the economic behaviour of the consumer in relation to a certain good or service*.

Let us look at the conditions for this ban in greater detail.

The fulfilment of the first requirement benefits from the definition of “professional diligence” in the mentioned Decree-Law (Article 3, h)): a competence criterion is required, assessed by two parameters, namely that of *honest market practice* and that of *good faith*. The relevance of the second element is widely known, contrary to the first^[56]. No definition was provided for the second requirement (*i.e., the effect on the economic behaviour of the consumer by reference to a certain good or service*). In fact, there is only the definition of what is meant by “*substantially distorting the economic behaviour of consumers*”, but this aspect embodies an alternative for the qualification of the practice as unfair to the already described aspect of the effect requirement.

In the context of the problem at hand, and per the analysis of the provision, as a direct result of the impact on the good, the consumer may, in a second moment, see his economic behaviour substantially distorted (Articles 3 e), 5/1). While this distortion is defined, in turn, as the taking of a decision of *forced* transaction (Article 3, l)) – *e.g.*, to acquire a new equipment since its own is not repairable –, which occurs *after* that first affectation of behaviour, also qualifying the practice as unfair. Returning to the previous example, the consumer can no longer, for example, repair the equipment at unauthorised agents by the market operator (*affectation* of behaviour) and, to that extent, is conditioned to purchase a new one (*distortion* of behaviour). The direct result of the classification of the practice as *commercially unfair* implies, without prejudice to the

resort to precautionary measures (Article 20), (1) the *punishment*, as an administrative offence, with a fine, as well as (2) the existence of several *accessory sanctions*, including the interdiction of the exercise of the profession, the closure of the establishment, and the publicity of the application of the applicable sanctions (Article 21). The consumer may also – and this point is relevant – be compensated directly by the offender under the standard terms of civil liability (Article 15)^[57].

It remains to be established what type of civil liability is involved. It is known that the commonly known *contractual liability* arises from the breach of obligations in the technical sense of the functional relationship between the creditor and the debtor (see the Article 798 of the Portuguese civil code). Is this the case? The law specifies the provision to which one of the parties is obliged (the professional) in the bond that binds him to the consumer, even if just in an accessory way. We are in the field of the accessory duties of information, protection, and loyalty. Without prejudice, the rules also apply to the moment *prior* to the commercial transaction itself – in the *precontractual phase* (see the Article 227 of the Portuguese civil code), as well as, after the transaction – the field is, still, that of the *contractual liability*. It is not denied, however, the possibility of competition of this liability with the *tortious* one (Article 483/1 of the Portuguese civil code), considering the qualification of these provisions as *protection ones*.

Our analysis cannot disregard the subsidiary role that exists in the application of the domestic law, generally preceding the laws that transpose the related Directives. In Portugal, the general regime established by the Civil Code applies to the legal relationship of consumption, in everything that is not specifically regulated by these Laws and Decree-Laws[58]. This is a clear benefit, although not as far as the system of defects is concerned, since the system based on European law is clearly more advantageous for the consumer[59]. The behaviour previously described may mainly represent a *breach* of (i) the main duty, (ii) accessory duties of the parties or, finally, (iii) the offence of interests disconnected from that of contractual performance. Let us briefly look at each of these hypotheses.

[i. *non-fulfilment of a main duty*] It is conceptually far-fetched to visualise a *duty* for the party who supplied the good or product to allow the other one to repair it. Moreover, under the assumption and penalty of contractual perpetuity, the obligation to deliver a good with the agreed-upon characteristics is exhausted at the moment of performance, generally with the tradition or transfer of ownership of the item. Therefore, there is no duty of *post-delivery* repair and if there are any means of protection, such as those that follow from the prism of conformity, the existence of defects is assumed (or presumed) to exist at the moment of the good's delivery. Well then, in parallel, there is no *right* to repair on the same level, simply because the legal position no longer depends on the behaviour of a third party: the power in question relates directly to the property and this is a characteristic of other rights, which are not relative, but rather *absolute*. Without prejudice, it is possible for the parties to agree to maintain a *status quo* regarding the good, i.e., an extraordinary guarantee period, when the basic law does not provide for it (i.e., because it does not concern problems in the stipulating or enforcement phase), or beyond the regime specially granted (as happens in the sale of consumer goods, as we have seen).

[ii. *breach of accessory duties*] The support of the post-effectiveness of accessory duties of conduct, even if the main ones are extinguished, based on the principle of good faith, is another way of tackling the problem at hand [60]. In short, the individual may invoke the breach of accessory duties, existing even after the performance of the main obligation to deliver the item,

and long after the general warranty periods have expired. Such conduct, insofar as it affects the right of repair, is contrary to good faith and causes the defaulting party to incur contractual liability[61]. The accessory duty, concretely violated, should be examined, although it is the duty of security that fits the matter better; without prejudice, it should be noted that the accessory duty of information is directly contemplated in similar situations in other laws, such as in the Portuguese Advertising Code (articles 10 and 11).

[iii. *the infringement of other interests*] It seems excessive, and perhaps unnecessary, to call for the creation of a (new) subjective right to repair (of the goods and products). Excessive, because we see no advantage in elevating a faculty of the owner of the thing to the category of the (absolute) right from which it derives. Unnecessary, because as an option of the holder of the right over the thing, it is protected, sometimes by prerogatives aimed at the protection of the status of owner, sometimes by those of the holder of the possession, eventually overlapping with the temporarily existing contractual protection. Thus, the owner of the thing always has the faculty to use it and this also implies repairing it. Any illegitimate restriction of this faculty is an offence against the *right in rem, per se*, and must be repressed. Of course – and we must emphasise this aspect – the protection concretely erected may be covered by other institutes, such as the regime of the conformity of the thing, within the time limits established by the respective regime, but this does not forget the basic situation that governs it. The question is, quite simply: what is the reason that allows us to treat differently the third party that damages the thing, from the producer who voluntarily limits its utilities by force? Apparently, there is no basis or need to separate these realities. Both behaviours are protected, in most systems, from the tortious standpoint (in the Portuguese case, as an offence against another's right; Article 483/1 of the Portuguese Civil Code). Interference in the enjoyment of the benefits of the thing is not dependent on the quality of the third party, particularly when this may be, or also be, assessed by the scope of the consumer's interest in integrity.

This liability may be combined – it should not be forgotten – with the *criminal* and/or *administrative* liability [62], whose diminutive significance derives from its *ultima ratio* nature and does not fail to generate other difficulties, such as that of identifying the perpetrator of the crime (among, for example, the engineer, manufacturer, seller or administrator of the company that sells the product).

V. CLOSING REMARKS

I. The repair of goods and products is a fundamental faculty inherent to ownership. Its limitation or exclusion, especially because of planned obsolescence practices, should be vehemently opposed. However, within the scope of Consumer relations, the power of repair has been conceived, not as a pure compliance interest, but only as a contractual re-balancing tool, in face of a professional's non-compliance. Nevertheless, it is neither conceptually necessary, nor appropriate to create a *right* of repair; although this power to benefit from the utilities of the thing must be protected, including when the intention is to protect other individuals who are not consumers. Indeed, the concern goes beyond the scope of Consumer Law: at the environmental level, the transition to a policy of waste prevention should prevail or, at least, complement the recycling one, especially in materials that are difficult to recycle, as it happens with electronic equipment and its infamous *e-waste*.

II. To this end, an explicit ban on the practice of planned and provoked obsolescence is recommended. The creation of a consumer code, for those legal systems which do not possess one[63], or the amendment of the existing civil code, as is the case in Germany (cf., for example, § 476 BGB), facilitates this task. At the very least, we agree with Tobias Brönneke who calls for an amendment to the Directive on the sale of consumer goods to directly include the ban on planned and provoked obsolescence[64].

[3] Regarding the concept of the Sharing Economy, sometimes referred to the marketing technique of Manipulated Durability and Maintainability (MDM); see, with references, Belk, “You are what you can access: Sharing and collaborative consumption online”, *Journal of Business Research* 67, 2014, pp. 1595-1600.

[4] Especially in a context of monopolistic market dominance (Toshiaki Iizuka, “An empirical Analysis of Planned Obsolescence”, *Journal of Economics & Management Strategy*, Vol. 16, 2007, pp. 191-226, 194). There are other purposes inherent to the practice, such as for warfare. A famous case concerns the supply of electronic chips to the former Soviet Union by the United States at the height of the Cold War as a counterintelligence measure. The chips were built to fail, and this act of sabotage, coupled with a disinformation operation, caused enormous damage to the Soviet war effort; about this episode, entitled “*cold-eyed economic warfare*”, see Gus W. Weiss, “The Farewell Dossier: Duping the Soviets”, *Studies in Intelligence*, Central Intelligence Agency, 1996; accessed at 23-Jun-2022.

[5] See Glenn Adamson/David Gordon, “Industrial Strength Design: How Brooks Stevens Shaped Your World”, Cambridge: MIT Press, 2003, pp. 4-5.

[6] A prime example of perceived obsolescence concerns competition in the automobile industry. In the 1920s, General Motors, chaired by Alfred P. Sloan Jr., found a way around the saturation of the car market, which had been in decline for several years. By developing and launching a new car model every year – contrary to best business practice at the time – consumers were persuaded to upgrade their vehicle to the latest model. The practice was a commercial success, with General Motors overtaking the sales of its major competitor, Ford, early in the following decade. See, on the topic, Giles Slade, “Made to break: technology and obsolescence in America”, First Harvard University Press: United States of America, 2006, p. 29 *et seq.*

[7] Other types can be found; see Jesús Pineda/Prada Salmoral “A Juridical Theory of Planned Obsolescence”, May 10, 2017, SSRN, accessed at 10-June-2022, pp. 6-11, William Cornetta, “Obsolescência. Da origem ao problema social e seus reflexos à sociedade”, in *Estudos de Direito do Consumidor*, Centro de Direito do Consumo da Faculdade de Direito da Universidade de Coimbra, December 2019, pp. 315-354 (322-327). On the second concept, presently not further explored, see Maria Victória Rocha, “Pirataria na lei da moda? Um paradoxo”, *Estudos de Direito do Consumidor*, no. 12, Centro de Direito do Consumo da Faculdade de Direito da Universidade de Coimbra, 2018, pp. 185-290.

[8] A prime example is the agreement reached probably in 1924 between the main manufacturers of light bulbs to reduce the number of hours of their operation by one third (from the usual one thousand five hundred on the market to one thousand hours). The practice would lead to the organisation behind this case (*Phæbus S.A., Compagnie Industrielle pour le Développement de l'Éclairage*), founded in 1915 and based in Switzerland, becoming known as the *Phoebus cartel*. About the history of planned obsolescence see N. Maycroft, “Consumption, planned obsolescence and waste”, University of Lincoln (working paper), pp. 10-12.

[9] Accordingly, see the solution initially provided for in Directive 1999/44/EC (Article 3/1), which was replaced by Directive (EU) 2019/771 (see its Article 5). In Portugal, see the provisions of Article 3 of Decree-Law No. 67/2003, of 08 April; the solution has been maintained by the current Article 12/1 of Decree-Law No. 84/2021, of 18 October, which revoked the former Decree-Law.

[10] See: Ann Hodges/Porcher Taylor, “The Business fallout from the rapid obsolescence and planned obsolescence of high-tech products: downsizing of noncompetition agreements”, *Columbia Science and technology law review*, Vol. VI, no. 3 2005, pp. 1-32. On other modern practices, equally unlawful, see L. Menezes Leitão, “A protecção do consumidor contra as práticas comerciais desleais e agressivas”, *Estudos de Direito do Consumidor*, V, Coimbra, 2003, pp. 163-181.

[11] An important example of this type of practice was the *Epson case*, in which the company was accused of altering the printing system, programming it to report the lack of ink before the ink cartridge was used up; see Emmanuele La Rosa, “Planned Obsolescence and Criminal Law: A Problematic Relationship”, in Volker Mauerhofer/Daniela Rupo/Lara Tarquinio, “Sustainability and Law, General and Specific Aspects”, Springer, E-book, 2020, pp. 221-238 (231).

[12] See the concept put forward by Andreas Oehle, et al., in *Qualität statt vorzeitiger Verschleiß – Diskussionspapier zur eingebauten Obsoleszenz bei Konsumgütern*, Stellungnahme verbraucherkommission Baden-Württemberg, 32a, 2014, Stuttgart, pp. 1-14 (4), as *fahrlässiger Obsoleszenz*.

[13] This has been the well documented case of the software update cycle of several equipment, such as mobile phones. The lack of FOTA (Firmware Over-The-Air) updates have been regularly denied when the hardware can suffice. These cases are not to be mistaken, however, for the inadequacy *unintentionally* caused by technological evolution, which requires additional capabilities of the equipment. It is curious to note that on 24 June 2021, the Act regulating the sale of goods with digital elements and other aspects of the purchase contract was approved in Germany (*Gesetz „zur Regelung des Verkaufs von Sachen mit digitalen Elementen und anderer Aspekte des Kaufvertrags“*). This Law, which implemented the new European Directive that also regulates this matter (EU 2019/771), established the duty of the professional to guarantee the functionality and security of an information technology product, after the delivery of the good and for a reasonable period (given the nature and purpose of the good). This obligation to update (*Aktualisierungspflicht*) is now set out in § 327f BGB; on this new duty, see Dirk Staudenmayer, “Kauf von Waren mit digitalen Elementen – Die Richtlinie zum Warenkauf”, *NJW* 40/2019, pp. 2889-2893, as well as Karin Potel/Stefan Hessel, “Update qua Gesetz – Aktualisierungspflicht nach § 327 f BGB in der Praxis”, *Recht Digital* 2022, p. 25, and Gerard Spindler, “Umsetzung der Richtlinie über digitale Inhalte in das BGB”, *MMR* 2021, pp. 451–457.

[14] In an historical decision, the European Commission has recently adopted a legislative proposal to amend the 2014 Radio Equipment Directive, as a first step towards mandating a common charger for mobile phones and other small portable devices. The proposed new directive of the European Parliament and of the Council amending Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment is closer to being in force.

[15] A textbook example is the automobile industry, through its practice of refusing to supply spare parts to dealers and workshops which are not authorised. The U.S. Supreme Court has observed, under the federal antitrust laws (notably the *Sherman Act*), a business generally has a right to deal, or not to deal, with whomever it likes, if the manufacturer has a legitimate business reason for its refusal to deal.

It should be noted that the unexpected events that affect the products' functionality are not always attributable to the professional. In one example, the ban on access to low-emission zones in the city – a restriction which is, moreover, common in several European countries – has condemned several vehicles to obsolescence and prevented them from being used. The phenomenon is, however, due to a third party and falls within the consumer's sphere of risk. This is also the case of the sale of consumer goods, where the Portuguese law opted not to set the moment of risk transference to the time the good is delivered (this was the criteria adopted in Sweden, Denmark and in the Netherlands); for further developments, see João Calvão da Silva, “Venda de bens de consumo”, 4th ed., Almedina: Coimbra, 2010, pp. 99-101.

[16] Manufacturer HP has been forced to withdraw a software update that prevented consumers of certain branded printers from using third-party ink cartridges (<https://www.washingtonpost.com/news/the-switch/wp/2016/09/29/hp-removes-update-that-forces-customers-to-use-on-brand-ink-cartridges/>; accessed 23-Jun-2022). In France, on 18 September 2017, the association HOP (*Halte à l'obsolescence programmée*) filed several complaints for the offence of programmed obsolescence against four leaders in the printer market (*Epson*, *HP*, *Canon* and *Brother*).

[17] It remains to be seen whether this is guided by the needs of progress and to what degree. This practice, safeguarded by the reformist scope, may lead to abusive practices, having in mind other main purposes, especially economic ones, which become reprehensible when they substantially impact the consumer's position.

[18] Ana Amorim, “Obsolescência programada e proteção dos consumidores: abordagem comparada de direito luso-brasileiro”, *Revista de Direito, Estado e Telecomunicações*, Vol. 11, Universidade de Brasília, 2019, pp. 155

[19] Ana Amorim, *idem*, pp. 153-176.

[20] Ângela Frota, “A codificação do direito do consumo na Itália”, *Revista luso-brasileira de Direito do consumo*, vol. III, no. 11, (September), 2013, pp. 137-151 (146).

[21] The Decision No. 27365 (PS11039) was published on 24 October 2018 and is publicly accessible: it can be viewed on AGCM's website – https://www.agcm.it/dotcmsdoc/allegati-news/PS11039_scorr_sanzDich_rett_va.pdf; (accessed on 23-Jun-22). In the same respect and on the same day (PS11009), the company Samsung was sentenced for a similar practice: a recent operating system update (Marshmallow) of a device that did not support it (Galaxy Note 4) was at stake - https://www.agcm.it/dotcmsdoc/allegati-news/PS11009_scorr_sanz_omi_dichrett.pdf; (accessed on 23-Jul-22).

[22] Section I, Rec. No. 201815516. The decision is found at giustizia-amministrativa.it and follows the previous ruling in other cases; see, in this sense, the decision of TAR Lazio, Rome, Section I, 20 February 2020, No. 2245.

[23] Gerhard Ring, “Schuldrechtsreform 2022 Sachmangelbegriff - digitale Inhalte – Verbraucherverträge”, *DeutscherAnwaltVerlag*: Bonn 2022, pp. 102-105, 208-221.

[24] Claudia Déméné/Ane Marchand, “L’obsolescence des produits électroniques : des responsabilités partagées.” *Les ateliers de l'éthique, The Ethics Forum*, Vol. 10, 1, Hiver, 2015, pp. 4–32.

[25] Translation of Article L. 213-4-1.-I. of the said Law: «*L'obsolescence programmée se définit par l'ensemble des techniques par lesquelles un metteur sur le marché vise à réduire délibérément la durée de vie d'un produit pour en augmenter le taux de remplacement*».

[26] Under the current art. L.454-6 the infraction of that provision is punishable with a prison sentence of two years and a fine of three hundred thousand Euros, without prejudice to the possibility of increasing the amount of the fine (to 5% of the average annual turnover, calculated based on the last three years) or to the application of additional penalties.

[27] By *Ordonnance* n° 2016-301, of 14 March 2016: «*Est interdite la pratique de l'obsolescence programmée qui se définit par le recours à des techniques par lesquelles le responsable de la mise sur le marché d'un produit vise à en réduire délibérément la durée de vie pour en augmenter le taux de remplacement*» – as well as its punishment in art. L.454-6, as amended by art. 25 of Law 2020-105 of 10 February 2020.

[28] Rédaction introduite par Law No. 2021-1485 of 15 November 2021, arts. 5 and 6: «*Est interdite la pratique de l'obsolescence programmée qui se définit par le recours à des techniques, y compris logicielles, par lesquelles le responsable de la mise sur le marché d'un produit vise à en réduire délibérément la durée de vie*».

[29] This provision was given the necessary development by the *Décret* n.° 2014-1482, du 9 décembre 2014, *relatif aux obligations d'information et de fourniture concernant les pièces détachées indispensables à l'utilisation d'un bien*.

[30] DDL S. 615 - *Modifiche al codice di cui al decreto legislativo 6 settembre 2005, n. 206, e altre disposizioni per il contrasto dell'obsolescenza programmata dei beni di consumo*.. The proposed Law can be consulted at senato.it.

[31] *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*.

[32] *Ley 3/1991, de 10 de janeiro, de Competencia Desleal*.

[33] Art. 49 of the proposal (No. 122/000265), published in the official bulletin of general courts (BOCG) No. 302-1 of 7 September 2018.

[34] No. 5-1251/1 of 7 October 2011, available at senate.be. Three bills on planned obsolescence are currently under Parliamentary scrutiny.

[35] Of 14 February 2012 (doc. 53 2060/001 and doc. 53 2061/001) and in 2018, the proposals of 22 January (doc. 54 1603/001), 11 (doc. 54 1749/001) and of 20 April (doc. 54 1783/001), all available on dekamer.be. The most recent initiative is of 21 July 2019 (doc. 55 0193/001).

[36] Doc. 54 2884/001.

[37] As amended by the Law of 29 June 2016, *Loi portant dispositions diverses en matière d'Economie*.

[38] As a matter of fact, in the main options of the plan for 2020 (approved by Law no. 3/2020, of 31 March), namely in the point dedicated to Consumer Protection (7.5), the problem was expressly framed, having assumed the intention to solve it; in this point it is stated that the Government aimed to «provide instruments that allow the consumer to obtain information and compare, in what concerns the useful life of products, as well as to promote the updating and repair of products, in a logic that promotes environmental sustainability and limits the planned obsolescence».

[39] Approved by Decree-Law No. 153-D/2017, of 11 December, as amended by Decree-Law No. 102-D/2020, of 10 December.

[40] However, only the failure to comply with the annual duty to communicate the measures taken for that purpose (Article 55/5 and 90, kk) constitutes an infringement of the mentioned Decree-Law.

[41] See draft laws (1) 37/XIV/1.^a (PCP), (2) 116/XIV/1.^a (PAN), 119/XIV/1.^a (BE), 120/XIV/1.^a (PEV); initiatives that have expired with the end of the Parliament's XIV legislature. See also the brief commentary by Mário Frota, in “A obsolescência programada e as novas medidas legislativas”, BOA, December 27, 2019, pp. 28-31.

[42] The State of Massachusetts passed legislation in 2012 regarding automobiles. In short, it allowed private individuals, who own a vehicle, to repair their car. To this end, the manufacturer is obliged to provide all the information, components, and tools necessary for the repair, carried out by the individual or a third-party specialist, as well as to use standardised physical diagnostic tools. The precedent set gained immediate traction and was adopted, almost without exception, by all vehicle manufacturers. However, the impetus for this measure had been there before: in the 1970s, through the *Clear Air Act*, manufacturers were obliged to disclose information relating to the emission system so that it could be checked by external agents. The most recent case concerns the repair of *John Deer* tractors, widely known, and still in dispute.

[43] (2014/C 67/05), published in the Official Journal of the European Union, C 67/23-26, 6.3.2014.

[44] Mariateresa Maggiolino, *Planned Obsolescence: A Strategy in Search of Legal Rules*, *International Review of Intellectual Property and Competition Law*, vol. 50, Springer, 2019, pp. 405–407.

[45] E-015113-15, E-006067-15, E-005304/2014, P-5252/14, E-3441/13 e E-6339/13; cfr. Jana Valant, *Planned obsolescence: Exploring the issue*, European Parliamentary Research Service, May, 2016, 7.

[46] Among others, see Directive 2002/96/EC, on waste electrical and electronic equipment (repealed by Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment); Directive 2005/29/EC on unfair commercial practices; Directive 2006/66/EC on batteries and accumulators; Directive 2008/98/EC on waste; and Directive 2009/125/EC on establishing a framework for the setting of eco-design; see Caren Kalafatich, “Planned obsolescence as an unfair commercial practice”, 15th International Conference on Consumer Law, University of Amsterdam, June/July, 2015, side note 17.

[47] Initially designed for five pilot products, including computers and smartphones. This index was specified by the joint decree of the Minister for Ecological Transition and the Minister for the Economy, Finance and Recovery of 29 December 2020 on the methods of display, signalling and general parameters for calculating the reparability index (JORF No. 0316 of 31 December 2020, § 18; the other decrees relating to the various equipment concerned are set out in §§ 19 to 25).

[48] In this matter, see the annotation to art. 60 of the Portuguese Constitution by Gomes Canotilho/Vital Moreira, “Constituição da República Portuguesa anotada”, Vol. I, Coimbra Editora: Coimbra, 2007, p. 781.

[49] “Negócio Jurídico de Consumo”, Separata do BMJ, no. 347, Lisboa, 1985, pp. 23-25. About the role of good faith in consumer law in Portugal, see, also, José Engrácia Antunes, “Direito do Consumo”, Almedina: Coimbra

(2019), p. 142, and David Falcão, “Lições de Direito do Consumo”, 2nd ed., Almedina: Coimbra (2020), pp. 108-109.

[50] *Ob. cit.*, p. 24.

[51] *Ob. cit.*, p. 25 (and footnote 47). The Author relied on the provisions of art. 7, d) of the Consumer Protection Law, approved by Law no. 29/81, of 22 August, which was revoked by Law no. 24/96, of 31 July.

[52] Jorge Morais Carvalho, “Manual de Direito do Consumo”, 7th ed., Almedina: Coimbra (2021), p. 199.

[53] *Ibidem*.

[54] João Calvão da Silva, “Responsabilidade civil do produtor”, Almedina: Coimbra (1990), p. 633 *et seq.*

[55] See, also, Assunção Cristas, “Concorrência Desleal e Protecção do Consumidor: A Propósito da Directiva 2005/29/CE”, in Prof. Doutor Inocêncio Galvão Telles: 90 Anos – Homenagem da Faculdade de Direito de Lisboa, Almedina: Coimbra (2007), pp. 141-162, José de Oliveira Ascensão, “O Anteprojecto do Código do Consumidor e a Publicidade”, in Estudos do Instituto de Direito do Consumo, Vol. III, 2006, pp. 7-36, 28, and Elsa Dias Oliveira, “As práticas comerciais proibidas, Estudos do Instituto de Direito do Consumo”, vol. III, Almedina: Coimbra, 2006, pp. 73-97.

[56] Menezes Cordeiro, “Da boa-fé no Direito civil”, Almedina: Coimbra, 1983, *passim*.

[57] It is necessary, according to L. Menezes Leitão, to combine the effects of this claim with the possible termination of the contract. In this case, the compensation of damages is limited to the negative contractual interest; in “As práticas comerciais desleais nas relações de consumo”, ROA, 71, No. 2, (April-June, 2011), pp. 423-445 (444).

[58] Jorge Morais Carvalho, “Manual de Direito do Consumo”, *cit.*, 182.

[59] See Rui Ataíde, “A venda de bens de consumo. Meios de tutela do comprador e a responsabilidade directa do produtor”, Estudos de Direito Privado, AAFDL: Lisboa, 2020, p. 239. On the subject see also Paulo Mota Pinto, “Compliance e garantias na venda de bens de consumo”, Estudos de Direito do consumidor, I, No. 2, pp. 197-332, Januário da Costa Gomes, “Ser ou não ser conforme, eis a questão : em tema de garantia legal de conformidade na venda de bens de consumo”, Estudos em Homenagem ao Professor Doutor Paulo de Pitta e Cunha, III, pp. 247-268.

[60] This is the case, out of curiosity, in Argentine law; Lorena Bianchi, “La influencia del principio del consumo sustentable en el combate de la obsolescencia programada, la garantía de los “productos durables” y el derecho a la información de los consumidores en Argentina”, Revista de Derecho Privado, n.º 34, January-June, 2018, pp. 277-310 (304).

[61] Menezes Cordeiro, “Da boa-fé no Direito civil”, *cit.*, pp. 625-631.

[62] In Portugal, as far as computer products are concerned, it is possible to call into question the crimes of computer and communications fraud (Article 221 of the Portuguese Criminal Code) and – overcoming the lack of consent by the owner – under the terms of the cybercrime law (the crime of computer *sabotage*; Article 5 of this Law). This approach is particularly explored by Italian legal doctrine. On the subject, in general, see Emanuele La Rosa, “Planned Obsolescence and Criminal Law: A Problematic Relationship?”, in Volker Mauerhofer/Daniela Rupo/Lara Tarquinio (Org.), *Sustainability and Law*, Springer: Cham (2020), pp. 221-238 (233).

[63] See the French consumer code (*code de la consommation*), the Italian consumer code (*codice del consumo*) and the Brazilian consumer protection code (*código de protecção e defesa do consumidor*).

[64] Tobias Brönneke, “Premature Obsolescence: Suggestions for Legislative Counter-measures in German and European Sales & Consumer Law”, Journal for European environmental & planning law 14, Brill, Leiden (2017) pp. 361-372 (370).

SMART CONTRACTS, ARTIFICIAL INTELLIGENCE AND CONSUMER PROTECTION^[1]

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Summary

Although Smart Contracts are promising, they present some issues, such as those related to consumer relations. While some people defend that Smart Contracts could correct these relationships, others, on the other hand, point out the reduction of the protection of the more vulnerable parties, since consumers, effectively, barely interfere in the creation of the contract. In those cases, the use of Artificial Intelligence is discussed to ensure the flexibility and adaptation of the contract, providing greater legal certainty for the parties. Therefore, this work intends to discuss how the use of AI would be expressed in consumer Smart Contracts to help in the protection of the consumers.

Keywords

Smart Contracts, blockchain, consumer relations, artificial Intelligence.

I. INTRODUCTION

During the last few years, especially in the last two decades, digital innovations have become a more significant representation not only in daily life, but also in Law. In some way, technological transformations give rise to different uncertainties related to the most varied traditional legal aspects, such as a simple signature. Since the internet emerged, we have been completely absorbed by its use and – what used to be fear and uncertainty – is now a normal part of legal professionals' lives, *e.g.*, the use of emails to exchange important information^[2]. Further examples of how the accelerated technological evolution influences Law are the electronic processes and digital contracting. The latter, though it has existed for a while, has been growing and evolving exponentially due to recent^[3] events.

Smart Contracts were created in this context of Digitalization – which also provided the emergence of other technologies, like blockchain and Artificial Intelligence – and the increase of the use of electronic contracts. They receive this “Smart” denomination, but, in fact, they are not associated with any type of Artificial Intelligence (AI). Szabo adopted this expression because, at the time his concept was created, he was convinced that Smart Contracts were much more efficient than traditional contracts, since they did not require human intervention for their performance^[4].

As a matter of fact, in theory, Smart Contracts could not be called “contracts”, either, at least not with the meaning recognised by us, legal professionals^[5]. This given that, in most cases, Smart Contracts are related to the execution of computer tasks that have no relation with the enforcement of obligations. Thus, we may say that Smart Contracts are digital instruments based on computer codes or protocols that facilitate the automatic enforcement of material orders, without the intervention of third parties, and could or could not perform the function of a contract^[6].

A key tool, a huge influencer in the progress of Smart Contracts, is the DLT^[7] (Distributed Ledger Technology) blockchain. Blockchain has a great impact and repercussion, since it stores transactions and information in a distributed and tendentially immutable way, that hinders the possibility of information fraud in the blockchain, providing security for the use of Smart Contracts and trust in the digital environment.

Along with the fact that blockchain brought the reliability that Smart Contracts needed for their good performance, it also brought many doubts and concerns, mainly related to its use in specific types of contractual relationships. The main issues associated with the use of Smart Contracts – most of them due to their self-executability and potential immutability – involve their use in legal agreements with vulnerable parties, as is the example of B2C (Business-to-Consumer) relations^[8].

On the one hand, the optimists on the subject advocate that Smart Contracts could correct the disparities of these consumer relations and help consumers to guarantee their rights. On the

other hand, there are those who argue that, indeed, there would not be a strengthening, but a reduction in the protection of vulnerable parties, since consumers effectively have limited interference in the creation of the contract and, moreover, do not have the necessary knowledge to influence the creation of Smart Contracts^[9].

In an attempt to answer these and other debates involving the use of Smart Contracts, it is being analysed not only the use of accessory tools – *v.g.* the “oracles”, but the use of Artificial Intelligence. In this sense, the intention is to assure the flexibility and adjustment of agreements performed through Smart Contracts and prevent unfair and opportunistic practices, providing legal certainty to the parties.

Therefore, this paper has the purpose to discuss how the use of Artificial Intelligence would be reflected in the consumer Smart Contracts and its consequences in Law, especially for the legal-consumer relations.

II. SMART CONTRACTS, BLOCKCHAIN TECHNOLOGY AND CONSUMER RELATIONS

1. Understanding Smart Contracts and the blockchain technology

The Smart Contracts were first^[10] defined in the 90s by the lawyer and cryptographer Nick Szabo, defining that “A smart contract is a set of promises, specified in digital form, including protocols within which the parties perform on these promises”^[11]. This set of promises operates according to an objective and conditional logic (if “this”, then “that”)^[12], executed automatically, without the need of an intermediary for its drafting, negotiating and conclusion.

In summary, Smart Contracts are digital protocols that can perform the roles of contracts or any other type of computer task, in which the parties agree on their terms in advance and, automatically, once these requirements are met, their execution becomes effective. The great innovation in the Smart Contracts is the “trustless” system and its self-executability^[13].

Szabo's first conception, which reminded us of vending machines^[14], had the main objective of correcting the weaknesses of conventional contracts, since he considered the latter to be inefficient and extremely costly. However, for all their potential effectiveness to be used, an advanced technological environment was required to enable their use and to store the information securely.

In 2008, when the crypto-asset Bitcoin and the blockchain technology arose – whose creation was attributed to the pseudonym Satoshi Nakamoto^[15], but even today it involves a mystery about who and how many people were behind its creation – an opportunity was seen for the improvement and development of Smart Contracts. This being so, the blockchain technology, due to its characteristics of potential immutability and decentralisation, provides more effectiveness and reduces costs in the process of formation and execution of contracts and computer tasks, facilitating the enforcement of obligations and (or) transactions, with a safe and transparent system for the storage of information^[16].

Blockchain technology is defined as a technology for registration of information that is based on peer-to-peer^[17] and distributed consensus. The name “blockchain” is used due to its functioning system, which works through overlapping blocks – the next block will always have the information from the previous one – forming its own fingerprint. This performance mode means that transactions are validated at the same time in several places/devices and nowhere, preventing the introduction of false or fraudulent information into the chain.

In this way, although it has been created to improve the Financial System^[18], it also works as an operational and practical force of the Smart Contracts, receiving the Smart Contract previously codified, written, and programmed, publishing and expanding that information through the network^[19].

2. The use of Smart Contracts in consumer relations

Indeed, blockchain technology and Smart Contracts were created at different times and with different objectives. However, blockchain has an essential role for the use of Smart Contracts, especially in contractual relations. The big question, nevertheless, is that being one of the main objectives of Contract Law to protect the fragile parties^[20], to guarantee liberty and balance between individuals – both party and counterparty – and to promote contractual justice^[21], how to provide these objectives in Smart Contracts based on blockchain? Moreover, we cannot forget the duty of information, duty of diligence, among other duties that cannot be based on the terms purely written in the cryptographed code.

The liberty of contracting requires consideration and knowledge, mainly in the conclusion of consumer contracts, at a time when technological advances and the open markets offer the consumer a diversity of goods and services characterized by supply and demand, together with increasingly complex information^[22]. This situation puts the consumer in a weak position, since companies will have superior knowledge of what is being sold or provided, while the consumer may have little – or no – knowledge.

Therefore, Consumer Law is designed to protect and support consumers against possible unfair situations of a diverse nature, which affect the interests of the parties and may result from an asymmetry of knowledge, tools and power between consumers and businesses in the context of market transactions^[23]. In the European Union, for example, the Article 169^[24] of the Treaty on the Functioning of the European Union identifies consumers as vulnerable parties in consumer relations, demonstrating the commitment to guarantee their protection.

Regarding the application of Smart Contracts^[25] in B2C relations, for the business parties^[26], the “reduced costs, simplified enforcement procedures and faster supervision of contract performance”^[27] seem certainly beneficial and attractive. The controversy exists, however, relatively to consumer protection, i.e., if the use of Smart Contracts reinforces or undermines the protection of consumers.

III. THE CONSUMER PROTECTION IN SMART CONTRACTS

About the protection of consumers in the use of Smart Contracts we clearly notice a division of two groups: those who argue that Smart Contracts strengthen the protection of these parties considered more vulnerable and those who advocate that there would be, in fact, an obstacle to this protection.

The first group, formed by the ones who believe in the enhancement of consumer protection using Smart Contracts, is based on the idea that consumers would have new resources in online bargaining, correcting the existing disparities between the parties in B2C relations, thus restoring the information imbalance^[28]. According to Eduardo Tatit^[29], Smart Contracts enable consumers to establish their own contracting conditions, without the intervention of a trustable third party^[30]. The Smart Contracts connect these consumers directly to sellers who are in accordance with the predetermined requirements, i.e., the contract would only be made when those conditions are satisfied^[31]. In addition, they also see Smart Contracts as instruments to assist in the direct enforcement of consumer rights, when consumers are injured by a breach (total or partial) in the contract by the company or entity contracted^[32]. In this sense, Bernardo Moraes and Gustavo Mello defend the effectiveness of Smart Contracts in contractual relations, since “the verification, execution and entry into force of the terms of the bilateral legal business – contract – are automatic, while ensuring its stability (because it cannot be revoked), as well as its transparency and publicity”^[33].

By contrast, there are the voices of those who believe that all this “pro-consumer” potential is not true at all. Firstly, because consumers effectively have minimal influence over the creation of the Smart Contract, enabling powerful parties – businesses, traders, etc. – to take advantage at the consumer's expense^[34]. Moreover, even if consumers had the power of decision, in most cases, they do not even have the required knowledge and expertise to influence the construction of Smart Contracts^[35]. Taking, for example, the standard-form contracts via Smart Contracts, companies could take advantage and benefit from the generally low motivational level of consumers to file a lawsuit to insert unfair terms^[36] within these contracts. Given that businesses parties can enforce – through a unilateral decision – quite easily any factual legal consequence on the counterparty simply by creating or issuing automated decisions, the use of Smart Contracts could come to encourage this type of practice. Consequently, the use of Smart Contracts in this kind of contractual relations would also difficult the justice and protection of the parties. It is important to emphasize that, over the years, the European Union has been making a movement precisely to protect consumers from these abusive practices, generally present in standard-form contracts^[37]. In fact, looking at the Article 8b of Directive 2019/2161 amending Council Directive 93/13 and Directives 98/6, 2005/29 and 2011/83 of the European Parliament and of the Council on the better enforcement and modernization of Union consumer protection rules, we verify tougher sanctions, which support the idea of combating this type of clause.

Therefore, considering these two positions, we understand that, depending on the specific case, there may be, in fact, the unprotection of the average consumer in relation to the trader. For the Law professionals achieving contractual justice is often a difficult task, let alone for a computer

code that – in opposition to us, human beings – cannot, by itself, generate solutions or even make decisions that take into consideration aspects that were initially unpredictable or difficult to clearly define^[38].

The objective language, added to the potential immutability and self-executing nature of Smart Contracts may bring, consequently, disadvantages to consumers. However, the automation present in Smart Contracts, if in compliance with the legislation, may help this process of consumer protection, automatically applying the consequences for the breach of a certain clause or disrespect to some principle, for example.

When it comes to consumer protection, Geraint Howells, Christian Twigg-Flesner and Chris Willett^[39], bring an interesting reflection: on the one hand, the legal rules must adapt to new technological and market conditions, considering the risks and vulnerability of consumers, which may be emphasized by the use of these new technologies; on the other hand, a strongly protective regulation may undermine the development of these innovations. In essence, they reflect that consumer protection should be more focused on the values – contexts behind the level of protection – than purely on the existing law, so that there is a balance between consumer protection and technological developments.

1. The use of “oracles” in Smart Contracts for the consumer protection

It is true, as previously mentioned, that Smart Contracts and the blockchain provide a “trustless” environment, i.e., there is no need for human intervention for its execution. However, blockchain is only able to verify if a predetermined task has been performed or not, and cannot get external factors, which depend on a human interpretation and an analysis of elements that do not belong to the contract but are essential for its proper functioning. This is not to say that Smart Contracts should not be applied at all in consumer relations, because, visibly, they have their advantages. It must be associated with elements that provide the protection of the weaker parties – consumers – so that they are not harmed, though.

Bearing in mind that the revocable reasoning and the dialectical argument are important in contractual and consumer relations, the integration of the so-called “oracles”^[40] becomes fundamental to optimize the quality of operation of Smart Contracts in consumer contracts. The “oracles” are third-party companies that connect the offline world with the online world, i.e., these companies collect external information and bring it into the blockchain to be validated and inserted into that specific contract. They work as a bridge between the Smart Contracts code and the external structure of any content/information^[41]. These “oracles” can be decentralized^[42], which makes the system more secure and impartial, having a “relevant role to prevent abuse of rights and ensure legal certainty”^[43].

In the case of rail passengers’ compensation^[44], provided for in Regulation 1371/2007, for example, the “oracle” would transmit the necessary information to the blockchain, and, in case of delay, the Smart Contract would automatically apply the corresponding compensation^[45]. In this context, the data received through the “oracles” would improve the functioning of the

Smart Contract, which would obtain more accurate and reliable information, supporting both parties to the contract.

It should be noted that, as blockchain technology, *per se*, does not allow the transaction to be reversed or stopped once executed, the presence of an “oracle” is important to allow it to be contested, in compliance with the relevant legislation, or with the updated status of that particular contract^[46]. This could hardly happen if there was no connection between the Smart Contract and the outside world.

The first big issue for the inclusion of “oracles”, however, is the intervention – in a way, human – of third parties. By the way, this is one of the main features of Smart Contracts, which differs them from all other means of electronic contracting and, at the same time, attracts many users.

Another important point to consider is that, when we discuss numerical elements events, this task seems easy to be performed by the “oracles” and correctly included within the Smart Contracts. Still, in cases where the contents must precede interpretation, or are related to expressions that refer to general clauses or generic legal concepts, it seems to be more difficult^[47].

Furthermore, the use of the “oracle”, although it seems to us to be the best alternative to enhance the use of Smart Contracts and safeguard the consumer, is not completely infallible and its legal consequences are not yet clearly defined^[48].

2. The application of Artificial Intelligence for the improvement of Smart Contracts in consumer relations

Responding to concerns about the use of Smart Contracts not only in consumer relations, but in contractual relations in general, a possible solution would be the creation of “oracles” based on Artificial Intelligence, increasing the efficiency of the information obtained and, consequently, reducing the costs. As Gabriele Mazzini declares, AI is recognized as a technology with the potential to bring great transformative economic and social effects, which need to be harnessed for the benefits of people and society, according to the European approach^[49].

The use of “oracles” based on AI, due to the great capacity of collecting data in a short space of time, would serve to express and simulate legal reasoning, being able to evaluate fundamental notions of contract and consumer law by inserting these nuances into Smart Contracts. The use of Artificial Intelligence would not only help in a quantitative analysis of information, but it would also help in the application of Law in issues that require human interpretation of natural or legal contents^[50]. At the same time, it would permit the code to approach the reality of the contractual parties and the possible unpredictable changes more accurately.

However, we cannot forget that the use of Artificial Intelligence in transactions between companies and consumers must be fair, transparent, and compatible with Consumer Law. The lack of an adequate legal framework keeps the concern around the use of these technologies,

since the possible negative impacts of abuse in Smart Contracts become more evident, especially in B2C relations^[51].

The issue of the application of AI, though, is still very uncertain and we do not know its effects on Smart Contracts and whether the creation of specific legislation, in this aspect, would not make sense to safeguard the protection of the most vulnerable parties. Furthermore, in case of failure of the “oracles”, the legal consequences are not yet expressly established. In the same way, adding Artificial Intelligence to Smart Contracts to protect the consumer is interesting, but it brings other issues related to technology, which deserve special attention.

At the current point in which the development of Artificial Intelligence in the “oracles” is, even though technology is important to get external information essential for the development of the Smart Contract, the difficulty of understanding the ambiguous terms may remain, keeping the problem of interpretation. If there is this interpretative deficiency, would it consequently affect the correct execution of the contract? And, if so, who would be responsible for this error?

It does not mean, at all, that the use of Artificial Intelligence and Smart Contracts should be excluded from consumer relations. However, it is necessary to find – or try to promote – a balance between the parts of this relationship that are usually in asymmetric situations. Thus, before the application of these technologies, it is necessary to devise strategies that guarantee the execution of the contractual terms in an automated way and take advantage of their full potential, without disrespecting consumer laws and preserving the logic that involves the creation of laws^[52].

IV. CONCLUSIONS

Smart Contracts are presented as a contractual technological innovation that significantly modifies the way of contracting and, above all, the way of executing consumer agreements/contracts. The characteristics of Smart Contracts reduce the need for a third party, both to manage the business terms and to resolve possible conflicts between the parties, which facilitates contracting and, potentially, reduces the costs of transactions carried out this way.

It is currently observed that consumers have more and more rights; however, it does not mean any guarantee of enforcement of them. Mainly about consumer protection, there is, in fact, a discrepancy between having these rights and applying, since most consumers are not even aware of them and, even if they do, they often prefer not to do anything about. In other words, a more educated minority of consumers claims their rights, which, consequently, harms even more the others who remain inert, since there is a price dynamic on the part of the companies to insert in the amounts charged the payment of the small part of the population that postulates its enforcement^[53].

It remains evident that, due to the automatic execution of Smart Contracts, they can be highly advantageous and potentially applicable in various fields. Despite criticism of this technology, mainly because of its rigidity and automaticity, in the long term and during its development and study, the tendency is that it can be more easily – and on a larger scale – applied for the

benefit of Consumer Law. However, there are a few challenges to be confronted to establish Smart Contracts as a reliable mechanism for enforcing these rights.

The use of “oracles”, undoubtedly, can answer some questions related to consumer protection in the context of Smart Contracts, in spite of its limitations. Artificial Intelligence, too, can help in the process of interpreting and simulating human reasoning, but to what extent and in what way this could occur without generating new legal questions – perhaps, without a solution. Furthermore, if there is a need for support from specific regulations, what would be the limit for creating new laws for intervention under new technologies so as not to prevent their development?

Regardless of which position you take in relation to the use of Smart Contracts in consumer contracts, what is certain is that, increasingly, the paper-based economy is moving towards the digital world. Therefore, instead of trying to stop technological evolution, it is necessary to understand to what extent technological creativity and new forms of communication – as in the case of Smart Contracts – are revealed in the legal field to safeguard a balance between the interests of the parties in the consumer relations and the protection of their rights.

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[2] M. S. VÍTOR, *Inteligência Artificial e Contratos*, *Inteligência Artificial & Direito*, M. L. ROCHA; R. S. PEREIRA (coord.), Coimbra, Almedina, 2020, pp. 222-223.

[3] Here we refer to the pandemic of COVID-19. In fact, even before the pandemic situation, the influence of technology in our *modus vivendi* was already being noted, but, undoubtedly, in the last two years we have seen the importance of technology in everything, from the simplest tasks to the most complex ones in an electronic environment. Therefore, the use of technology is no longer questionable, what is being discussed is the best way to apply it and take advantage of its use on society's behalf.

[4] R. UNSWORTH, “Smart Contract This! An Assessment of the Contractual Landscape and the Herculean Challenges it Currently Presents for “Self-executing” Contracts”, *Legal Tech, Smart Contracts and Blockchain*, M. CORRALES; M. FENWICK; H. HAAPIO, Singapore, Springer, 2019, pp. 19-20.

[5] Cf. F. DE ARAUJO MEIRELLES MAGALHÃES, “Os Smart Contracts e o papel dos tribunais em matéria de Direito dos Contratos”, *Estudos Jurídicos Sobre Inteligência Artificial e Tecnologias*, F. VEIGA; C. CEBOLA; S. MONTEIRO (Coords.), Porto, IBEROJUR, 2022, pp. 146 e ss. M. VÍTOR, *Inteligência Artificial e Contratos*, *Inteligência Artificial & Direito*, M. ROCHA; R. PEREIRA, Coimbra, Almedina, 2020, pp. 225 e ss.

[6] J.W. IBÁÑEZ JIMÉNEZ, *Derecho de Blockchain y de la Tecnología de Registros*, Cizur Menor (Navarra), Aranzadi, 2018 p. 96.

[7] Distributed ledger technologies are a kind of digital, distributed transaction ledger that stores blocks of data shared across a network of computer nodes. P. LAURENT; S. HURTAUD; T. CHOLLET; S. GENCO, “Distributed Ledger Technologies services: using the power of blockchain”, *Deloitte*, 2017, pp. 1-8. Available in <https://www2.deloitte.com/lu/en/pages/technology/solutions/blockchain-distributed-ledger-technology-stitch-in-time.html> (15.01.2022)

[8] In this context, see S. WRBKA, Stefan, “A Multilayer Safeguard Mechanism to Optimise the Potential of Smart Contracts in B2C Transactions”, *Smart Contracts – Technological, Business and Legal Perspectives*, M. COMPAGNUCCI; M. FENWICK; S. WRBKA, Oxford, Hard Publishing, 2021, pp. 123-144.

[9] S. WRBKA, “A Multilayer Safeguard Mechanism to Optimise the Potential of Smart Contracts in B2C Transactions”, *Legal Tech, Smart Contracts and Blockchain*, M. CORRALES; M. FENWICK; H. HAAPIO, Singapore, Springer, 2019, pp. 123-124.

[10] We say the first concept, because Smart Contracts were conceptualised years later by the creator of the Ethereum platform, Vitalik Buterin. The difference between Buterin's concept and Szabo's original concept is that the more recent concept refers to Smart Contracts created and used within the Ethereum platform, through DLTs, more specifically, the blockchain. The Ethereum Project was launched by Vitalik Buterin in 2015, in a context where blockchain technology already existed. V. BUTERIN, “A next generation smart contract & decentralized application platform”, Ethereum White Paper, 2014. Available in <https://github.com/ethereum/wiki/wiki/White-Paper#decentralized-autonomous-organizations> (23.05.2021).

[11] N. SZABO, Smart Contracts: Building Blocks for Digital Markets, 1996. Available in <http://www.truevaluemetrics.org/DBpdfs/BlockChain/Nick-Szabo-Smart-Contracts-Building-Blocks-for-Digital-Markets-1996-14591.pdf> (12.02.2019).

[12] M. A GÓMEZ, “(In)fallible Smart Legal Contracts”, in *Legal challenges in the New Digital Age*, A. M. LOPEZ RODRIGUEZ; M. D. GREEN; M. LUBOMIRA KUBICA, Leiden, Koninklijke Brill, 2021, p. 29-30.

[13] A. A. BECERRIL GIL; S. ORTIGOZA LIMÓN, “Habilitadores tecnológicos y realidades del derecho informático empresarial”, *Revista del instituto de Ciencias jurídicas de Puebla*, vol. 12, nº. 41, México, Nueva Época, 2018, p.29.

[14] Vending machine: “a machine from which you can buy small things such as cigarettes, drinks, and sweets by putting coins into it”. Available in <https://dictionary.cambridge.org/pt/dicionario/ingles/vending-machine> (13.06.2020)

[15] S. NAKAMOTO, “Bitcoin: A Peer-to-Peer Electronic Cash System”, Bitcoin, 2008.

[16] F. DE ARAUJO MEIRELLES MAGALHÃES, “‘Smart Contracts’: o paradigma entre a imutabilidade e a necessidade de flexibilização contratual em tempos de crise”, *Atualidade Jurídica Iberoamericana*, n.º 16, febrero 2022, pp. 1254-1269.

[17] “Peer-to-peer systems are distributed systems consisting of interconnected nodes able to self-organise into network topologies with the purpose of sharing resources such as content, CPU cycles, storage and bandwidth, capable of adapting to failures and accommodating transient populations of nodes while maintaining acceptable connectivity and performance, without requiring the intermediation or support of a global centralized server or authority”. S. ANDROUTSELLIS-THEOTOKIS; D. SPINELLIS, “A Survey of Peer-to-Peer Content Distribution Technologies”, *Athens University of Economics and Business*, 2004, p. 337.

[18] The European Central Bank even recognizes blockchain technology as a financial transformational force, having its president highlight its adoption to improve the efficiency of banking and market services. I. SÁNCHEZ RUÍZ DE VALDIVIA, “Blockchain y plataformas de financiación participativa: dos retos del mercado único digital”, in *Relaciones contractuales en la economía colaborativa y en la sociedad digital*, G. GARCÍA GONZÁLEZ; M. R. GOMES REDINHA; M. R. GUIMARÃES; B. SÁENZ DE JUBERA HIGUERO, Beatriz, Madrid, Editorial Dykinson, 2019, pp. 353-373.

[19] J. W. IBÁÑEZ JIMÉNEZ, *Derecho de Blockchain y de la Tecnología de Registros*, Cizur Menor (Navarra), Aranzadi, 2018.

[20] E.g. consumer relations, where the consumer, in general, is weaker compared to large companies both at the informational and economic level.

[21] F. DE ARAUJO MEIRELLES MAGALHÃES, “Os Smart Contracts e o papel dos tribunais em matéria de Direito dos Contratos”, in *Estudos Jurídicos Sobre Inteligência Artificial e Tecnologias*, F. DA SILVA VEIGA; C. MARQUES CEBOLA; S. SARDINHA MONTEIRO, Porto, IBEROJUR, 2022, pp. 143-156.

[22] L. M. SIMÃO DA SILVA CALDAS, “Direito à informação no âmbito do direito do consumo: o caso específico das cláusulas contratuais gerais”, in *Julgar*, n.º 21, 2013, p. 204. Available in <http://julgar.pt/wp-content/uploads/2013/09/11-Silva-Caldas-Direito-%C3%A0-informa%C3%A7%C3%A3o-direito-do-consumo.pdf> (15.07.2022)

[23] G. MAZZINI, “A System of Governance for Artificial Intelligence through the Lens of Emerging Intersections between AI and EU Law”, in *Digital Revolution: New Challenges for law*, A. DE FRANCESCHI; R. SCHULZE, Germany, Verlag C.H. Beck/Nomos, 2019, p. 267.

[24] Article 169

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

[25] From now on, when we use the term Smart Contracts, we are referring to Decentralized Smart Contracts, or in other words, Smart Contracts based on blockchain technology.

[26] Producers, suppliers or traders.

[27] S. WRBKA, “A Multilayer Safeguard” cit., p. 127.

[28] R. PARDOLESI; A. DAVOLA, “Smart Contract: Lusinghe ed equivoci dell’innovazione purchessia”, *Liber Amicorum – Guido Alpa*, Francesco Capriglione, Milano, Wolters Kluwer, Padova, Cedam, 2019, p. 306.

[29] E. MACEDO LEME TATIT, *Smart Contracts: A evolução dos contratos tradicionais*, 2018. Available in <https://www.linkedin.com/pulse/smart-contracts-evolu%C3%A7%C3%A3o-dos-contratos-tradicionais-eduardo/> (17.08.2019).

[30] In this sense, see M. RUDANKO, “Smart Contracts and Traditional Contracts: Views of Contract Law”, *Legal Tech, Smart Contracts and Blockchain*, M. CORRALES; M. FENWICK; H. HAAPIO, Singapore, Springer, 2019, pp. 59-78.

[31] E. MACEDO LEME TATIT, *Smart Contracts: A evolução dos contratos tradicionais*, 2018. Available in <https://www.linkedin.com/pulse/smart-contracts-evolu%C3%A7%C3%A3o-dos-contratos-tradicionais-eduardo/> (17.08.2019).

[32] In this context, let us use Article 17 of Regulation (EC) No 1371/2007, which is about rail passengers’ compensation for delays from the railway. The minimum compensations are equivalent to 25% of the ticket price for a delay of 60 to 119 minutes and a 50% of the ticket price for delay of two hours or more. In case of contracting through Smart Contracts there would not be the problem of railroad companies not making the payment voluntarily or trying to hinder the consumer's right by imposing several bureaucratic procedures, as these rights would be automatically guaranteed by the contract, facilitating consumer protection.

[33] Our translation. B. BISSOTO QUEIROZ DE MORAES; G. MARCHI DE SOUZA MELLO, “Smart legal contracts carregam consigo incontáveis benefícios”, *Revista Eletrônica Consultor Jurídico*. Available in <https://www.conjur.com.br/2018-out-29/smart-legal-contracts-contratos> (15.08.2019)

[34] M. RUDANKO, “Smart Contracts” cit., p. 75.

[35] S. WRBKA, “A Multilayer Safeguard” cit., p. 124.

[36] In Portuguese legislation: DL nr. 446/85 - Standard Contractual Clauses.

[37] In this context, thanks to Directive 93/13/EEC (Unfair Contract Terms Directive) protection against unfair contract terms has common minimum standards throughout the EU. The objectives of the UCDT, are based on “idea [...] that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms[...]”. COMMISSION NOTICE, “Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts”, in *Official Journal of the European Union*, 2019. Available in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52019XC0927%2801%29> (15.07.2022).

[38] S. WRBKA, “A Multilayer Safeguard” cit., p. 133.

[39] G. HOWELLS; C. TWIGG-FLESNER; C. WILLETT, “Protecting the Values of the Consumer Law in the Digital Economy: The case of 3D-printing”, *Digital Revolution: New Challenges for law*, A. DE FRANCESCHI; R. SCHULZE, Verlag C.H. Beck/Nomos, Germany, 2019, pp. 215 e ss.

[40] C. TUR FAÚNDEZ, *Smart contracts: análisis jurídico*, Colección de derecho de las nuevas tecnologías, Madrid, Reus Editorial, 2018, p. 111-115.

[41] R. H. WEBER, “Smart Contracts: Do we need New Legal Rules?”, in *Digital Revolution: New Challenges for law*, A. DE FRANCESCHI; R. SCHULZE, Germany, Verlag C.H. Beck/Nomos, 2019, pp. 308-309.

[42] On this point, as stated by André Feiteiro (and we agree), the character of centralization in a single oracle is presented as a point of failure, since it goes against the whole idea behind Smart Contracts. A. FEITEIRO, “The Complementary but not Alternative Utility of Smart Contracts”, in *Revista de Direito e Tecnologia*, Vol. 2, 2020, disponível em <https://blook.pt/publications/publication/24df53083858/> (23.02.2021).

[43] Our translation. F. DE ARAUJO MEIRELLES MAGALHÃES, “‘Smart Contracts’ cit., p. 1263.

[44] See footnote 32.

[45] In this aspect, see <https://etherisc.com/>

[46] R. H. WEBER, “Smart Contracts” cit., p. 307.

[47] F. S. DI S. IPPOLITO; M. NICOTRA, *Diritto della blockchain, Inteligenza Artificiale e IoT*, Milano, Wolters Kluwer, 2018, p. 105.

[48] R. H. WEBER, “Smart Contracts” cit., p. 309.

[49] G. MAZZINI, “A System” cit., p. 245.

[50] M. RUDANKO, “Smart Contracts” cit., p. 73.

[51] S. WRBKA, “A Multilayer Safeguard” cit., pp. 143-144.

[52] S. WRBKA, “A Multilayer Safeguard” cit., loc. cit.

[53] M. FRIES, *Law and Autonomous Systems Series: Smart consumer contracts - The end of civil procedure?*, 2018.

THE DIVISIBILITY OF AN ACCELERATED REPAYMENT CLAUSE WHERE ONLY SOME OF THE CAUSES ARE UNFAIR PREVENTS ITS TOTAL ERADICATION

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Summary

The forfeiture of the term has serious consequences for the borrower. Therefore, the courts have had to rule on the conditions of its implementation, particularly with regard to the provisions of the Consumer Code, but also to European case law. The Court of Cassation has recently decided that an accelerated repayment clause of which only some of the causes are abusive may be maintained in part, provided that, because of its divisibility, the removal of those elements is not tantamount to revising the content of that clause by altering its substance.

Keywords

Accelerated repayment, loan contract, unfair terms, divisibility, eradication.

I. THE ABUSIVE NATURE OF CERTAIN CAUSES OF ACCELERATION OF TERM

1. The concept of abuse

The acceleration of the term continues to be at the heart of many disputes. The forfeiture of the term has serious consequences for the borrower, especially if he or she is impecunious. Claimants persist in trying to have their loan contract cancelled on the grounds that certain clauses are unfair.

As the name suggests, the concept of abuse is central to unfair terms. According to Article L.212-1 of the Consumer Code, the clause must create "a significant imbalance between the rights and obligations of the parties of the contract to the detriment of the non-professional or the consumer".[1] In other words, a term is unfair if it upsets the contractual balance. This article adopts the solution provided for in Article 3 of the Directive of 5 April 1993[2], which considers as unfair a clause which "contrary to the requirement of good faith, ... causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer ». However, there is a difference between these two provisions. The European Directive lays down the general rule that where there is good faith, there cannot be unfair terms. The Consumer Code does not mention good or bad faith. However, in principle, good faith will rarely be present in a contract containing an unfair term.

In order to assess this unfairness, Article L. 212-1 of the Consumer Code requires reference to all the legal and economic circumstances surrounding the conclusion of the contract, to the actual wording of the clauses, as well as to all the other clauses of the contract. European law has also taken such a position.[3] Instead of a strictly legal approach to the clause, the legislator preferred to combine a legal and economic approach. The criterion thus requires a case-by-case assessment. Also, everything depends on the context of the clause, and the same clause may be unfair in one contract, but not in another. However, this must be qualified, because the contracts offered to consumers are often standardised and therefore similar[4].

In addition, the protection is not intended to remedy any economic imbalance.[5] For this reason, Article L. 212-1 of the Consumer Code provides that "the assessment of the unfairness of terms does not concern the definition of the main subject matter of the contract or the adequacy of the price or remuneration for the goods sold or the service offered, provided that the terms are drafted in a clear and comprehensible manner". This rule indirectly recalls the general principle of freedom of contract. Furthermore, the rule that unfairness does not relate to the definition of the main subject matter of the contract or to the adequacy of the price or remuneration of the goods sold or services provided has been used by both European and national case law to exclude, for example, the application of the unfair terms theory to real estate loans denominated in foreign currency. However, Article L.212-1 paragraph 3 adds an additional condition: "provided that the clauses are drafted in a clear and comprehensible manner". The idea of transparency of clauses is thus put forward. This concept is not very precise and is likely to give rise to significant difficulties of interpretation. The consumer must

be put in a position to assess, on the basis of precise and intelligible criteria, the economic consequences for him of the clause.

Finally, we should point out that the imbalance must be significant. From this it can be logically deduced that not every unbalanced contract will necessarily be subject to the rules on unfair terms. The difficulty lies in setting a threshold that requires a rebalancing of the contractual relationship. There must be an asymmetry between the contracting parties. The imbalance becomes significant if the disputed clause influences the rights of the parties, that is if it restricts the consumer's prerogatives while directly or indirectly increasing those of the professional. It is important to consider what would have been the situation of the parties if such a clause had not been stipulated.[6]

2. The acceleration of the term: a potentially unfair clause

Practitioners are not completely helpless in identifying unfair terms. A decree of 18 March 2009 established a list of twelve terms presumed to be irrefutably unfair.[7] Unfair terms fixed by decree have since been nicknamed 'black' terms. This list is contained in Article R. 212-1 of the Consumer Code. The originality of the system lies in the fact that the judge has no discretionary power with regard to these clauses[8]; he will be required to eliminate them.[9] There will be no need to check that the disputed clause has actually created a significant imbalance. The professional cannot prove that the clause is not unfair.

Conversely, possibly unfair terms are those which are not irrefutably condemned as such, but which are likely to become so because of their use by a professional to the detriment of a consumer or non-professional. These clauses are taken from a list in Article R.212-2 of the Consumer Code which was largely inspired by the annex to the directive of 5 April 1993; in contrast to the previous clauses, these clauses are known as "grey" clauses. It is a purely indicative list which raises a simple presumption of abuse. It is up to the professional to prove that they are not abusive.

In loan contracts, it is generally provided that the acceleration of the term, in case of default by the borrower, must be preceded by a letter of formal notice. The role of this letter of formal notice is essential because it allows the debtor to regularise his situation and avoid the debt becoming payable. By the way, the provisions of Article R. 212-2, 4° of the Consumer Code define as an unfair "grey" clause the termination provided for "without reasonable notice".

But if the term is not included in the list of prohibited terms or in the list of terms presumed to be unfair, the consumer or non-professional still has the possibility of demonstrating the unfairness of this term in court, in accordance with the definition of unfair terms provided for in the first paragraph of Article L. 212-1 of the Consumer Code. He may be assisted in this by the opinions of the Commission on Unfair Terms [10].

The Commission has become an expert on abuse.[11] The role of the Unfair Contract Terms Commission is primarily to give advice. Article L. 212-1 of the Consumer Code thus provides that the Commission must be consulted on draft decrees whose purpose is to prohibit, limit or

regulate certain terms considered unfair. The opinion is not binding on the judge. But it also looks for clauses that could be unfair in the model agreements usually proposed by professionals to non-professionals or consumers and issues recommendations in this regard, which may be made public. The list of these recommendations is now extensive.[12] The authority of these recommendations is relatively uncertain. The Council of State considered that « *it follows from Articles L. 132-1 and L.132-4 of the Consumer Code that the Commission on Unfair Terms, when issuing recommendations, does not lay down rules that would be binding on individuals or public authorities, but merely invites the professionals concerned to delete or modify the terms that it considers to be unfair; it is only for the competent judge, in the event of a dispute, to declare such terms null; consequently, the recommendations issued by the Commission do not constitute administrative decisions that may be appealed against on the grounds of misuse of power* ».[13] However, this does not mean that they are useless. We are in the realm of the semi-compulsory, because there is a "persuasion by authority".[14] They have an authority that sometimes strongly influences jurisprudence and legislation.[15] The Court of Cassation sometimes expressly refers to the recommendations of the Commission. In a decision of 10 February 1998, the Court rejected an appeal "by noting that the said clause gave the school an excessive advantage by requiring the student to pay the school fees, even in the event of non-performance of the contract attributable to the establishment or caused by a fortuitous event or force majeure, and that the Court of Appeal, on this ground alone and in line with Recommendation No. 91-09 of 7 July 1989 of the Unfair Contract Terms Commission, legally justified its decision".[16] The legislator itself is sometimes inspired by these recommendations when legislating to restore a contractual balance in favour of consumers. For example, the law of 23 June 1989 on consumer protection was inspired by Recommendation No. 87-02 on marriage agencies. To use a current expression, we would be in the presence of a flexible law.

The inclusion of cases of forfeiture for causes external to the contract or not resulting from a fault of the borrower was recently stigmatised by the Commission in its recommendation of 25 May 2021.[17] Although aimed at consumer credit, this recommendation declares unfair certain clauses that are also used in the context of real estate credit. Among the cases mentioned by the Commission are external to the debtor, causes of forfeiture such as death, involuntary loss of real or personal guarantee or false declaration by the guarantor.[18] It should also be mentioned that a resolutive clause may be considered unfair, if the default of the borrower, the non-performance of which leads to payability, is unclear.[19] The latter case is a simple application of Article 1225 of the Civil Code.[20]

That said, in general, the judge is necessarily in the front line in the fight against unfair terms insofar as, in order to sanction them, he must establish their existence and characteristics. Firstly, the Act of 10 January 1978, known as the Scrivener Act, made the prohibition or regulation of unfair terms subject to the initiative of the regulatory authority. From this it could be deduced that the judge could not declare unfair a clause not included in a decree. Nevertheless, faced with the lack of regulatory power and with the desire to better control the contractual balance, the Court of Cassation decided, in a decision[21] that was described as a jurisprudential "coup d'état", that it could determine whether or not a clause was unfair.[22]

This solution was indirectly enshrined in law with the Act of 1 February 1995, since paragraph 3 of Article L. 132-1 of the Consumer Code, which was then applicable, states that the list annexed to the Consumer Code is only indicative and not exhaustive, which means that the judge may take the initiative of declaring a term unfair even though it is not included in this list. To be declared unfair, the clause must meet the criteria set out in Article L. 132-1 of the Consumer Code. In order to deem a term unwritten, it will therefore be necessary for the non-professional or consumer to prove that the term is unfair. In this task, he is helped by the judge, who may be inspired by the recommendations of the Unfair Contract Terms Commission or ask it directly for its non-binding opinion, or be inspired by the list of "grey" terms. The Court of Cassation controls this qualification.[23] Some of the accelerated repayment clauses have been declared unfair by the judge because they create a significant imbalance. These are, for instance, accelerated repayment clauses without formal notice after a single unpaid instalment or payability clauses covering multiple causes external to the contract or to the borrower.[24]

The judge's power to take the initiative in determining whether or not a term is unfair is further enhanced by his power to determine *ex officio* whether or not a term is unfair. This power was first recognised by the European Court of Justice in the *Oceano* judgment of 27 June 2000[25], where the ECJ authorised national courts to find of their own motion that contract terms referred to them were unfair. Consequently, according to the ECJ, the courts must declare terms which they consider unfair to be unwritten, even if the consumer does not ask them to do so. In the *Cofidis* judgment of 21 November 2002[26], the ECJ added that the court could, of its own motion or following a plea raised by the consumer, declare a term unfair even after the expiry of a short limitation or prescription period.

The reform resulting from the Act of 3 January 2008 enshrined this prerogative while giving it a much broader scope of application. According to Article R. 632-1 paragraph 2[27] of the Consumer Code, the court "shall, after hearing the parties' observations, set aside *ex officio* the application of a term whose unfairness is apparent from the elements of the debate". From now on, the judge has the power to raise *ex officio* all the provisions of the Consumer Code. The judge must not be a passive spectator, but becomes an actor in the fight against unfair terms[28]. This solution makes it possible to remedy any passivity on the part of the consumer due to his ignorance of certain legal rules. In a decision of 11 March 2020, the Court clarified the role of the court. According to the Court, *"Article 6(1) of the Directive on unfair terms in consumer contracts must be interpreted as meaning that a national court, seised of an action brought by a consumer seeking a declaration that certain terms contained in a contract concluded by that consumer with a seller or supplier are unfair, is not required to examine, of its own motion and individually, all the other contractual terms, but must examine only those terms which relate to the subject-matter of the dispute, as defined by the parties, as soon as it has the necessary legal and factual information for that purpose, supplemented, where appropriate, by measures of inquiry"*. [29]

The advantage of this possibility for the judge to declare a term unfair is that it allows for a better application of the rules of the Consumer Code. The judge's decision, pursuant to Article 5 of the Civil Code, will apply only to the case referred to him. But given the standardisation

and multiplication of similar contracts, such a decision is also a kind of warning to the professional that the contracts he proposes are likely to have a clause removed. A judge who has declared a term unfair in one contract will tend to use this solution in another contract. But this has the disadvantage of weakening contractual security. It is not uncommon for a judge to declare certain clauses in the same contract unfair and not others.[30]

Finally, it should be noted that the Court of Cassation recently referred a question to the CJEU for a preliminary ruling on the validity of a clause which provides for the forfeiture of the term without prior notice.[31] In this case, a bank had granted a loan repayable over twenty years to a natural person so that the latter could acquire a building. The contract provided for "general conditions" in which an article 16-1 specified that "the sums due would be automatically and immediately payable, without formality or formal notice, in the event of a delay of more than thirty days in the payment of a term in principal, interest or accessories." The question was whether a delay of more than 30 days in the payment of a single instalment in principal, interest or accessories, as provided for in the clause at issue, can characterise a default of a sufficiently serious nature in view of the duration and amount of the loan. This clause therefore allowed the bank to declare the term of the contract expired, without prior notice of default and without any possibility of regularisation in the presence of a notice of default. It was therefore a formidable sanction for the borrower who had not been warned by the bank in a letter about the consequences of the absence of a regularisation. The borrower had challenged the procedure in various proceedings and in particular before the Court of Appeal, where it was argued that the clause was unfair, in the absence of a formal notice. The borrower considered that French case law was contrary to an European Court of Justice decision on acceleration.[32]

II. THE ERADICATION OF AN UNFAIR TERM: AN ADJUSTABLE SANCTION

1. **The effects of eradication: elimination of the clause and continuation of the contract**

The Consumer Code provides for a relatively effective system of sanctions if an unfair term has been included in a contract. The clause will be deemed unwritten[33]. French law has transposed Article 6(1) of the Directive of 5 April 1993, which now appears in Article L. 241-1 of the current Consumer Code with a wording close to the European text.[34] Article 6(1) of the Directive provides that "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms »[35] . This text contains various principles which seem simple to apply: on the one hand, any unfair term is rendered ineffective in accordance with the rules laid down by the law of each country; on the other hand, the contract is maintained after the unfair term has been deleted, unless this partial eradication prevents the contract concerned from surviving. The effects of eradication are therefore simple: the clause is eliminated and the contract remains. In other words, the eradication of the unfair term leads to a continuation of the contract.[36] This solution is to the advantage of the consumer, since the contract will be rebalanced and maintained. Indeed, the eradication of the abusive clause seems to be in perfect harmony with the basis of unfair terms,

namely to restore the contractual balance which had been distorted by the insertion of such a clause. The nullity of the entire contract would have been perfectly inappropriate, since this would have meant that the consumer would often be penalised and thus deterred from denouncing the unlawfulness.

It should be noted that France has chosen to transform the unenforceability of the unfair term originally provided for in the European Directive into a "clause deemed not to have been written", but that it has taken over in an almost identical manner the part of the text relating to the maintenance of the contract.[37]

Finally, as part of the 2016 reform of contract law, the Civil Code has also incorporated the concept of unfair terms in the new Article 1171, which is deemed unwritten too. However, the new text does not specify the consequences for the fate of the main contract, unlike European law and the Consumer Code. The principle of maintaining the contract despite the removal of unfair terms is therefore enshrined in European law as well as in our law, despite the incompleteness of Article 1171 of the Civil Code. Combined with the exclusion of the unfair term, this mechanism "stems from a desire to enforce a standard, in order to guarantee a minimum of contractual security».[38]

The "deemed unwritten" clause enjoys a specific *sui generis* legal regime with various fundamental uses for the consumer.[39] On the one hand, it has retroactive effect. On the other hand, the case law decided, in an important judgment of 13 March 2019, that the request to have an unfair term deemed unwritten did not constitute a nullity.[40] It is therefore not affected by the five-year limitation period[41] and becomes, on the contrary, imprescriptible. Thus, the sanction of a judicial finding of the existence of an unfair term does not lead to the nullity of the term or of the contract, but to its ineffectiveness in the relationship between the borrower and the professional lender.

The CJEU does not recognise any room for manoeuvre for the national judge to review or amend an agreement containing an unfair term: it limits the judge's powers to eradicating the disputed term[42]. However, this restrictive approach does not preclude a suppletive rule from replacing the excluded unfair term, insofar as this is a necessary effect of the law which may be beneficial to the consumer[43]. Even in this case, the European court remains reluctant to accept the replacement of an unfair term by a supplementary provision of national law. Thus, in the judgment of 3 October 2019, the CJEU, after having ruled out an unfair Swiss franc indexation clause, refused to replace it by the general provisions of Polish law, despite the difficulty of determining the new rate of credit.[44]

Although the use of the unwritten clause is "historically conceived as a procedure to save the contract"[45], nullity is not always excluded. The European and French texts expressly provide for this hypothesis when the contract cannot be maintained following the removal of the disputed stipulation, as it becomes impossible to apply it.[46] This is the case for real estate loans denominated in foreign currency in cases where this clause is considered unfair. The Court of Justice of the European Union seems to favour such a possibility[47]. Other exceptions are provided for if the clauses of the contract were stipulated as indivisible[48] or if the term

deemed not to have been written was the implicit and determining cause of the trader's consent. It will then be for the professional to prove this link.

2. The partial eradication of a severable clause

In principle, eradication cannot be only partial. The CJEU decided in a judgment of 26 March 2019 that *"Articles 6 and 7 of Council Directive 93/13 on unfair terms in consumer contracts must be interpreted, first, as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance"*.^[49] Interpreting this case law *a contrario*, in a judgment of 2 June 2021, the First Civil Chamber of the Court of Cassation considered that *"It follows that an accelerated repayment clause of which only some of the causes are unfair may be maintained in part, provided that, because of its divisibility, the removal of the elements which make it unfair does not affect its substance"*.^[50] The CJEU judgment of 26 March 2019 serves as a touchstone for the Court of Cassation to rule on the effect of the partial eradication of an unfair term on the contract. Although it decides *a contrario* to the CJEU, the High Court reuses the concepts developed by the European decision, and in particular by the Advocate General, to conclude that the divisibility of a clause makes it possible to save it from being eradicated because of the abusive nature of some of its terms.^[51] Indeed, in his particularly rich conclusions, the Advocate General examined with great precision the legal mechanisms involved. He studied the case law of the Bundesgerichtshof (German Federal Court of Justice), which developed the notion of divisibility of the unfair term and that of the "blue pencil test": only the unfair part of the term is set aside, with a simple stroke of the pen, the rest of the stipulation is maintained.^[52] The retention of a partially unfair term is therefore only possible if this does not lead to a distortion of the term.

Basically, the solution evokes, at the level of the clause, the rule laid down in Article L.241-1 of the Consumer Code (reflecting, incidentally, Article 6, 1 of the 1993 Directive) which provides that the contract remains enforceable in all its provisions other than those deemed unfair if it can survive without these clauses. The First Civil Chamber in fact admits the possibility of transposing this logic within each clause: the disputed clause thus remains enforceable in all its provisions other than those deemed unfair if it can survive without these provisions, which is only possible if this clause is severable. Ultimately, the divisibility of a clause makes it possible to avoid its total eradication because of the unfairness of some of its terms.

[1] X. LAGARDE, « Qu'est-ce qu'une clause abusive ? Etude pratique », *JCP G* 2006, I, 110.

[2] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29.

- [3] CJEU 9 July 2015, *Maria Bucura v. SC Bancpost SA*, C-348/14 (PT 66), EU:C:2015:447
- [4] S. PIEDELIEVRE, *Droit de la consommation*, Economica, 2020, p. 540
- [5] See in this sense CJEU, 16 January 2014, *Constructora Principado SA v. José Ignacio Menéndez Álvarez*, C-226/12, EU:C:2014:10
- [6] CJEU 14 March 2013, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, C-415/11, EU:C:2013:164
- [7] J. ROCHFELD, « Clauses abusives- Listes réglementaires noire et grise. Décret n° 2009-302 du 18 mars 2009 portant application de l'article L. 132-1 du code de la consommation, *RTD civ.*, 2009. 383.
- [8] In this sense, S. PIEDELIEVRE, *Droit de la consommation*, *op.cit.*, p. 542.
- [9] For a reminder of this rule, Cass. 1^{re} civ., 11 December 2019, n° 18-21164.
- [10] G. PAISANT, « A propos des vingt-cinq ans de la Commission des clauses abusives en France », in *Droit et Actualité, Etudes offertes à Jacques Béguin*, Litec, 2005, p. 605 s., n° 14.
- [11] In the words of L. LEVENEUR, « La commission des clauses abusives et le renouvellement des sources du droit des obligations », in *Le renouvellement des sources du droit des obligations*, Travaux de l'Association Henri Capitant, Paris, LGDJ, tome I, 1997, p. 155.
- [12] The list can be consulted on the website of the Unfair Contract Terms Commission.
- [13] CE, 16 January 2006, n°274721 *Gaz. Pal.*, 15 août 2006 17.
- [14] P. JESTAZ, « Rapport de synthèse », *Le renouvellement des sources du droit des obligations*, LGDJ, tome 1, 1996, p. 187s.
- [15] O. KUHNMUNCH, « Le dispositif d'élimination des clauses abusives : les nouvelles données », *Rev. conc. Consom.*, 1992, n° 65 25.
- [16] Cass. 2^{re} civ., 10 February 1998, n° 96-13.316, *Bull. Civ.*, 1998, I, n° 53.
- [17] CCA, recommandation, 17 May 2021, n° 21-01, on consumer credit agreements: BOCCRF, 17 May 2021, available at <https://ext.so/rZ6lg>; ; G. POISSONNIER, « Clauses abusives dans les contrats de consommation : vers une modification en profondeur des offres proposées ? », *Contrats, conc. Consom.*, juillet 2021. Alerte 26 ; S. BERHEIM-DESVAUX, « 43 clauses abusives relevées dans les contrats de crédit à la consommation », *Contrats, Conc. Consom.*, juillet 2021. Comm. 126 ; J.-D. PELLIER, « Regard sur la recommandation de la Commission des clauses abusives n° 21-01 relative aux contrats de crédit à la consommation », *JCP E*, 2021.
- [18] Recommendation, *op.cit.*, 11°, 13° et 15°.
- [19] Recommendation *op. cit.*, 16°.
- [20] Article 1225 of the Civil Code provides that "The resolutive clause specifies the undertakings whose non-performance will result in the termination of the contract. Termination shall be subject to an unsuccessful formal notice, if it has not been agreed that termination would result from the sole fact of non-performance. The formal notice shall only be effective if it expressly mentions the termination clause."
- [21] Cass. 1^{re} civ., 14 mai 1991, n°89-20999, *Bull. civ.*, I, n° 153.
- [22] J. CARBONNIER, *Droit civil, T.4, Les obligations*, PUF, 22 éd., 2000, n° 83.
- [23] For example, Cass. 1^{re} civ., 26 février 2002, n° 99-13912

[24] Cass. 1re Civ. 2 june 2021, n° 19-22.455. The Court of Cassation stated that "after noting that Article 14 of the loan contract contained grounds for forfeiture of the term that could be declared abusive because they were unrelated to the performance of the contract, the Court of Appeal noted that it provided for other grounds linked to the performance of the contract itself that were valid» (pt.7)

[25] CJEU 27 june 2000, *Océano Grupo Editorial SA v. Roció Murciano Quintero*, C-240/98, EU:C:2000:346

[26] CJEU 21 november 2002, *Cofidis SA v. Jean-Louis Fredout*, C-473/00, EU:C:2002:705

[27] Paragraph added by the law of 17 March 2013.

[28] Article R. 632-1 of the Consumer Code states that "the judge may raise ex officio all the provisions of this Code in disputes arising from its application".

[29] CJEU 11 march 2020, *Györgyné Lintner v. UniCredit Bank Hungary Zrt.*, C-511/17, EU:C:2020:188

[30] For example, Cass. 1re civ., 20 mars 2013, n°12-14.432

[31] Cass. 1re civ, 16 june 2021, n° 20-12.154.

[32] CJEU, 26 january 2017, *Banco Primus SA c/ Jesús Gutiérrez García*, C-421/14, EU:C:2017:60

[33] V. KULLMANN, « Remarques sur les clauses réputées non écrites », *D.* 1993, Chron. 59.

[34] See on this subject J.-D. PELLIER, *Droit de la consommation*, 3rd ed., 2021, Dalloz, Cours series, no. 113.

[35] Council Directive 93/13/EEC of 5 April 1993

[36] See in particular S. GAUDEMET, *La clause réputée non écrite*, Economica, 2006.

[37] Article L. 241-1 of the Consumer Code states that "Unfair terms shall be deemed not to be written. The contract shall remain in force in all its provisions other than those deemed unfair if it can survive without such terms".

[38] V. COTTEREAU, « La clause réputée non écrite », *JCP G* 1993, I, 3961.

[39] J. BRUTTIN, « La présence d'une clause abusive et le maintien du contrat de crédit », *RDI* 2021, p. 540

[40] Cass. 1re Civ., 13 mars 2019, n° 17-23. 169.

[41] The Court of Cassation decided that "the Court of Appeal rightly held that the request to have the disputed clauses deemed unwritten was not a request for nullity, so that it was not subject to the five-year limitation period ».

[42] CJEU, 14 june 2012, *Banco Español de Crédito, SA v. Joaquín Calderón Camino*, C-618/10, EU:C:2012:349

[43] CJEU, 30 april 2014, *Arpad Kasler et Hajnalka Kaslerne Rabai v. OTP Jelzálogbank Zrt*, C-26/13, EU:C:2014:282

[44] CJEU, 3 october 2019, *Kamil Dziubak et Justyna. Dziubak v. Raiffeisen Bank International AG*, C-260/18

[45] S. GAUDEMET, *La clause réputée non écrite*, Economica 2006, cited by H. PERINET-MARQUET, « Les clauses réputées non écrites en droit de la copropriété », *JCP NI* 2021. 1124, n° 5.

[46] Council Directive 93/13/EEC of 5 April 1993, art.6-1 ; C. consom., art. 241-1.

[47] CJEU, 14 march 2019, *Zsuzsanna Dunai v. ERSTE Bank Hungary Zrt*, C-118/17, EU:C:2019:207

[48] V. en ce sens : G. RAYMOND, « *Clauses abusives* », *J.-Cl. Concurrence-Consommation*, fasc. 820, 2012, n° 109.

[49] CJUE, 26 march 2019, *Abanca Corporación Bancaria SA v. Alberto García Salamanca Santos and Bankia SA v. Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez*, C-70/17/C-179/17, EU:C:2019:250

[50] Cass. 1re civ., 2 june 2021, n° 19-22.455 (pt.6). The Court conclude “*that from these findings and statements, which highlight the divisibility of the grounds for forfeiture of the term provided for in Article 14, the Court of Appeal correctly deduced that the unwritten nature of some of these grounds for forfeiture did not preclude the implementation of those that were validly stipulated, since the deletion of the elements that rendered the disputed clause unfair did not affect its substance*” (pt. 8).

[51] Civ. 1^{re}, 2 juin 2021, n° 19-22.455. In this case, following a notarised deed dated 21 March 2008, a bank granted a couple of borrowers a real estate loan, the general conditions of which provided in Article 14 that the sums due would be automatically and immediately payable in a certain number of cases and in particular in the event of a delay of more than thirty days in the payment of a principal, interest and accessory instalment of the loan and that, in order to avail itself of this, the lender would notify the borrower by simple letter. Subsequently, the borrowers brought an action against the bank for the cancellation of the payment orders for the purpose of seizure and sale that the bank had issued to them, claiming that this clause was abusive on the grounds that it provided for some twenty causes of forfeiture of the term, some of which related to causes outside the contract, it being observed, moreover, that no prior notice of default was provided for. The Douai Court of Appeal, in a judgment of 16 May 2019, rejected this request, which led to an appeal to the Supreme Court by the borrowers, but in vain.

J.D PELLIER, « *La divisibilité d’une clause permet d’éviter son éradication totale* », *D. actu.* 11 juin 2021.

[52] Concl., § 88 Since the 1980s, the Bundesgerichtshof (Federal Court of Justice) has developed nuanced case-law with regard to the interpretation of terms which are unfair in part. The legal basis for that interpretation is Paragraph 306 of the Bürgerliches Gesetzbuch (German Civil Code). That provision, which predates Directive 93/13, is today regarded as transposing Article 6 of that directive. The issue raised by that court in its case-law is the following: is it possible to divide a term which is ‘tainted’ by an unfair element into a part which is unfair and a part which is fair? If so, what are the consequences of that division?

CONSUMER-CENTRED ELECTRICITY MARKETS IN THE EU: OPPORTUNITY OR TRAP?

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Summary

The article discusses the impact the “information paradigm”, an essential in the “average” consumer construction, has on the electricity customer. As the current energy crisis is culminating, the energy consumer faces price difficulties. At the same time, in the wake of the Target Model era in the EU, markets have more expectations from the consumers. The latter are expected to educate themselves and become energy-literate, while the “buffer zone” of state intervention is progressively diminished. The market becomes consumer-centric; however, this does not mean that the amount of consumer protection is increased. More responsibility is demanded from the customers, as they have to be aware of the price signals and adapt to them. The “average” consumer is transforming into the “active” one.

Keywords

Consumer protection, electricity supply, information paradigm, average consumer, active consumer.

I. INTRODUCTION

1. From the “average” consumer towards the real consumer?

European consumer policy has undergone some seismic changes during the past years. In its early phase, consumers were enjoying the protection of the social welfare state, as the weaker parties in any agreement.[3] Back then, the concept of a consumer was regarded as uniform and no categorizations were necessary. Consequently, there was no characterization as such of a “vulnerable” consumer.

However, the ensuing privatisation of network industries, a venture starting from telecommunications and spreading to transport and energy, significantly changed the landscape. It meant that a new archetype of consumer was required in order for users to “survive” the newly-set rules and challenges. Choices grew considerably, pushing consumers to develop new qualities, in order to cope with different and mostly fragmented markets, mainly vertically regulated.[4] During that period, an essential change of the orientation of consumer policy happened: the normative concept “consumer” would become malleable and would vary from one sector to the other.

Micklitz calls the process which took place in the integrated market framework “marketisation”:[5] the consumer is seen as “market-citizen” and is given a diminished role, limited to a market-behavioural function. “Marketized consumers” are seen as active commercial actors, ready to benefit from the market and to contribute to its smooth functioning. This, however, required that consumers be sorted into different categories, assessing their qualities and their ability to adapt to the market.

Accordingly, the CJEU proceeded to develop the notorious “average consumer” benchmark, a concept articulated in its *Gut Springheide* judgment and consistently thereafter.[6] The concept of the average consumer was meant to describe a well-informed, reasonable and circumspect market actor,[7] reflecting the role of consumer as a catalyst for the proper functioning of the integrated market.[8] Since this energetic and resourceful individual is able to assess the value of information, this would require a consumer system overfull of information duties,[9] which would function in both directions: suppliers shall *inform* and consumers shall ensure they *are informed*. In classical internal market law this “average consumer” has a right to precise information; however, the cognitive processing of such information largely lies with the consumer.[10]

The CJEU added an extra layer of complexity, in *Scotch Whisky Association*.^[11] There, the Court concluded that “*the national court is called on to examine the compatibility of the national legislation [...] with EU law....In that assessment, the referring court must take into consideration any relevant information, evidence or other material of which it has knowledge ... Such an assessment is all the more necessary in a situation [...] where there appears to be scientific uncertainty as to the actual effects of the measures ...*”. In other words, the Court

urged national courts to seek and put through any newest scientific evidence *ex officio*, while examining the national measures' compatibility with the EU legal framework and more specifically their proportionality aspect. This implies the incorporation of behavioural sciences into consumer law. This, in turn, means that "if the proportionality principle gets "topped up" with scientific elements, this has implications on the interpretation of the "average consumer" benchmark, which is by itself a product of the proportionality test." [12] The result is a by far more polymorphous concept of "consumer" based on many numerous variables.

In recent years, however, the Court has nuanced its position. Thus, in *Koipe*, [13] it stressed the significance of the contextual approach and accepted that the surrounding circumstances and the common sense thereby ensuring may drive consumers to erroneous decisions. Later, in *Teekanne*, [14] the Court stated that even "correct and comprehensive" information may be insufficient to reconstitute any false or flawed idea one has for the characteristics of a product or service. Most recently, the Court has made clear that, for a consumer "with no legal training", where EU secondary law stipulates the supplier's obligation to inform the consumer on the substance of the contractual obligations proposed to him, the supplier is required to inform the consumer in a clear and concise manner. [15] The Court went out of its way to clearly state that "*a mere reference [...] to a legislative or regulatory act determining the rights and obligations of the parties is insufficient*", explaining that, even for a well-informed and skillful consumer, legal expertise would never be required. Therefore, in recent years, the Court revised upwards - at least qualitatively - the information required by traders and downwards the aspirations the market could have from consumers.

2. The energy "customer": a wider concept

In the energy field, the conventional version of the marketized consumer is that of the "customer": a notion first described in the First Package Directive, [16] and then clarified under Directives 2003/54 and 2009/72. [17] As the EU legislator has chosen to use this term instead of "consumer", it is clear that an autonomous and uniform interpretation had to be followed across the EU. This corresponds to the narrative illustrating the shift from law-making at the Member State level to regulating markets via regulatory authorities at the EU level. If there is a lack of coherence and consistency in the substantive law, effective enforcement is difficult to achieve. [18]

The Directives attributing consumers the role of "customer" were, at the same time, focusing on breaking-up national markets and guaranteeing energy users the right to freely choose their suppliers. However, this development has not been readily accepted in every case. As a recent CJEU judgment illustrates, privatisation is not always seen as the *optimum* by consumers. In *RWE*, [19] a consumer association, the Consumer Centre of North Rhine-Westphalia started a battle in order to persuade the local governments to reverse the privatisation of the energy sector. In Germany, communities had sold their energy suppliers to one of the biggest companies in Europe, RWE. However, following that, price increases were observed and the company was not abiding by its information duties. More specifically, it was not providing consumers clarifications regarding the price-increase clauses included in standard term contracts; subsequently, consumers were in the dark as for the price strikes suffered. A big

number of claims was accumulated and finally the Court found, much to the vindication of the consumers, that it is for the national court to assess whether such a term allowing an energy supplier unilaterally to alter the price satisfies the requirements of good faith, proportionality and transparency. When making this assessment the national court must pay attention to two criteria in particular: first the contract must set out in transparent fashion the reasons for and method of the variation of the charges; second the right of termination conferred on the consumer must actually be capable of being exercised in the specific circumstances.[20]

The people's opposition to the company's practice went on even further, motivating a referendum in two big cities (Hamburg and Berlin), asking for the regional governments to buy the electricity grid operation back from the multinational companies. Eventually, Hamburg attained the re-municipalization of its power grid in 2014[21] and Berlin in 2019, after the municipal grid operator "Berlin Energie" applied for energy grid concession through a formal bid.[22] What this case shows, is that breaking the markets and maximising user's choice is not panacea: sometimes, the consumer empowerment goal is advanced through decentralised ways of producing and consuming energy.

Similar complaints are currently ongoing in Greece,[23] with group and individual actions flooding the courts, claiming inadequate information provision as for the application of price-adjustment clauses in energy supply contracts. The supply companies started introducing such clauses in the contracts for mitigating the excessive costs of buying electricity in the wholesale market; however, thousands of consumers complain[24] that the companies informed them poorly or did not inform them at all, before having recourse to such clauses. The problem, already existing before, has been exacerbated in view of the price spikes caused by the war in Ukraine.

As prices soar, similar phenomena have been observed across the EU. Many countries have introduced measures to protect consumers against the passing-on of wholesale market costs to customers. For example, in Belgium, the federal government prohibited suppliers to proceed to unilateral increase in the down payment bill, not only in variable-rate energy tariffs, but also in fix-price agreements.[25]

In immediate reaction, the European Commission agreed on a price cap on gas for Spain and Portugal at €50/MWh for the next 12 months.[26] This measure *de facto* decouples the price of electricity from gas, thus shielding consumers from the steep rises of the energy price. As it has been reported, this should result in electricity bills being halved for about 40% of Spanish and Portuguese consumers with regulated rates.[27] The above examples showcase the fact that, as it currently stands, customer protection in the field of energy is clearly not sufficient under crisis conditions.

II. INFORMATION DUTIES: PROBLEM OR SOLUTION?

1. Nudging your way through the right choice

The information paradigm implies that there are consumers who are “able, willing, and competent to deal with information provided, to read different languages, to take informed rational decisions and to enforce their information-based rights.”[28]

The model is overall building on the nudge theory teachings.[29] Nudging is the method using behavioural insights and experimental outcomes, asserting that consumer behaviour can be influenced by small suggestions and positive reinforcements.

Directive 2019/944 is clearly moving towards this direction, as its Chapter III titled “Consumer Empowerment and Protection” aims at backing consumers up and providing them with the tools to participate more in the energy market, including participating in new ways.[30] Many nudging policies have been incorporated in the Directive text, including price signals,[31] smart metering systems,[32] and billing information.[33] As David Cameron, a pure nudge enthusiast,[34] had underlined in a speech, “the best way to get someone to cut their electricity bill” is to cleverly reformat the bill itself.[35] Reformation of the bills has emerged as an imperative need recently, since with the growing complexity of energy markets (self-consumption, energy communities, etc) the bills were to contain more information than in the past. In order to make it easier for consumers to comprehend their billing information, the Council of European Energy Regulators (CEER) suggested the principles of Prioritisation and Reduction to be applied on the bills’ layout, a technique intending to avoid overwhelming the consumer by excess information.[36] Countries across Europe including Greece,[37] Portugal,[38] France,[39] Italy[40] and Denmark have already followed the above suggestion and have launched standardised forms for both precontractual application forms and consumer bills. France has successfully introduced a normalised contract summary chart (*fiche descriptive de l’offre*), facilitating customers to have a direct vision of the contract proposed to them.[41] Denmark, on the other hand, built up on behavioural insights in order to improve the intelligibility of the bill’s content.[42]

However, such structural reshaping of the bill templates may be seen as a simplistic intervention on the form, not substance. It takes more for the electricity market actors to comply with their information duties nowadays, especially in the conditions formed after the Target Model[43] applied for the development of the single market in Europe. Besides, and despite the stakeholders calling for inclusiveness in policymaking, new risks emerge threatening the market’s consumer-centric design. Technological developments may create new societal divisions among consumers,[44] as certain social groups like the digitally illiterate people or the ones lacking access to electronic means may find it arduous to adjust to this new reality.

2. Choice impediments

This is the reason why, despite the aforementioned efforts, the “Consumer Markets Scoreboard” has shown, as for electricity services, that consumers find that this market section does not perform well for them overall.[45] May this be a vindication for the academics voicing fierce criticism against behavioural economics policies? Many of them have blamed the discipline for largely looking at consumers as individuals, while the collective dimension of consumer law is heavily disregarded. In a strongly critical article, two of the leading behavioural scientists, Chater and Loewenstein, seem to regret their previous inducements, by recognizing that *“If your problem is basically that fallible individuals are making bad choices, behavioural science is an excellent solution. If, however, the real problem is not individual but systemic, then nudges are at best limited, and at worst, a harmful diversion.”*[46] The aphorism seems to contradict the conception of libertarian paternalism, the soft centre of any nudge theory. The idea was initially introduced by Thaler and Sunstein,[47] as an alternative to classic State paternalism. Libertarian paternalism operates through individual empowerment and aims to navigate individuals towards more efficient lifestyle choices. The theory argues that any freedom to choose can be enhanced rather than restricted by altering the structure of choice to benefit the chooser.[48] As its inspirers emphasise: *“Libertarian paternalists want to make it easy for people to go their own way; they do not want to burden those who want to exercise their freedom”*.[49] They envision better, happier lives, through the endorsement a “choice architect” offers.

At the same time, consumer empowerment, requiring people to be purchase-ready might have collateral implications. This information paradigm indicates that imperfect or asymmetric information may hinder the conclusion of a consumer-effective agreement.[50] This applies especially in the electricity sector, where the level of complexity could be confusing even for an energy market expert.[51] Several reports and studies underline the knowledge gap in the electricity market. In its recent evaluation, the European Commission[52] found that information regarding the period of notice to terminate an electricity contract was not indicated at all on bills in some EU countries (Italy, Poland, Slovenia and Spain), while in others (Germany and France) only half of the customers were able to identify such information. The same report indicates that a scant percentage of only 7% of consumers on average had noticed that they might be charged for switching energy suppliers.[53] In general, after a mystery shopping exercise, the Commission made disappointing observations: in some countries (Lithuania, Spain and Sweden) almost two-thirds of the possible customers were incapable to spot the crucial information as for the switching procedure.[54] As the *Bureau Européen des Unions de Consommateurs* (BEUC) highlights,[55] in the Czech Republic consumer organisation dTest found that consumers often had difficulties in getting information on the expiration of their ongoing contract and how much it would cost them to switch suppliers. In some cases, the supplier refused to provide the above information on the grounds of commercial secrets and the risk of these details being abused. Such lack of critical information

confuses the consumer and further hampers one of the most crucial parts of the consumer life-cycle: switching.

Consumer choice finds its absolute expression in the unhindered supplier switching: customers shall be able to turn to any supplier which offers a better fit to their needs and personal profiles. As the Recast Directive underlines: *“Several factors impede consumers from accessing, understanding and acting upon the various sources of market information available to them. It follows that the comparability of offers should be improved and barriers to switching should be minimised to the greatest practicable extent without unduly limiting consumer choice.”*[56]

In order to avoid any restriction of choice, the option impediments are identified and classified as barriers shaped from commercial contract conditions and barriers altering customer perception.[57] The EU has continuously acted on facilitating the switching procedure, by seeking to abolish those barriers and disallowing any contractual terms which could hinder it.

The most common barriers stemming from the supply contracts' terms and conditions are the unjustified termination fees imposed by the electricity suppliers. Such fees act against consumer trust-building and exacerbate the existing difficulties. According to an ACER/CEER Market Monitoring Report,[58] exit fees used to be common in almost 40% of the Member States. Exit fees sometimes range at levels so high compared to the final price of energy, so they can be considered as a type of product differentiation. The amount normally exceeds any potential costs incurred by suppliers due to consumers' breaking away from the contract within the contractual period (e.g. marketing costs for signing up a 'replacement' consumer) and these fees end up to be totally unjustified.

The current Directive,[59] like its predecessor,[60] unequivocally prohibits charging any switching fees. The Recast Electricity Directive exceptionally allows them for fixed-price and fixed-term contracts, taking into consideration the level of commitment such contracts entail. The elimination of exit fees in general (switching or termination) offers the incentive to move easily in the energy market, stimulating the competition and trying different solutions which may be more advantageous for consumers. As free switching has always been seen as the index for a well-functioning market, it was recently asked “what the right switching level is”.[61] Despite the fact that the switching rates are very diverse across EU,[62] it is reported that, since the energy liberalisation, 70-80% of consumers have switched at least once, which should be considered as a sign of success.[63]

Consumers' conceptions form another kind of possible impediment to effective switching, as they may affect consumers' willingness to change suppliers - especially when it comes to sufficient monetary gain. In order for consumers to migrate to another electricity company, they shall have first been persuaded that the actual gain is sufficient to offset the possible costs and hustle of switching. Such costs are often unpredictable or obviously irrelevant to the energy supply itself. The latter happens, for example, when switching impediments rise from commercial practices involving additional services, offered together with electricity supply (for example, boiler maintenance, additional insurance cover). Consumers contemplating switching from their current supplier may face problems disengaging, as the value-added service and the

energy contract appear to be directly linked and non-dissociable. Typically, in these cases, the renewal of the electricity supply contract leads to an automatic renewal for the additional services provision. This close connection inevitably results in restricting consumers' choice, since even if they are not interested in using those additional services anymore they may nonetheless feel safer by keeping those. This situation leads to customer lock-in, entrapping consumers in a complex transaction, with aspects for which they have not knowingly consented to.

III. EU: CHOICE ARCHITECT?

While free choice of energy providers has been pivotal to the liberalisation of the sector, on the flip side this has reduced the opportunities for national voice and for political participation in shaping the national economy.[64] In the State-nation setting, the citizen participated in the law-making process, voiced his concerns and could claim protection. In the EU framework, the balance is far more complex, as a potential full harmonisation might deactivate national law. In this framework, consumer protection is not built upon protecting individuals, but rather on protecting their freedom of choice: EU market is a market where *choices* are really what is offered.[65] Deregulation and market integration contributed to a whole range of better, more diversified choices to be offered, to better serve individual consumers' profiles. The Recast Electricity Directive unfolds around the notions of consumer choice and engagement:[66] the first one leads to the attainment of the second, and the EU law's mission is to retain all the choice possibilities intact for customers. Consumers who hesitate to engage with the market will therefore not be able to benefit from the competition, ensuring lower prices and better services. And, as it has been shown,[67] disengaged consumers are usually the ones displaying traits of vulnerability.

1. Consumer passiveness as vulnerability

Consumers' inaction in many cases works to the benefit of powerful energy suppliers. This tendency was aptly presented by the UK Competition and Markets Authority (CMA), in a field research examining the state of the country's energy market.[68] The survey indicated that the consumer's disinclination to partake in the energy market made suppliers powerful: the consumer segment which was lying dormant, was susceptible to exploitation through abusive pricing practices.[69] The most undesirable effect of this disengagement is the *de facto* creation of a "two-tier market".[70] Two different, unequal subsets of customers are being created: the first, responding to the EU consumer archetype, comprises "active" consumers, keen to learn, evaluate and act upon market signals and price developments. The second one concerns passive consumers, stuck with suppliers who do not fit their profile, thereby harming their individual budgets. The existence of such a second tier is not conclusive to either consumers and suppliers or competition. The question arises, then, whether States should step in and protect the passive consumers or whether they shall more actively impel them to interact with the market actors? Different countries have given different responses to the question. On the one end of the spectrum there is a clearly protectionist strategy. The State interferes with the energy market and takes specific measures in order to mitigate the impact on the most vulnerable customers.

The most striking example of such a strategy is the United Kingdom, which adopted the Tariff Cap Act, back in 2018.[71] According to it, the independent regulator (Ofgem) sets an absolute price cap on poor value tariffs, meaning the poorer households. An absolute cap requires the regulator to set a rate above which no energy supplier can charge. And despite the fact it is an interventionist initiative, Price Cap is estimated to have offered relief to almost 22 million households.[72] The same strategy has been followed by France, in the face of the energy crisis. The Government, keen on the public interest, has announced a cap on the price of gas through the end 2022.[73] The cap has a direct effect on electricity prices, since it affects them through the markets' correlation.

On the other end of the spectrum lies the promotion of more empowering solutions. Certain States have chosen to reinforce consumers in order to make the most appropriate choices, Norway being one of them. The Norwegian energy market is one of the most dynamic in Europe: by the end of 2017, around 70% and 90% of Norwegian consumers, respectively household and professional, had a spot-price-based contract.[74] This means that the majority of the electricity customers in Norway are aware of the market fluctuations and responsive to price signals. In addition, the Norwegian Consumer Protection Authority has drafted standard contract terms for electricity supply contracts offered to consumers. The terms regulate many significant aspects of the contract: the notification obligation for any price or duration changes, the termination of contracts and any associated fees, as well as the duration of fixed contracts. Hence, customers may take advantage of their own knowledge about the market and at the same time they benefit from the Authority's "safety net".

Finally, there are also countries which have followed a more mixed approach, thus offering protection mechanisms to vulnerable consumers, while at the same time trying to build consumer-consciousness. Italy has introduced the PLACET offer, "intended to help consumers to enhance their ability to choose and to facilitate comparison within the free market".[75] The Italian Regulator, ARERA, adopted Resolution no. 555/2017/R/com, providing for offers which must meet certain criteria. The contracts offered under PLACET have to be comparable and easy to understand, thus being an "end-customer protection instrument".[76] The contractual terms and conditions are set by ARERA, which has also approved the structure of presentation of the energy prices in the contract. However, the price level is set freely by the supplier. At the same time, it is emphasised that households are also able to benefit from the "Social Bonus", a tool supporting large families and those in conditions of economic and/or physical hardship, ensuring them discounts on their annual energy cost. The PLACET offers to act cooperatively with this social-policy framework.

The same solution has been followed in Greece. The Regulatory Authority for Energy (RAE) recently introduced revised guidelines for a standardised electricity-bill presentation. The suppliers shall follow a certain billing layout and are obliged to apply the offer template the Authority has designed.[77] However, these empowerment moves are combined with a kind of state care. The poorer households may be eligible to be included in the Social Residential Tariff (SRT). SRT is granted for the protection of vulnerable consumers' groups by all Electricity Suppliers, but only for the beneficiaries' principal residence.[78] Moreover, the Energy

Ministry announced that public funds will be released for the construction of photovoltaic stations, aligning with the REPowerEU Plan.[79] Those investments shall focus on providing power to vulnerable households: active consumers will be mobilised for supporting the sensitive ones in an energy pluralism scheme.

2. Consumer activeness as democratisation

The implementation of Directive 2019/944/EU gave rise to another “consumer model”: the prosumer, i.e. the producer-and-consumer amalgam. As it has been stressed elsewhere,[80] the involvement of “prosumers” in economic activity seriously blurs the traditional production/consumption paradigm, questioning the classic consumer protection model based on the dichotomy between suppliers and consumers.

The Directive does not directly refer to the term prosumer, however it regulates cases where energy consumers produce or co-produce their energy demand individually or through collective organisations. Articles 15 and 16 of the Directive provide for the “active customer” and the “citizen energy communities”, meaning consumers who consume, store or sell electricity generated on their premises, but not as a commercial/professional activity. Prosumers are expected to play a central role in the new energy market design, as they can help change the production patterns. Generating electricity in small hubs will decentralise the energy production, thus bringing a form of energy democracy in the current scheme.[81] These elements of democratization are that have driven some researchers to describe prosumers as the energy citizens.[82] And this might be the answer to the problem raised before, as for the EU law’s legitimation. Harmonizing EU law might deprive citizens from largely contributing to any legal process. However, if consumers produce their own energy, then they have a participation in the factual process: self-determination is even more powerful in this case. Choice is all the more strengthened and its repercussion is multiplied: it is not only choice among offers but also choice to act autonomously.

However, besides the sense of empowerment and independence such a concept would entail, the prosumer concept should be considered as a quite uncertain one. The EU has not clarified their legal position and their status still remains indefinite and, to some extent, perilous. Prosumers are most likely to engage in the so-called mixed transactions, playing different roles simultaneously in the energy market.[83] If their situation is not further clarified, then both prosumers, as well as their co-contractors undertake important risks. Prosumers should know for which transactions they act as businesses and when they enjoy the consumer law protection. In any other case, the possibility for one to undertake self-generation or become a member of an energy community initiative will seem unattractive.

IV. CONCLUSION

The all-recent Directive 2019/944 has instituted far-reaching rules aiming to mobilise consumers to interact with the supplier companies. The fact that the energy market remains one of the most complex, sophisticated and difficult to understand is unquestionable. In the short period during which the Directive has been implemented, these difficulties do not seem to be eliminated or even diminished. More than recasting the EU rules may be needed for consumers to get involved into the energy play in the long run. Time is required if consumers are to familiarise themselves with the multiple factors affecting their energy cost and learn how to control it; taking the centre stage will only follow later in time. Further, energy markets have been labelled as “problem markets”, in the sense that they fail delivering optimal results.

As market conditions had started maturing, the international turmoil unfolding these last months has added new uncertainties. Energy prices in Europe are soaring, reaching unprecedented levels. The sharp increase is mainly due to the tight connection of the electricity market to the one of gas and the unforeseen invasion of Ukraine by the Russian Federation army, bringing uncertainty for the future availability of gas and oil supplies.

Notwithstanding the fact the current market architecture is not formally put into question,[84] the truth is that focus has changed once again. The European Commission has encouraged governments to take measures to protect final consumers directly,[85] shifting the spotlight from the EU back to Member States again. It remains to be seen whether this change of attitude will be transcribed into legal texts, and how. The ongoing energy crisis may serve as a testbed for existing legislation and for consumer protection in this field. The experience gained so far shows that customers shall always be treated as customers: granting them responsibilities for the market opening and operation should not be overwhelming, or else the outcomes may be counter-intuitive, requiring fresh EU interventions.

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WHY ADVERTISING DISCLOSURE ON SOCIAL MEDIA DOES NOT WORK AS IT SHOULD – PROPOSALS FOR REFORM FROM AN EU AND ESTONIAN PERSPECTIVE

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Summary

This research endeavours to investigate the legal compliance of social media advertising disclosures at the example of Estonian law, which is in this regard representative for most other EU national laws. Great emphasis is put on the analysis of specific forms of advertisements' disclosures and their language as well as the connection between the structure of the disclosure and the purchase and sharing intentions - exemplified by the practice of Instagram, one of the market's dominant companies. The paper is based on comparative and empirical research in the form of a survey among Estonian social media users, on base of which proposals for specific legal amendments and further recommendations are made.

Keywords

Instagram, Social Media, Marketing, Advertising, Disclosure.

I. INTRODUCTION

Online social media platforms allow users to share images, videos, texts and links with their followers. For instance, Instagram offers a diversity of ways to create content such as photos, videos, IGTV, reels, swipe-up links, call-to-action buttons, shopping links, Instagram Shop, and shoppable posts. Content can be both personal and intertwined with business, tailored to the user's individual wishes and needs[2] Instagram is thus a valuable marketplace to promote advertising on social media.

The Estonian Advertising Act[3] stipulates that advertising has to be clearly distinguished from other content or information transmitted[4] i.e. all advertised content, including both visual and its accompanying text, must refer clearly to the advertisement or promotion in which it is contained. For legally appropriate disclosures, it is requisite for the advertisement not to contain any misleading information about the product or service presented in the advertisement.[5] Disclosure language is significant, inter alia, to the extent that it assists in building a relationship between the consumer and the trader, strengthening trust between them and creating a broader engagement metric in general.[6] In addition, it is essential that the disclosed advertisement includes relevant indicators enabling the addressee to recognize the advertisement as such.

According to p. 4 sec. 1-2 of the Estonian Consumer Protection Act[7], the consumer has the right to fair, transparent and comprehensible information,[8] whereas the Law of Obligations Act[9] in sec. also offers opportunities for the consumer to withdraw from the contract, as well as receive compensation.[10] These national acts are partly transposing the “Enforcement and Modernisation Directive“ 2019/2161 (“Omnibus-Directive”),[11] which pursues a technology-neutral approach in compliance with the continuous development of the marketplace,[12] reckoning innovations and advances in technology. The definition of marketplace takes into account established trading practices on online platforms and thus provides appropriate means for remedies in the scope of misleading advertising on social media.[13]

This paper, which is an abridged and updated version of Anette Sooväli's Bachelor thesis[14] supervised by Thomas Hoffmann and successfully defended at TalTech Law School, Tallinn University of Technology, in spring 2021,[15] aims to provide evidence that advertisements and their disclosures as composed on Instagram need a clearer legal underpinning in order to remain compliant with relevant legislative acts in Estonia and the EU.

To this aim, the paper is subdivided into four parts: Following this introduction, a general overview of the variety of common social media marketing tools such as photo-, video-, text-, and link-based opportunities is provided in the second chapter, which also includes a legal analysis of advertising practices on social media with specific emphasis on disclosures of language, hashtags, Instagram-specific handles, as well as the absence of identifiable indicators within disclosure in order to discern promoted posts from regular content, demonstrating the strong entanglement of disclosures and language used for composing advertisements.

The third chapter addresses consumer behaviour, especially how advertisement recognition influences the development of brand attitude, i.e. brand image and ad quality. It outlines the degree of persuasion tactics targeted at consumer behaviour, as well as their impact on shaping purchase and sharing intentions of consumers. The fourth chapter provides a legal analysis of online actions and behaviour of traders, promoters and other market players and their contribution to the generation of consumers' intentions and decisions. The chapter also assesses national and international law in terms of consumer protection, advertising law, as well as competition law. This analysis forms the base of a proposal for an amendment of the Estonian Advertisement Act made by the authors in the same chapter, which includes the involvement of adequate indicators on social media advertisements as well as the prohibition of misleading consumers by certain words, expressions, or claims. The final chapter contains conclusions.

II. CONTEMPORARY ADVERTISING PRACTICES ON SOCIAL MEDIA

While there is a broad variety of different forms of advertising, recent practice has developed a more or less exhaustive set of main methods, which in this paper are exemplified by the advertising practices deployed by Instagram. Instagram is a U.S. company providing – among other services - marketing tools for various purposes and client types, including the option to share photos, videos, texts and links. While originally Instagram intended to mainly share aspects of everyday individual lives including pictures of events, entertainment, and social life in general,[16] the company is by now valued at over \$100 billion[17] and considered market leader in terms of interaction and engagement rates.[18] Instagram has grown into a community of various marketing opportunities, including Instagram Stories, Guides, TV, Reels and many other visual and/or videographic outputs.

1. Common marketing methods

At present, there are four main marketing methods, among which photo-based marketing is the most popular both in general as well as specifically among Instagram users. The photo-based method consists of a single photograph or a series of photos posted onto the user's feed. Video-based marketing methods enable users to share their videographics on their platform, including video posts, IGTV, and Reels. Video posts can be described as a singular post on the user's account, being limited to 60 seconds of video graphic content. IGTV also enables the user to post longer videos on their page, extending the length up to 60 minutes. The 15-30 second Reels are at present rising in popularity on Instagram, i.e. users are most likely to gain new followers or general audience by posting Reels on their page.[19] Text-based marketing mainly includes captions written by users, meaning that there are no other text-based outputs on Instagram. All users are generally enabled to add captions under their picture as well as supplement it with their IGTV or Reels. In contrast to e.g. services such as Twitter, the style or length of the caption is not determined by Instagram. Finally, Instagram offers an opportunity to link products, websites or other pages for the user's individual audience. A clickable link is a hyperlink attached to one's story, on which others can click and enter a specific page favoured by the user. This means that the user is able to share one's favourite products, newly released songs, calls for donations, fundraising etc. The clickable link can be added and managed only by the user, which provides ultimate independence in determining detailed parameters of the

output. This feature is categorically enabled, i.e. regardless of the amount of followers on the account.

Another link-based output can be attached to the picture that is posted on the feed by the user. In this case, the titled hyperlink appears in the bottom section of the picture and usually consists of a call-to-action phrase (CTA) suggested by Instagram. CTA phrases suggested include "Shop Now", "Book Now", "View Profile" etc. It has to be taken into account that attaching affiliate links to posts requires a public Business Account. The linked content can be a company's page, or an agency, or whichever business one might attach the profile to, whereas it can also be a personal brand. This output is also highly connected to creating and running paid advertisements on Instagram.

Moreover, a business profile enables the user to add shopping links to their pictures, i.e. once a business issues a post about their new product, this product can also be respectively linked to the post. The consumer is then able to click on the product icon and enter Instagram Shop, which will provide the customer with detailed information about the product, as well as a product link to the website of the business. These kinds of posts are also called shoppable Instagram posts.

2. Legal compliance of the advertising practices

Deriving from the Estonian Advertising Act (Reklaamiseadus), an advertisement must be clearly distinguished from other information. Its content, design and presentation shall ensure that it is understood as an advertisement.[20] The particular client benefitting from the established advertisement shall be discernible as well, including either their registered trademark or domain name in the design or disclosure.[21] Moreover, it is essential that an advertisement does not present misinformation of any kind.[22] Special emphasis is put on children, which must not be targeted as potential buyers of a product in order to gain popularity or targeted be evoking the impression that the acquisition of the product makes the child superior to others, or that the absence thereof has the opposite effect.[23]

A. Disclosure language

Disclosure language is the most important parameter when analysing endorsed or promoted posts. Promotions with specific benefits for the consumer increase the use of Instagram, including the growth of mutual engagement, as well as establishing a connection between the user and the consumer of their content. Once the user feels a particular connection or engagement with the post, she or he will be more eager to like or comment on it, creating a greater engagement metric for the user behind the promotion as well.[24] Greater engagement necessitates broader emphasis on disclosure, as well as its length and language.

Advertisements of any kind are marked as such by specific indicators. Thus, appropriate indicators shall be inserted into the disclosure enabling the consumer to identify and discern the promotional post from a native one. The consumer must be able to distinguish advertisements from regular posts, as advertisements with no indicating elements may mislead

the consumer. A thoroughly constructed disclosure facilitates the consumers' persuasion knowledge as well, thus benefiting the recognition of advertisements. Therefore, a consumer who is aware of the advertising disclosure, is likely better informed about the possibility of advertised content that is being shared. Moreover, the use of specific indicators such as "advertisement", "sponsored" or "collaboration" facilitate the recognition of an advertisement compared to disclosures with no indication.[25]

B. Hashtags

Most commonly used indicators include hashtags, which are defined as a word or phrase used on social media to ascertain the digital nature of a particular subject. Hashtags include a “#”-symbol before the word or phrase intended for use.[26] Hashtags required for promotion or advertisements may differ depending on national laws of each country. The Estonian Agency for Consumer Protection and Technical Surveillance has composed a guide for social media influencers and advertisers to ensure their free or paid content's compliance with national law,[27] i.e. also with the Estonian Advertising Act. Therefore, if it is known to be an advertising post, it must be properly marked so that all consumers are informed that it is not the personal preference of the influencer, but rather a brand or a company has paid for it, or the influencer has received some extent of advantages or benefits for creating this post.[28]

C. Instagram-specific handle

Every user on Instagram has registered with a specific handle identifying their account on the platform. Instagram uses a detection system to preclude handles that are already taken, whereas no particular rules or regulations apply for the name chosen by the user. There is no way to discern handles used by regular accounts apart from the domain names used by companies or brands, therefore the targeted audience of an advertisement can be chosen individually by the owner of the account, free from any restrictions or rules. However, Instagram-specific handles can also be used to promote or advertise brands or companies, linking their username in a Story, Reels, IGTV, visual posts/videos or any other content outputs provided by Instagram. This facilitates the promotion both in cases of non-advertising recommendations, as well as promoted and paid posts.

D. Absent indicators in disclosure

A disclosure which lacks significant indicators violates the primary conception of an advertisement under Estonian law. The content may in that case be perceived as biased or misleading, since all advertisements must be clearly distinguishable from ordinary content.[29] A study conducted in 2019 regarding disclosure of sponsored Instagram posts indicated that whereas the content of an account lacks indicators in disclosure despite it evidently being an advertisement, the account has often accrued a certain degree of scepticism and considerably lost credibility among their audience.[30] Furthermore, accounts that provided genuine product or service recommendations and were transparent with their audience by stating that it is a recommendation as opposed to an advertisement, generally produced higher engagement, as well as positive brand responses.[31]

III. THE IMPACT OF SOCIAL MEDIA ADVERTISING ON CONSUMER DECISION-MAKING

Consumer behaviour can be affected in various ways on Instagram, directly influenced by the recognition of advertisements, accompanied by ad quality and the brand's appearance both visually and in writing, as well as contributing to sharing and purchase intention resulting from these.

1. Ad recognition

The recognition of a social media output as an advertisement might seem easy at first. However, if the advertising-like output lacks any remarks indicative of promoted content, the comprehension of the extent to which the user is misled is jeopardised. Directive 2006/114 provides legal implications of misleading and comparative advertising, stipulating that even if national law on falsely presented or comparative advertising may be distinct already, the necessity for smooth functioning of the internal market prevails;[32] more specifically, article 5 of the Directive states that all Member States shall assure the efficient means to regulate and therefore contend misleading advertising. Thus, the pertinence with comparative advertising in the interests of competitors and merchants shall be considered.[33]

The more transparent the influencer is, the more reliable and trustworthy their content ought to be, making the recognition of advertisements more lenient.[34] Tactical persuasion is broadly used to explicitly influence the intentions of a consumer, just as well as directing them to effect a purchase decision, or gain followers to a brand's social media account. Therefore, if recognizing advertised content has been respectively safeguarded, a disclosure should not be needed. However, there is a distinct approach by social media influencers as opposed to brands while creating promotions or advertisements. Since the advertised item or service may indicate the person's real-life choices genuinely even without a disclosure, and is therefore more difficult to recognize, brands gain more organic recognition for their advertised content.[35]

2. Brand attitude

Brand attitude is the key component for determining consumer behaviour, while it also influences purchase intention. It is closely connected to the brand's image, which is mainly created through the brand's media output on the platform and therefore influences consumer behaviour directly. A brand's image or reputation can be endorsed both through word-of-mouth (WoM),[36] as well as with a higher number of likes, which is generated by greater extent of engagement.[37] Yet, if the platform user exploits persuasion knowledge towards their followers, the consumers are more likely to be critical about the content.[38] This means that whereas the consumer is aware of different marketing techniques used upon them, they tend to believe them being less transparent.

Where influencers as social media figures have established themselves or their name as a brand, it may be a burden to differentiate the scope of engagement provided by their followers. Thus, whether an influencer creates an advertised or promoted post, one is more likely to reach greater

engagement, including likes, comments and shares of their post, compared to brand-endorsed posts or promotions.[39] If an influencer aims at being identified as a brand, it would be likely less difficult for him or her to create a positive image or reputation online, although brands as companies strive for the same result among their followers. However, brands tend to gain more credibility than influencers if the consumer has sufficient persuasion knowledge and therefore their instincts for advertisement recognition are heightened.[40]

3. Ad quality

An efficient advertisement has to be sufficiently attractive to gather an audience and potential consumers. Attractiveness can be defined in various ways, of which many are subjective, yet as objective criteria are generally considered the visual aspect, which shall be embraced by the eye, as well as a grammatically correct text.

4. Purchase intention

Purchase intention can be defined as the extent to which a consumer is fit to purchase a product. Intention development depends on the consumption culture the consumer belongs to, as well as the values and beliefs this culture carries.[41] Purchase intention is thus highly correlated with purchase behaviour, as well as product efficacy. Product efficacy prevails as an attribute of a product promoted with Standard Media Indexes (SMIs), tripling the number of categories that the product appears in, thus leading to the belief that the product is indeed of high quality.[42] The indicators of actual product efficacy might be biased in reality. Some of these indicators include "green-washed" products, creating a false perception of the company aiming for sustainability and ecology, whereas the product itself lacks sustainable materials, or is produced unethically.[43]

Purchase intention is densely connected to the composed disclosure - also known as the caption - of the post on Instagram. Transparency of the advertised item described or promoted in the disclosure remains important while shaping purchase intention among consumers. It relies on the relationship between the company and consumer, being one of the most valuable and common preconditions for establishing strong relations between them. Thus, the importance of transparency estimation by the consumer and towards the company plays a significant role in forming intentions to purchase the product under promotion.[44] Dismissing the component of transparency regarding advertised posts may lead to *caveat emptor* on the consumer's side. This means that whereas the consumer has purchased a product or service *bona fide*, and when the order is received, one may find the item or service defective. Since the advertisement strictly influences the consumers' purchase intentions, the information symmetry between the seller and the buyer might not always remain as conscious. Furthermore, the promoter rarely takes liability or provides warranty for the defective item or service, and thus the consumer is misled in his or her perception of the advertised product, e.g. in terms of its quality.[45] However, it may have not been the promoter's intention to obscure the defects of said product or service, and therefore it may not be equivalent to deliberate fraud.

However, call-to-action buttons are only found to have influence on impulse buying among younger age groups on Instagram. Visual attractiveness of the online store remarkably increases the mood of the consumer, therefore increasing the user's tendency to buy an item impulsively.[46]

5. Sharing intention

Brands on Instagram prompt the users' sharing intention, while numerous shares direct even more audience to the brand's account and therefore create a broader revenue for the company. It must be noted that sharing someone's pictures or other content on Instagram, either reposting on Stories or sharing the brand's page, might be considered a copyright infringement. Although Instagram's own copyright policy in terms and conditions of the platform prohibits re-sharing other users' content, the platform itself contributes to a re-posting community, therefore benefitting the revenues of the company.[47] An influencer is a beneficial tool for the company to generate engagement with their advertised products or services, thus creating links to their website, or other social media accounts. While consumers engage with the content, writing comments, liking, or sharing the post, the company profits from their actions by an elevated number of sales. However, this might not be the case when the particular advertisement is entirely recognizable, and considered as less appealing.[48]

IV. SOCIAL MEDIA ADVERTISING UNDER ESTONIAN LAW AND PROPOSALS FOR REFORM

1. The Estonian Status quo

In general, Estonian influencers are rather committed to comply with legal regulations. This is also facilitated by the fact that in September 2020 the Consumer and Technical Surveillance Authority issued a corresponding guide to ensure legal compliance.[49] Estonian influencers use different methods to ensure compliance with the Estonian Advertising Act. These measures include, inter alia, the use of indicators mentioned in the content itself; the use of appropriate indicators in disclosures, such as #ad, #collaboration, #advertisement, or #sponsored; the use of "Paid partnership with" or "Branded content" indicative buttons available for business accounts.[50] In addition, some influencers use the hashtag #dealfrompromoty, aimed to demonstrate their usage of the influencer platform Promoty, which is a platform created for sourcing brand deals for influencers. However, there are those influencers who do not use any indicators in their captions, nor do they implement these in their disclosures of obvious advertising, thus disabling the audience from recognising the advertisement, as it is not clearly distinguishable from other content. Absent indicators in disclosure may also lead to false or misleading advertising, since the audience is not able to distinguish the glorified product from the usual similar product, as seeing the advertisement may not lead the targeted consumer to become acquainted with other similar or same category products.

2. Estonian and EU law on the matter

Pursuant to § 3 (1) of Estonian Advertising Act,[51] advertising must be clearly distinguished from regular content. However, no specific attention has been paid towards the question of how or by what means social media advertising could be brought into compliance with the law. The fact that it is still possible to mislead the consumer on social media without any further consequences is highly problematic, thereby influencing individual consumer behaviour, specifically comprising purchases and sharing intentions. These intentions are based on the information or knowledge that the consumer absorbs on social media and the content of which one can be directly influenced by advertising companies or individuals. By serving false or misleading information about one's brand or product, it has a significant impact on consumer awareness of the brand or product, as well as on purchasing and sharing decisions. Consequently, the Estonian Consumer Protection Act stipulates the conditions for consumer protection, implicitly the consumer's right to information, including truthful and comprehensible information,[52] as well as the prohibition on attributing special or defective characteristics to a product or service where the characteristics of that product are present in all such goods or services.[53] Moreover, the trader is prohibited from using intrusive sales techniques, significantly distorting the consumer's economic behaviour. Such trading techniques include, for instance, a significant reduction in the consumer's ability to make an informed choice and the associated negative impact on the consumer's purchase intention and decision that one would not otherwise have made.[54] Pursuant to § 51 (3) of the Estonian Competition Act[55], giving the impression of non-existent business relationships could also be considered misleading advertising. This could be, for instance, information on the method or sources of supply of the goods offered or other characteristics of the undertaking.[56] Thus, the online actions and behaviour of a trader, promoter or business considerably contributes to the development of the consumers' intentions and decisions.

Just as respective national law of other EU member states, these Estonian acts do transpose European secondary law in the field, which in this case is mainly the above-mentioned Omnibus Directive – and the interpretation (and reform) of these national acts is conducted in the light of the Directive, i.e. taking into account its objectives. The Omnibus Directive was enacted with the aim to further facilitate transactions on this marketplace, which was defined technology-neutral, i.e. as "a service using software, including a website or an application",[57] thus better informing consumers about the possibility for trade existing within the website or application. However, trade or other similar actions within the website or application may lead to unfair business practices, such as those which contain misleading information presented to consumers or intrusive marketing techniques to influence their choices, behaviour, and intentions. For instance, whereas a beauty service gift card is bought through Instagram, or any other online platform using intensive techniques to promote one's product or service, including failure to inform the consumer of the terms of the contract, is likely to lead to civil litigation and a fine.[58] The Omnibus Directive additionally obliged member states to establish legal remedies for misleading advertising, e.g. price reduction, replacement or financial compensation,[59] similarly as in the mentioned example, and considering the right of withdrawal from contract, as well as the right for compensation.

3. Specific proposal for reform

Against these backgrounds, a reform of the Estonian (and eventually likewise other respective national) Advertising Act would address the starkest discrepancies: Since there is a significant causal relation between the provided advertisements containing misleading information, as well as its impact on consumer behaviour, there is also an indispensable legal need for reform. The most appropriate position for the amendment would be continued after § 4 *Misleading advertising*, and therefore named § 4² *Social media advertising*. The paragraph would proceed as follows:

4. Social media advertising

(1) The use of phrases and words that may mislead the consumer in social media advertising is prohibited.

(2) Misleading claims, such as those that might not be feasible for equal achievement, are prohibited under this Act in social media advertising. Misleading claims within the meaning of clause (2) shall include claims which are debunked by third party fact checkers.

(3) A social media advertisement must contain one or more of the following indicators clearly distinguishable from the rest of the text or visual: #advertisement, #collaboration, #sponsored or #ad. The corresponding indicator must be located in a place coherently visible to the viewer.

It would be inexpedient to place it elsewhere, e.g., under the advertising of prohibited goods or services in Chapter 3, as the social media platform as such is not a specific good or service within the meaning of this Act, but instead a service that offers the possibility to advertise goods or services within the platform. In addition, this social media platform or the goods/services advertised on it are not banned but would instead require stricter regulation.

At the same time, as stated by expression theorist Martin Redish[60], even specific details of misleading and deceptive advertising may be regulated by law. In this case, however, certain conditions must be met in advance. As a precondition for the penalty, it must be established that such advertising was intentional. Without establishing a fault, such advertising may be required to cease without any other penalty. All informative advertising, including information for children, should remain unregulated.[61] Similar to Reddish, McGowan[62] believes that only intentionally deceptive advertising should be regulated.[63] This, in turn, favours the debate over the outline of intentional deceptive advertising. It is possible to canvass diversely whether the activities of an advertising company or an individual were malicious from the very beginning, but the actual truth may only be known by the author of the advertisement oneself. It is also possible for the author to cite, for instance, their general desire to advertise and to pretend to be ignorant of its malicious motives, e.g., seek unintentional error towards the specificity of the accusation. Therefore, the investigation for intentional, or unintentional error may remain concise and thus the need for alteration abides.

Consequently, advertisements on the Internet indeed require a more flexible interpretation of the law, as the legislator is intelligibly unable to keep pace with the rapid development of

technical possibilities.[64] However, since the shortage of appropriate regulations does have an extensive effect on shaping consumers' purchase and sharing intentions, the Estonian Advertising Act calls for necessary amendment in terms of social media advertising.

V. CONCLUSION

The aim of this research was to evaluate the legal compliance of advertisements' disclosures on Instagram and attest its relationship with consumer behaviour, as well as its correlation to the development of consumers' purchase and sharing intentions. The hypothesis of the paper was that advertisements and their disclosures composed on Instagram need further legal regulation to remain compliant with the purpose of relevant legislative acts in Estonia.

In the first two chapters, empirical research was conducted for the purposes of background information about Instagram's platform and its opportunities for advertising. Besides that, the second chapter addressed consumer behaviour in its essence and therefore affirmed the dense relationship between persuasion techniques such as any misleading advertisement, as well as the development of purchase and sharing intentions, or consumer behaviour in general. Moreover, examples from Estonian influencers' compliance were investigated. This research suggests that the advertisers' potent engagement ratio creates preconditions for trust between the trader and the consumer, and thus facilitates potential false information being included in advertising regardless of applicable regulations.

These specific matters are being supported by both Estonian and European legislation described in the fourth chapter of this research. These legislative documents aim to protect the consumer, as well as strive for transparent and fair legislation concerning consumer contracts; misleading advertising; consumer behaviour; the development of sharing or purchasing intentions; and means for opportune remedies in case of fraud. The relationship between the trader and the consumer can be assessed as highly correlated with the evolution of consumer behaviour, thus contributing to the need for applicable laws on this certain issue.

Deriving from the topicality, as well as pertinency of this issue today in a digital society, advertisements' disclosures on social media pose a legal need reformation in national advertising acts, as it was exemplified here via a specific proposal of reform of the Estonian Advertising Act by adding a subsection to paragraph four regarding social media advertisements. The suggested paragraph shall include prohibition on misleading or false advertising, and thus provide appropriate indicators essential for compliance with the law.

It is understandable that under the guise of continuous technological development the course of legislation may be delayed, but the suggestion conserves its significance as an essential component for the Act in terms of advancing legal correspondence among social media advertising, including advertising on Instagram in particular. Therefore, more active intervention from national legislators is requisite in order to provide the legal basis for advertisers, as well as consumers to follow, and thus be able to resolve future complaints regarding social media advertising.

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DIRECTIVE 93/13 ON UNFAIR TERMS: A TROJAN HORSE IN SPANISH PROCEDURAL LAW?^[1]

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Summary

Almost thirty years after the publication of Directive 93/13 on unfair terms, the process of progressive legal and jurisprudential implementation continues in Spain, in which judges play an important role through preliminary rulings. This Directive is - like no other - a paradigm of the institutional game between the Member States and the European Union. The Spanish case is a case in point. A Directive that in principle has a material or substantive content has turned out to be a real *Trojan horse* in Spanish formal (procedural) law, altering its classic principles, to the astonishment of the proceduralist doctrine.

Keywords

Unfair terms, European consumer procedural law, Directive 93/13.

I. APPROACH

In relation to Directive 93/13 on unfair terms, a curious and noteworthy phenomenon has occurred in Spain: The case law of the Court of Justice of the European Union (hereinafter, CJEU) has gone beyond the limits of substantive law - proper to the Directive - and has fully entered the procedural field in our country. And although the legislator initially transposed the Directive into civil rules relating to consumer law (in the material sense), over the years it has been compelled by the CJEU to modify several procedural rules. This European case law has been followed both by the legislator and by the highest courts, represented by the Supreme Court and the Constitutional Court.

What is interesting, perhaps, is that this phenomenon originates from the performance of national judges. The itinerary has been as follows: The CJEU has issued authentic rules when answering the preliminary ruling question posed by national judges, concerning Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts. Many Spanish judges, notably the commercial judge in Barcelona, José María Fernández Seijo, have played a leading role in this area. And, although the content of the Directive consulted was basically substantive law, the responses of the CJEU have had an impact beyond this material sphere, reaching procedural law[3].

The aim of this study is to offer a panoramic synthesis of the process of implementation of Directive 93/13 on unfair terms, which allows us to present - like no other - the play of the Spanish national powers - legislative and judicial - in the effort to adapt the internal system to the European dictates: over the years, it can be seen that the incorporation of Directive 93/13 in Spain has been carried out progressively, and is the result of both the legislator's work and the dialogue of our judges with the Court of Justice of the European Union. At the same time, the conclusion is reached that being a Directive with a material or substantive (civil) content, it is only fully implemented when formal (procedural) law is affected, to the astonishment of the proceduralist doctrine.

II. THE TRANSPOSITION OF DIRECTIVE 93/13 IN THE SUBSTANTIVE FIELD

In Spain, it was thought that the ideal place to transpose Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts was the special civil legislation on consumer protection:

Law 7/1998, of 13 April 1998, on General Contractual Terms and Conditions (GCC), amended the then current Law 26/1984, of 19 July 1984, General Law for the Defence of Consumers and Users (LGDCU), in order to transpose the Directive: The GCC Law added an Article 10.bis to the aforementioned LGDCU, with the definition of "unfair term" and a first Additional Provision that included a list of unfair terms in accordance with the list in the Directive and added others that were considered as such under Spanish law. In its Article 8.2, the GCC Act (1998) referred to the legal regime of unfair general terms and conditions to these two new texts which it incorporated into the then existing 1984 LGDCU.

When the Royal Legislative Decree 1/2007, of 16 November, approving the Revised Text of the General Law for the Defence of Consumers and Users and other complementary laws (TRLGDCU), repealed the previous LGDCU of 1984 (to merge its content with other consumer protection regulations in a single text), it incorporated the content of the Directive in articles 80 and following[4] .

The Spanish legislator, when transposing Directive 93/13 in 1998, expressed his will as a magnanimous wish in the following terms: "The power of the State obliged to transpose the Community Directive to increase the level of protection beyond the minimum obligations it imposes is exercised" (Explanatory Memorandum of the aforementioned Law 7/1998, of 13 April, GCC). However, over the years, it became clear that deeper or broader reforms were needed, not only in substantive law but also in procedural law, in order to make consumer protection effective.

The driving force behind the extension of the areas in which the Directive was to have an impact on national law has been the case law of the Court of Justice of the European Union, following preliminary rulings on the interpretation of Directive 93/13 on unfair terms and its compatibility with national legislation and case law.

From the point of view of substantive law, this case law has been included in Law 5/2019, of 15 March, on real estate credit contracts. In this way, the aim is to consolidate solutions to the major fronts that were opened by the judges before the CJEU, giving rise to new case law on abusive clauses (floor clauses, early maturity, multi-currency mortgages, etc.).

III. THE STRONG IMPACT OF DIRECTIVE 93/13 IN THE PROCEDURAL FIELD.

As we have announced, the implementation of Directive 93/13 in the material or substantive civil sphere does not close the panorama of the dimensions of domestic law that have been affected. Specifically, the procedural doctrine perceives Directive 93/13 on unfair terms as a *Trojan horse* as far as the scope of its discipline is concerned. When it comes to unfair terms, the classic procedural principles seem to be blown out of the water as a result of the CJEU's case law on the matter.

This is evidenced - among others - by expressions such as: that the case law of the CJEU seems to provoke the "deconstruction" of the basic procedural principles on which legal certainty is based (F. Adán Domenech[5] , M. López Gil[6]); that "res judicata is dead"[7]; or that it represents "a frontal attack on the dispositive principle"[8]; or, in more traditional terms, the question is asked: "In view of the case law of the CJEU, why does Procedural law have to pay the price?" (J. Damián Moreno[9]).

One possible answer, provided by some of these authors, is the following: Just as the Civil Procedure Act (LEC) and the procedural principles were developed in the 19th century on the basis of the principle of equality of parties, and just as the Civil Code in matters of contracts rests on this same principle of equality of the contracting parties, so it also happens that, as consumer law developed in the 20th century on a different basis (the inequality between the

consumer and the professional), the principle of consumer protection for which the legislator opts in the field of consumer contracts, ends up affecting the classic procedural principles in order to become effective. It thus gives rise to a specific procedural law in the 21st century (as is the case in the area of obligations and contracts): Consumer procedural law[10] .

From the civil perspective, attempts have been made to explain that the declaration of nullity of unfair terms in Directive 93/13/EEC is a matter of public policy and that - consequently - the effect it should have had in the procedural sphere was simply a multiplication of the cases in which the judge had to assess nullity *ex officio*. But perhaps it was not so simple, given the characteristics of the civil proceedings that would be affected.

It should be borne in mind that some special procedures, in which the judge (or notary) had to deal with the aforementioned unfair terms, did not allow them to declare them null and void (a matter that was relegated to ordinary declaratory proceedings): This was the case, for example, in the foreclosure procedure. For this reason, Spanish judges referred questions to the CJEU for a preliminary ruling, in order to contrast the compatibility of our procedural rules with the provisions of the Directive. The response of the CJEU to these questions -declaring incompatibility- gave rise to a well-known *domino effect* of procedural reforms (mortgage, judicial and notarial enforcement procedure[11] ; enforcement phase of ordinary proceedings[12] ; payment order procedure[13]). The legislator's work in the procedural field is therefore in line with the indications of the CJEU. Probably the most illustrative and best known example is the *Aziz* case: Let us look at it.

IV. PARADIGM: THE *AZIZ* CASE AND THE MODIFICATION OF THE FORECLOSURE PROCEDURE.

From a European consumer procedural law perspective, the *Aziz* case[14] is undoubtedly the most outstanding case, as it led the Spanish legislator to introduce a rapid modification of the judicial and extrajudicial mortgage procedure[15]. If we dwell on it, we can analyse first the preliminary ruling question and then the legislator's reaction.

1. The preliminary ruling

On 19 July 2011, the Judge of Barcelona Commercial Court No. 3, José M^a Fernández Seijo, in charge of resolving the application for nullity of the enforcement proceedings brought by *Aziz*, issued an order referring a question to the CJEU for a preliminary ruling, taking into account the previous case law of the CJEU, in relation to the interpretation of Directive 93/13/EEC, according to which the judge conducting proceedings *can* and *must* assess *ex officio* the existence of unfair terms in the contract:

First: Under Spanish law, the defendant could not stop the execution of the mortgage by arguing the existence of unfair terms in the contract[16];

Second: Under Spanish law, the judge could not assess *ex officio* the existence of unfair terms in the foreclosure proceedings[17] ; and,

Third: Under Spanish law, the judge in an ordinary declaratory proceeding on the nullity of the clauses could not adopt precautionary measures that would paralyse the foreclosure.

All three aspects were declared by the CJEU to be incompatible with Directive 93/13 in the *Aziz* case. The legislator took action in relation to the first two, but did not consider it necessary to amend the third and last aspect consulted.

2. The legislator's reaction

Two months after the CJEU ruled in the *Aziz* case, the Kingdom of Spain showed its docility to the rulings of the EU High Court, introducing important amendments to domestic law through Law 1/2013, of 14 May, on measures to strengthen the protection of mortgage debtors, debt restructuring and social renting:

First: The defendant may oppose the foreclosure claiming the existence of unfair terms in the contract (articles. 695.1.4º and 557.1.7ª LEC);

Second: The judge (or, where appropriate, the notary) in the mortgage enforcement proceedings can and must assess *ex officio* - or at the request of a party - the existence of unfair terms (Articles 552.1 LEC[18] , 129 LH[19], 83 TRLGDCU)[20] .

The reform does not modify either Article 698 LEC (which prohibits interrupting the mortgage enforcement procedure), or Article 721 LEC (relating to precautionary measures, which is limited by the provisions of the aforementioned 698 LEC). Á.F. Carrasco[21] spoke in favour of this decision by the legislator. If opposition to foreclosure is already admitted on the grounds of the existence of abusive clauses, it is not necessary to introduce as a precautionary measure in ordinary proceedings that could be held in parallel, for example, opposition to abusive clauses in enforcement proceedings.

V. DIRECTIVE 93/13 AND THE REVIEW OF THE PRINCIPLE OF MEMBER STATES' PROCEDURAL AUTONOMY

In my opinion, the greatest scientific contribution entailed in analysing the *Aziz* case and its impact on domestic law lies in noticing how a Directive which, in principle, contains rules of substantive law, ends up fully affecting procedural law, an area to which it was not addressed. Directive 93/13 on unfair terms is an illustrative example of the extent to which the principle of procedural autonomy of the Member States can be affected and limited by the principles of the primacy of Union law and of equivalence and effectiveness, or - indistinctly - by the consumer's right to effective judicial protection (Article 47 EU Charter of Fundamental Rights). The issues arising from this are, in my opinion, of notorious importance[22] .

The principle of procedural autonomy of the Member States (which may well derive from Article 19.II of the Treaty on European Union and Article 291.1 of the Treaty on the Functioning of the European Union), is recognised by the case law of the CJEU, rather to

delimit it by the principles of equivalence and effectiveness; The European Parliament Resolution of 4 July 2017, with recommendations to the Commission on common minimum standards for civil procedure in the EU, devotes a first section to the "Case law of the Court of Justice on national procedural autonomy and effective judicial protection": In its four recitals it can clearly be seen what I have just stated.

As is well known, consumer law is a shared competence between the European Union and the Member States (Article 4.f FTEU) and therefore judges must bear in mind that, when resolving disputes in which a consumer is a party, they fall within the scope of application of EU law, and for this reason it is necessary to take into account not only European legislation and the case law of the CJEU that interprets it, but also the guiding and informing principles of EU law, of jurisprudential origin[23] : in particular, the principles of the primacy of EU law[24], effectiveness and efficiency, to which should be added the principle of direct application of EU law:

Insofar as the CJEU can intervene to ensure that directives are applied, annulling public acts (rules or judgments) that contravene EU law (Article 267 FTEU), we can speak of a principle of direct application of EU law in general, both in relation to regulations and directives, although strictly speaking it might seem that only regulations would have direct effect, as directives have to be transposed by the Member States (Articles 288 and 291.1 FTEU). This principle of direct application is supported by the case law of the CJEU (starting with the Van Gend judgment in Loos/1963[25]), which applies the content of the Directives regardless of the existence in the Member State concerned of non-harmonised rules or rules that hinder or diminish the effectiveness of the provisions of the Directive. The CJEU thus opens the way for the principles of equivalence and effectiveness.[26]

According to the *principle of equivalence*, national law cannot be less favourable when applied to a situation regulated by the EU (e.g. trade in a certain product between member countries) than when applied to nationals (e.g. domestic trade in that product).

According to the *principle of effectiveness*, if there are procedural rules that make it difficult or impossible to apply EU law in practice, the domestic rule ceases to apply because it is incompatible with EU law.

In relation to this last principle, the reflection of the proceduralist Juan Damián Moreno is interesting: the author observes that the principle of effectiveness has not had as much impact on civil law when applying Directive 93/13 as it has on procedural law, since the *ex officio* assessment of nullity by the judge is a matter well known to civil lawyers, but its application in the procedural sphere, over classic procedural principles and altering the rule in force, is quite unusual:

"(W)hen European justice imposes on national judges the duty to assess the existence of unfair terms *ex officio*, this has nothing to do with the principle of effectiveness, as it is something it normally does when they are allowed to assess other grounds for nullity that affect legal transactions. However, it does when a consumer alleges such

nullity, even if it is not at the procedural moment when such allegations should ordinarily be made and his request is not complied with; then, yes, as is clear from the most recent case law of our Constitutional Court"[27] .

For this reason, national judges - as European judges - have played a role in the correct implementation of Directive 93/13 by making a reference for a preliminary ruling when there is doubt as to its compatibility with national law (Article 267 FTEU), whether at the civil or substantive level or at the procedural level.

It is easy to see that, from the *Aziz* case (2013) to the present day, the case law of the CJEU interpreting Directive 93/13 has had a constant influence on our domestic legal system: it has had it not only on the decisions of our ordinary courts of civil jurisdiction - in particular, on the case law of the Supreme Court - but also on the case law of the Constitutional Court, which denotes a very significant scope.

Within the framework of ordinary jurisdiction, it is worth mentioning the incessant work of the Spanish courts and tribunals, raising questions for preliminary rulings on Directive 93/13, and thus giving rise to rulings by the CJEU that have been shaping its doctrine on various aspects related to the Directive, both in substantive and procedural law.

VI. THE IMPLICATION OF THE SUPREME AND CONSTITUTIONAL COURTS IN THE IMPLEMENTATION OF THE DIRECTIVE. PARTICULAR ATTENTION TO THE PRINCIPLES OF *RES JUDICATA* AND *REFORMATIO IN PEJUS*. THE ACCUMULATION OF CONSUMER DISPUTES.

The proliferation of litigation related to unfair terms in Spain can undoubtedly be attributed not only to the clarification by the CJEU of the interpretation of Directive 93/13, but also to bad banking practices. It is very likely that - after thirty years of the Unfair Terms Directive being in force - the situation will start to improve. Let us hope that so much effort - in which the Supreme and Constitutional Courts have also taken an active part - has not been in vain.

It is normal that this multitude of proceedings, some concluded, others pending resolution, has opened up a debate on the effectiveness of *res judicata*, or rather on how to define more precisely the operability of this key principle of procedural law. And this has been the case, not only at the doctrinal level but also in the jurisdictional sphere, a debate in which our High Courts, the Supreme and Constitutional Courts and the CJEU are involved, as I will explain below.

In relation to *res judicata*, it is undoubtedly worth highlighting the accumulated preliminary questions that - on the occasion of the Supreme Court's doctrine on the nullity of floor clauses[28], but limiting in time the effects of the ineffectiveness[29]- were brought before the CJEU, giving rise to the *Gutiérrez Naranjo* judgment[30]: In it, the CJEU left the doctrine of the limitation of the effects of the nullity of the floor clauses decreed by the Supreme Court without application, while declaring that EU law *does not oblige* national judges *to stop*

applying domestic procedural rules that confer the effects of *res judicata*[31], a pronouncement that generated "a great storm"[32].

At the same time, the effort that the Spanish legislator had made after the *Aziz* case to adapt domestic law to Directive 93/13, although it was rapid, as we have seen, came up against a new declaration of incompatibility with Directive 93/13 (*BBVA* case[33]): The CJEU declared that the Fourth Transitional Provision of Law 1/2013, by giving a period of one month in which - in proceedings already initiated - the unfairness of the clauses could be invoked, without providing for the notification of this possibility to the consumers affected, did not guarantee the effective exercise of the new right recognised to consumers by the legislative amendment[34]. Logically, consumers began to object on the grounds of unfair terms, irrespective of the date on which the procedure was initiated.

In order to unblock the situation of the return of amounts generated for these reasons, Royal Decree-Law 1/2017, of 20 January, on Urgent Measures for the Protection of Consumers in relation to floor clauses, was approved, establishing a system for the extrajudicial resolution of conflicts; In addition, the Judiciary launched a plan for the specialisation of courts in abusive clauses, a solution that - over the years - has achieved very positive results[35] ; Finally, the Draft Law on Procedural Efficiency of the Public Service of Justice (2022)[36] provides for the so-called "witness procedure", which has not yet been implemented in the LEC[37], in order to solve the saturation of Courts and Tribunals in matters such as those involving massively defrauded consumers (e.g. preference shares or floor clauses).

Now then: If - as we have just explained - the cited judgment of the CJEU in the *Gutiérrez Naranjo* case declared it legitimate for a national judge to place a limit on consumer protection in the presence of *res judicata*, and affirmed the compatibility between this national procedural principle and Directive 93/13/EEC, the issue in Spain has not remained there, and - as we will see below - it has been precisely the Constitutional Court who has taken a step forward by restricting the cases in which *res judicata* can act as a limit to consumer protection (STC 31/2019, of 28 February).

Shortly before the Constitutional Court ruling just mentioned, Josep M^a Bech Serrat had questioned whether the principle of effective protection, as well as the principles of equivalence and effectiveness, would not justify, in some cases, making an exception to *res iudicata* to give priority to the application of EU law, also when there is *res judicata*[38] ; The author alluded, in the matter of unfair terms, to the CJEU ruling of 26 January 2017, in the so-called *Banco Primus* case (ECLI:EU:C:2017:60). In this judgment, the CJEU stated that for a decision to have the effects of *res judicata* and not be reviewable in relation to a specific term, it must contain sufficient reasoning to consider that there was an *ex officio* review of the legality of the contract as a whole; however, in the event that a term had not been examined in a previous judicial review concluded with the effects of *res judicata*, the judge would be obliged to assess the nullity, either *ex officio* or at the request of a party[39] .

In the aforementioned judgment of 28 February 2019, the Spanish Constitutional Court echoed the doctrine of the CJEU, established in the *Banco Primus* case[40] , but went a step further by

demanding that - in order to speak of *res judicata* - there must be a reasoning in a prior final decision on the specific unfair term in question (a judgment on the legality of the contract in general would not therefore be sufficient): In this case, the TC assumes the obligation to provide effective judicial protection, as the other judicial bodies have not done so, and declares that the failure of the latter to comply with the obligation to assess the unfairness of a contractual clause justifies the granting of constitutional protection to the consumer, citing articles 24, 47 and 51 Spanish Constitution.

M^a José García-Valdecasas makes two interesting considerations in this respect[41]: On the one hand, she recalls that in *Banco Primus*, the CJEU considered the existence of a judicial pronouncement on the legality of the contract as a whole to be sufficient for there to be *res judicata*, while the Spanish Constitutional Court, in its judgment of 28 February 2019, "goes further and requires additional motivation" by stating that the right to effective judicial protection is violated if there is no pronouncement on the possible unfairness of the clause that caused the execution. In the author's opinion, "this requirement of express motivation, in relation to the disputed clause, is a requirement of a procedural nature, and, therefore, whether or not it is required in the national sphere is perfectly possible" if the principles of equivalence and effectiveness are respected[42]. The Spanish Constitutional Court (TC) has reiterated its doctrine: Thus, in STC 44/2022, of 21 March 2022[43] and in STC 80/2022, of 27 June 2022[44] .

Returning to the commentary of the author cited above, she notes that the Constitutional Court indicates as the only limit to the control of the unfairness of contractual terms, the existence of *res judicata* in relation to the specific unfair term, "without it appearing to be deduced from the judgment of the Court of Justice that *res judicata* constitutes the only exception to the examination of the unfairness of a contractual term"[45] . The existence of a third party successful tenderer may also constitute a limit to the effects of the nullity of the unfair term and thus to the protection of the consumer at the end of the enforcement procedure[46] .

Finally, the Spanish Supreme Court (SC) has sought to take a step forward by raising before the CJEU the compatibility between a series of procedural principles and Article 6 of Directive 93/13/EEC, on the occasion of a dispute arising from the above (doctrine on floor clauses and retroactivity in time). The response of the CJEU to the Supreme Court, in the judgment of 17 May 2022[47], while reiterating the compatibility of the principle of *res judicata* with the aforementioned rule and affirming that consumer protection is not absolute, qualifies that "the fact that a consumer has not lodged an appeal in due time can be attributed to the fact that, when the Court of Justice delivered the judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C154/15-, C307/15 -and C308/15-, EU:C:2016:980), the time-limit within which an appeal could be brought or the judgment could be challenged under national law had already expired. In those circumstances, the consumer cannot be regarded as having shown total passivity".

The fact is that - in the case that gave rise to the CJEU judgment of 17 May 2022 - it was the bank and not the consumer who had appealed, and therefore, the judicial assessment of the unfairness of the term clashed head-on with the prohibition of *reformatio in peius*, as well as

with other related procedural principles (the principles of the principle of prompt justice and of congruence, as well as the principle of *tantum apellatum quantum devolutum*). For this reason, the Supreme Court had to ask the CJEU for a preliminary ruling, in order to obtain an answer as to whether the principle of effectiveness imposed consumer protection in the presence of an unfair term, even in such circumstances, or whether the classic procedural principles of national law (Article 267 TFEU) should be applied.

The CJEU answered the SC's question by arguing that Article 6 of Directive 93/13/EEC 'precludes the application of national procedural principles under which a national court hearing an appeal against a judgment limiting in time the restitution of sums unduly paid by the consumer as a result of a term declared unfair cannot examine of its own motion a plea alleging infringement of that provision'. Consequently, instead of applying the abovementioned procedural principles (in particular the prohibition of *reformatio in pejus*), "full restitution of those sums must be ordered where the failure of the consumer concerned to challenge such a limitation in time cannot be attributed to total passivity on his part".

In a masterful analysis of the case, the proceduralist Juan Damián Moreno has presented a perspective on how the system works, which is of interest not only to civil and procedural lawyers but also to those involved in constitutional and European law[48].

VII. THE NEED TO SYSTEMATISE EUROPEAN CONSUMER PROCEDURAL LAW

In 2017, the European Parliament adopted a Resolution (pushing for a Directive, pending) on civil judicial procedure[49]. The Resolution cites consumer affairs as a specific branch of procedural law, parallel to intellectual property and - more recently - competition law, but this branch is not developed (nor is the Directive expected to do so). The Resolution deals only with general aspects of civil procedure. However, in its No. 21, the Resolution stresses the importance of effective civil procedural systems and states "that they are a precondition for sustainable investment and a favourable environment for business and consumers".

In response to the aforementioned Resolution, the *European Law Institute* has launched a joint proposal with UNIDROIT, entitled *ELI-UNIDROIT Model European Rules of Civil Procedure* (2020), in which attention should be paid to paragraph 6 of the Preamble, entitled: "Integrating consumer cases into the Rules". Although we do not find here either a separate regime that we could call a proposal for European consumer procedural law, or anything similar, we do find a valuable reference to "procedural protection for consumers" as something specific, to remind us that in these cases the mandatory rules on the matter will apply and that the judge must apply them ex officio in accordance with the case law of the CJEU (nn. 31 and 33).

To assist the judge in his mission, and legal operators in general, as well as for the information of consumers, the European Commission has published the abovementioned 2019 Guide[50], which systematises European doctrine and case law on the interpretation and application of Directive 93/13/EEC, with a fifth section devoted in particular to the remedies and procedural guarantees required by Articles 6.1 and 7.1 of the aforementioned Directive on unfair terms.

What has been seen so far justifies, in my opinion, that the response to the irruption of consumer law in the procedural sphere should not be the harmonisation of national enforcement mechanisms, but the harmonisation of European consumer procedural law or - at least - a systematisation of the procedural principles and rules that can serve as a reference for the legislator and - in any case - for those applying the law, as well as its doctrinal explanation and general dissemination[51], a response partially covered by the aforementioned Guide of the European Commission (2019).

However, in this matter it should not be forgotten that the implementation of Directive 93/13 in each country may be more or less extensive, so there will be differences, and therefore it is one thing to speak of European consumer procedural law in a broad sense (principles common to all EU countries, such as those included in the aforementioned *Guide* of 2019), and another thing to speak of European consumer procedural law in our country (specifically, of the peculiarities that Directive 93/13 has introduced in Spanish procedural law, and of the improvements that can be made).

In the *Aziz* judgment, for example, it was stated that the lack of harmonisation of national foreclosure mechanisms should be resolved in accordance with the principles of equivalence and effectiveness[52]. If the sought-after harmonisation of general civil procedural law is based on the traditional paradigm of application between equals, it will not be extensible to cases involving consumers, where the starting point is the principle of inequality between the parties. This is precisely what leads us to consider the systematisation of European consumer procedural law.

VIII. CONCLUSIONS AND FINAL THOUGHTS.

After thirty years of implementation of Directive 93/13/EEC on unfair terms in consumer contracts, it is possible to affirm that this is a joint and progressive task of the legislator and the judges, which - although well advanced - does not seem to be finished. The following conclusions can be drawn from the analysis of this period:

First. Directive 93/13/EEC on unfair terms in consumer contracts could only be effective in Spain if its transposition was accompanied by procedural reforms, beyond the incorporation into Spanish law of its material content. For this reason, Directive 93/13 is at the origin of important procedural changes in Spain, driven by the case law of the CJEU when it responds to the preliminary ruling question posed by our judges. As this case law also implies an exception to classic principles of procedural law, the result can be explained by alluding to the generation of a specific branch - "European consumer procedural law" - which is detached from general procedural law (as consumer law also abandons the "general part or theory" in matters of contracts). This branching is logical since the starting point of one and the other branch of procedural law is different, depending on whether or not there is equality between the parties.

Second. The case law of the CJEU, in the dialogue held with national judges through the preliminary ruling on the occasion of Directive 93/13/EEC, has recalled - like no other - the role of national judges in the European jurisdictional pyramid. In fact, a milestone in the

process of shaping the Spanish judicial system in the European context has been the preliminary questions referred by the Spanish Supreme Court to the CJEU on the occasion of the aforementioned Directive[53].

At the same time, the study of this period of implementation of Directive 93/13 prompts a final reflection on the role of the case law of the CJEU in the national system of sources. It is interesting to note that the case law of the CJEU seems to act as a genuine source of EU law on unfair terms: although its judgments are not legal but judicial rules and, therefore, applicable to the specific case, it happens that - as an authoritative interpretation of the Directive - they must be applied to other cases in which identical circumstances are present, which in the area of contractual terms introduced in mass contracts can be commonplace. This has led to the acceptance of new procedural engineering concepts, such as the witness procedure, which are pending approval.

[1] This work is part of the project "Hacia un Derecho Procesal de Consumo: un paso en la modernización de la jurisdicción civil en el contexto europeo" (PID2020-117624GB-I00), financed by the Ministry of Science and Innovation. The author thanks Francisco Verdún the general review of the chapter.

[2] As explained by M. JIMENO BULNES, in "El diálogo entre tribunales europeo y nacional: su incidencia en derecho procesal español", *Adaptación del Derecho procesal español a la normativa europea y a su interpretación por los Tribunales*, JIMÉNEZ CONDE (dir.), Tirant lo Blanch, 2018 (pp. 101-135), the best examples of the dialogue between European and national courts are that of unfair terms in civil matters and that of European arrest warrants in criminal proceedings, and -among both- the one that best shows its impact on Spanish procedural law is the former (p. 104).

[3] Currently, Articles 80 to 91 TRLGDCU.

[4] F. ADAN DOMÉNECH, "Deconstructing the Spanish procedural code", *Justicia*, 2018, no. 2, pp. 223-268. The author describes the effect of the CJEU's case law on the Spanish procedural code as a "legal tsunami". In his opinion, applying this case law and the European Directives entails a breach of "the basic principles and Spanish procedural dogmas", which is why he considers that "the main challenge" of the Spanish legislator consists of "finding a solution to these inconsistencies and incompatibilities" in order to allow "harmonious coexistence with the Community legal system" (p. 223).

[5] M. LÓPEZ GIL, in "El principio *tantum appellatum quantum devolutum* en la justicia de consumo: una nueva cuestión prejudicial ante el TJUE", *Actualidad Civil*, La Ley-Wolters Kluwer, online, nº 5, 2022.

[6] A.-J. PÉREZ-CRUZ MARTÍN, "La cosa juzgada ha muerto (y los principios procesales vilipendiados)", in *Actualidad civil*, La Ley-Wolters Kluwer, online, nº 7, 2022.

[7] S. GONZÁLEZ GARCÍA, "El control de oficio, un ataque frontal al principio dispositivo del proceso civil: Hacia un proceso especial de consumidores?", *Diario La Ley*, 15.12.2017, no. 9100.

[8] J. DAMIÁN MORENO, "Ante la jurisprudencia del TJUE, por qué el Derecho procesal tiene que pagar los platos rotos?", *V Encuentro sobre Jurisprudencia Europea*, Centro Español del *European Law Institute* (Spanish Hub), online, 15 May 2020. In a similar vein, M. LÓPEZ GIL ("El principio *tantum appellatum quantum devolutum* en la justicia de consumo: una nueva cuestión prejudicial ante el TJUE", *Actualidad Civil*, May 2022) seeks a conciliatory interpretation of the case law of the CJEU with national procedural law, the rejection of which would make it necessary, in his opinion, to address "the creation of a special process in consumer matters governed by other principles" (*Summary*).

[9] Conversations with the Dean of the Faculty of Law of the Autonomous University of Madrid, Professor Juan Damián Moreno, Professor of Procedural Law, in December 2020. Currently, the author gives a very valuable explanation of how the system is working: J. DAMIÁN MORENO, "El valor de las ficciones como garantía del principio de efectividad: consideraciones en torno a la situación creada por la sentencia del TJUE de 17 de mayo de 2022", *Diario La Ley* (21.11.2022).

[10] Both, in the wake of the *Aziz* case, by Law 1/2013, of 14 May, on Measures to strengthen the protection of mortgage debtors, debt restructuring and social renting.

[11] By the same Law 1/2013, of 14 May, on Measures to reinforce the protection of mortgage debtors, debt restructuring and social renting.

[12] Reform also driven by the CJEU, in the *Banco Español de Crédito* case (CJEU 14 June 2012, Case C-618/10).

[13] Judgment of the CJEU of 14 March 2013 (Case C-415/11).

[14] Law 1/2013, of 14 May, on measures to reinforce the protection of mortgage debtors, debt restructuring and social renting.

[15] The defendant could not paralyse the execution by opposing the existence of unfair terms in the contract because article 695 LEC did not contemplate, among the causes of opposition, the aforementioned.

[16] Although it should be remembered that, even before the *Aziz* case, the CJEU had begun to declare that the judge could not only assess the existence of unfair terms of his own motion, but that he was even obliged to do so, in accordance with the provisions of Article 6.1 of Directive 93/13/EEC. The reason for this is that the consumer is in a vulnerable position vis-à-vis the trader in terms of both bargaining power and information, so that the contractual balance must be restored by means of special consumer protection measures. According to the doctrine of the CJEU, this rebalancing of the equality of the contracting parties requires the intervention of third parties outside the contract: in particular, the judge hearing the case; thus, in the CJEU judgments of 27 June 2000 (*Océano Grupo Editorial and Salvat Editores* case, EU:C:2000:346), 16 October 2006 (*Mostaza Claro* case, EU:C:2006:675) and 6 October 2009 (*Asturcom Telecomunicaciones* case, EU:C:2009:615), among others. See: M.J. GARCÍA-VALDECASAS DORREGO, *Diálogo entre los Tribunales españoles y el TJUE sobre la tutela judicial del consumidor al amparo de la Directiva 93/13/CEE*, Colegio de Registradores, 2018, pp. 33-48 (the book has been published in English as well).

[17] This can be related to Article 681.1 LEC.

[18] Mortgage Law.

[19] Even more so if they are complemented by the case law of the CJEU.

[20] Á.F. CARRASCO PERERA, "La Ley 1/2013, de 14 de mayo, de reforma hipotecaria, y la articulación procesal del control sobre cláusulas abusivas en la ejecución hipotecaria", *Revista CESCO de Derecho de consumo*, n. 6, 2013, pp. 58-65.

[21] I refer to questions such as the role of the case law of the CJEU in the system of sources; the role of the CJEU itself as "tutor" of the legislator in relation to the transposition of the Directive, and of course as "tutor" of the Judges and Magistrates when it comes to interpreting it. In short, it raises the question of whether we are dealing with a *Common Law* system, with the consequent normative function of precedent when it comes to the CJEU.

[22] J. L. REQUEJO PAGÉS ("Un Tribunal constituyente", *El Tribunal de Justicia de la Unión Europea. Una mirada española*, Colegio de Registradores, 2020, pp. 203-213) explains that "the problems caused by the lack of a Constitution common to the Union and the Member States are solved to some extent by the unifying function attributed to the Court of Justice" (p. 207). As a result, the European Commission has taken care to systematise the vast amount of doctrinal and jurisprudential material that Directive 93/13 has given rise to, so that it is known and can be applied [Communication from the Commission, Guidelines on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, 2019/C 323/04, OJEU 27.9.2019], but logically this document is a *Guide* (p. 6) without binding force: each CJEU judgment does have binding force for the specific case, giving rise to a mechanism worthy of study from the point of view of the sources of law in the EU (and its relationship with the Anglo-Saxon system of judicial precedent).

[23] The principle of the primacy of Union law - mentioned above - appears in the Declaration (no. 17) annexed to the Treaty of Lisbon, but not as an original right but rather as a recognition of the imperative nature of the CJEU's interpretation of EU law. The text reads as follows: "The Conference recalls that, according to the settled case-law of the CJEU, the Treaties and the law adopted by the Union (...) take precedence over the law of the Member States, under the conditions laid down by that case-law / It follows from the case-law of the Court of Justice that the primacy of Community law is a fundamental principle of Community law". The principle of the primacy of Union law is supplemented by other principles, also in case-law, which reinforce it (principles of unity of interpretation, consistency, full effectiveness and autonomy of EU law).

[24] CJEU 5 February 1963, Case 26/62, *Van Gend en Loos v. Dutch Tax Administration*. The judgment enshrines the principle of direct effect of EU law, which not only creates duties for States but also rights for EU citizens, who may invoke them before national courts or before the CJEU when there is no remedy under national law. This direct effect covers two aspects, vertical and horizontal, of the application of EU law.

[25] Both principles have their origin in the *Rewe* case (CJEU judgment 20.02.1979; Case 120/78).

[26] J. DAMIÁN MORENO, "El valor de las ficciones como garantía del principio de efectividad: consideraciones en torno a la situación creada por la sentencia del TJUE de 17 de mayo de 2022", *Diario La Ley* (21.11.2022).

[27] The Supreme Court ruled that floor clauses are null and void when they are not accompanied by a ceiling clause or when there is such a difference between the two that it results in a contractual imbalance detrimental to the consumer.

[28] In its ruling 241/2013, of 9 May, the Supreme Court limited the effects of the nullity of floor clauses both for payments made prior to the ruling and for cases in which a decision with *res judicata* effect had been handed down.

[29] C-154/15; ECLI:EU:C:2016:980. <https://curia.europa.eu/juris/liste.jsf?num=C-154/15>

[30] The judgment states (n. 68): "(...) the Court of Justice has already recognised that consumer protection is not absolute. It has held, in particular, that EU law does not require a national court to disapply domestic procedural rules conferring *res judicata* on a decision, even if that would make it possible to remedy an infringement of a provision, of whatever nature, contained in Directive 93/13 (see, to that effect, Case C-40/08 *Asturcom Telecomunicaciones*, -EU:C:2009:615, paragraph 37). It follows that the Supreme Court could legitimately hold, in the judgment of 9 May 2013, that the latter did not affect situations definitively decided by earlier judicial decisions having the force of *res judicata*".

[31] J. M^a BECH SERRAT; "Cláusulas suelo y autonomía procesal en la Unión Europea: ¿Por qué no hacer una excepción de la cosa juzgada?", *Revista para el análisis del Derecho. InDret*, 2018, p. 4.

[32] CJEU 29 October 2015, *BBVA*, C-8/14.

[33] The Spanish legislator was obliged to comply with this ruling, introducing the third transitional provision in Law 5/2019 of 15 March, regulating real estate credit contracts, but the delay with which it rectified the situation caused, in our opinion, serious harm to all mortgagors who lost possession of their home from the date of the *BBVA* ruling (October 2015) until the entry into force of the third transitional provision (15 June 2019).

[34] On the website *Poder Judicial.España*, it is published on 23.12.2021, that "The CGPJ concludes the plan of specialisation in abusive clauses in 20 courts thanks to the notable decrease in pending cases" (while in another 24 it is extended for half a year to a year).

[35] The bill was approved by the Council of Ministers on 12.04.2022, and together with the Digital Efficiency Act and the Organisational Efficiency Bill, it constitutes the legislative basis of the Justice 2030 Plan.

[36] E. CASTRILLO DE LARRETA-AZELAÍN, "El nuevo procedimiento testigo", *Lex. El portal jurídico hispano-alemán*, 30.04.2021 <https://lex.ahk.es/actualidad-juridica/el-nuevo-procedimiento-testigo>

[37] J. M^a BECH SERRAT, "Cláusulas suelo y autonomía procesal en la Unión Europea: ¿Por qué no hacer una excepción de la cosa juzgada?", *Revista para el análisis del Derecho. InDret*, 2018. The author cites several cases in which the case law of the CJEU admits this result; among them: (1) *Asturcom Telecomunicaciones*, although he refers to an award; and, (2) *Banco Primus* (to which I will refer below).

[38] The judgment expressly refers to the precedent of the *Gutiérrez Naranjo* case, among others, in these terms: "47. Furthermore, the Court of Justice has already accepted that consumer protection is not absolute", and recalls that the courts are not obliged to disapply the principle of *res judicata* "even if this would make it possible to remedy the infringement of a provision" of Directive 93/13/EEC. While declaring the compatibility of Article 207 of the Spanish LEC, the CJEU specifies that "in the case of the existence of one or more contractual terms whose possible unfairness has not yet been examined in a previous judicial review of the contract at issue, which has been concluded by the adoption of a decision having the force of *res judicata*, Directive 93/13 must be interpreted as meaning that the national court, before which the consumer has, in accordance with the requirements of the rule, lodged an objection, is required to assess, at the request of the parties or of its own motion, where it has the necessary factual and legal evidence to do so, whether those terms are unfair' (Nos 54 and 76). 54 y 76).

[39] STC 31/2019, of 28 February, of the Plenary of the TC (ECLI:ES:TC:2019:31).

[40] M^a J. GARCÍA-VALDECASAS DORREGO ("La sentencia de 28 de febrero de 2019 del Tribunal Constitucional: preclusión procesal, cosa juzgada y derecho de propiedad en la declaración de abusividad de una cláusula contractual", *Derecho privado y Constitución*, 37, 2020, pp. 343-380) explains that the antecedents of this judgment of the Constitutional Court are, on the one hand, the CJEU judgment *Océano Grupo Editorial and Salvat Editores* (various joined cases, ECLI:EU:C:2000:346), in which the CJEU declared for the first time that the national court is obliged to declare *ex officio* the nullity of unfair terms, and the CJEU *Pannon* judgment (C-243/08, 2009), which states that this obligation of the court arises from the moment it has the factual and legal elements necessary to do so; On the other hand, the cases *BBVA* (C-8/14, 2015) and *Banco Primus* (C-421/14, 2017), also decided by the CJEU, on the same issue and with an identical solution (declaring the one-month time limit for the extraordinary motion for opposition, provided for in the Fourth Transitional Provision, paragraph 2, of Law 1/2013, of 14 May, on measures to strengthen the protection of mortgage debtors, debt restructuring and social renting, to be contrary to the principle of effectiveness), but which present a notable difference, the author points out: In *Banco Primus* the home had already been awarded to the bank but had not yet been placed in the possession of the successful bidder (an act that can be voluntary, or else developed judicially after the launch). In the author's opinion (p. 347), the Constitutional Court could also have taken into account the TJUE *Banco Santander* judgment (C-598/15, 2017), because of its relation to the subject.

[41] In the work cited (2020), p. 372.

[42] The judge of first instance had refused to classify the abusivity of the clause because the adjudication decree had already been issued after the auction; the Provincial Court subsequently refused for a different reason: although the criterion set out in the STC 28.02.2019 (STC 31/2019), because delivery had not taken place, it was considered that it was not appropriate to enter into the classification of the abusiveness of the clause because the conduct of the foreclosed party had been an obstacle to delivery (giving rise to two suspensions of the launch as it had voluntarily refused to make the delivery) and because it had lost the opportunity to request the declaration of nullity of the clause at the time. The TC considers that the judicial body should have acted *motu proprio* to declare the clause null and void at the time, but did not do so.

[43] In which the necessary judicial control of abusive clauses is reiterated before the moment of conclusion of the procedure (article 24 EC), and that this moment occurs when the third party acquirer takes possession of the property (as in STC 30/2019, cited above).

[44] In the work cited (2020), p. 362.

[45] In the work cited (2020), pp. 365-370.

[46] ECLI:EU:C:2022:397.

[47] I take the liberty of transcribing in English some of his statements in this note: "It is forbidden for judges to shape or adapt a process as they wish in order to guarantee the principle of effectiveness; and however much will they put into applying this principle, they are often constrained and have no room for manoeuvre to do so, so that, to save their responsibility as judges, they have no choice but to refer the matter to the Court of Justice". This leads the author to state: "The principle of effectiveness is the right to effective judicial protection squared". And, as if to reconcile the proceduralist doctrine (or, at least, himself) with the case law of the CJEU, he adds this reflection: "Ihering, defender of the advantages of the existence of procedural rules, was not unaware that the process is tributary to the material law that regulates the substance of the matter and that, however much it resists, in the end it ends up giving in and adapting to the new reality imposed on it by the substantive law it serves" (J.

DAMIÁN MORENO, “El valor de las ficciones como garantía del principio de efectividad: consideraciones en torno a la situación creada por la sentencia del TJUE de 17 de mayo de 2022”, *Diario La Ley*, 21.11.2022).

[48] European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards on civil procedure in the European Union [2015/2084(INL)].

[49] Communication from the Commission, Guidelines on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, 2019/C 323/04, OJEU 27.9.2019.

[50] It is significant in this regard that, in Spain, the General Council of the Judiciary, through its Standing Committee, programmed in 2017 a plan for specialisation in unfair terms for 44 judicial bodies (concluded in 2022 in 20 of them and extended in the other 24). The positive result is said to be the streamlining of procedures and a certain homogenisation of the criteria applied [Source: https://vlex.es/vid/cgpi-concluye-plan-especializacion-879588877?from_fbt=1&forw=go&fbt=preview Date of consultation: 07.01.2022].

[51] This is what the CJEU judgment 14.03.2013, *Aziz* case (point 50): "in the absence of harmonisation of national enforcement mechanisms, the detailed rules for the application of the grounds of opposition allowed in the context of mortgage enforcement proceedings and of the powers conferred on the court hearing the declaratory judgment, which is competent to examine the lawfulness of the contractual terms on the basis of which the enforcement order was established, form part of the domestic legal order of each Member State by virtue of the principle of the procedural autonomy of the Member States, provided, however, that they are no less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness) (see, to that effect, Case C-168/05 *Mostaza Claro* -[2006] -ECR I-10421, paragraph 24, and Case C-40/08 *Asturcom Telecomunicaciones* -[2009] -ECR I-9579-, paragraph 38).

[52] A. GONZÁLEZ ALONSO/S. OUBIÑA BARBOLLA, "Prólogo de las directoras", *El vértice de los sistemas judiciales*, UAM/BOE, Madrid, 2018, pp. 65-67, p. 66. Subsequent are, for example, the preliminary questions referred in June 2021 by the Supreme Court to the CJEU on the limitation period for the action for restitution of mortgage expenses, in relation to Directive 93/13, on unfair terms (Articles 6 and 7.1); or in September 2021 on the compatibility with the aforementioned Directive of its doctrine on transparency and unfairness of arrangement fees in mortgage credit transactions with consumers.

TRANSPOSITION OF DIRECTIVE (EU) 2019/771 ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE SALE OF GOODS IN CROATIAN PRIVATE LAW

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Summary

As one of the member states, Croatia also had the obligation to transpose Directive 2019/771 on certain aspects concerning contracts for the sale of goods, which repealed the previous Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees. The new directive is now transposed in the Obligations Act and those transposed norms apply to all obligational relations, but with some exceptions for consumer contracts. To create a balance and also to properly transpose Directive 2019/771, the Croatian legislator was faced with the enormous challenge of deciding on the norms applicable only to either commercial or consumer contracts, or to any contractual relation in case of non-conformity.

Keywords

Non-conformity, consumer remedies, sale of goods, commercial guarantees, Directive 2019/771.

I. INTRODUCTION

Regulation of buyer's rights in case of a lack of conformity has been a part of Croatian private law since the 1978 Obligations Act.[1] After signing the Stabilisation and Association Agreement between the EC and Croatia[2] and its ratification in 2001, Croatia began the process of aligning Croatian legislation with the European *acquis communautaire*. In that context, and as regards buyer's remedies, Directive 1999/44 of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (hereinafter: Directive 1999/44)^[3] was transposed into Croatian private law. The Croatian legislator has decided to change existing norms of the Obligations Act (hereinafter: OA).[4]

Directive 1999/44 was repealed by the new Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation 2017/2394 and Directive 2009/22, and repealing Directive 1999/44[5] (hereinafter: Directive 2019/771). Member states had the obligation to transpose this Directive by 1 July 2021 and the transposed norms were to apply from 1 January 2022, but only to those contracts which are concluded after 1 January 2022 (Art. 24 Directive 2019/771). Although Directive 2019/771 is a maximum harmonization directive, member states were able to decide on the way of transposition and to provide a higher level of protection for consumers as buyers in some specific areas of regulation. Also, this directive gave many opportunities for extended harmonization. This article aims to explain the approach of the Croatian legislator regarding the transposition of Directive 2019/771.

II. GENERAL REMARKS ON THE METHOD OF TRANSPOSITION OF DIRECTIVE 2019/771 IN CROATIAN PRIVATE LAW

After the transposition of Directive 1999/44 it became apparent that member states used different transposition techniques and legal solutions, which led to new differences between member states' private laws.[6] One might say that it could have been expected since that directive was a minimum harmonization directive. The transposition of a directive can be discussed from the point of view of the choice of act in which the directive was transposed. In general, some countries decide to change existing regulation of lack of conformity which was a part of the general rules for obligations while other countries amended acts which regulated consumer protection.[7] As was already stated above, the Croatian legislator amended the general rules on obligations provided in the OA.[8] The same approach was taken while implementing Directive 2019/771. The Act on Amendments to the Obligations Act[9] was published in November 2021 and came into force on 1 January 2022. Again, member states had different approaches in transposing the directive concerning the choice of the act they changed. Some member states that changed their general law of obligations while implementing the old directive used the same approach as the Croatian regulator.[10] Another possible option for the Croatian legislator was implementation in the Consumer Protection Act[11], since this act regulates only B2C relations, while the OA regulates all obligations

(B2C, B2B and C2C).[12] This variety of relations regulated in the OA made the transposition more complex because it was important to balance the interference of the legal solutions designed for consumers in commercial contracts. It is, however, very questionable if this balance was achieved.

It should be noted that the Croatian legislator had a different approach while transposing another directive that also regulates consumers' rights in case of a lack of conformity arising from Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter: Directive 2019/770).[13] That directive was transposed in the Act on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services (hereinafter: ACD)[14] and is only applicable to consumer contracts. Such approach led to a situation in which norms that regulate a lack of conformity concerning the sale of goods in the OA apply to commercial contracts for the supply of digital content and digital services.[15]

The last general remark on the transposition of Directive 2019/771 in the OA deals with the tradition of this act and its normative approach since in that sense one minor disruption can be emphasised. To implement the directive correctly, Article 399a of the OA was added. This article regulates the main definitions[16] of the terms needed for a proper practical understanding and application of the norms that regulate seller's obligations in case of a lack of conformity. This approach is usual for the transposition of directives through a single act.

III. CROATIAN NORMATIVE SOLUTIONS FOR THE TRANSPOSITION OF DIRECTIVE 2019/771

1. Scope of application

The transposed legal solutions provided in Directive 2019/771 firstly apply to contracts of sale.[17] Article 376 paragraph 1 of the OA regulates that "by a contract of sale a seller undertakes to deliver to a buyer ownership of a thing, and the buyer undertakes to pay him the price". Also, the norms that regulate the buyer's right in case of a lack of conformity apply to all contracts for consideration unless otherwise provided for certain cases. One of those cases is the performance contract since the Croatian legislator has provided different legal solutions for a lack of conformity.[18] This is important from the aspect of Article 3(2) of Directive 2019/771 which regulates that "contracts between a consumer and a seller for the supply of goods to be manufactured or produced shall also be deemed sales contracts for the purpose of this Directive". Consequently, the Croatian legislator had to regulate that in the case of consumer contracts for the delivery of goods yet to be made or produced the seller is liable for a lack of conformity in accordance with the rules prescribed for the contract of sale, regardless of whether, under the general rules, it is a contract of sale, a performance contract or another type of contract. This means that in the case of B2C performance contracts norms that regulate a lack of conformity under a performance contract would not apply.

Although the norms of the OA regulating a lack of conformity do not apply to consumer contracts for the supply of digital content and digital services, while ACD does, they do apply

to the sale of smart goods.[19] Accordingly, those norms apply both to the consumer and commercial sale of smart goods but with some specific solutions for consumer contracts. For example, the OA regulates that in case of a doubt, it is presumed that the digital content or digital service is part of a consumer sale contract (Article 400(8) of the OA) while this presumption does not exist for commercial contracts or C2C contracts.

Directive 2019/771 allowed member states to exclude from the scope of the directive the sale of second-hand goods sold at public auctions and living animals. The OA does not exclude living animals but when it comes to the goods sold at public auctions, the OA only regulates that the seller is not liable for any lack of conformity of goods sold in a public enforced sale (Article 409 of the OA). Public auctions and public enforced sales are not necessarily the same kind of sale. Although a public enforced sale is usually a public auction, the emphasis is on the non-voluntary sale of goods during the enforcement procedure.[20] So, it can be said that the exception to the application of the norms that regulate a lack of conformity exists only for those public auctions that are a part of the enforcement procedure. However, both new and second-hand goods can be sold this way.[21] Additionally, the norms that regulate a lack of conformity generally do apply to second-hand goods[22] but they would not apply to those sold in a public enforced sale.

2. The term “lack of conformity”

While transposing Directive 1999/44 in the OA, the Croatian legislator failed to completely comply with the goals of the directive in defining when the lack of conformity exists.[23] Having in mind that the new directive is a maximum harmonization directive, one might say that it is not possible to introduce a different regulation from the one prescribed in Articles 6 to 8 of Directive 2019/771. Those articles set out the main criteria under which it is estimated whether the seller’s performance is with or without any lack of conformity. Directive 2019/771 distinguishes subjective requirements for conformity (Article 6) from objective requirements for conformity (Article 7) and a lack of conformity resulting from incorrect installation of goods. [24] But in setting out each criterion, the European legislator enumerates the requirements for conformity in a positive way by regulating what requirements are supposed to be met. In Croatian private law, those requirements are normatively regulated in a negative sense because the norm itself starts with the wording “the lack of conformity exists...”. [25] Also, the OA does not explicitly use the terms subjective or objective criteria.

Article 401(1) of the OA[26] regulates that a lack of conformity exists if the goods: do not fit the description, type, quantity, and quality or do not possess the functionality, compatibility, interoperability and other features as required by the sales contract; are not fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the latest at the time of the conclusion of the sales contract, and in respect of which the seller has given acceptance; are not delivered with all accessories and instructions, including those on installation, as stipulated by the sales contract and, are not supplied with updates as stipulated by the sales contract. Through this paragraph, Article 6 of the Directive has been transposed.

Additionally, according to Article 410(2) of the OA a lack of conformity also exists if the goods do not fit the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct; the goods do not correspond to the quality or the description of the sample or model that the seller made available to the consumer before the conclusion of the contract; the goods were not delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive; the goods are not of the quantity and do not possess the qualities and other features, including in relation to durability, functionality, compatibility and security, normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling; the goods are incorrectly installed or mounted and the installation or mounting service forms a part of the sales contract and was carried out by the seller or under the seller's responsibility; the goods that were intended to be installed or mounted by the buyer are incorrectly installed or mounted, and this was due to the shortcomings in the installation instructions provided by the seller or, in the case of goods with digital elements, provided by the seller or by the supplier of the digital content or digital service.

This means that Article 401(2) of the OA combines the objective requirements for conformity regulated in Article 7 of Directive 2019/771 with the incorrect installation of the goods referred to in Article 8 of Directive 2019/771. The reason for such an approach can be found in the regulation of the term “lack of conformity” in a previous version of the OA[27] which was more alike to the legal solutions from the 1978 OA.

Furthermore, Directive 2019/771 introduces third party rights[28] in Article 9 as a possible reason for a lack of conformity. This norm emphasises intellectual property rights which might limit or prevent the use of the digital content or digital service relevant for the goods with embedded digital content or digital service. Also, it has to be noted that by this novelty, regulation of the lack of conformity for the first time includes the seller’s liability for the legal defects on the European level. The major particularity in the regulation of third party rights is the alternative approach of the EU legislator.[29] It leaves member states an option not to include this solution in their private laws if they already regulate nullity or right to rescind the contract if third party rights limit or restrict the use of digital content and digital services.[30] In Croatian private law a set of norms regulate the seller’s obligations in case of third party rights under which the buyer has, among other rights, the right to terminate the contract.[31] While transposing Directive 2019/771 the Croatian legislator has been confronted with a problem of the wrong translation of Article 9 in the Croatian version of the directive. The words relating to nullity and termination of the contract were translated as “null and void” as a consequence of third-party rights.[32] Nevertheless, Article 9 of Directive 2019/771 has not explicitly been implemented because the rules on legal defect can apply since they provide a right to terminate the contract.[33]

3. Liability of the seller in case of a lack of conformity

When it comes to the liability of the seller, several conditions have to be met in order to legally establish his liability. First, a general prerequisite of the seller's liability is a lack of conformity itself as defined in the previous chapter. According to Article 400(1) of the OA, a lack of conformity has to exist at the moment of the passing of the risk to the buyer. Directive 2019/771 does not use the same terminology. Article 10(1) of Directive 2019/771 uses the words "when the goods were delivered". One might say that Croatian approach of the regulation of this moment in time is wider because the goods might not be only delivered but they can also be given personally to the buyer, for example in the store.[34] Additionally, the seller is liable for any lack of conformity which becomes apparent after the transfer of the risk to the buyer if it arose as a result of the cause that existed previously (Article 400 (2) of the OA). In the case of goods with digital elements, the risk passes to the buyer at the moment in which the one-time delivery of digital content or digital service is performed or when the continuous delivery of digital content or digital service started (Article 400 (6) of the OA). If the item is to be installed or mounted by the seller or a person for whom he is responsible, the risk passes to the buyer at the time the installation or mounting is completed (Article 400 (7) of the OA).

The moment of the passing of the risk, as a part of the first prerequisite is in connection with the burden of proof.[35] Under Croatian law it is presumed that any lack of conformity of the goods, including goods with digital elements, that appeared within one year from the moment of the risk transfer existed at the moment of passing the risk to the buyer, unless the seller proves otherwise or if the contrary can be derived from the nature of the item or the nature of the defect (Article 400 of the OA).[36] Such regulation of the burden of proof is, with good reason, regulated differently for commercial contracts.[37] Since such level of protection of buyers in commercial contracts is not needed, the presumption exists only for the period of six months. Additionally, in the case of consumer contracts for the sale of goods with digital elements, if the continuous supply of digital content or digital service is provided during a certain period, the burden of proof that there is no lack of conformity of digital content or digital service is on the seller within two years, but in the case of continuous delivery of digital content or digital service for a period longer than two years, the burden of proof that there is no lack of conformity of digital content or digital service is on the seller for the entire period for which the delivery is contracted (Article 400(11) of the OA).[38]

The second prerequisite for the liability of the seller concerns the knowledge of the existence of the lack of conformity. Knowledge of the seller of lack of conformity is not relevant, which means that he will be liable even if he did not know that the lack of the conformity existed.[39] On the other hand, the seller will not be liable either if the buyer knew of the existence of the lack of conformity or it could not remain unknown to him at the time of the conclusion of the contract. Article 402(2) of the OA regulates that "it is presumed that the buyer could not have been unaware of the defects that a prudent and diligent person having the average knowledge and experience characteristic of a person of the same occupation and profession as the buyer could easily have noticed during a usual examination of the goods". In addition, the OA regulates that this provision is not applicable to consumer contracts, which means that the trader

has to prove that the consumer as a buyer knew or must have known that he was buying goods with a lack of conformity in order to avoid his liability.

The seller is liable for any lack of conformity which becomes apparent within two years of handing over the goods to the buyer, i.e. six months in the case of commercial contracts (Article 404(2) of the OA).[40] According to Article 10(3) of Directive 2019/771, member states may introduce longer time limits.[41] However, the Croatian legislator opted for a minimum protection of consumers.

Another important novelty introduced in Directive 2019/771 creates new seller's obligations and liability concerning updates to digital services and content of smart goods. Although the obligation to provide updated goods is regulated along with subjective requirements for conformity in Article 6 of Directive 2019/771, the transposition of that legal solution is not the one dealing with the updates. Those basic subjective requirements for conformity became a part of the norm regulating the existence of conformity as previously explained, and such legal solution is applicable to all contracts. But when it comes to a legal solution that regulates the seller's obligation to supply with updates, including security updates, that are necessary to keep those goods in conformity, it is transposed through a special norm.[42] Article 401a of the OA introduces the seller's obligation for those future updates, but only for consumer contracts.

Under Croatian private law it is possible to limit or to exclude the seller's liability. Such disposition can be based on a contractual provision. Such contractual provisions shall be null if the seller already knew of the existence of the lack of conformity and he failed to notify the buyer, and in a case where such contractual provision was imposed by the seller because of his monopolistic position.[43] Consumers are even better protected in case of a possible exclusion or limitation of the seller's liability. Such provisions in consumer contracts will not be binding on consumers before the moment of notifying the seller about the lack of conformity.[44] Overall, it is stipulated that if the buyer, which is not necessarily the consumer, has renounced his right to terminate the contracts, still has other rights (Article 408(4) of the OA).

The seller's legal position has been changed by the transposition and special regulation of the right to redress.[45] Additionally, Article 18 of Directive 2019/771 stipulates that "the person against whom the seller may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law". First of all, Article 422a of the OA regulates that the seller in respect of whom the buyer has exercised the rights concerning liability for a lack of conformity may exercise the rights concerning liability for a lack of conformity in regard to his seller (the previous seller). The first condition is that the seller is authorized to exercise the rights towards the previous seller only if the preconditions of liability for a lack of conformity are met in the relationship between him and the previous seller.[46] The second condition is that the seller has informed the previous seller without delay that he has repaired or replaced the item to the buyer, reduced its price or that the contract with the buyer has been terminated, and provide him with all the information important for assessing liability for material defects. The final condition is that no more than two years has passed since the transfer of risk between the previous seller and the seller.[47] The legal nature of the presented legal

solution is not mandatory and the OA in Article 422a(5) explicitly stipulates that the previous seller and the seller may agree on other deadlines, exclusion, limitation or extension of liability.

A parallel set of rules regulating possible seller's liability are those regulating commercial guarantees of durability of goods. Under those rules[48], both the seller and the producer are liable for any lack of conformity arising from the warranty statement.

4. Buyer's rights

The centrepiece of the regulation of lack of conformity as a special aspect of sale of goods on the EU level are without any doubt buyer's (consumer's) rights. Before elaborating on legal remedies, it is of importance to draw attention to the buyer's obligation to notify. Article 12 of Directive 2019/771 stipulates that "Member States may maintain or introduce provisions stipulating that, in order to benefit from the consumer's rights, the consumer has to inform the seller of a lack of conformity within a period of at least 2 months of the date on which the consumer detected such lack of conformity". In Croatian private law such an obligation existed even in the 1978 OA[49] and is in a way a part of legal tradition. It is not a surprise that even while transposing Directive 2019/771 the Croatian legislator decided to keep this obligation of the buyer. The regulation of the obligation to notify is not the same for commercial contracts and consumer contracts. In case of a visible lack of conformity[50] the buyer in a commercial contract must notify the seller within eight days and consumer within two months. The same timeframe exists for consumers in case of a hidden lack of conformity[51], while the buyer in a commercial contract must notify the seller about the lack of conformity immediately. Only the buyer who has notified the seller is entitled to legal remedies.

A crucial change for Croatian private law is the regulation of the hierarchy of legal remedies. Although the transposition of Directive 1999/44 in the OA at first glance gave the opportunity for a free choice of remedy, a more careful observation of the norms leads to the conclusion that the buyer was not entitled to choose termination of contract as the first and only remedy.[52] The new legal solution resulting from Articles 13 to 16 of Directive 2019/771 provides a clearer distinction between the legal remedies available to the buyer.

Under Article 410(1) of the OA, the buyer, in the event of a lack of conformity, is entitled to have the goods brought into conformity, to receive new goods without the lack of conformity, to demand a proportional price reduction, or to declare a termination of the contract. Additionally, in each case the buyer is also entitled to have the damage repaired according to the general rules on liability for damage, including damage sustained by his other goods.[53] The buyer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose disproportionate costs on the seller, taking into account all circumstances, such as the value the goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be provided without significant inconvenience to the consumer.[54] If one of the conditions is met, the seller might refuse to replace or to repair the goods (Article 410(4) of the OA).

When it comes to the repair and replacement, they must be free of charge and performed within a reasonable time[55]. However, the buyer must make the goods available to the seller, and the seller is obliged to accept them, and bear related costs. Also, the seller has the obligation to install the goods and even replace installed goods and must bear the costs of such removal and installation.

The buyer is entitled to a price reduction or termination of the contract when replacement or repair did not occur.[56] The buyer is entitled to terminate the contract only if he has previously given the seller additional reasonable time for contract fulfilment (Article 412(1) of the OA). Also, the buyer need not allow a reasonable time if the seller has informed him that he will not fulfil the contract, or it is obvious from all circumstances that the seller will not fulfil the contract. The contract will be terminated *ex lege* if the contract is not fulfilled by the seller during the given additional time unless the buyer has explicitly declared that he maintains the contract to be in force.[57] Transposition of Directive 2019/771 has resulted in a special provision applicable only to consumer contracts. New Article 413a of the OA stipulates that if the seller fails to fulfil the contract in a reasonable time, the consumer is entitled to declare that the contract is terminated. This means that in consumer contracts termination of the contract depends on the consumer's disposition.[58] It is not regulated how this disposition has to be done, for example if it has to be presented in a written form.[59] In general, this approach in consumer contracts is different from traditional legal solutions of termination of contract *ex lege* if the contract is not fulfilled in additional reasonable time. While transposing Directive 2019/771 the Croatian legislator kept some legal solutions on termination of contract such as the loss of the right to terminate the contract[60] and legal consequences of the termination which have been slightly changed.[61] Article 419(3) and (4) of the OA additionally stipulate that if the buyer has terminated the contract, the buyer must return the goods to seller at the seller's expense, while the seller must reimburse the buyer.

IV. CONCLUSION

During the transposition of Directive 2019/771 the Croatian legislator was faced with two main challenges. The first one was to properly implement the directive and to achieve its goals, while the second one was to achieve a balance in the application of norms designed for consumer contracts on other kinds of contracts, i.e. commercial contracts.

When it comes to the first goal, the Croatian legislator mainly did achieve the goals arising from Directive 2019/771. A new definition of the term lack of conformity has been introduced in the OA. One might say that without a good command of Directive 2019/771, it will be hard for practitioners to differentiate between, understand and explain in legal decisions the subjective and objective requirements for conformity. The OA preserved the buyer's obligation to notify the seller about the lack of conformity and without this notification the buyer is not entitled to legal remedies in case of a lack of conformity. It was decided to set the timeframe for the burden of proof to one year, as opposed to two years, as was made possible under Directive 2019/771. Additionally, the seller's liability is limited to a timeframe of two years. The last two legal solutions have been regulated differently in different member states, which will lead to new differences between member states and possible insecurities in consumers'

behaviour in the digital market. It can be concluded that the major difference between the private laws of member states lies in the regulation of buyers' rights and the overall buyers' position in case of a lack of conformity because of third party rights. Even from the point of view of Croatian private law, the consumer is not in the same position regarding his legal rights in case of a lack of conformity in the sale of goods with embedded digital content in comparison with his legal position in a contract for the supply of digital content and digital services.

However, the creation of a balance in the regulation of consumer and commercial contracts with the transposed norms did create some exceptions for commercial contracts and some exceptions for consumer contracts. Regulation of the seller's obligation to update is maybe the most illogical legal solution because it only exists in consumer contracts. Also, when it comes to consumer contracts it is presumed that the supply of digital content and digital services is a part of a contract for sale. This presumption does not exist for commercial contracts. But if the contract for the supply of digital services and digital content is a commercial contract and a lack of conformity exists, the legal solution for this situation would also lead to the same norms which regulate the seller's obligation under a contract of sale. The only difference is who will be responsible – the seller in the sale of goods or the provider of digital content and digital services in the supply of digital content and digital services. In the end, it has to be noted that it is unclear how relations between traders in chains of transactions will evolve in practice since the seller's liability for a lack of conformity usually exists in a time frame of six months, while in the regulation of relations in chains of transactions the seller can pursue remedies towards the previous seller for two years after the risk passed from the previous seller to the seller pursuing the remedies.

[1] Obligations Act of 1978, Official Gazette SFRY 29/1978, 39/1985, 46/1985, 57/1989, Narodne novine / Official Gazette, 53/1991, 73/1991, 3/1994, 111/1993, 107/1995, 7/1996, 91/1996, 112/1999, 88/2001, 35/2005 (hereinafter: OA 1978), Articles 478 – 515 OA 1978.

[2] Official Journal L 26, 28.1.2005, p. 3–220.

[3] Official Journal L 171, 07.07.1999, p. 12-16.

[4] It was done through the Act on Amendments to the Obligations Act, published in Narodne novine 35/2005 and 41/2008 (Art. 400 – 429). The current Obligations Act was also published in Narodne novine / Official Gazette, 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021.

[5] Official Journal L 136, 22.5.2019, p. 28–50

[6] For more see: H. SCHULTE – NOLKE, C. TWIGG – FLESNER, M. EBERS, *EC Consumer Law Compendium, The Consumer Acquis and Its Transposition in the Member States*, Sellier, 2008, Germany, p. 407-451; Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332, accessed on: 08.02.2018. Also, those new barriers become one of the main reasons for the new directive.

[7] See more: H. SCHULTE – NOLKE, C. TWIGG – FLESNER, M. EBERS, op. cit. p. 411, 412.

[8] P. KLARIĆ, M. VEDRIŠ, *Građansko pravo*, Narodne novine, Zagreb, 2014, p. 415-426.

[9] Narodne novine / Official Gazette 126/2021. See: Art. 399a – 429 of the OA, I. MILOTIĆ, “*Materijalni nedostaci u Noveli Zakona o obveznim odnosima iz 2021. godine*”, Pravo i porezi, No. 12/21, p. 11-18.

[10] For example, the German legislature decided to change the German Civil Code (*Bürgerliches Gesetzbuch* from 18.08.1896, BGBl. I S. 42, 2909; 2003 I S. 738, with the last changes from 21 December 2021, BGBl. I S. 5252). See: T. PFEIFFER, “*Die Umsetzung der Warenkauf-RL in Deutschland - Beobachtungen zu Sachmängeln und Aktualisierungspflicht*“, Zeitschrift für das Privatrecht der Europäischen Union, vol. 18, no. 3, 2021, p. 120-128.

[11] Narodne novine / Official Gazette, 19/2022.

[12] This approach was, for example, taken in Italian and Spanish private law (except for Catalonia where the directive was transposed in the Civil Code). See: A. DE FRANCESCHI, “*Italian Consumer Law after the Transposition of Directives (EU) 2019/770 and 2019/771*”, Journal of European Consumer and Market Law, Volume 11, Issue 2, 2022, p. 72 – 76; E. ARROYO AMAYUELAS, “*The Implementation of the EU Directives 2019/770 and 2019/771 in Spain*”, Journal of European Consumer and Market Law, Volume 11, Issue 1, 2022, p. 35 – 40.

[13] Official Journal OJ L 136, 22.5.2019, p. 1–27.

[14] Narodne novine / Official Gazette 110/2021.

[15] See Art. 357 OA which regulates that those norms which regulate lack of conformity along with the sellers’ obligations apply to all contracts for consideration.

[16] Terms that are defined are: consumer, consumer contract, producer, digital content, digital service, compatibility, functionality, interoperability, durable medium, durability, free.

[17] See S. PETRIĆ, “*Ugovorna odgovornost prodavatelja*“ in: E. MIŠĆENIĆ et. al., *Europsko privatno pravo – posebni dio*, Školska knjiga, Zagreb, 2021, p. 33-35.

[18] Art. 590 of OA regulates that “under a performance contract, the contractor undertakes to carry out certain work, such as make or repair a thing, physical or intellectual work etc. in exchange for a price that the ordering party undertakes to pay”. Also, legal solutions for a lack of conformity regulated in Articles 604 – 611 OA apply to a construction contract. For more on those contracts see P. KLARIĆ, M. VEDRIŠ, op. cit., p. 537-543.

[19] Smart goods are defined as goods with embedded digital content or digital service which are necessary for the functionality of the goods (Article 400(5) of the OA). See: K. SEIN, ‘*Goods With Digital Elements’ and the Interplay With Directive 2019/771 on the Sale of Goods*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600137, last accessed: 29 May 2022.

[20] V. GORENC; L. BELANIĆ, H. MOMČINOVIĆ, A. PERKUŠIĆ, A. PEŠUTIĆ, Z. SLAKOPER, M. VUKELIĆ, B. VUKMIR, *Komentar Zakona o obveznim odnosima*, Narodne novine / Official Gazette, 2014, p. 704.

[21] Some authors argue that goods sold in a public enforced sale are second-hand goods, which is a justification for this exception, but it should not be taken as a rule. See: V. GORENC; L. BELANIĆ, H. MOMČINOVIĆ, A. PERKUŠIĆ, A. PEŠUTIĆ, Z. SLAKOPER, M. VUKELIĆ, B. VUKMIR, op. cit., p. 704.

[22] For example, see Article 404(3) of the OA.

[23] See I. KANCELJAK, “*Određeni aspekti prodaje robe na digitalnom tržištu i preuzimanje u hrvatsko pravo*“, in: J. BARBIĆ (ed.), *Pravna zaštita pojedinaca na jedinstvenom digitalnom tržištu Europske unije*, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2021, p. 76.

[24] See R. SCHULZE, F. ZOLL, *European Contract Law – third edition*, Beck, Nomos, Hart, Baden-baden, Munchen, 2021, p. 221-228.

[25] Article 401 p. 1 of the OA.

[26] See I. MILOTIĆ, op. cit., p. 13, 14.

[27] See P. KLARIĆ, M. VEDRIŠ, op. cit., p. 418; S. PETRIĆ, „Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima“, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 27, No. 1, 2006, p. 102-104.

[28] For more on third party rights see ROSENKRANZ, F., “Art. 10: Third-party rights”, in: SCHULZE, R.; STAUDENMAYER, D. (ed.), EU Digital Law – Article-by Article Commentary; Baden-Baden, 2020, p. 186 – 198; R. SCHULZE, F. ZOLL, op. cit., p. 229.

[29] See ATAMER, Y., HERMIDAS, S., „Die neue EU-Richtlinie zum Verbrauchsgüterkauf“, Aktuelle Juristische Praxis, 29. Jahrgang, 1, 2020, p. 61.

[30] For example, French law already stipulates that the breach of intellectual right in such cases leads to nullity of contract. See SENECHAL, J., „The Implementation of the EU Directives 2019/770 and 2019/771 in France“, Journal of European Consumer and Market Law, Volume 10, Issue 6, 2021, p. 266.

[31] Article 430 – 437 of the OA. See P. KLARIĆ, M. VEDRIŠ, op. cit., p. 426 – 249.

[32] This problem has also been noticed by some other authors. In that sense see footnote 113 in S. PETRIĆ, „Ugovorna odgovornost prodavatelja“, op. cit. p. 55.

[33] The Croatian legislator had the opposite approach while transposing Directive (EU) 2019/770 which has the same norm (Art. 10) and this norm has been transposed through Art. 11 of the ACD.

[34] Transfer of the risk or passing of the risk as a term existed in the earlier versions of the OA. This approach is also familiar in European private law. For example, see p. 55 of the Preamble and Article 20 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 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 (Official journal of the EU, L 304, 22.11.2011, p. 64–88). Some authors explain it by emphasizing the gaining of physical possession, see R. CANAVAN, “Contracts of sale” in: C. TWIGG-FLESNER (ed.), Research Handbook on EU Consumer and Contract Law, Edward Elgar Publishing, Cheltenham, UK + Northampton, MA, USA, 2016, p. 281.

[35] See Article 11 of Directive (EU) 2019/771. For more on reversal of burden of proof see R. SCHULZE, F. ZOLL, op. cit., p. 249-252.

[36] While transposing Article 11 of Directive (EU) 2019/771 each member state could provide even higher protection for consumers by introducing or by retaining a period of two years.

[37] For more on the purpose of the presumption and burden of proof see judgment of the European Court of Justice of 4 June 2015, C-497/13, Froukje Faber v Autobedrijf Hazet Ochten BV, ECLI:EU:C:2015:357, p. 54.

[38] See I. MILOTIĆ, op. cit., p. 12.

[39] This does not mean that the knowledge of the seller has no legal impact. See Article 408(2) of the OA and later in this paragraph.

[40] When it comes to second-hand goods, the parties may stipulate a timeframe of one year, or even shorter in commercial contracts (Article 404(3) of the OA). But also, in all these situations, the contracting parties may stipulate an even longer timeframe (Article 404(4) of the OA).

[41] For more reasons for this option see I. KANCELJAK, “Reform of Consumer Sale of Goods and Associated Guarantees – Possible Impact on Croatian Private Law”, EU and Comparative Law Issues and Challenges Series (ECLIC), 2, 2018, p. 592, 596.

[42] See Article 7(3)(4) of Directive (EU) 2019/771.

[43] Article 408(2) of the OA and compare with V. GORENC; L. BELANIĆ, H. MOMČINOVIĆ, A. PERKUŠIĆ, A. PEŠUTIĆ, Z. SLAKOPER, M. VUKELIĆ, B. VUKMIR, op. cit., p. 702-704.

[44] This norm is created to implement Article 21(1) of Directive (EU) 2019/771.

[45] See Article 18 of Directive (EU) 2019/771.

[46] Since this could be a whole chain of relations, it is possible that the seller's seller will, under all those conditions, be liable (Article 422a (6) of the OA).

[47] This solution is quite interesting having in mind that in practice those relations will probably be B2B and liability in such contracts is only six months as previously discussed.

[48] Articles 423 to 429 of the OA, implementing Article 17 of Directive (EU) 2019/771.

[49] See V. GORENC; L. BELANIĆ, H. MOMČINOVIĆ, A. PERKUŠIĆ, A. PEŠUTIĆ, Z. SLAKOPER, M. VUKELIĆ, B. VUKMIR, op. cit., p. 699, 700.

[50] Article 403 of the OA, see P. KLARIĆ, M. VEDRIŠ, op. cit., p. 420.

[51] Hidden lack of conformity is defined as a lack of conformity that could not have been discovered by usual inspection. Article 404 of the OA, see P. KLARIĆ, M. VEDRIŠ, op. cit., p. 420.

[52] I. KANCELJAK, "Reform of Consumer Sale of Goods and Associated Guarantees – Possible Impact on Croatian Private Law", op. cit., p. 591.

[53] General rules on liability for damages are regulated in Article 1045 to 1110, 342 to 349, for more see KLARIĆ, M. VEDRIŠ, op. cit., p. 583 – 643.

[54] Compare Articles 13(2) of Directive (EU) 2019/771 and 410(3) of the OA.

[55] During the presentation of possible novelties in the Croatian Parliament (Hrvatski sabor), a part of the discussion concerned the term „reasonable“, where some politicians wanted to stipulate exact timeframes. For more on the discussion see <https://sabor.hr/hr/prijedlog-zakona-o-izmjenama-i-dopunama-zakona-o-obveznim-odnosima-prvo-citanje-pze-br-148>, <https://www.sabor.hr/hr/konacni-prijedlog-zakona-o-izmjenama-i-dopunama-zakona-o-obveznim-odnosima-drugo-citanje-pze-br-148>.

[56] The buyer is not entitled to terminate the contracts if the lack of conformity is not significant but he is entitled to other rights (Article 410(7) of the OA).

[57] Article 413 of the OA, see V. GORENC; L. BELANIĆ, H. MOMČINOVIĆ, A. PERKUŠIĆ, A. PEŠUTIĆ, Z. SLAKOPER, M. VUKELIĆ, B. VUKMIR, op. cit., p. 709-713.

[58] See also M. JOSIPOVIĆ, „Novo reguliranje ugovora o kupoprodaji“, Informator, num. 6707, available at: <https://informator.hr/strucni-clanci/novo-reguliranje-ugovora-o-kupoprodaji>.

[59] It is possible that Article 288 of the OA will apply. It stipulates that “contracts in a prescribed form may be cancelled by agreement in any form, except where the law provides otherwise in a particular case or where the purpose for which the form is prescribed requires that the cancellation of the contract be effected in the same form”.

[60] Article 417 of the OA, see: V. GORENC; L. BELANIĆ, H. MOMČINOVIĆ, A. PERKUŠIĆ, A. PEŠUTIĆ, Z. SLAKOPER, M. VUKELIĆ, B. VUKMIR, op. cit., p. 717-719.

[61] In general, it is regulated in Article 419(1) of the OA that “termination of contract due to a lack of conformity shall have the same effect as the termination of bilateral contracts due to non-performance”.

CHALLENGES TO CUSTOMER RIGHTS PROTECTION IN THE FACE OF GLOBAL CHALLENGES

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Summary

Covid-19, the war in Ukraine, the energy crisis, inflation, the digitalization of services and products, and climate change are crises and challenges that have touched each of us and will further influence our daily lives in the immediate and long-term future. We analyse here not only the challenges for customer protection that have emerged during these transitional times, such as the cancellation of obligations, misleading communication, online contracts and services, unfair terms of contracts, difficulties for consumer protection posed by technological advances, the uncertainty of legal regulation, and other issues, but also how the consumer protection system responds to these crises and challenges, whether it provides adequate consumer protection, whether it is sufficiently balanced and flexible, and what new legal regulation initiatives were proposed or should be considered as a response to the issues under scrutiny.

Keywords

Covid-19, consumer rights, online contracts and services, smart technologies, legal uncertainty

I. INTRODUCTION

Today, more than fifty years after the consumer protection movement (consumerism) began, it is safe to say that the European framework (“*acquis communautaire*”) adopted in the field of consumer protection is one of the most elaborated and sophisticated in the world. Although as a general rule the consumer is considered attentive, responsible, and educated, even the most educated individual is not adept in grasping the nuances of legal language and unfortunately not always able to understand and especially negotiate the essence of contract clauses, which tend to become longer and more complicated. According to consumer rights doctrine, the law must protect consumers from lack of competition, information asymmetries, inadequate pricing, lack of bargaining power, and so on; in other words, from the threats of an imperfect market. Thus, consumer policy is deemed an important part of the Europe 2020 strategy. Measures to increase competition among service providers, consumer information, and effective remedies are the part of this strategy.

Due to the Covid-19 crisis, in March of 2020 many countries declared a state of emergency. This was followed by lockdowns and many restrictions for business and public life, including shop closures (excluding grocery stores and pharmacies), flight cancellations, a suspension of education and childcare activities, of cultural and entertainment events, tourism, sport, and leisure services, and much more. During the quarantine period, sales and services shifted primarily to digital spaces. This naturally led to an increase in consumer complaints.

Unfortunately Covid-19 is only one of many recent major global crises. The war in Ukraine, the crisis of energy resources, the digitalization of services and products, climate change, massive migration, and inflation are some of the other crises and challenges that have touched each of us and will further influence our daily life in the immediate and long-term future. For example, due to Covid-19 measures and the energy crisis, annual inflation in Lithuania in June and July of 2022 rose to a record level of almost 21% (18.5% in May, 16.6% in April) compared to the same months in 2021, when the rate of inflation in July was 4.3%, and in June and May 3.5%. It is obvious that such rates of inflation could lead to the cancellation or improper implementation of consumer contracts. For example, one of the largest independent electricity suppliers in Lithuania, “Perlas Energija,” unilaterally announced recently that all customer contracts will be changed: customers who chose fixed prices will be transferred to the variable price plan “Birža.”[2]

The unifying factor in all these crises is unpredictability. On the one hand, as a legally concluded contract has the force of law for its parties, contracts, including consumer contracts, should create security and predictability for both parties. Furthermore, as the consumer is the weak side of the contract, usually the risks should be borne by the product/service provider or the state. However, when the world is hit by various crises, states and businesses may not always be able to bear the full cost of a crisis because everyone is affected by a system, and if

it were to collapse or become bankrupt, there would be no winners. Thus sometimes, in the face of crises, it is inevitable to look for a balanced way out.

In this article we analyse the major challenges for customer protection that have emerged during these transitional times, concentrating on such major issues as the cancellation of obligations, misleading communication, online contracts and services, unfair terms of contracts, the difficulties posed by technological advancements, the uncertainties of legal regulation, and so on. In addition, we analyse how the consumer protection system responds to these crises and challenges, whether it provides adequate consumer protection, whether it is sufficiently balanced and flexible, what new legal regulation initiatives have been proposed or should be considered as a response to the issues examined.

To provide empirical examples illustrating the challenges analysed, we use data from recent customer protection cases from the Lithuanian state agency for consumer protection[3] (Valstybinė vartotojų teisių apsaugos tarnyba, further referred to as ‘consumer agency’) and legal practice in Lithuania. The Agency for the Protection of Consumer Rights is a pretrial institution aimed at resolving disputes between consumers and sellers/service providers in Lithuania. During 2016-2020, the number of resolved consumer disputes grew by 92%: from 3,076 disputes in 2016 to 5,919 disputes in 2020. It should also be noted that a large part of the consumer disputes examined by the consumer agency were settled peacefully (54% in 2018, 43% in 2019, 37% in 2020).

II. CHALLENGES TO CONSUMER PROTECTION DURING THE COVID-19 CRISIS

In March of 2020, due to the threat of the Covid-19 virus, many European countries declared a state of emergency. This was followed by lockdowns and many restrictions for business and public life, including shop closures (excluding grocery stores and pharmacies), flight cancellations, the suspension of education and childcare activities, of cultural and entertainment events, tourism, sport, and leisure services, etc. During the quarantine period, sales and services largely shifted to a remote mode. In the absence of direct contact with the consumer, sellers and service providers sought other means of reaching potential customers. One such tool is marketing. Along with advertisements of conventional products and services, consumers were confronted with misleading information, especially on social media through fake accounts offering products allegedly capable of curing or protecting against viruses. For example, in cases examined by the Lithuanian consumer agency, advertisements by sellers of food supplements claimed that some ingredients in food supplements increase resistance to bacterial and viral infections, strengthen blood vessels, support the immune system, kill viruses, and so on.

Due to a lack of information and a desire to protect ourselves against the virus, customers were especially vulnerable and susceptible to such misleading ads and other unfair commercial practices. For example, in one case a pharmaceutical company representative called consumers asking them to participate in a health program that included purchasing OmegaMarineForte+ food supplements and offering to pay only for postage of the first pack of 60 capsules, with the possibility of withdrawing from the program at any time. Phone conversations and written

notifications assured consumers they could cease participating at any time by contacting the company. However, evidence gathered in the case confirmed that the company acted contrary to the conditions they themselves had established. After receiving consumers' telephone requests to withdraw from the program, the company continued to send them food supplements along with invoices. In addition, the seller sent them partially threatening reminders about consumer indebtedness to the trader, even though the goods (in this case capsule packages) had not been bought or even ordered by consumers. The court ruled that the seller's actions, whereby consumers expressly and specifically refuse any and all goods being sent to them and the seller himself acknowledging such a refusal, and whereby the seller continues to send said goods in addition to partially threatening reminders about the consumer's indebtedness to the seller, even though the goods were not bought or ordered by the consumer, can be considered aggressive commercial activity.[4]

Changes in sales practices during the Covid-19 crisis naturally led to an increase in consumer complaints. For example, in 2020, the Lithuanian consumer agency received eight times more complaints about cancelled trips.[5] Complaints about missed cultural and entertainment events increased almost three times; the same occurred with sport clubs, hotels, and other accommodation services. In addition, the number of complaints about transactions executed via websites increased dramatically.[6] On the other hand, during this period the consumer agency also received more queries from businesses requesting explanations of the legal provisions surrounding consumer rights in various areas. This is a positive trend, as it shows a growing responsibility of businesses toward consumers in seeking to prevent potential consumer rights violations in advance.[7]

III. SOME LEGAL INITIATIVES AS A RESPONSE TO THE COVID-19 CRISIS

The Lithuanian government, like authorities in other countries worldwide, was looking for urgent measures to save jobs and local economies by helping the most vulnerable business sectors deal with quarantine issues. In this regard, legislative initiatives were introduced that stipulated that in special circumstances, such as Covid-19, limitations for the protection of consumer rights (such as vouchers for cancelled travel, prolonged terms of compensation, etc.) would be initiated. Thus, due to Covid-19 and seeking to preserve the tourism sector, the Seimas of the Republic of Lithuania changed Article 171 of the Law on Tourism, allowing travellers to be compensated for a cancelled trip with a voucher (provided the traveller agrees), and Article 6.751 of the Civil Code was changed, allowing compensation for a cancelled trip due to Covid-19 within 90 days from the *date on which the applicable restriction no longer applies* (if a tourist and a travel operator do not agree to other compensation options). It should be noted that in such a case, it would be very difficult to foresee when applicable restrictions will cease; in other words, the timing of refunding a customer for a cancelled trip would be unpredictable and might last forever.

However, this new legal regulation has received the attention of the European Commission, as its provisions may violate the rights of passengers established in EU legislation, namely EU Directive 2015/2302 of the European Parliament and the Council of 25 November 2015 on package travel and linked travel arrangements. Article 12 of this directive stipulates that

travellers shall be refunded or reimbursed without undue delay and in any case no later than 14 days after the termination of the travel contract. Also, the European Commission launched infringement proceedings against 10 Member States, including Lithuania. It discovered that during the Covid-19 pandemic in Lithuania (as well as in nine other EU Member States, including the Czech Republic, Greece, Italy, Poland, France, etc.), new legal initiatives had possibly infringed EU consumer laws. As a response, seeking to avoid this procedure, Lithuania rescinded this regulation.

In September of 2021, significant changes to the Law on Consumer Rights Protection were also introduced.[8] Initiating these changes was determined in keeping with the goal of establishing a more effective pretrial settlement of consumer disputes, encouraging sellers and service providers to settle disputes with consumers amicably as soon as possible, and promoting more effective consumer protection against the use of unfair terms in consumer contracts.

A new regulation established the duty of the entrepreneur to reimburse the costs incurred by the institution handling consumer disputes – in other words, the national consumer agency – when the decision is taken in favour of the consumer. The average cost of processing one consumer dispute at the agency is about 270 euros. Of course, this rule will not be applied to the consumer, who will not be obliged to reimburse the costs of the dispute resolution. This measure can significantly contribute to the incentive of sellers or service providers to settle the dispute with the consumer peacefully, especially since trends in handling consumer disputes in recent years show that approximately half of all decisions were made in favour of consumers (55% in 2018, 47% in 2019, and 45% in 2020).

Another important legal measure to protect consumers introduced by the new regulation is the right of the consumer rights agency to carry out a preliminary (ex ante) assessment of draft consumer contracts in terms of unfair clauses of consumer contracts. To prevent an entrepreneur from continuing to use conditions recognized as unfair, the law stipulates a fine imposed by the agency, amounting to 3% of annual income but not exceeding one hundred thousand euros, and if the violation is committed repeatedly within one year, the fine can amount to 6% of annual income (not exceeding two hundred thousand euros). This measure was already used in the cited case of the electricity suppliers “Perlas Energija,” which unilaterally changed the agreement with electricity consumers. As the national consumer agency recognized that the terms of the contract unilaterally offered by the supplier to the customers were unfair, the company was instructed not to apply them. Otherwise, the company would have incurred a fine.[9] However, the supplier altogether stopped its activity under threat of bankruptcy.[10] Now the problem appears to have become a state problem, which eventually means the problem of all taxpayers.

Unfortunately, this seems to be only the first signs of a new crisis. Whether a balanced way out of this crisis of unprecedented inflation can be found remains unclear.

IV. CHALLENGES INVOLVING SHIFTING CONTRACTS AND SERVICES ONLINE

During the quarantine period, contracts, sales, and services have largely shifted online. In this regard, data from customer rights related cases shows that customers often complain about the unfair terms of such online contracts because they have no possibility to negotiate or otherwise influence their clauses. Consumers are frequently not properly informed about their rights and obligations, and thus online contracts usually exacerbate the imbalance between a customer's rights and obligations and the provider's product and service. When concluding contracts with consumers, standard contracts are usually used, the terms of which are not individually negotiated. So when concluding these contracts, the consumer can only choose either to sign or to refuse the contract offered. In Lithuanian court practice, it is emphasized that due to lack of information, experience, special knowledge, and so on, the consumer has limited opportunities to influence the content of the terms of such a contract for the proper protection of his interests. In other words, as mentioned, in most cases the customer can only choose to sign the contract or refuse to do so. Accordingly, the seller or service provider gains an unjustified advantage over the consumer, and thus the principle of fairness is particularly relevant in online consumer contracts. A consumer whose rights have been violated due to the unfair terms in a consumer contract has the opportunity to defend his violated rights in court or by pretrial procedures at the state consumer agency.

One could mention as examples in this regard the cases involving contracts with insurance companies. In a few cases,[11] Lithuanian courts found that the standard insurance contract terms shall be considered unfair because the result is a significant imbalance among the rights and obligations of the parties. For example, if an insurance company has the exclusive right to interpret the contract[12] and the absolute and unconditional right to choose the method of compensation and this choice has a major impact on the amount of the insurance benefit[13] or clause of a standard insurance contract which has not been individually discussed with consumer, this can result in a significant imbalance between the rights and obligations of the parties.[14]

According to Shoshana Zuboff, author of *The Age of Surveillance Capitalism* (2019), one of the most influential books in recent years, these contracts in most cases are among the most pernicious and are called "contracts of adhesion" by legal experts because they impose take-it-or-leave-it conditions on customers. She notes that online "contracts" are also referred to as "click-wrap," because most people get wrapped up in these oppressive contract terms by simply clicking on the box that says "I agree" but without ever reading the agreement.[15]

Furthermore, as in most cases, as online contracts are excessively long and complex, customers are discouraged from actually reading their terms. Paper documents require a physical item and a signature, which naturally restrains the contracting process simply by virtue of paper, printing, archiving, and other costs. Digital terms, in contrast, are "weightless" and can be expanded, reproduced, distributed, and archived at no additional cost.[16] This raises the question of lack of meaningful consent, at least on the part of the consumer of such a contract.

Indeed, since Roman times the sacred notions of “agreement” and “promise” have been critical to the evolution of contracts. According to Zuboff, such expressions of solidarity and human agency as promises, dialogue, shared meaning, problem solving, dispute resolution, and trust over the course of millennia were gradually institutionalised in the notion of “contract.”[17] When there is a lack of understanding or consent in the customer, some experts call such a situation as “a unilateral seizure of rights without consent” and consider such “contracts” as a moral and democratic “degradation” of the rule of law and the institution of contract, a perversion that restructures the rights of users granted through democratic processes. Zuboff concludes that for now it appears that the institution of *the uncontract* is celebrated, given the asymmetries of knowledge and power[18] between the two parties involved: the corporation and the customer.

V. CHALLENGES INVOLVING TECHNOLOGICAL ADVANCES

Another to digitalised society-related challenge of recent years for customers has been the risks stemming from complicated, smart devices and/or smart technology-based services, such as vacuum cleaners, robots, mobile phones, apps, sharing platform services, autonomous cars/drones, etc. Customers using these products and services complain about the lack of information, unclear or imbalanced responsibility for damage in the event of improper exploitation,[19] risks of lost or stolen personal data, and so on. For example, in case 3K-3-246-1075/2021, the plaintiff (consumer) bought an electric scooter from the defendant. While driving the scooter downhill, the plaintiff was forced to break, and because he lost control of the scooter, fell off it, breaking his hand. As a result of this trauma, the plaintiff was incapacitated for a long time, underwent five surgeries, followed by long-term rehabilitative treatment. The plaintiff filed a lawsuit against the defendant, the seller of the scooter. In the first instance, the court dismissed the action. Although the Appellate Court left the decision of the first instance court unchanged, the Supreme Court overruled both decisions. The court stated that the seller must provide the consumer with a user manual and safety information about the electrical product in the consumer’s language. The average consumer can only assess whether a particular electrical product meets his individual needs and properly understand how to use it safely if he is provided with instructions for use and safety information in a language he understands. The Supreme Court stated that selling a product without providing this information to the consumer is the equivalent of selling an unsafe product.

One more concern that is most often mentioned in this regard is privacy. In terms of damage and privacy as a protected right, it is obvious that possible harm to humans does not have to be physical. Thus, it is easy to imagine why smart technologies raise unprecedented privacy concerns. Smart devices of all sizes and shapes are equipped with the ability to magnify the human capacity to observe by sensing, recording, and processing the world around them; they have perfect memories, are tireless, and cannot be embarrassed; for example, household robots help us with vacuum cleaning, lawn-mowing, window-cleaning, or even more delicate and sensitive tasks such as playing with children, taking care of pets, or preparing food or drinks. Since many household robots come equipped with sensors like cameras and microphones, it is obvious that they can be transformed into spying devices or other malicious tools used for

invading one's privacy and intimacy; moreover, recent studies show that these products are vulnerable to technological attacks. Therefore, if, as it is predicted, robots will soon attain the prevalence and utility that personal computers possess today, this could have profound implications for household privacy. The problem appears even more serious if one takes into consideration the development of nano-robotics, given that their small size makes them invisible to human eyes.

Furthermore, smart technologies are increasingly based on artificial intelligence (AI) technology and possess human-like skills such as learning, speech recognition, automated reasoning, sensing, interaction, problem solving, and creativity. Therefore, eventually every smart device will be able to exhibit at least some degree of autonomy due to advances in artificial intelligence technology. Where human involvement in the decision making of AI is obvious, there is no need to re-examine legal regulation, because those companies currently manufacturing devices with AI are already subject to a well-developed doctrine of product liability, for example, toys, cars, or kitchen appliances. However, researchers argue that the extant product liability legal framework is likely to become inadequate, as commercially available AI machines become more sophisticated and autonomous, eventually blurring the lines between the responsibilities of manufacturers and those of users.

Another aspect of smart technologies that profoundly influences consumer rights is the growing availability of smart technologies, such as drones for example, to the broad public, and the development of participatory models in the economy and other social spheres, including law. Social networks (Facebook, Twitter, Instagram), the sharing economy (Uber, Airbnb, Task Rabbit), and cryptocurrencies (Bitcoin, Ethereum) are but a few examples of this phenomenon.

VI. THE CHALLENGE OF REGULATORY UNCERTAINTY

The aforementioned challenges related to the unpredictability of crises, shifting to digital spaces, and growing impact of smart technologies leads us to the issues of functioning in regulatory uncertainty and inadequate or insufficient legal regulation. The legal system commonly divides legal categories into certain binary systems; for example, public vs. private, business vs. personal, labour vs. professional, manufacturer vs. consumer, commercial property vs. personal property, and so on. However, in the context of smart technologies, digital spaces, and an unpredictable, changing environment, these regulatory schemes often do not correspond to reality, as quasi-professional, quasi-commercial, quasi-public legal relationships emerge whose regulation takes place in the so-called "grey zone."

For example, in case e3K-3-305-378/2021, the court was discussing the legal issue of whether a natural person who has not declared his commercial activity but has actually engaged in a commercial activity must be considered an entrepreneur. The Supreme Court ruled that the concept of trader (entrepreneur) is defined very broadly in European Union law and includes any natural or legal person who carries out a commercial activity. The court also stated that a natural person who has not declared his commercial activity but has actually engaged in it (even illegally) must be considered an entrepreneur and cannot rely on the fact that he was by law not recognized as such.

Thus, most current legal instruments are arguably too slow and ineffective for regulating our transformative society. According to Milleire Hildebrant, modern law emerged in a culture of print and remains firmly wedded to the medium of text. However, legal concepts and instruments, which were developed in a print culture, may be ineffective in the internet age.[20] According to Alexander Bart, language as information technology is society's most important instrument of power balance. The internet has created the foundations for a new paradigm, and increased the quantity of information available in society to a revolutionary extent, which in turn has created entirely new social hierarchies.[21]

As long as futurists, artists, and academics are modelling the scenarios for the impact of these transformations on society, culture, law, etc., it is clear that businesses and even states can gain an advantage if they are prepared to benefit from these changes. If the law is not technologically neutral and is sensitive to its technological mediators, one might ask how the institution of law will change in this new paradigm of society. In other words, how are smart technologies able to change legal regulation? One might also ask whether traditional hierarchical regulatory models with a wide scope may be replaced by decentralized, soft, inclusive governance tools as well as foresight instruments.

VII. CONCLUSIONS

1. In March of 2020, due to the threat of the Covid-19 virus, many countries introduced lockdowns and a number of restrictions for business and public life. During the quarantine period, sales and services largely shifted to a remote mode. This situation naturally led to an increase in consumer complaints. The Lithuanian government, like authorities in other countries around the world, sought urgent measures to save jobs and local economies by helping the most vulnerable business sectors deal with quarantine problems. Some legislative initiatives were introduced stipulating that under special circumstances, such as the coronavirus, limitations for the protection of consumer rights (such as vouchers for cancelled travel, prolonged terms of compensation, etc.) would come into effect. Not long afterwards, the European Commission launched infringement proceedings against 10 Member States including Lithuania, as its provisions may violate the rights of passengers established under EU legislation, namely EU Directive 2015/2302 of the European Parliament and the Council of 25 November 2015 on package travel and linked travel arrangements. As a response, seeking to avoid this procedure, Lithuania rescinded the regulation.
2. As during the quarantine period, contracts, sales, and services for the most part shifted to online venues, customers often complained about unfair terms of such online contracts because they had no possibility to negotiate or otherwise influence their clauses. Furthermore, as in most cases, online contracts are excessively long and complex, and so customers are discouraged from reading the terms. This raises the question of the consumer's lack of meaningful consent. Because of the asymmetries of knowledge and power between parties to the contract – the corporation and the customer – online contracts could be regarded as a moral and democratic degradation of the rule of law and the institution of contract.

3. One more related challenge to the digitalised society of recent years for customers is the risks stemming from smart devices and/or smart technology-based services. Customers, using these products and services, complain about lack of information, unclear or imbalanced responsibility for damage in the event of improper exploitation, and risk of lost or stolen personal data. In terms of privacy as a protected right, it is obvious that possible harm to humans does not have to be physical, and so smart technologies raise unprecedented privacy concerns. Furthermore, smart technologies are increasingly based on artificial intelligence (AI) technology, with its human-like skills such as learning, speech recognition, automated reasoning, sensing, interaction, problem solving, and creativity. Also, the growing availability of smart technologies to the wider public and the development of participatory models in the economy and other social spheres such as social networks (Facebook, Twitter, Instagram), the sharing economy (Uber, Airbnb, Task Rabbit), and cryptocurrencies (Bitcoin, Ethereum) are also challenging the system of customer protection. However, the extant legal framework related to product liability is likely to become inadequate as commercially available AI machines become more sophisticated and autonomous, eventually blurring the lines between the responsibilities of manufacturers and sellers and those of users.

4. Covid-19 is unfortunately only one of a number of recent major global crises. The war in Ukraine, the energy crisis, the digitalization of services and products, climate change, massive migration, inflation, are other crises and challenges that have touched each of us and will further influence our lives in the immediate and long-term future. The unifying factor of these crises and challenges is unpredictability. On the one hand, a contract, including consumer contracts, should create security and predictability for both parties. However, when the world is hit by various crises at the same time, states and businesses may not always be able to bear the full cost of a crisis.

5. The challenges related to the unpredictability of crises, shifting to digital spaces and the growing impact of smart technologies, for example, generate issues related to functioning in regulatory uncertainty and inadequate or insufficient legal regulation, and to the idea that legal concepts and instruments, which were developed in a print culture, may be ineffective in the internet age.

[2] “Perlas Energija Naikina Fiksuotus Planus, VERT Pespėja Laikytis Sutarčių Sąlygų - Verslo Žinios”, <https://www.vz.lt/pramone/energetika/2022/08/05/perlas-energija-pasirinkusieji-fiksuotas-kainas-bus-perkelti-i-kintamos-kainos-plana>.

[3] Fresh Media, “About Service | State Consumer Rights Protection Authority,” About Service | State Consumer Rights Protection Authority, accessed August 19, 2022, <https://www.vvtat.lt/en/about-service/541>.

[4] Case A-204-756/2019

[5] For example in case e2A-119-544/2021 the plaintiff entered into a tourism services contract with the defendant travel provider, according to which the plaintiff's family of four individuals had to go to a Turkish resort. The plaintiff paid for the trip. As a result of the Covid-19 pandemic, all the trips were cancelled and the plaintiff's trip to Turkey did not take place. The plaintiff sent an email to the defendant requesting a refund, but his money was

not refunded. In this case the Court of Appeal overruled part of the decision of the court of first instance by which the defendant was ordered to refund the money no later than 90 days from the date on which the restrictions which made it impossible to perform the tourism services agreement disappeared. The court stated that the provision of Paragraph 5 of Article 6.751 of the Civil Code of the Republic of Lithuania, which establishes a three-month refund period, is incompatible with Directive 2015/2302 and in principle contradicts its provisions. The defendant was required to honour the contract and to refund money paid for the trip within 14 days of the termination of the contract.

[6] Fresh Media, “Pandemijos laikotarpiu - rekordinis vartotojų skundų skaičius | VVTAT,” Pandemijos laikotarpiu - rekordinis vartotojų skundų skaičius | VVTAT, accessed August 19, 2022, <https://www.vvtat.lt/informacija-vartotojams-koronaviruso-laikotarpiu/677/pandemijos-laikotarpiu-rekordinis-vartotoju-skundu-skaicius:1413>.

[7] Resolution of the State Consumer Rights Protection Agency in the case “Del UAB “Silicio biotechnologijos,” 2020-08-20 No. 12R-44; Resolution of the State Consumer Rights Protection Agency in the case “Del UAB “Mosus,” 2020-06-10 No. 12R-30;

[8] Law on Consumer Rights Protection/ Lietuvos Respublikos vartotojų teisių apsaugos įstatymas (Žin., 1994, Nr. 94-1833; 2000, Nr. 85-2581; 2007, Nr. 12-488)

[9] “Vartotojų teisių tarnyba: 'Perlas Energijos' sutarties sąlygos nesąžiningos,” lrt.lt, accessed August 11, 2022, <https://www.lrt.lt/naujienos/verslas/4/1758635/vartotoju-teisiu-tarnyba-perlas-energijos-sutarties-salygos-nesaziningos>.

[10] The company “Perlas Energija” has informed all customers that as of August 31 of 2022, it is ceasing its activities as an independent electricity supplier. “Nepriklausomas energijos tiekėjas 'Perlas Energija' nutraukia veiklą: ESO pataria, ką daryti toliau,” 15min.lt/verslas, accessed August 22, 2022, <https://www.15min.lt/verslas/naujiena/energetika/nepriklausomas-energijos-tiekejais-perlas-energija-nutraukia-veikla-eso-pataria-ka-daryti-toliau-664-1918110>.

[11] Cases e3K-3-130-611/2021, e2A-873-330/2021, and e3K-3-337-403/2021.

[12] In case e3K-3-337-403/2021, the court ruled that clause 135.9 of the insurance rules stipulates that the consumer (policyholder) must prove that he will restore the destroyed property in the future and the obligation of the entrepreneur (insurer) to honour the contract depends only on the will of the entrepreneur; the insurer decides unilaterally whether the policyholder has proved that he will restore the destroyed property in the future. In addition, the court noted that such a provision gives the entrepreneur (insurer) the exclusive right to interpret the contract; the policyholder must prove to the insurer that he will restore the buildings that were destroyed during the insured event, and the insurer has the exclusive right to decide whether this evidence is sufficient. Therefore, the procedure for calculating and paying the insurance benefit depends exclusively on the will of one of the parties of the contract: the insurer. Additional conditions imposed by the insurer when such a method of calculating the indemnity cannot be applied and the nature of such insurance protection not properly disclosed to the consumer distorts the balance of rights and interests of the parties to the detriment of the consumer.

[13] In case, e2A-873-330/2021, the court found that the Property Insurance Rules provide for two methods of compensation to the policyholder for damage to the property, but the unilateral right to choose the method of compensation belongs to the insurer. In one or another method of compensation, the amount of the insurance benefit differs significantly. In the case of indemnity by way of monetary compensation, the insurance indemnity is calculated from the replacement value of the building minus the amount corresponding to the depreciation of the damaged building before the insured event. When applying the indemnification by way of restoration of the building, the degree of depreciation of the building is not calculated. The court found that the provisions of the Property Insurance Rules, gives the insurance company an absolute and unconditional right to choose one or another method of compensation and the amount of the insurance benefit may vary several times depending on the insurer's unilateral choice of the method of compensation. Moreover, the policyholder who is the consumer can have no influence on the choice of insurance company.

[14] In case e3K-3-130-611/2021, the court found that the contractual clause for the plaintiff to install an additional car security system was set out in the annex to the insurance policy and not in the insurance contract (or insurance policy). The court held that the condition relating to the installation of the additional security system set out in the annex to the insurance policy had not been individually discussed and that the applicant could not influence the preparation of that condition. The plaintiff was provided with a standard contract and was not told

how the installed factory security system correlated with the requirement to install an additional vehicle security system and how that alters the terms of the insurance contract. For that reason, the court considered that the condition relating to the installation of the additional vehicle security system set out in the annex to the insurance policy had not been properly explained to the applicant and had not been expressed in a clear and comprehensible manner.

[15] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: PublicAffairs, 2020), 51–53, 209–11.

[16] Zuboff, 52.

[17] Zuboff, 209–11.

[18] Zuboff, 211.

[19] In case e2A-772-794/2021, the defects of the goods were caused by the buyer (consumer) who improperly maintained the purchased goods; however, the court found that the product provider who has failed or improperly fulfilled the obligation to provide information about maintenance of the goods to the consumer shall be liable for the losses incurred by the consumer despite the fact that defects of the goods appeared because of the consumer's improper care of the product.

[20] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Cheltenham, UK: Edward Elgar Publishing, 2015), 140-218.

[21] In terms of the impact of language technology on societal development, Bart argues that feudalism began with the emergence of written language, which was invented and started to develop more than 5,000 years ago. It was at this time that the world was also blessed with the first formalised world religions—Zoroastrianism, Brahmanism, Buddhism, Jainism, Taoism, and Judaism—and the first documented philosophy. With capitalism came the golden age of the printed and mass-distributed ideologies. Capital was set in motion after the breakthrough of the bank note press in the seventeenth century. With the arrival of capital, for the first time in history the symbol became even more important than what it claimed to represent. Capitalism's industries also demanded a constantly increasing level of education among the general public. However, when the internet arrived with full force in the late 1980s and early 1990s, that society was endowed with an environment in which holism and generalism were fostered at the expense of the academic world's atomism and specialism. The informationist paradigm was characterised by a narrative of the developing information, communication, and network society, by interactivity as the dominant form of communication, by the cyber world as the geographical arena, and by attention rather than capital as the driving force of the economy. Alexander Bard and Jan Soderqvist, *Syntheism: Creating God in the Internet Age* (Stockholm: Stockholm Text, 2014), 58-79.

SOME NEW NUANCES OF FAIRNESS IN CONSUMER LAW THE CASE OF PROTECTING CONSUMERS' PERSONAL DATA

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Summary

A new trend where consumer law applies also in cases where traders process consumers' personal data in order to create direct revenues has appeared the last few years, even though in the EU the main instrument for regulating the processing of personal data has been the General Data Protection Regulation and its predecessor Data Protection Directive. In this Chapter I aim to elucidate how this new trend may open for some more social considerations in the area of consumer law.

Keywords

Fairness, unfair terms, unfair practices, data protection.

I. INTRODUCTION

“Personal data is the currency of today’s digital market”.[1] This phrase, used by the former EU-Commissioner Viviane Reding in 2012, summarises how personal data has been re-conceptualised in the 2010’s. I use the word “reconceptualise” here for two reasons. Firstly, even though personal data have been used by traders since the beginning of the Internet-era – and even before it – as a means to generate revenues,[2] it is only the last ten years where the idea of personal data as a valuable asset, oil,[3] *commodity*,[4] the *raw material* for added value services,[5] the ‘blood in the veins of the digital economy’,[6] money,[7] *counter-performance*[8] and the likes became mainstream – at least in Europe. This economic importance of personal data for the European market has also been depicted in a number of contemporary existing[9] and proposed EU legislation[10].

Secondly, the processing of personal data in the EU in general has traditionally been regulated under the data protection law framework.[11] Even though the market aspects of this framework cannot be overseen, it is also evident that this framework has mainly been based on fundamental rights considerations. The previous Data Protection Directive (DPD) was adopted on the internal market basis, something that clearly indicates that the legislator regarded personal data as a matter related to the market and in that sense the economic importance of personal data was also recognised. However – and regardless of the fact that the successor of the DPD, the General Data Protection Regulation (GDPR), is not based on the internal market basis but on the Charter of Fundamental Rights of the EU – the discourse regarding data protection as an area of EU law has since its beginning focused primarily on the fundamental rights aspects of data protection.[12] Conceptualising, however, personal data not merely as something relevant for the market but more specifically as some kind of commodity, money, asset and the likes, that is provided by one market actor (the consumer) to another (the trader) opens up for regulating this transaction – also – by economic law, and in particular consumer law.

It is therefore not a surprise that consumer law has lately been used rather extensively in order to address matters related to the processing of consumers’ personal data. A number of European consumer authorities have decided for example that specific commercial practices should be regarded as unfair because traders mislead consumers to provide their personal data which are then monetised; or that privacy policies are not transparent and therefore unfair since consumers have allegedly accepted to provide their data for monetisation without knowing that their data are monetised or having fully understood the consequences of such processing. [13] The Commission has also focused on this matter especially with regard to the application of the UCPD;[14] and some national courts have also ended up to the same conclusion, namely that consumer law should apply directly in case of processing of personal data.[15] A great deal of literature also points towards this way.[16]

II. CONSUMER LAW ENTERING THE PROTECTION OF CONSUMERS' PERSONAL DATA

Even though in Europe matters related to the protection of personal data has not traditionally been approached through consumer law, there seems nevertheless to exist many similarities between EU consumer law and data protection law that have probably led to this new trend of using consumer law for matters related to personal data.

The first attempts at data and consumer protection legislation appeared approximately at the same time, in the 60's and 70's,[17] and since then these areas of law have been developing in parallel. They were both created in order to protect a weaker party from a stronger party; they have both been affected by the social justice movement focusing on power imbalances as well as liberalism ideologies aiming at the freedom of choice; and they both seem to use as an overarching, main normative principle the one of fairness, understood both with regard to its procedural and substantive aspects, namely fairness related to the process of making decisions as well as to the outcomes of such decisions.[18]

In data protection law, the GDPR – as did the DPD previously – explicitly refers to the principle of fairness that has to be taken into consideration when personal data is processed. Fairness is actually the only principle under that GDPR that is also found as one of the two main requirements for data processing in the Charter – the other being the provision of consent.[19] It is, therefore, rather righteously stated that fairness is the only overarching principle in the GDPR and therefore all other principles and requirements found therein should be understood in the context of fair processing.[20]

However, fairness is also the main normative requirement under consumer law. In the beginning of the 1990's the UTD[21] explicitly dictated that terms in consumer contracts must be fair. A decade later the UCPD also asked for all commercial practices that are directed to consumers to be fair.[22] These two universally applicable directives, in the meaning that they apply in (almost) all consumer contracts as well as commercial practices targeting consumers, follow the same pattern as the similarly universally applying GDPR does: one powerful actor has to act fairly in relation to another less powerful actor. In the context of personal data this could be understood as if traders, being at the same time data controllers, should act fairly when they deploy practices, including the provision of contractual terms, that are related to the processing of consumers' personal data.

However, even though the parallels between consumer and data protection law are not new and have been pointed out in the past, there are some incidents that seem to have ignited the discussion on why consumer law *should* apply for the protection of personal data in general. More specifically, the Cambridge Analytica scandal, which monopolised media for a considerable amount of time in 2018, made clear that while tech giants make high profits by the processing of consumers' personal data these data are grossly misused. At the same time two main pieces of legislation in consumer and data protection law made their appearance, the Digital Content Directive[23] (DCD) and the GDPR respectively. The GDPR, which was adopted in 2016 after a 4 year-long process, brought some important changes in the existing

data protection law framework but at the same time became the target of critique as a highly complicated and difficult to apply piece of legislation;[24] while in 2015, another piece of EU law was proposed, the DCD, which recognized the provision of personal data as some kind of counter-performance/payment,[25] and consequently recognized the processing of personal data when this takes place in order to create direct revenues as a matter relevant to consumer law.[26]

Scholars and authorities started, therefore, especially after 2016, to claim that consumer law and data protection law, both aiming at the common goal of fairness, could and should work synergistically in order to protect consumers when their personal data are processed by traders.[27]

Here, however, we have to make a distinction between three different situations where personal data are relevant for consumer law: a) the processing of personal data is part of the functioning of a product, b) personal data are used in order to manipulate consumers into making purchases and c) personal data constitute a target for traders, namely traders deploy practices, including the drafting of contractual terms, that aim at acquiring these personal data in order to monetise them. The two first situations are within the contours of traditional consumer law, in the meaning that they do not bring any changes in how consumer law is understood until now: consumer law is about regulating the functioning of a product as well as about regulating the behaviour of traders when they try to manipulate the economic decisions of consumers. The last situation, however, related to the processing of personal data as such brings a number of conceptual novelties which I aim to shortly discuss here.

III. THE PROTECTION OF CONSUMERS' ECONOMIC INTERESTS AND THE PROTECTION OF PERSONAL DATA

As it is made apparent by the Treaty on the Functioning of the European Union (TFEU), consumer law is without a doubt an instrument for the protection of consumers' economic interests.[28] What exactly constitutes an economic interest is not explicitly defined, but it goes without saying that a decision on how to spend money is an economic one. In that sense the first two situations mentioned above, are relevant for consumer law as soon as they may affect decisions on whether or not to make a purchase with money. More specifically, when it comes to the processing of personal data related to the economic decisions of consumers, consumer law could provide some additional benefits since data protection law does not care about the contractual relationship as such. For example, what are the rights of a consumer if a smart TV that provides a personalized experience does not function as promised? Similarly, is it fair to manipulate consumers to make specific purchases by processing their personal data or to provide different (personalized) prices based on such personal data? Even though the answer to these questions is not easy, they nevertheless find themselves in the core of consumer law, namely how to regulate the behaviour of traders so that the economic choices of consumers are taken freely and informed.

In these two scenarios, even if we accept that the actual considerations of consumers regarding their data are related to matters of privacy and data protection, such non-economic considerations may affect consumers' economic decisions, namely how consumers choose whether and under what conditions to make a purchase with money. In that sense fairness under consumer law may cover matters related to these economic considerations while the GDPR will cover the mainly societal considerations found under the GDPR.

While, however, in these two situations traders aim to affect how consumers choose to allocate their economic resources, in the third situation, where personal data is regarded as some kind of payment, traders aim at affecting consumers on whether and under what conditions to provide their personal data. The difference here is that the processing of personal data is not merely a factor that may affect how consumers will make economic decisions but instead it is regarded as the object of the economic decision itself.

This has been characterized as a paradigm shift with regard to how we regard transactions that involve the provision of personal data;^[29] and as I will elucidate in this paper it is not only that this new conceptualization changes the way we understand such transactions but, more importantly, it brings a number of novel changes in the way we understand consumer law as such. What I mean here is that this new trend where the processing of personal data is regarded as equal to payments opens for some new interpretations in consumer law mainly related to the notion of fairness, in the meaning that these new interpretations do not exactly follow the traditional interpretations within this area of law. Instead, they ask for some conceptual leaps to be taken.

Even though I have critically examined this new trend in a previous paper and the possible risks for data protection,^[30] the goal here is to focus on how this new trend can lead to a more social-oriented consumer law and present the four main changes that are brought into consumer law exactly because consumer law is regarded as relevant for the protection of consumers' personal data when these data are directly monetized by traders. I will therefore focus on the extended scope of the UCPD and the UTD, the less circumspect persona of the average consumer, and the societal considerations infiltrating procedural and substantive fairness.

IV. A MORE SOCIAL-ORIENTED CONSUMER LAW

1. Expanding the scope

As I stated above, in the core of EU consumer law we find the protection of the economic interests of consumers. Whenever these economic interests are at stake consumer law *should* apply. For that reason, whenever scholars, authorities and courts argue for the use of consumer law in cases where the provision of personal data is regarded as some kind of payment, they refer to the economic value of personal data.^[31] Since personal data have an economic value this value is what constitutes the price of a purchase; simply put the provision of the data is something equal to a payment. Consequently, consumers have an economic interest related to this value the same way they would have an economic interest related to how to spend their money; and such interest should be protected under the regime of the UTD and the UCPD that

aims exactly at securing that consumers take informed and free economic decisions or that their legal obligations, which are also normally translated to some economic value, are not increased in comparison to the obligations consumers would have if the unfair contractual terms did not exist – but instead the default rules would apply.

Even if this argument sounds reasonable it contains, nevertheless, a novel understanding with regard to what constitutes an economic interest for consumers within the meaning of EU consumer law.

The first thing to consider here is that when it comes to the meaning of payments, prices, costs and so on, the CJEU seems to accept that such notions have a “pecuniary connotation”. Similarly, the Advocate General has clarified in a case related to the application of the UCPD that this directive “is concerned with those practices that require consumers to give consideration (i.e. to pay a fee) rather than situations where there is no such economic commitment.”[32] This pecuniary connotation that is needed in order for consumer law to apply was pointed out also by a German court, when it was asked to examine whether a claim of a trader that a digital product was “free” was misleading.[33] We should not forget either that the final text of the DCD explicitly states that the provision of personal data should not be regarded as a counter-performance or a payment exactly because the idea of a counter-performance based on the provision of personal data was found rather unfitting with regard to the data protection tradition in the EU.[34]

By reproducing, however, the argument that there is an economic value of – and therefore an economic interest to – personal data, a new understanding of what constitutes an economic value relevant for consumer law seems to arise, namely a value that cannot directly be correlated to a pecuniary value. Consequently, the notion of economic interests in EU consumer law is defined with a broader meaning since these interests are not only the ones referring to interests related to a pecuniary value but they may also refer to any interest related to a market, for example the one of social media.

This broader understanding of economic interests seems to become apparent if we also examine closer the arguments brought in order to prove that there is an economic value in personal data. These arguments refer primarily not to the economic value or economic importance these data have for consumers, as it would be the case with payments with money, but to the economic value understood as revenues that can be generated by traders in another market, namely the market between traders (B2B).[35] However, this argument merely shows an economic interest from the side of the trader and not of the consumer.

Similarly, a number of considerations related to the economic interests of consumers are actually not economic in nature but rather related to fundamental rights considerations, such as how these data will be used in the future for purposes that are not known to consumers.[36]

For the above reasons, it seems as if the notion of economic interests, a notion of paramount importance for the application of EU consumer law, gets a broader meaning which includes not only considerations related to the allocation of economic resources but to considerations

that are in general related to the markets even if these considerations in the end are anything but economic in the traditional understanding.

2. A less vigilant average consumer

This new application of consumer law also for protecting consumers when their personal data are used as payment seems to have opened for a more pro-consumer interpretation of the persona of the average consumer.

The average consumer has been the main normative persona in consumer law, used explicitly as the yardstick for assessing the unfairness of commercial practices in the EU, and has even infiltrated the assessment of the unfairness of contractual terms.[37] The definition of a reasonably well-informed and reasonably observant and circumspect consumer has been the main paradigm until now. This persona has many times been the target of criticism as being a rather stringent and not as consumer-friendly standard.[38] Even though there have been some cases lately related to product labelling where the average consumer was not expected to read all information provided in a product,[39] the main idea is still that the average consumer is a rather careful consumer that internalizes the information provided to her and has at least some contextual understanding.[40]

More specifically, the CJEU has found that this persona is a rather alert one;[41] while the Advocate General in *Mediaprint* emphasised that the average consumer is an active market actor and therefore the information that is provided to her must be given in a way that makes possible the comparison of products.[42] In the same case, the CJEU found that even if some part of the public is affected by some practice, this is not the decisive factor.[43] The assessment of unfairness based on the average consumer has to find an “appropriate balance between the aim of consumer protection and the need to encourage the movement of goods in an internal market characterised by free competition.”[44] The average consumer should not therefore be understood as a mere protector of consumers.

However, the arguments brought in the case of payments with data reveal another persona, a consumer that is not so much aware of the common commercial practices and who actually does not need information in order to compare products and services but instead in order to understand the future risks related to the processing of her data.

With regard to the common commercial practices, it is rather difficult to believe that the average consumer in 2022 would not know that the business models of online traders that are not based on direct payments by consumers are not either based on the monetisation of their personal data.[45] Even more so, many studies have shown that even though consumers know that their data are monetised they are nevertheless not eager to pay any money instead, something that has been defined as the privacy paradox.[46] Going back to the UCPD and considering a) that information on the traders’ business model has not until now been considered as information that has to be provided to consumers – or differently put it is not information needed – and b) that personal data are not price, payment etc., it is rather interesting

that according to this new trend it is argued that consumers should, nevertheless, get this information.

Similarly, as it is often emphasised, consumers do not normally have the power to change products and services since there is some kind of monopoly of specific digital products, such as social media. Providing therefore information related to how the data are processed after they have been provided is not so much a question of comparing products and services but instead a question of whether consumers may retain some control of their data, a question that is traditionally related to data protection law.[47]

The arguments therefore that consumers are in need of information related to the business models and the processing of personal data in general seem therefore to be more in line with how the average data subject is understood within the discourse of data protection law. More specifically, even though it is true that the persona of the data subject is not well-defined there are some good indications that this persona is a lot less circumspect and vigilant. Fuster has made clear that information on the processing by the trader is not a matter of enabling choice between different actors but one of understanding the purposes.[48] Similarly, the rather stringent framework for valid consent under the GDPR[49] shows that this piece of law is not based on the more rational choice theory model of consumer law, where proper information is enough. Instead, a number of safeguards, among others that the data controller is not in a position of power, have to be in place.

More importantly, the CJEU in *Orange România*, seems to understand the average data subject as a rather lazy, passive individual who probably does not even bother to read the information provided by the data controller related to how her data are to be processed when such processing is related to some product. As the Court stated ‘[i]t is not inconceivable that a user would not have read the information accompanying the preselected checkbox, or even would not have noticed that checkbox, before continuing with his or her activity on the website visited.’ What is interesting here is that even though it is for the national courts to assess if this was the case the Court seems to assume that data subjects do not even read the information concerning the processing of personal data when they enter into a contract for some service – in case of *Orange România* a telecommunication contract.

3. Procedural fairness and structural power

As pointed out above, the average consumer is the main instrument for assessing the unfairness of commercial practices – including the provision of contractual terms. This assessment focuses mainly on what has been characterised as procedural fairness, namely the fairness related to how consumers may take specific decisions. For example, the goal of the UCPD is to make possible the formation of an informed decision – no matter the consequences of such a decision – while the UTD also aims at ensuring procedural fairness, in the meaning that the economic consequences for the consumers have to be made apparent before entering a contract.

According to the UCPD, procedural fairness can be achieved either by providing to consumers the information needed in order to take an informed transactional decision or by avoiding

aggressive practices that affect the decision of consumers.[50] When it comes to payments with data, many scholars and authorities have claimed that a number of practices targeting consumers may unduly influence consumers, while some other practices mislead consumers to take decisions they would otherwise not have taken.[51]

Starting with the matter of undue influence, it is interesting to examine first how the CJEU has interpreted the provisions of the UCPD on undue influence. It is true that there are very few cases on undue influence in order to generalise[52] but, nevertheless, these few cases brought in front of the Court have shown that the main consideration has been how the trader acted in a specific case, or to put it differently the Court has taken a relational approach that lays weight on how the trader acted in a specific situation with the consumers.

More specifically, in *Wind Tre*, the Court examining the practice of promoting SIM cards with pre-installed and pre-activated services found that such a practice is to be regarded as inertia selling under No 29 of the Annex I of the UCPD. However, interestingly enough, the Court proceeded to a full-scale assessment of the unfairness of this practice. The Court related the aggressiveness of this practice to the lack of information provided by the trader, implying therefore that in case the information was provided differently, the outcome could be different. However, in the specific situation the trader acted in a way that was considered unfair. Similarly, in *Purely Creative*, the Court again argued that it is the information provided to consumers that is of importance. The case was about No31 of Annex I of the UCPD and even though the Court actually stated that the question of what impression is created to the consumer is irrelevant it nevertheless argued that information related to the description of a prize is important. Therefore, stating that the prize is an “entrance ticket” creates a different expectation to consumers than a claim that the prize is the “attendance” at an event, since in the latter case the prize indicates also that it includes the transportation. It is therefore the information that defines whether there is a cost – in this case the question was whether the transportation to the event constitutes a cost – or not. Again, the assessment was based on the specific situation. Lastly, in *Orange Polska* the aggressiveness of the practice was based on the fact that a courier, who was present when the consumer received some papers by the trader in order to be signed by the consumer, made specific claims that could affect the consumer. The Court did not find as aggressive the practice that the courier was waiting until the consumer would sign the documents or that the information (the standard-form contract) was not provided beforehand, but the aggressiveness was based on the claims made by the courier.

All in all, the aggressiveness has never been found by the Court to be a matter of structural power, namely whether the trader was a powerful actor in the market (as for example *Orange Polska* was), or whether the consumer had a de facto possibility to turn herself to other competitors. The Court even claimed that a practice where a courier asks “the consumer to take his final transactional decision without having time to study, at his convenience, the documents delivered to him by that courier” is not aggressive in itself. The problem in all cases, according to the Court’s argumentation, was the information provided to consumers by the trader. The judgments were based on how the consumer-trader relationship was developed.

However, the arguments brought by authorities and scholars related to the application of consumer law in cases of “payments with data” focus instead on the structural power imbalances that may lead consumers to take decisions they would otherwise not have taken. Take for example the BEUC-claim against WhatsApp. As it was clearly argued there:

“[a]lthough, in theory, users could decide to turn to other messaging apps, quitting WhatsApp would be at the expense of losing most of their contacts. For many people, leaving WhatsApp is not an option because of the strong network effects and the lack of interoperability with other messaging services. For many, WhatsApp is the main channel for staying in touch with family and friends”.[53]

The reason for finding a practice in the context of payments with data aggressiveness, such as accepting terms of a contract, is based here on the structural power traders have. Similarly, Mulders and Goanta claim that the use of social media, for example, is such ‘an integral part of an individual’s identity’ that there is in practice no possibility to freely choose which social media to use and under what terms since consumers are under the pressure of tech giants. For that reason, they end up claiming that ‘given all the uncertainty relating to the sociological and psychological effects of social media on its users, it is challenging to claim that the UCPD test on aggressive practices is met.’[54] It is the need to remain connected with co-workers, family and friends that provides the trader the possibility to force specific choices on consumers.[55]

This argumentation finds then some practices related to the processing of personal data as aggressive based now not on the specific relational power asymmetry between traders and consumers – because the trader provided some information in a way that might affected psychologically the consumer – but on the structural asymmetries that appear because of the power some traders have in the market. [56] This approach brings then a new understanding on what may constitute an aggressive practice where structural power imbalances are also to be taken into consideration as the main reason why a practice should be regarded as aggressive. Such an approach seems also to shift the focus from the information that is provided to consumers, something that has been a matter of criticism for quite a while now,[57] to the power between the different actors and how this power may make itself apparent. This new interpretation brings then another layer of protection, where the important is not only about how the information provided may have some psychological effects to consumers but more importantly on the factual possibility of the consumer to reject dealings with a trader because of the traders’ power in a specific market.

Interestingly enough, this approach reminds somewhat of the interpretations we find in the context of the GDPR on valid consent, that I also named above. In this case, as the GDPR explicitly states, the EDPB has further clarified, and the Court has elucidated, structural power asymmetries are very important when it comes to the question whether the consent that was provided has been valid or not.[58] More specifically, if for example a data controller asks for consent but an individual cannot in effect reject this proposal, the consent that is provided is not to be considered as valid. This is normally the case when the consent is given for processing conducted by the state or by an employer, but as the EDPB has clarified, any case where there

is a “risk of deception, intimidation, coercion or significant negative consequences (e.g. substantial extra costs)” may deem the consent as not free.[59]

Continuing on the new interpretations on aggressive practices, another practice which until now was not considered *by definition* aggressive under the UCPD, namely the pre-formulated consumer choices, or as more commonly known the pre-ticked boxes, seems now to be regarded as such.[60] More specifically, the Court has not until now regarded default options as a by definition aggressive practice; as it was shown above in *Wind Tre*, even if the Court claimed that the practice in question there constituted inertia selling and was therefore found as unfair under No 22 of the Annex I, it was the information provided to consumers in combination with the psychological effect of such a practice that actually led to the finding that pre-installed and pre-activated SIM-cards constitute inertia selling. The only default option that has by definition been considered as unfair in consumer law is the case of additional payments, since according to Article 22 of the CRD traders are not allowed to pre-make a decision for consumers to pay additional payments; or alternatively put, in case of pre-ticked boxes for additional payments, such choices do not constitute a valid consent to the terms in question. However, it is now claimed that, in general, pre-ticked boxes related to the processing of personal data should by definition be considered as aggressive practices.[61]

Therefore, the application of consumer law for the protection of personal data seems to bring some non-economic considerations to the notion of transparency, or alternatively some considerations that are not merely related to the rights and obligations of the parties between each other but considerations related to the fundamental rights of consumers and how the life of consumers may be impacted in the future in general.

4. Substantive fairness and fundamental rights

Like the case of procedural fairness, the application of consumer law for regulating the processing of personal data in case of payments with data has also the potential to bring some changes to substantive fairness. This type of fairness has traditionally been related to the outcomes following the choice of consumers. As already pointed out the UCPD has not focused on such matters since it understands as by definition bad that consumers did not take an informed decision, without however caring about the consequences of this decision; even decisions that lead to negative outcomes for consumers are fair according to the UCPD as long as they have been taken freely and they are informed. However, the UTD adds another layer of protection since it assumes that even informed choices may be unfair if they lead to a significant imbalance to the detriment of consumers.[62]

Substantive fairness under the UTD seems to be based on two main requirements: a) the trader has not acted in good faith and b) this action has led to a significant imbalance to the detriment of consumers. With regard to the good faith requirement, this has been understood as the so called “possible agreement test”.[63] This test is about assessing whether the trader would expect that the consumer would accept the terms if she had the opportunity to negotiate them. However, the most important criterion is the one of significant imbalance to the detriment of

consumers. This criterion, starting with *Aziz*, has primarily been assessed by the Court by examining what default rules would apply if the term did not exist. If the default rules would lead to a more beneficial outcome for consumers the terms in question should be regarded as unfair. The court further defined this criterion in *Constructora Principado* by stating that the significance of the imbalance is not to be measured by a mere economic evaluation “between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause”, but instead one has to examine whether the rights consumers would have according to the national default rules are restricted, if the terms of the contract place a constraint on exercising those rights or if ‘an additional obligation not envisaged by the national rules’ is imposed on consumers.

However, when it comes to personal data the default rules that would apply if the terms related to the processing of personal data did not exist are in fact the obligatory rules under the GDPR. In contract law, terms that are against obligatory legislation are normally found to be invalid and are therefore not to apply. Moreover, such invalid terms cannot lead to significant imbalance exactly because they are invalid and consequently consumers have an effective way to avoid their application. By claiming, however, that terms against the GDPR are also to be regarded as unfair, a new understanding is created under the UTD where it is not only that the unfairness of contractual terms may lead to their invalidity but also that invalid terms may lead to their unfairness.

Similarly, the matter of significant imbalance has until now been regarded as a matter of imbalance between the rights and obligations between consumers and traders. As stated above, the typical example used by the CJEU has been the additional obligations put upon the consumer that were not envisaged by the legislator in the default rules that would apply if the terms did not exist. In the case of payments with data it has often been used as an argument that such unfairness between the rights and obligations of the parties arises when traders ask for extensive processing or when consumers are obliged to provide data but traders accept no, or fewer, obligations. Disregarding the fact that in a free market it is rather difficult to examine what constitutes a fair price when neither the performance nor the counter-performance have a predefined value, I find it rather problematic to keep such a narrow understanding of unfairness when it comes to the processing of personal data.

In a study for the JURI committee Loos and Luzak claimed for example that such an imbalance could arise if traders would “adopt terms excluding or limiting their liability for the quality and continuity of the provided services [] or for the security of the consumers’ data”.[64] A problem that arises here if one adopts a traditional understanding of consumer transactions is that the expectations of consumers related to a product are connected to the price.[65] If we now combine this with the fact that the personal data of one person have a rather low economic value,[66] this means that the expectations of consumers with regard to a product that is purchased with personal data should not be high either. In that sense it would be acceptable for a low value obligation by the consumer to be met by a low value obligation by the trader.

However, when it comes to the effects contractual terms related to the processing of personal data may have on consumers it makes more sense to accept such unfairness when we regard

the value of aggregated data and the value data have for society as a whole. In that sense, expectations are created not because of the value of each consumers' personal data in one transaction but because the value of the aggregated data of a large number of consumers is high; and additionally, and more importantly because of the importance of personal data for society in general it is expected that the economic value of a digital product or service should be equal to this high social value of personal data.

Societal considerations have for long time been within the discourse of consumer law.[67] However, except for the situations where the Court examined whether the consumer protection framework was effective or not, fundamental rights considerations have not been used by the Court for the assessment of the unfairness of contractual terms as such.[68] This interpretation can therefore open the road for an understanding of the “significant imbalance” requirement that is in line with the understanding of consumer law recommended by the proponents of the idea of social justice in contract law.

V. FINAL THOUGHTS

As I already pointed out, I am rather sceptical when it comes to the application of consumer law for regulating the processing of personal data when this processing is understood as some kind of payment.[69] However, if consumer law is to apply even in this case, the above analysis shows that the introduction of “payments with data” in consumer law may open up for some novel and interesting interpretations that could change the way we understand consumer law and finally make possible the use of social considerations when it comes to the assessment of fairness in consumer law.

Most importantly, even if the arguments on why to apply the UCPD and the UTD when traders process personal data in order to create direct revenues, still use to an extent the narrative of the economic value provided by consumers to traders and the need for protecting the interests related to such a value, the fact that personal data are strongly connected to fundamental rights considerations opens up for the inclusion of such considerations in consumer law.

[1] V. REDING, ‘President of the European Commission, EU Justice Commissioner - The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age Innovation’ (European Commission, 22 January 2012) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_26 > accessed 11 July 2022.

[2] See here in general G. González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU*, Springer 2014, p. 34, where it is presented that a number of national attempts to data protection in the beginning were very much related to the protection of individuals from private entities, presumably because these data could be used in order to create revenues. Similarly, the very influential “OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data” in the 1980’s were also focusing on the importance of personal data as an element of the international market.

[3] World Economic Forum, "Personal Data: The Emergence of a New Asset Class" (2011); World Economic Forum, "Unlocking the Value of Personal Data: From Collection to Usage" (2013). See also William D Eggers, "Data as the New Currency" (*Deloitte Insights*, 24 July 2013) <<https://www2.deloitte.com/us/en/insights/deloitte-review/issue-13/data-as-the-new-currency.html>> accessed 6 December 2021; Simon Taylor, 'Data: The New Currency' (2014) <<https://www.politico.eu/wp-content/uploads/2014/10/Data-report.pdf>> accessed 6 December 2021. For a legal overview on the commercialization of data see Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools: Münster Colloquia on EU Law and the Digital Economy III*, 1st edition, Nomos, 2017.

[4] H. ZECH, 'Data as a Tradeable Commodity—Implications for Contract Law'; 'The World's Most Valuable Resource Is No Longer Oil, but Data' [2017] *The Economist* <<https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>>.

[5] M. V. LIESHOUT, 'The Value of Personal Data' in Jan Camenisch, Simone Fischer-Hübner and Marit Hansen (eds), *Privacy and Identity Management for the Future Internet in the Age of Globalisation*, vol 457, Springer International Publishing, 2015, <http://link.springer.com/10.1007/978-3-319-18621-4_3> accessed 17 September 2018.

[6] S. LOHSSE, R. SCHULZE and D. STAUDENMAYER (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools: Münster Colloquia on EU Law and the Digital Economy III*, 1st edition, Nomos, 2017, p. 15; Recital 13 of the 'Proposal for a Directive of The European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content COM(2015) 634 Final'.

[7] Recital 13 of the 'Proposal for a Directive of The European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content COM(2015) 634 Final'.

[8] 'Proposal for a Directive of The European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content COM(2015) 634 Final'.

[9] Recital 6 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 (hereinafter the GDPR). See also the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter the DPD).

[10] Data Act, Data Governance Act, Digital Services Act and Digital Markets Act.

[11] The previous DPD and its successor the GDPR as well as the Charter of Fundamental Rights of the European Union (hereinafter the Charter).

[12] See O. LYNSKEY, *The Foundations of EU Data Protection Law*, Oxford University Press, 2016. *ProQuest Ebook Central*, as well as Case C-139/01 Österreichischer Rundfunk and Others [2003] ECR I-4989 where it was declared that 'insofar as [the provision of the DPD] govern the processing of personal data liable to infringe fundamental freedoms ... [they] must necessarily be interpreted in light of fundamental rights'..

[13] Hungarian Competition Authority, 'Competition Proceeding against Google Is Closed with Commitment Decision' (GVH, 31 August 2018) <gvh.hu/en/press_room/press_releases/press_releases_2018/competition_proceeding_against_google_is_closed> accessed 15 March 2021, Commission, 'Facebook Changes Its Terms and Clarifies Its Use of Data for

Consumers' (4 September 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048> accessed 16 March 2021, Italian Competition Authority, 'Facebook Fined 10 million Euros by the ICA for Unfair Commercial Practices for Using Its Subscribers' Data for Commercial Purposes' (2018) Press Release <<https://en.agcm.it/en/media/pressreleases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfaircommercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercialpurposes>>

accessed 16 March 2021

[14] Commission, 'Staff Working Document - Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices - Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

Committee of the Regions - A Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses' COM(2016) 320 final <<https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN>> accessed 20 May 2021.

[15] Tribunal de Grande Instance de Paris, N° RG 14/07300 (n 30); Tribunal de Grande Instance de Paris jugement du 9 avril 2019; Tribunal de Grande Instance de Paris jugement du 9 février 2019, LG Frankfurt aM, Urteil vom 10.06.2016 – 2-03 O 364/15

[16] M. RHOEN, 'Beyond Consent: Improving Data Protection through Consumer Protection Law', 2016, 5 Internet Policy Review <<https://policyreview.info/node/404>> accessed 16 March 2021; N van Eijk, C Jay Hoofnagle and E Kannekens, 'Unfair Commercial Practices', 2017, 3 European Data Protection Law Review 325; Natali Helberger, Frederik Zuiderveen Borgesius and Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law', 2017, 54 Common Market Law Review 1427; Natali Helberger and others, 'Surveillance, Consent and the Vulnerable Consumer. Regaining Citizen Agency in the Information Economy', EU Consumer Protection 2.0 - Structural Asymmetries in Digital Consumer Markets, BEUC, 2021; BJ Koops, 'The Trouble with European Data Protection Law', 2014, 4 International Data Privacy Law 250.

[17] With regard to consumer law, the first piece of law related to consumer protection has been the Consumer Bill of Rights in the 1962 after the famous speech by Kennedy about the need to protect the consumer, 'President Kennedy: Consumer Bill of Rights, March 15, 1962 – Chris Hoofnagle | UC Berkeley School of Law, School of Information' <<https://hoofnagle.berkeley.edu/2015/05/07/president-kennedy-consumer-bill-of-rights-march-15-1962/>> accessed 25 March 2021. See also Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2nd ed, Hart 2007, p. 2. Similarly in Europe, even though we find some mention to consumers in the Treaty of Rome in 1957, it was after 1975, the soft law initiative, the Council Resolution of 14 April 1975 – the First Consumer Protection Programme, that brought consumers to the forefront. After the Treaty of Maastricht in 1993 a clear policy for consumer protection was defined and a number of directives were adopted, such as the UTD. Similarly, when it comes to data protection law, even though the first national attempts to data protection legislation can be traced back to the 1970's and in the 1980's the OECD Guidelines and the Council's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) emphasised the importance of data protection law in general the first data protection legislation in the EU was adopted, the DPD, was adopted in the mid 1990's...

[18] For data protection law see Damian Clifford, 'The Legal Limits to the Monetisation of Online Emotions', doctoral thesis, 2019; Damian Clifford, Inge Graef and Peggy Valcke, 'Pre-Formulated Declarations of Data Subject Consent—Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections', 2019, 20 German Law Journal 679, while for consumer law see for example Bradgate R, Brownsword R and Twigg-Flesner C, 'The Impact of Adopting a Duty to Trade Fairly', Department of Trade and Industry, Consumer and Competition Policy Directorate, 2003.

[19] Article 8(2) of the Charter.

[20] D. CLIFFORD, 'The Legal Limits to the Monetisation of Online Emotions', doctoral thesis, 2019.

[21] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29

[22] 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 [2005] OJ L 149/22.

[23] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services

[24] BJ KOOPS, 'The Trouble with European Data Protection Law', 2014, 4 International Data Privacy Law 250

[25] 'Proposal for a Directive of The European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content COM(2015) 634 Final' <http://ec.europa.eu/justice/contract/files/digital_contracts/dsm_digital_content_en.pdf> accessed 25 January 2017. The proposal contained the term counter-performance while the final text abandoned this term. However, the framing of the final text creates a clear connotation between paying with money and paying with personal data.

[26] However, for the DPD the processing of personal data is only an enabler for its application, meaning that if personal data are processed, consumers should have some protection related to the product that is “purchased” with these data while any matters of data protection are to be regulated under the data protection law framework

[27] It is indicative that before 2012 it is difficult to find any references to consumer law with regards to personal data – except for a case in Italy where the national consumer protection authority found that an advertisement regarding a free subscription to online services is misleading on the grounds that it ‘omitted to specify those terms of use, which played a significant role in the overall evaluation of the convenience of the offer’ AGCM, PI2686 – Libero Infostrada [2000] Provvedimento n 8051; while it is also very difficult to find any literature on the matter before 2016.

[28] Article 169 of the TFEU

[29] A. METZGER, ‘Data as Counter-Performance: What Rights and Duties for Parties Have’, 2017, 8 J. Intell. Prop. Info. Tech. & Elec. Com. L. 2

[30] A. KOTSIOS, *Paying with Data: A Study on EU Consumer Law and the Protection of Personal Data*, Doctoral thesis, 2022.

[31] Commission, ‘Staff Working Document - Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices - Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe’s Citizens and Businesses’ COM(2016) 320 final <<https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52016SC0163&from=EN>> accessed 20 May 2021, para 88-89; Hungarian Competition Authority, ‘Competition Proceeding against Google Is Closed with Commitment Decision’ (GVH, 31 August 2018) <gvh.hu/en/press_room/press_releases/press_releases_2018/competition_proceeding_against_google_is_closed> accessed 15 March 2021.

[32] Opinion of Advocate General Sharpston in Case C-515/12 ‘4finance’ UAB v Valstybinė vartotojų teisių apsaugos tarnyba and Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos [2013] EU:C:2013:868 para 32.

[33] See, however, the decision of the Italian Council of State that ended up to the opposite outcome, namely that such a practice constitutes a misleading practice, Consiglio di Stato, esenzione 6, IT:CDS:2021:2631SENT.

[34] The connotations created because of the framing are of course impossible to disregard but nevertheless the legislator was very careful to not define the provision of personal data as a counter-performance and neither did it indicate a specific type of contract that should be adopted by MS.

[35] European Commission ‘Staff Working Document - Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices - Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe’s Citizens and Businesses’ COM(2016) 320 final, pp 88-98; Hungarian Competition Authority, ‘Competition Proceeding against Google Is Closed with Commitment Decision’ (GVH, 31 August 2018) <gvh.hu/en/press_room/press_releases/press_releases_2018/competition_proceeding_against_google_is_closed> accessed 15 March 2021

[36] N. HELBERGER, F. Zuiderveen Borgesius and A. Reyna, ‘The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law’ (2017) 54 Common Market Law Review 1427. See also Michiel Rhoen, ‘Beyond Consent: Improving Data Protection through Consumer Protection Law’, 2016, 5 Internet Policy Review where even if the author makes a case for the use of consumer law in case personal data are processed as a payment he nevertheless talks about privacy and data protection considerations.

[37] See Case C-26/13 .rp.d Kásler, Hajnalka K.slern. R.bai v OTP Jelz.logbank Zrt [2014] EU:C:2014:282, Case C-348/14 Maria Bucura v SC Bancpost SA [2015] EU:C:2015:447, Case C-143/13 Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA [2015] EU:C:2015:127 referring to the same consumer as the one in the UCPD, the reasonably well-informed and reasonably circumspect consumer.

[38] S. WEATHERILL, 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation' (1999) 36 Common Market Law Review 51, 69–70, Geraint Howells and Gert Straetmans, 'The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection' (2017) 9 Perspectives on Federalism E, 200 with references.

[39] Case C-195/14 Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Teekanne GmbH & Co KG [2015] EU:C:2015:361

[40] See for example Böhler when commenting the *Purely Creative* (Case C-428/11 *Purely Creative Ltd and Others v Office of Fair Trading* [2012] EU:C:2012:651) where the Court took into consideration the actual behaviour of a consumer, emphasized that we cannot draw the conclusion that the Court pictures the consumer differently than it did before, as a casual consumer or an "impressionable idiot"; Christian Böhler, 'A Thin Line between the Rationalization of Consumer Choices and Overburdening Market Participants. Are the Courts Able to Keep the Balance?' (2015) 10 European Food and Feed Law Review 34.

[41] Case C-122/10 Konsumentombudsmannen v Ving Sverige AB [2011] EU:C:2011:299.

[42] Opinion of the Advocate General Trstenjak in *Pereničová*, in Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Österreich'-Zeitungsverlag GmbH* [2010] EU:C:2010:161 para 99

[43] Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Österreich'-Zeitungsverlag GmbH* [2010] EU:C:2010:660

[44] Opinion of Advocate General Trstenjak in Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Österreich'-Zeitungsverlag GmbH* [2010] EU:C:2010:161 para 102

[45] Remember for example that in 2018 that the US Senator Hatch was mocked when he asked Zuckerberg '[s]o, how do you sustain a business model in which users don't pay for your service?' and received the answer 'Senator, we sell ads' – understood as personalized advertisements, since this question was considered as rather naïve.

[46] S. BARTH & M. DE JONG, 'The Privacy Paradox – Investigating Discrepancies between Expressed Privacy Concerns and Actual Online Behavior – A Systematic Literature Review', 2017, 34 *Telematics and Informatics* 1038

[47] A. FURMAN WESTIN, *Privacy and Freedom*, IG Publishing, 2015.

[48] G. GONZÁLEZ FUSTER, 'How Uninformed Is the Average Data Subject? A Quest for Benchmarks in EU Personal Data Protection' [2014] *IDP Revista de Internet Derecho y Política* 92, p. 101.

[49] Article 7 of the GDPR.

[50] Articles 6-9 of the UCPD.

[51] Italian Competition Authority, both cases, *Goanta* and *Molders*

[52] Joined Cases C-54/17 and C-55/17 *Autorit. Garante della Concorrenza e del Mercato v Wind Tre SpA, Vodafone Italia SpA* [2018] EU:C:2018:710, Case C-428/11 *Purely Creative Ltd and Others v Office of Fair Trading* [2012], Case C-628/17 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska SA* [2019] EU:C:2019:480 EU:C:2012:651

[53] BEUC, 'What's up with WhatsApp? An Assessment of WhatsApp's Practices in the Light of EU Consumer Protection Rules', 2021, 12–16 <https://www.beuc.eu/publications/beuc-x-2021-063_report_-_whats_up_with_whatsapp.pdf> accessed 4 October 2021.

[54] S. MULDER and C. GOANTA, "'Move Fast and Break Things': Unfair Commercial Practices and Consent on Social Media", 2019, *Journal of European Consumer and Market Law* 136, p. 143

[55] See also N. ZINGALES, 'Between a Rock and Two Hard Places: WhatsApp at the Crossroad of Competition, Data Protection and Consumer Law', 2017, 33 *Computer Law & Security Review* 553, p.

[56] N. HELBERGER et al., 'Surveillance, Consent and the Vulnerable Consumer. Regaining Citizen Agency in the Information Economy', *EU Consumer Protection 2.0 - Structural Asymmetries in Digital Consumer Markets*

(BEUC 2021), Stephan Mulders and Catalina Goanta, “‘Move Fast and Break Things’: Unfair Commercial Practices and Consent on Social Media”, 2019, *Journal of European Consumer and Market Law* 136, p. 143.

[57] N. HELBERGER and others, ‘Surveillance, Consent and the Vulnerable Consumer. Regaining Citizen Agency in the Information Economy’, *EU Consumer Protection 2.0 - Structural Asymmetries in Digital Consumer Markets* (BEUC 2021), Chris Willett, ‘Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive’ (2010) 33 *Journal of Consumer Policy* 247, 259

[58] WP29, ‘Opinion 15/2011 on the Definition of Consent’ (2011) (WP187), WP29 Guidelines on Consent under Regulation 2016/679 (2020) Wp259 rev.01 and EDPB Guidelines 05/2020 on Consent under Regulation 2016/679, Version 1.1 (2020) <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf> accessed 2 July 2021

[59] EDPB Guidelines 05/2020 on Consent under Regulation 2016/679, Version 1.1 (2020) <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf> accessed 2 July 2021, p 9

[60] AGCM, PS10601 – WhatsApp- Trasferimento Dati a Facebook [2017] Provvedimento n. 26597

[61] AGCM, PS10601 – WhatsApp- Trasferimento Dati a Facebook [2017] Provvedimento n. 26597, BEUC, ‘What’s up with WhatsApp? An Assessment of WhatsApp’s Practices in the Light of EU Consumer Protection Rules’ (2021) <https://www.beuc.eu/publications/beuc-x-2021-063_report_-_whats_up_with_whatsapp.pdf> accessed 4 October 2021

[62] Article 3 of the UTD.

[63] N. JANSEN and R. ZIMMERMANN (eds), *Commentaries on European Contract Laws*, First edition, Oxford University Press, 2018, p. 945.

[64] M. LOOS and J. LUZAK, ‘Update the Unfair Contract Terms Directive for Digital Services’, Parliament’s Committee on Legal Affairs (JURI), 2021, p. 28.

[65] M. LOOS and C. MAK, ‘Remedies for Buyers in Case of Contracts for the Supply of Digital Content’, 2012, ad hoc briefing paper for the European Parliament’s Committee on Legal Affairs PE 462.

[66] It is indeed very difficult to find the economic value of personal data and many models have been used, see Marc van Lieshout, ‘The Value of Personal Data’ in Jan Camenisch, Simone Fischer-Hübner and Marit Hansen (eds), *Privacy and Identity Management for the Future Internet in the Age of Globalisation*, vol 457, Springer International Publishing, 2015, p. 2. However, it is interesting that in the black market most of the data records related to a person are below 1 U.S. Dollar, Trustwave, ‘Trustwave Global Security Report’, 2018,

<<https://trustwave.azureedge.net/media/15350/2018-trustwave-global-securityreport-prt.pdf?rnd=1319921844000000000>> accessed 8 November 2021.

[67] D. KENNEDY, ‘Form and Substance in Private Law Adjudication’, 1976, 89 *Harvard law review* 1685; Thomas Wilhelmsson, ‘Varieties of Welfarism in European Contract Law’, 2004, 10 *European Law Journal* 712; Chris Willett, *Fairness in Consumer Contracts - The Case of Unfair Terms*, Routledge, 2016; Hugh Collins, *Regulating Contracts*, Repr, Oxford Univ Press, 2005.

[68] G. HOWELLS, ‘Europe’s (Lack of) Vision on Consumer Protection’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement and competition law*, Hart Publishing 2016, p. 440

[69] A. KOTSIOS, *Paying with Data: A Study on EU Consumer Law and the Protection of Personal Data*, Doctoral thesis, 2022.

PROTECTION OF CHILDREN AS CONSUMERS

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Summary

In the era of rapid digitalisation, children are subjected to certain inherent risks in the digital environment – not only to pornography, scams, cyberbullying, malware or illicit data collection, but also in their role as consumers. The retail industry has recognised children as an increasingly important group and targets them with new marketing techniques (e.g. embedding products within a programme content, using viral or influencer marketing). Due to their young age and immaturity, children are more vulnerable when exposed to invasive advertising, which is why competent authorities are paying close attention. The paper discusses steps taken by the Slovenian authorities to protect their best interest and draws attention to the most recent developments in the area of EU consumer protection.

Keywords

Consumer law, child's best interest, advertising, marketing, vulnerable consumers.

I. INTRODUCTION

Relevant actors in the field of consumer relationships have recognised children as an important social group and often explicitly target these young consumers with the advertising of goods and services. According to some of the more recent data, the global toy market had reached an estimated size of almost 100 billion U.S. dollars in 2020,[1] and the children's fashion market was estimated to be worth 60 billion U.S. dollars in 2018 in the U.S. only (and is expected to reach 76.4 billion by 2024).[2] It should be emphasised that in addition to children's own buying power (primary market) and their role as future consumers with the already developed brand loyalty and consuming habits (future market), they also exert influence over spending habits and shopping decisions of their parents with the so-called pester power, which directly or indirectly affects the purchase of a family car, the choice of holidays, computer, cosmetics, etc. (parental market).[3] It is not surprising that the retail industry tries to benefit from such an influential group of consumers, which is reflected in the increased spending on advertising to children. In recent years, the expenditure on children advertising has reached between 4 and 5 billion U.S. dollars annually, out of which 1.7 billion is estimated to stem from digital advertising formats.[4]

The challenges related to advertising aimed at children are becoming more and more complex with digitalisation and technical advancement, as children nowadays spend much time behind the screens, either on their computers, smartphones or televisions. Despite the fact that such technology has become a constant and a necessity in everyday life, education and work, its use is accompanied by certain inherent risks that are far greater when minors are concerned, even though adults are far from immune (e.g. pornography, grooming, scams, cyberbullying, hacking, malware, data collection and theft, etc.). Due to their young age and immaturity, children are more vulnerable when exposed to invasive advertising, which tends to create a strong desire, need or even the necessity to own a particular product. Traditional marketing techniques in television commercials include repetition, branded characters, catchy and interesting production features, celebrity endorsements, and premiums (free merchandise that accompanies a product).[5] However, these techniques are reasonably well-known, their effect is well-researched, and their use when targeting children is generally well-regulated at both national and international levels. More worrisome are the so-called stealth marketing techniques, in which marketers attempt to conceal the intent of advertising, as they are more difficult to detect and thus regulate. They include embedding products within a programme content (movies, websites or video games), using viral marketing, enabling children to interact with online characters who promote specific brands, disguising advertisements as video news releases, collecting information from youth visiting online sites and similar. The underlying presumption behind such techniques is that advertising is most effective when consumers do not recognise it as advertising and are more receptive to persuasive arguments about the product.[6] Young children are especially vulnerable in that regard, as they lack the cognitive capacities to recognise and understand the persuasive nature of advertising.[7]

The dangers and peculiarities of advertising to children have long been a cause of worry and attention by different shareholders responsible for their protection (in terms of consumerism and children's rights in general). The paper analyses steps taken by the Slovenian legislator and other competent authorities to protect the children's best interest when they participate in consumer relationships and transactions, especially when they are targeted by advertising. As Slovenian consumer-protection legislation is heavily affected by EU law, the contribution also draws attention to some of the most recent developments in the area of European consumer protection.

I. THE PROTECTION OF CHILDREN AS CONSUMERS IN THE REPUBLIC OF SLOVENIA

1. Consumer Protection Act (ZVPot)

In the Republic of Slovenia, the main piece of national legislation in the area of consumer protection is the Consumer Protection Act (ZVPot),^[8] which regulates the rights of consumers in respect of supply, sale and other forms of trade in goods and services by companies and lays down the obligation of state bodies and other entities in order to guarantee these rights (the first paragraph of Article 1 of ZVPot). A consumer is defined as any natural person who acquires or uses goods or services for purposes outside their occupational or gainful activity (the second paragraph of Article 1 of ZVPot), without any additional qualifications regarding their age or other personal characteristics. Therefore, provisions regulating consumer rights apply equally to children and adults, except where the law explicitly states otherwise. Such is the case of Article 15 of ZVPot, which prohibits advertising that would include elements which cause or could cause physical, mental or other harm to children, or elements which exploit or could exploit their trusting nature or lack of experience. If the Market Inspectorate of the Republic of Slovenia or any other competent inspection body finds that advertising includes such elements, it shall issue a decision temporarily prohibiting such advertising of goods or services, or the publication of such advertisement, if it has not yet been published, but its publication is imminent (Article 73 of ZVPot). The entity (legal entity, sole trader or self-employed person) responsible for such an offence may be sanctioned with a fine of EUR 3,000 to EUR 40,000, while the responsible person of the legal entity or the responsible person of the sole trader may be sanctioned with a fine of EUR 1,200 to EUR 4,000 for the same offence (Article 77 of ZVPot). Except for this relatively broadly-drafted provision, ZVPot fails to offer any special protection to children as consumers that would consider particular circumstances arising from the stage of their personal development.

In May 2021, the Slovenian Ministry of Economic Development and Technology drafted a proposal for a completely new version of the Consumer Protection Act, which would replace the existing ZVPot adopted in 1998. In its proposal, the Ministry stated that in light of technological, economic and market developments, Slovenian legislation no longer provides sufficient protection to consumers and is in dire need of updates and amendments that would bring it into line with the EU legislation and national legislation in the other Member States. While it aims to address certain issues that are currently regulated insufficiently (a requirement to inform consumers of any algorithm-based price adjustments or for-pay higher rankings or

more visible placements of products, prohibition of false ratings or recommendations, etc.), the proposal contains no additional provisions that would explicitly protect underage consumers.[9]

2. Mass Media Act (ZMed) and Audiovisual Media Services Act (ZAvMS)

While ZVPot provisions refer to advertising in general, the Mass Media Act (ZMed)[10] further regulates advertising in the mass media[11] with more precisely defined requirements regarding advertisements targeted primarily at children or in which children appear. Namely, such advertisements must not contain scenes of violence or pornography or any other content that could damage the children's health or mental and physical development or otherwise have a negative effect on them. Moreover, advertising must not morally or mentally affect the children and, therefore, must not encourage children to purchase products or services by exploiting their inexperience and credulity; encourage children to convince their parents or any other person to purchase products or services; exploit children's special trust in parents, teachers or any other persons; unjustifiably show children in dangerous situations (Article 49 of ZMed). The same criteria apply to teleshopping, which may not offer minors the opportunity to conclude contracts for the purchase or rent of goods or services (the second paragraph of Article 95 of ZMed). The access to pornographic content is explicitly limited for both printed and electronic publications, where it must be offered in such a way that minors cannot see, buy or access it (where applicable, by means of technical protection) (the eighth paragraph of Article 84 of ZMed).

The most comprehensive provisions protecting the child's best interest in the digital environment are stipulated under the Audiovisual Media Services Act (ZAvMS),[12] which was last amended with the Act Amending the Audiovisual Media Services Act (ZAvMS-B).[13] The amending act, which came into force in January 2022, transposed the amended Audiovisual Media Services Directive[14] into Slovenian legal order, thus bringing Slovenian legislation into line with the EU standards of protection.[15] The most crucial change in terms of consumer protection is the inclusion of video-sharing platform services amongst services regulated under this act, whereas the definition and the scope of video-sharing platforms are identical to that under the Audiovisual Media Services Directive (Article 3 of ZAvMS). The regulation under the previous version of the ZAvMS covered only television channels, other linear audiovisual media services and on-demand audiovisual media services, thus receiving much criticism for failing to bring influencer marketing under the scope of the act and failing to protect especially young users of video-sharing platforms. Before the amendment with ZAvMS-B, social media services were considered a platform and not media (consequently, the protection under the ZAvMS did not apply).[16]

The ZAvMS makes a notable effort to guarantee adequate protection to children and minors by including a general provision on the protection of their interests amongst other general provisions, thus emphasising its importance and the requirement to interpret other provisions of ZAvMS accordingly. Furthermore, it contains a special Chapter Three on the protection of children, disabled persons and vulnerable social groups. Article 10 of ZAvMS thus declares that children and minors are granted special protection under this Act and that the interests of

children and minors take precedence over all other rights and considerations. It prohibits all audiovisual media services from impairing the physical, mental or moral development of children or minors and from subjecting them to arbitrary or unlawful interference in their privacy, family or home or unlawful attacks on their honour and reputation. These general requirements and principles are reflected in other provisions of ZAvMS referring to, *inter alia*, the content of television programmes, audiovisual commercial communications, television advertising and teleshopping, product placement, etc. Under Article 14 of ZAvMS, all programmes that might seriously impair the physical, mental or moral development of children and minors must be classified under one of the following categories: suitable for all children under parental supervision, unsuitable for children under 12 years of age, unsuitable for children under 15 years of age, unsuitable for children under 18 years of age, and adult content (which includes the most harmful content, such as gratuitous violence and pornography). Except for the last category, the programmes must be preceded by an appropriate acoustic and visual warning and identified by the presence of an appropriate visual symbol throughout their duration. Programmes that are not suitable for children under 15 years of age may be broadcast only between 8 pm and 5 am, and programmes that are not suitable for children under 18 years of age may be broadcast only between 11 pm and 5 am (with the exception of non-linear audiovisual media services). The adult content may be broadcast only via channels with restricted access by means of a PIN code system or another equivalent system of protection that cannot be removed by the user and that enables access only for persons that have permission to view (code, password, etc.). Such permission may only be granted to adults. The provider of audiovisual media services is responsible for ensuring technical protection, the appropriate time of broadcast and the appropriate warnings and symbols, except where unsuitable content is impossible to predict due to live streaming.

In addition to general restrictions concerning the content of programmes, children are also protected when targeted as potential consumers. Thus, audiovisual commercial communications must not directly encourage minors to buy or hire a product or service by exploiting their inexperience or credulity; directly encourage them to persuade their parents or others to purchase the goods or services being advertised; exploit the special trust minors place in parents, teachers or other persons; or unreasonably show minors in dangerous situations. Teleshopping must also adhere to these criteria and may not allow minors to conclude contracts on the purchase or rental of goods or services. The volume of television advertising during children's programmes is also restricted, and interruptions of children's programmes with teleshopping are prohibited. Furthermore, providers are required to develop and publish codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in children's programmes, for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended. These codes of conduct must be formulated in such a way to allow children to develop healthy eating habits in line with the nutritional guidelines published by the minister responsible for health (Articles 21, 23, 28 and 31 of ZAvMS).

The provisions cited above were not subject to any significant changes from the previously valid version of ZAvMS, offering basically the same level of protection and demonstrating that the interests of children-consumers were granted a high level of protection under Slovenian legislation even before the last amendments. However, some general changes introduced with the ZAvMS-B are worth noting for easing some limitations and lowering some restrictions. Thus, under the previous legislation, the total volume of television advertising and teleshopping on a television channel was limited to 12 minutes per hour or 10 minutes per hour (7 minutes per hour between 6 and 11 pm) on the national radio and television station. Following the amendment, it is limited to 20 % of the time between 6 am and 6 pm and 20 % of the time between 6 pm and midnight (or 15 % on the national radio and television station for each time slot) (Article 32 of ZAvMS). Furthermore, product placement was previously prohibited as a rule, with some exceptions,[17] whereas it is now generally allowed, subject to certain conditions (e.g. it is still prohibited in children, religious, news and current affairs programmes, consumer affairs programmes, and programmes of advice) (Article 26 of ZAvMS).

The great importance placed on protecting children targeted by advertising in the mass media or subjected to inappropriate audiovisual media services is apparent from the comparatively high fines threatening the offenders of cited provisions. In the case of violations under ZMed, a broadcaster or a publisher responsible shall be punished with a fine of EUR 1,050 to EUR 83,500 (EUR 350 to EUR 450 in the case of a private individual) (Article 129 of ZMed). For violations of ZAvMS provisions, legal persons shall be fined in the amount of EUR 6,000 to EUR 60,000, individual sole traders or individuals who perform activities independently in the amount of EUR 3,000 to EUR 30,000, the responsible person of a legal person, of individual sole traders or of individuals who perform activities independently, and the responsible person of state authority or self-governing local community in the amount of EUR 600 and an individual in the amount of EUR 300 (Article 43 of ZAvMS).

3. The regulation of covert advertising

In the Republic of Slovenia, there are no provisions explicitly prohibiting covert advertising targeted at children, as it is already banned regardless of the age of its target group or person. Thus, Article 15.a of ZVPot requires that all advertising messages which are part of or represent an information society service clearly indicate the advertising nature of the message, as well as the name of the entity that ordered the advertisement (unless this is regulated by some other regulation to the same or broader extent). Where an advertising communication contains special offers (price discounts, premiums, gifts and similar), these must be clearly recognisable and the conditions for their acquisition accessible and clearly and unambiguously indicated. The same applies to authorised promotional competitions or gambling. Article 47 of ZMed takes an even stricter tone by declaring that covert advertising intended to convince the reader, listener or viewer that a particular advertisement is not advertising shall be prohibited. The person who commissioned the publication and the executive editor shall be held accountable for covert advertising, and the assumption applies that any covert advertising is intentional. In advertising, it is prohibited to employ techniques that prevent readers, listeners and viewers from consciously recognising advertising as such. Article 19 of ZAvMS similarly prohibits

surreptitious or covert audiovisual commercial communication and the use of subliminal techniques that do not allow for conscious recognition of such communications to users. Covert advertising is punishable by fines of up to EUR 40,000 (Article 77 of ZVPot), EUR 62,600 (Article 130 of ZMed) or EUR 30,000 (Article 43a of ZAvMS).

4. Slovenian Advertising Codex

Slovenian legislation in the area of advertising is supplemented with the Slovenian Advertising Codex,[18] an act of self-regulation adopted under the auspices of the Slovenian Advertising Chamber. The Codex established advertising standards for the Slovenian advertising industry, which must not contravene or interfere with the legislation, but, instead, provide another level of regulation, explanations and best practices, especially in the case of a legal vacuum. Alleged violations of these standards are assessed by the Advertising Tribunal following a proposal by any legal entity or individual, regardless of their membership status in the Slovenian Advertising Chamber.[19] Such self-regulation represents an additional – also cheaper and more flexible – option for alternative dispute resolution. Up to June 2022, the Advertising Tribunal has issued almost 400 decisions assessing the compliance of advertisements with the Codex.[20]

In addition to general rules advocating for the legality, dignity, fairness, truthfulness, privacy, and other social and moral values to be respected in advertising, the Codex contains a special part dedicated to the special protection of children. The rules are based on the presumption that children and minors under the age of 16 do not possess the knowledge, experience and capacity for mature decision-making and that advertising which directly or indirectly targets them must take into account their specific characteristics, especially how they perceive and respond to the advertising. With that in mind, the Codex provides a list of prohibitions and restrictions, including the following:

Products that are unsuitable for children shall not be advertised in media intended for children; advertisements intended for children shall not be published in media, the content of which is unsuitable for children.

Advertising shall not be used to collect personal data of children or their family members without the prior written consent of their parents.

Advertisements shall not undermine the authority, responsibility or judgment of parents.

Advertisements shall not directly instruct children to purchase a product, influence children to pressure their parents to purchase a product, create an impression that a child will be inferior or less popular than their peers without purchasing a product, or invite them to collect certain stickers, wrappings, coupons and similar.

Products and prices shall not be presented as being easily affordable (by the use of words such as "only" or "just").

Advertisements shall not encourage an improper attitude toward road safety (e.g. by showing children in the street without supervision if they are obviously too young to ensure their own safety, children playing in the street, crossing the street outside of zebra crossing or without paying attention to the traffic, children driving a car, etc.) or general safety (e.g. by showing children learning through a window or over a fence, climbing on dangerous objects, using matches or lighters that could cause burns or other injuries, talking to strangers or entering unknown buildings), unless such conduct is used to demonstrate what actions should be avoided.

The advertising of food and drinks shall not promote unhealthy eating habits, actively encourage children to eat or drink before going to bed, frequently eat sweets and snacks, eat more than usual, or mislead children regarding possible benefits of consuming the products.[21]

The Advertising Tribunal decided on the proper interpretation and alleged violations of these rules in several cases, although no infringements were identified as a result. Some examples of the tribunal's decisions are the following:

The applicant claimed that the advertisement by a meat processing company stating that the product is "Made with plenty of love "and "For a tasty and healthy bite" is misleading as meat processing can never be associated with love or health (but only with the suffering of animals and illnesses resulting from eating meat), while it also promotes unhealthy eating habits of children. The tribunal found the claim unjustified.[22]

The series of advertisements "Better eccentric than thirsty", in which children did something "crazy" to prevent others from drinking their juice (the product), including telling their father that they won the lottery or mother that they got a tattoo, was not found to constitute the violation of Codex rules.[23]

The advertisement by UNICEF using the slogan "The vaccine is more than just a vaccine. It is a mother's hug." was not considered a manipulation implying that the unvaccinated children would be deprived of a mother's hug, nor was it considered a violation of the rule that advertisements shall not undermine the authority, responsibility or judgment of parents. It did not address children but adults, who are capable of deciding whether they want to donate financial contributions for the vaccination of children in third-world countries.[24]

Given the number of cases brought before the tribunal, such an outcome indicates that the advertisers operating in the Republic of Slovenia are generally mindful of the rules protecting children-consumers and go to proper lengths to protect their interests.

III. RECENT DEVELOPMENTS IN THE AREA OF CHILDREN-CONSUMERS PROTECTION IN THE EU

The EU institutions and other affiliated entities have recognised the importance of children-consumers protection as well, with different restrictions and requirements intended to provide a higher fairness standard of protection to vulnerable consumers, i.e. consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity. It should be emphasised that the requirements provided by the EU legislation constitute minimum standards, not an end in themselves. Most notably, in addition to the already mentioned Audiovisual Media Services Directive, which addresses the issue of television advertising accompanying or included in children's programmes, the Unfair Commercial Practices Directive[25] grants protection against unfair commercial practices with a special focus on the protection of vulnerable consumers,[26] Consumer Rights Directive[27] instructs traders to take into account the specific needs of vulnerable consumers,[28] and the General Data Protection Regulation[29] recognises children as in need of special protection with regard to their personal data, especially for the purposes of marketing.[30] Several other directives or regulations provide additional protection concerning more specific products or services (e.g. general product safety, the safety of toys, electronic commerce, etc.). In its briefing of May 2021, the European Parliament criticised the current definition of a vulnerable consumer[31] as being too narrow and advocated for stronger protection, including in the energy, finance and digital sectors.[32]

The most recent developments in the area of children-consumer protection within the EU include the adoption of a new European strategy for a Better Internet for Kids (BIK+)[33] and the publishing of the Five Key Principles of fair advertising to children, which were drafted by a group of volunteers among consumer and data protection authorities during the European Year of Youth 2022, with the support of the European Commission and the European Data Protection Board Secretariat, and endorsed by the Consumer Protection Cooperation (CPC) Network.[34] As children are particularly susceptible to subliminal commercial practices and marketing based on behavioural insights,[35] the five principles appeal to the traders and controllers to comply with the following requirements:

- (1) Specific vulnerabilities of children should be taken into account when designing advertisements or marketing techniques that are likely to be seen by children.

Online: Service providers must not design or operate their interface in a manner that deceives children or unduly influences them to take a particular action.

Certain marketing techniques, e.g., personalised marketing, could be inappropriate to use due to the specific vulnerabilities of children.

- (2) Children's particular vulnerability because of their age or credulity is not to be exploited.

(3) When general marketing content is addressed to children or is likely to be seen by them, the marketing purpose should be indicated in a manner that is appropriate and clear for children.

(4) Children are not to be targeted, urged or otherwise prompted to purchase in-app or in-game content, and games marketed for free should not require in-app or in-game purchases to play them in a satisfactory manner.

(5) Children should not be profiled for advertisement purposes.

One should note that these principles are not binding on national authorities, the European Commission or other competent entities in the area of consumer protection, and the power to decide on the legality of commercial practices remains solely with the competent authorities and courts. Therefore, their direct impact is limited to expressing the views of relevant organisations and institutions on the proper interpretation of applicable legislation in the area of children's consumerism. Even so, their significance should not be underestimated. Both the CPC Network and the European Commission play an essential role in the enforcement of EU consumer protection legislation and are granted considerable powers to take action against any breaches of the above mentioned regulations, meaning that their understanding of what constitutes fair advertising toward children is decisive in that regard. Moreover, the five principles have already been referred to in the recent case involving TikTok,[36] arguably the most popular social platform at the time of writing this contribution.[37]

In February 2021, the European Consumer Organisation (BEUC) filed a complaint under Article 27 of Regulation (EU) 2017/2394[38] with the European Commission and the CPC Network, accusing TikTok of unfair practices that constitute a widespread infringement of consumer rules with an EU dimension (Article 3 and Article 5 of Unfair Contract Terms Directive,[39] Article 5 and Article 7 of Unfair Commercial Practices Directive, Article 6 of Consumer Rights Directive, Article 6 of E-Commerce Directive 2000/31/EC,[40] etc.) and demanding a comprehensive investigation into TikTok's practices. Among other accusations, TikTok was accused of failing to protect children and teenagers from hidden advertising and potentially harmful content by encouraging participation in branded hashtag challenges where the users create content of specific products; allowing hidden advertising by influencers of fast food, sugary drinks, beauty products, clothing and video games without displaying the sponsored nature of such content; and failing to protect children from inappropriate content such as videos showing sexually-explicit or otherwise suggestive content.[41] Following an extensive discussion with the European Commission and the CPC Network, TikTok has committed to implementing several changes and aligning its practices with the EU legislation on advertising and consumer protection in order to avoid possible sanctions by the EU authorities. The main commitments include allowing users to report advertisements and offers that could potentially push or trick children into purchasing goods or services; requiring branded content to abide by a policy protecting users, which prohibits the promotion of inappropriate products and services (e.g. alcohol, "get rich quick" schemes and cigarettes); reviewing videos of users with more than 10,000 followers to ensure that the content is appropriate; clarifying policies on how to purchase and use coins, how to get rewards and send

gifts, including the option to withdraw within 14 days from the purchase; implementing new rules for hashtags and labels, etc. With the CPC Network undertaking to actively monitor the implementation of these commitments (including, for example, whether there is sufficient clarity around children's understanding of the commercial aspects of TikTok's practices, such as what concerns personalised advertising in light of the Five Key Principles of fair advertising to children), the European Commission, satisfied with the outcome, closed the investigation.[42] The seriousness with which TikTok approached the discussion and the willingness to change its practices to avoid sanctions demonstrate that the protection of consumers granted under the EU law is, indeed, effective. However, the BEUC (as well as national authorities for consumer protection)[43] have expressed genuine concerns over certain issues that remain unaddressed, such as the absence of a mechanism to protect young consumers from abuse by influencers when they purchase TikTok "virtual coins" and the lack of commitment to stop profiling and targeting children with personalised advertising.[44] While the commitments made by TikTok and the fact that several institutions and organisations referred to the Five Key Principles in their communications and press releases are welcome progress in itself, further steps and ongoing monitoring might be needed to ensure their proper implementation in this and any future cases concerning children-consumers in the digital environment.

IV. LOOKING FORWARD

The EU laws and, consequently, national regulations implementing those laws cover a wide area of consumer protection, including consumer relationships formed in a digital environment and consumer transactions conducted online. However, the legislative work in the area of children-consumer protection is far from done. With technological advancements and the subsequent societal changes, new challenges keep appearing and demanding the attention of competent authorities. While the clarification of platforms as audiovisual media services has indeed eliminated doubts about whether the relevant EU legislation applies to such media and of the scope of protection to be granted to their users (which was of some concern in the Republic of Slovenia as well), some aspects remain highly problematic. In that regard, hidden or covert advertising in influencer marketing is especially worth highlighting. According to the Best Practice Recommendation on Influencer Marketing issued by the European Advertising Standards Alliance (EASA) in 2018, content provided by an influencer is defined as a marketing communication if the advertiser had editorial control over the message shared by the influencer (e.g. a final approval or general instructions) and if the advertiser compensated the influencer either by payment or other reciprocal arrangements (e.g. free products). In such cases, proper recognisability and disclosure of commercial communication should be guaranteed.[45] All notable social media platforms have adopted rules requiring influencers to disclose any compensation they received that could impact how viewers interpret their endorsement of a product or brand. Nevertheless, as demonstrated by the TikTok case, the enforcement of these rules is inconsistent, and the violations are difficult to detect unless reported (or even when reported).

By no account is this a minor issue. According to a 2015 survey, only 1% of millennials trust advertisements, while 33% rely on blog reviews before making a purchase. 62% of them stated that if a brand engages with them on social networks, they are more likely to become a loyal customer.[46] Another survey of 2021 found that 70% of teens trust influencers more than traditional celebrities, 49% of consumers depend on influencer recommendations, and 40% had purchased something after seeing it on Twitter, YouTube or Instagram.[47] The influencer marketing industry is set to grow to approximately 16.4 billion U.S. dollars in 2022,[48] and the average earned media value per 1 U.S. dollar spent had increased to 5.78 dollars in 2020.[49] Despite these staggering numbers, only 14% of influencer posts (based on a sample of over 4200 Instagram posts analysed in 2020) fully comply with legal requirements and guidelines.[50] As the relationship between influencers and consumers is characterised by perceived closeness, authenticity and trust, influencer marketing exacerbates the vulnerabilities of children and consumers with low education or income more than other forms of media.[51] The existing consumer protection legislation does not sufficiently address the issues arising from this type of advertising, even though it is regularly applied to influencer marketing by courts and other authorities.[52]

Some of the challenges arising from recent market trends have been tackled with the proposal of the Digital Services Act (proposed by the European Commission in December 2020), which sets new standards for the accountability of online platforms regarding illegal and harmful content. In April 2022, a political agreement was reached between the European Parliament and the EU Member States, clearing the path for its eventual adoption (subject to formal approval by the European Parliament and the Council). Once adopted, the Digital Services Act will be directly applicable across the EU. *Inter alia*, DSA contains measures to counter illegal goods, services or content online (e.g. a mechanism for users to easily flag such content and for platforms to cooperate with so-called 'trusted flaggers'), measures to empower users and civil society (e.g. the possibility to challenge platforms' content moderation decisions and seek redress, transparency measures for online platforms on a variety of issues, including on the algorithms used for recommending content or products to users), measures to assess and mitigate risks (e.g. new safeguards for the protection of minors and limits on the use of sensitive personal data for targeted advertising), enhanced supervision and enforcement by the Commission when it comes to very large online platforms, as well as the independent Digital Services Coordinators and Board for Digital Services.[53] In the context of children's consumerism, the Digital Services Act will oblige all online platforms to design their systems with consideration for the rights of child users, allowing them to easily understand the terms and conditions of the service they use. Furthermore, all online platforms offering services to children in the EU will be obliged to take appropriate and proportionate measures to ensure the privacy, safety and security of children on their services. All online platforms will be prohibited from presenting advertisements to children based on profiling, while very large online platforms and search engines will also have to consider any systemic risks concerning their services, including any actual or foreseeable negative effects in relation to the protection of children.[54] While the proposal does not explicitly refer to influencer marketing or other specific forms of content monetisation, Article 24 of the Digital Services Act integrates the most essential points made by the IMCO Committee in its draft report of May 2021 with respect

to advertising business models undertaken by influencers.[55] While further steps are needed in the area of children-consumer protection both at the EU and national levels, and new issues related to the rapid technological and societal developments are expected to appear continuously, it is commendable that competent authorities are demonstrating notable political motivation to protect children and their increasingly significant role in consumer relationships.

[1] Total revenue of the global toy market from 2007 to 2020, <https://www.statista.com/statistics/194395/revenue-of-the-global-toy-market-since-2007>, accessed on 2 July 2022.

[2] Key figures for children and youth in 2021, <https://www.alioze.com/en/figures-children-youth>, accessed on 2 July 2022).

[3] For more on statistics of children-related spending and on pester power and its effects, see A. J. NICHOLLS and P. CULLEN, “The child–parent purchase relationship: ‘pester power’, human rights and retail ethic”, *Journal of Retailing and Consumer Services* No. 11, 2004, pp. 75–86. See also National Retail Federation, Fall 2019 Consumer View, <https://cdn.nrf.com/sites/default/files/2019-10/NRF%20Consumer%20View%20Fall%202019.pdf>, accessed on 2 July 2022. For more on psychological and developmental aspects of children consumerism, see also P. M. VALKENBURG and J. CANTOR, “The development of a child into a consumer”, *Applied Developmental Psychology* No. 22, 2001, pp. 61–72; S. L. CALVERT, “Children as Consumers: Advertising and Marketing”, *The future of children* Vol. 18, No. 1, 2008, pp. 205–234; D.R. JOHN, “Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research”, *Journal of Consumer Research* Vol. 26, No. 3, 1999, pp. 183–213; B. ŠRAMOVÁ, “Children’s Consumer Behavior”, in S. SABAH (ed.), *Consumer Behavior - Practice Oriented Perspectives*, London, IntechOpen, 2017.

[4] Spending on advertising to children worldwide from 2012 to 2021, <https://www.statista.com/statistics/750865/kids-advertising-spending-worldwide>, accessible on 2 July 2022.

[5] For more on marketing techniques see also S. L. CALVERT, “Children as Consumers: Advertising and Marketing”, *The future of children* Vol. 18, No. 1, 2008, pp. 205–234.

[6] S. L. CALVERT, “Children as Consumers: Advertising and Marketing”, *The future of children* Vol. 18, No. 1, 2008, pp. 205–234.

[7] For example, research from the American Psychological Association (APA) showed that children under the age of eight are unable to critically comprehend televised advertising messages and are prone to accept advertiser messages as truthful, accurate and unbiased. See Report of the APA Task Force on Advertising and Children of 20 February 2004, <https://www.apa.org/pi/families/resources/advertising-children.pdf>, accessed on 2 July 2022.

[8] *Zakon o varstvu potrošnikov*, Official Gazette of the Republic of Slovenia, No. 98/04 – official consolidated text, 114/06 – ZUE, 126/07, 86/09, 78/11, 38/14, 19/15, 55/17 – ZKoliT and 31/18.

[9] For more, see the proposal for the Consumer Protection Act (ZVPot-1), <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=8592>, accessed on 2 July 2022.

[10] *Zakon o medijih*, Official Gazette of the RS, No. 110/06 – official consolidated text, 36/08 – ZPomK-1, 77/10 – ZSFCJA, 90/10 – odl. US, 87/11 – ZAvMS, 47/12, 47/15 – ZZSDT, 22/16, 39/16, 45/19 – odl. US, 67/19 – odl. US and 82/21.

[11] The mass media includes newspapers and magazines, radio and television channels, electronic publications, teletext, and other forms of edited programmes published daily or periodically through the transmission of written material, vocal material, sound or images in a manner accessible to the public (the first paragraph of Article 2 of ZMed).

[12] *Zakon o avdiovizualnih medijskih storitvah*, Official Gazette of the Republic of Slovenia, No. 87/11, 84/15 and 204/21.

[13] *Zakon o spremembah in dopolnitvah Zakona o avdiovizualnih medijskih storitvah*, Official Gazette of the Republic of Slovenia, No. 204/21. See also justification accompanying the proposal of the amending act, <https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/8fd173dd6d50a5b16b0e89f79633cf6b635d593a9c4c3e5379ceac1e94261e0b>, accessed on 2 July 2022.

[14] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15. 4. 2010, p. 1–24, consolidated version of 18 December 2018.

[15] The legislative process for the adoption of the amending act was lengthy and controversial, with the National Council of the Republic of Slovenia vetoing the first proposal. As a result, the Republic of Slovenia failed to comply with the deadline set in the Audiovisual Media Services Directive.

[16] See, for example, D. SCHITTON, “Vidiki varstva potrošnikov pri urejanju vplivnostnega marketinga v Sloveniji”, *Pravna praksa* Year 38, No. 12, 2019, pp. 13-15; D. SCHITTON, “Evropska direktiva o avdiovizualnih storitvah in podlage za ureditev vplivnostnega marketinga”, *Pravna praksa* Year 38, No. 9/10, 2019, pp. 22-24; D. SCHITTON, “Pravna vprašanja, povezana z vplivnostnim marketingom”, *Pravna praksa* Year 37, No. 12/13, 2018, pp. 15-17.

[17] Before ZAvMS-B, product placement was permitted in cinematographic works, films, docudramas, series and serials made for audiovisual media services, and sports and light entertainment programmes; in cases where there was no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme; or if the value of the goods or services was negligible in proportion to the programme’s production costs (subject to some additional requirements).

[18] *Slovenski oglaševalski kodeks*, 4th edition, valid since 1 October 2008, https://www.soz.si/sites/default/files/soz_sok_slo.pdf, accessed on 2 July 2022.

[19] As the Slovenian Advertising Chamber is a full member of EASA (European Advertising Standards Alliance), the Codex provisions may be used in international dispute resolution procedures in EASA member states.

[20] The database of Advertising Tribunal decisions is available at https://www.soz.si/oglasevalsko_razsodisce/arhiv-razsodb, accessed on 2 July 2022.

[21] See Article 18 of the Codex.

[22] Decision of the Advertising Tribunal No. 263, 16 November 2015.

[23] Decision of the Advertising Tribunal No. 278, 16 June 2016.

[24] Decision of the Advertising Tribunal No. 343, 27 August 2019.

[25] 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’), OJ L 149, 11. 6. 2005, pp. 22–39, consolidated version of 28 May 2022.

[26] Commercial practices are unfair if they are contrary to the requirements of professional diligence, and if they materially distort or are likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers (especially if they are misleading or aggressive). A commercial practice could be unfair if assessed based on a vulnerable consumer even if it is considered fair compared to the ‘average consumer’. See Article 5 of the Unfair Commercial Practices Directive and the following.

[27] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 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, OJ L 304, 22. 11. 2011, pp. 64–88, consolidated version of 28 May 2022.

[28] See point 34 of the preamble of Consumer Rights Directive.

[29] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4. 5. 2016, pp. 1–88.

[30] Point 38 of General Data Protection Regulation states that children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child. See also Articles 6, 8 and 12 of the General Data Protection Regulation.

[31] As opposed to the average consumer who is considered to be able to make rational choices to find the best deals and benefit from competitive markets. For more on the concept of the average consumer in the European Court of Justice case law, see, for example Case C-210/96, Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, 16 July 1998.

[32] European Parliament, Briefing on Vulnerable Customers, PE 690.619, May 2021, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI\(2021\)690619_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI(2021)690619_EN.pdf)> (accessed on 2 July 2022). See also L. WADDINGTON, “Vulnerable and confused: the protection of ‘vulnerable’ consumers under EU law”, *European Law Review* Vol. 38, No. 6, 2013, pp. 757-782 and E. KAPROU, “The current legal definition of vulnerable consumers in the UCPD: benefits and limitations of a focus on personal attributes”, in C. RIEFA and S. SAINTIER (eds.), *Vulnerable consumers and the law: Consumer protection and access to justice*, Routledge, 2020.

[33] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A digital decade for children and youth: the new European strategy for a better internet for kids (BIK+), COM/2022/212 final, Brussels, 11. 5. 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:212:FIN>, accessed on 2 July 2022.

[34] Five Key Principles of fair advertising to children, <https://ec.europa.eu/info/sites/default/files/5_key_principles_9_june_2022.pdf> (accessed on 2 July 2022). Compare with ICPEN Best Practice Principles: Marketing practices directed towards children online, June 2020, <https://icpen.org/sites/default/files/2020-06/ICPEN%20-%20Best%20Practice%20Principles%20for%20Marketing%20Practices%20Directed%20Towards%20Children%20Online%202020.pdf>, accessed on 2 July 2022.

[35] The authors drafted the 5 key principles with a special consideration of situations in which children are particularly vulnerable, for example clicking on advertisement messages, visuals or banners embedded into or ‘hidden’ in online games, websites or mobile applications without understanding their commercial purpose, not understanding that some operators and providers of digital content and services derive revenues from the use of personal data, peer pressure to purchase additional coins, tokens and other in-game content that is useful or necessary to progress with a game, etc.

[36] TikTok qualifies as a video-sharing platform under Audiovisual Media Services Directive.

[37] The statistics collected in March 2022 shows that the total number of monthly active users in Q4 2021 was 1.2 billion, total number of TikTok downloads in 2021 was 656 million, TikTok generated an estimated 4.6 billion U.S. dollars revenue and consumer spending on TikTok in Q4 2021 amounted to 824.4 million U.S. dollars.

[38] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27. 12. 2017, pp. 1–26.

[39] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993, pp. 29–34, consolidated version of 28 May 2022.

[40] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17. 7. 2000, pp. 1–16.

[41] For more, see BEUC, TikTok complaint – letter to CPC and European Commission of 16 February 2021, https://www.beuc.eu/publications/beuc-x-2021-013_beuc_submits_an_external_alert_to_the_cpc-network_about_tiktok_letter_to_ms_benassi.pdf, accessed on 2 July 2022, and BEUC, TikTok without Filters – a consumer law analysis of TikTok’s policies and practices – Report, <https://www.beuc.eu/publications/beuc-x-2021-012_tiktok_without_filters.pdf> (accessed on 2 July 2022). Additional complaints referred to infringements of data protection laws, unfair copyright terms, etc. See also J. AUSLOOS and V. VERDOODT, Confusing by Design: A Data Protection Law Analysis of TikTok’s Privacy Policy, 2021, https://www.beuc.eu/publications/beuc-x-2021-010_confusing_by_design-a_data_protection_law_analysis_of_tiktok_s_privacy_policy.pdf, accessed on 2 July 2022.

[42] European Commission, Press Release of 21 June 2022, EU Consumer protection: TikTok commits to align with EU rules to better protect consumers, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3823, accessed on 2 July 2022.

[43] See for example Slovenian Consumers' Association's press release of 22 June 2022, <https://www.zps.si/mediji/izjave-za-javnost-2020/1127-izjave-za-javnost-2022/11436-zps-pomembni-pomisleni-ostajajo-nereseni-tudi-po-zakljucku-preiskave-tiktoka>, accessed on 2 July 2022.

[44] BEUC press release of 21 June 2022, Investigation into TikTok closed with important questions unresolved - consumers left in the dark, <<https://www.beuc.eu/publications/investigation-tiktok-closed-important-questions-unresolved-consumers-left-dark/html>> (accessed on 2 July 2022).

[45] <https://www.arpp.org/wp-content/uploads/2021/02/EASA-BEST-PRACTICE-RECOMMENDATION-ON-INFLUENCER-MARKETING_2020_0.pdf> (accessed on 2 July 2022).

[46] D. SCHAWBEL, “10 New Findings About The Millennial Consumer”, *Forbes*, 20 January 2015, <<https://www.forbes.com/sites/danschawbel/2015/01/20/10-new-findings-about-the-millennial-consumer/?sh=4ab444b76c8f>> (accessed on 2 July 2022).

[47] For more statistics, see 20 Surprising Influencer Marketing Statistics, 19 October 2021, <<https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you>> (accessed on 2 July 2022).

[48] The State of Influencer Marketing 2022: Benchmark Report, <<https://influencermarketinghub.com/influencer-marketing-benchmark-report/>> (accessed on 2 July 2022).

[49] The State of Influencer Marketing 2020: Benchmark Report, <<https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020>, accessed on 2 July 2022.

[50] The State of Influencer Marketing 2020: Benchmark Report, <<https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020>, accessed on 2 July 2022.

[51] European Parliament, Study requested by the IMCO committee, The impact of influencers on advertising and consumer protection in the Single Market, 2022, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), accessed on 2 July 2022. See also M. DE VEIRMAN, L. HUDDERS and M. NELSON, Michelle, “What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research”, *Frontiers in Psychology* Vol. 10, 2019.

[52] For more criticism of the existing EU legislation, see also A. GARDE, “Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of ... Commercial Operators?”, *International Journal of Children’s Rights* No. 19, 2011, pp. 149–171.

[53] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Brussels, 15. 12. 2020, COM/2020/825 final,

<<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>> (accessed on 2 July 2022). See also European Commission, Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment, Press Release of 23 April 2022, <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545, accessed on 2 July 2022.

[54] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A digital decade for children and youth: the new European strategy for a better internet for kids (BIK+), COM/2022/212 final, Brussels, 11. 5. 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:212:FIN>, accessed on 2 July 2022.

[55] European Parliament, Study requested by the IMCO committee, The impact of influencers on advertising and consumer protection in the Single Market, 2022, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf), accessed on 2 July 2022

THE DIGITAL CONTENT DIRECTIVE AND POSSIBILITIES FOR A NATIONAL LEGISLATOR: THE CASE OF LATVIA

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Summary

The article deals with a discussion of the Digital Content Directive (Directive 2019/770) from the point of view of possibilities available for a national legislator to derogate from the regulation included in the Directive on the basis of the Latvian situation. The topicality of this theme concerns the actual use of these possibilities by a national legislator and their impact from the point of view of overall regulation in Latvia in the area of consumer protection law. At the beginning, the article generally discusses a set of possibilities provided for a national legislator by the Directive to derogate from its regulation. Afterwards these possibilities are discussed, and the article finishes with conclusion by summarising discussion reflected in the article.

Keywords

Digital Content Directive, national legislator, national law, exhaustive harmonisation, consumer.

I. INTRODUCTION

The Digital Content Directive[1] was adopted within the framework of revision of the regulation on consumer sales included in the Consumer Sales Directive 1999.[2] Though the European Commission initially proposed to adopt a single directive covering also supply of digital content and digital service, it was decided to differentiate[3] the regulation of supply of digital content and digital service into a single directive.[4] In the result, regulation on supply of digital content and digital service was included in the Digital Content Directive adopted in 2019.[5] Similarly to another directive meant for consumer sale in general (i.e. the Consumer Sale Directive 2019[6]), the Digital Content Directive is an exhaustive (full) harmonisation directive.[7] However, there are certain possibilities in the case of both Directives envisaged for a national legislator to step away from their regulation. These possibilities cannot be confused with issues which fall outside the application scope of this Directive such as excluded areas[8] or issues which are directly excluded such as general contract law issues[9].

This article focuses on the possibilities envisaged by the Digital Content Directive for a national legislator in conjunction with their use by the national legislator in a particular European Union (EU) Member State, i.e. Latvia. This article, therefore, does not discuss the Consumer Sale Directive 2019 adopted together with the former directive (with an exception to references in cases of a similar regulation). Likewise, a study on the use of these possibilities in a separate EU Member State reflected in the present article has an explanation linked to policy considerations within supply of digital content and digital service. As the situation in all EU Member States could be different concerning reasons underlying the choice of one or another of these possibilities, the choice of every national legislator in Latvia should be dealt with separately as it also involves national approaches characteristic to that EU Member State.

The studies for the implementation of both directives adopted in 2019 concerning consumer sale and supply of digital content and digital service was subject to studies in Latvia before. One article was published by author of these lines in 2019 solely concerning the Consumer Sales Directive 2019 before even the Latvian legislator drafted a draft legal act for implementation of both directives.[10] Another was published recently before the final draft legal act was adopted and only generally dealt with possibilities for the national legislator.[11] In difference from both these articles, the present article deals with the situation after Latvia has implemented the amendments into the Consumer Rights Protection Act[12] and focuses particularly on the national legislator's possibilities and their use in respect of the Digital Content Directive. Therefore, the present article allows to draw a final line for the possibilities used by the national legislator in respect of this Directive considering both the pre-adoption policy and the adopted text of the amendments to the Consumer Rights Protection Act on the basis of the Amendment Act.

The structure of the article is as follows. At first, the article generally discusses a set of possibilities provided for a national legislator by the Digital Content Directive to derogate from its regulation. Afterwards these possibilities are discussed in separate chapters. Finally, the article finishes with conclusion by summarising a choice of these possibilities by the Latvian national legislator and their potential effect.

II. POSSIBILITIES PROVIDED FOR A NATIONAL LEGISLATOR BY THE DIGITAL CONTENT DIRECTIVE

As it was noted in legal literature, the Digital Content Directive offers much poorer choices for a national legislator if compared with the Consumer Sales Directive 2019 adopted simultaneously.^[13] Yet a few possibilities are still available for the national legislature under the former Directive. It should be, however, noted that the very existence of these possibilities characterises the EU policy for the exhaustive nature of the regulation on supply of digital content or digital service^[14] allowing EU Member States to execute these possibilities. However, whether these possibilities are used or, on contrary, not used is a matter of national policy in this area in a particular EU Member State.

1. Liability for lack of conformity

The first possibility for a national legislator to derogate from the regulation included in the Digital Content Directive relates to the character of time limits concerning liability of a trader who supplied a digital content or digital service to ensure its compliance with the contract.

The Digital Content Directive distinguishes two situations in this regard depending on the fact whether the trader supplies a digital content or digital service in an individual case or over a period of time being a continuous supply. Both situations are regulated differently by the Digital Content Directive and, therefore, will be discussed further separately.

A) Individual supply

One situation refers to a single act of supply or a series of individual acts of supply.^[15] In this situation, the Digital Content Directive allows for EU Member States to establish that the trader is liable only in the case if a lack of conformity becomes apparent within a period of time after supply, i.e. to introduce a liability period and regulate related details.^[16] This rule is based on the following Directive's provision:

If, under national law, the trader is only liable for a lack of conformity that becomes apparent within a period of time after supply, that period shall not be less than two years from the time of supply, without prejudice to point (b) of Article 8(2).^[17]

As it could be seen from the phrase 'under national law', the quoted provision contains a possibility for a national legislator to provide the liability period and from which moment this period commences in a manner prescribed in this provision. In this regard, the Directive itself clarifies that EU Member States may provide 'under their respective national law the trader is only liable for any lack of conformity that becomes apparent within a period of time after supply'.^[18]

In addition, a national legislator has a possibility to introduce or maintain their limitation periods or treat a time limit for exploitation of remedies in the discussed situation as a limitation period but not as a preclusionary period. This possibility is based on the following rule which is worth to cite in full:

If, under national law, the rights laid down in Article 14 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 14 for any lack of conformity that exists at the time indicated in the first subparagraph and becomes apparent within the period of time indicated in the second subparagraph. [19]

Similarly as in the case of the previously discussed provision, it could be seen from the phrase ‘under national law’ that the above provision also contains a possibility for a national legislator to treat a time limit also as a limitation period instead of preclusionary period. The EU legislator here was rather relaxed concerning the character of the time limit by leaving this matter within national competence. Such approach is explained in the directive itself by providing that ‘Member States should remain free to regulate national limitation periods’.^[20]

B) Continuous supply

The second situation refers to continuous supply of digital content and digital service. In this regard, EU Member States are free to introduce a liability period as well as establish the character of the time limit concerning compliance of digital content or digital service with the contract.[21] The Digital Content Directive in this regard provides as follows:

If, under national law, the rights laid down in Article 14 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 14 for any lack of conformity that occurs or becomes apparent during the period of time referred to in the first subparagraph.[22]

The rationale for such a provision is similar as in the case of supply as an individual act by linking introducing and characterisation of a time limit at the hands of a national legislator within the national competence.

2. Violation of third-party rights

The Digital Content Directive envisages a special provision if a violation of rights of a third party is liable for prevention or limitation of the use of a digital content or digital service. This provision is expressed in Article 10 of the Directive in the following wording:

[w]here a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the digital content or digital service in accordance with Articles 7 and 8, Member States shall ensure that the consumer is entitled to the remedies for lack of conformity provided for in Article 14, unless national law provides for the nullity or rescission of the contract for the supply of the digital content or digital service in such cases.

As one may observe from the quoted provision, an EU Member State may provide that a contract loses its force instead of allowing a remedy for a consumer if he or she cannot use the digital content or digital service. Therefore, the rationale for the whole provision is solely related to a possibility granted for a national legislator to provide alternative remedy in the

discussed case and, hence, its use fully depends on the discretionary power of the national legislator.

3. Personal data

Furthermore, the Digital Content Directive allows for EU Member States to regulate the consequences for the contract if the consumer withdraws the consent for the processing of the consumer's personal data. It is expressed in the Directive in the following wording:

This Directive should not regulate the consequences for the contracts covered by this Directive in the event that the consumer withdraws the consent for the processing of the consumer's personal data. Such consequences should remain a matter for national law.[23]

Though this provision reflects the possibility for a national legislator, still it is bound by EU rules on data protection, especially the General Data Protection Regulation (GDPR).[24] In this regard, the Directive itself indicated that the right of the consumer to terminate the contract in accordance with the Digital Content Directive 'should be without prejudice to the consumer's right under [the GDPR] to withdraw any consent given to the processing of the consumer's personal data'.[25]

4. Right of redress

Finally, the Digital Content Directive while regulating the right of redress on the part of the trader provides that determination of a liable person and regulation of relevant actions falls within national competence and, therefore, should be dealt with by a national legislator.[26] This possibility is based on Article 20 of the Directive containing a provision in the following wording:

The person against whom the trader may pursue remedies, and the relevant actions and conditions of exercise, shall be determined by national law.[27]

This provision, therefore, allows for a national legislature to regulate a liable person against whom a trader may exploit its right of redress as well as related remedies and conditions for their exercise.

By summarising discussion in this Section, one may notice from the few possibilities discussed within this Section of the article that the national legislator does not have much freedom to derogate from the Digital Content Directive. These possibilities themselves are just narrow options in certain specific situations. Yet these possibilities could be rather important in particular practical situations, therefore, the response of the Latvian national legislator is essential which would be discussed in the next section.

III. RESPONSE OF THE LATVIAN LEGISLATOR

Before adoption of the final wording of the amendments into the last 3rd sitting of the Latvian Parliament, the Latvian legislator was rather dismissive concerning the use of the available possibilities.[28] Only one possibility was used in relation to the right of redress which should be easily explained by the regulation which was already provided in the Consumer Rights Protection Act concerning right of redress.[29] The situation did not also change during the 3rd sitting by adopting the amendments with the use of this single possibility. For the sake of clarity it should be mentioned that proposals for the 3rd sitting did not contain any proposals in this regard, therefore, the situation concerning the use of the possibilities offered by the Digital Content Directive before the 3rd sitting could be predictable.

Likewise, the use of the discussed possibilities envisaged by Digital Content Directive was raised neither before the competent commission of the Parliament[30] nor in Latvian legal literature for consumer protection[31]. It should be also mentioned that the *ex ante* scientific assessment of the draft legal act submitted to the Parliament did not mention that any of these possibilities should be used.[32] Interestingly that the drafters of the draft Amendment Act discussed in the explanatory part of that Act only possibilities under the Consumer Sale Directive 2019, however, did not pay any attention to the Digital Content Directive.[33] However, the non-use of the available possibilities cannot be treated negatively. The overall response of the Latvian legislator concerning these possibilities in the Amendment Act[34] may be generally upheld which is discussed below in respect of each possibility separately.

1. Liability for lack of conformity

The previous wording of the Consumer Rights Protection Act concerning consumer sale provided for a time limit on the seller's obligation to ensure conformity with the contract and treated this time limit as preclusionary but not as a limitation period.[35] The same approach was used also during the implementation of the Digital Content Directive (similarly as in the case of the implementation of the Consumer Sale Directive 2019 in the same Act). In this regard, the Amendment Act contains two provisions: one deals with a time limit for ensuring conformity with the contract but another – the use of remedies if such a non-conformity is established.

The former situation is regulated in the following provision inserted in the Consumer Rights Protection Act by the above Amendment Act:

If the contract for the supply of digital content or digital service provides for a one-time delivery or several separate deliveries, the seller or service provider is responsible for non-compliance existing on the day of delivery of the digital content or digital service, which is revealed within two years from the date of delivery of the digital content or digital service. If the non-conformity of the digital content or digital service is discovered within a year after the date of delivery, the seller or service provider is obliged to prove that the digital content or digital service was compliant at the time of delivery.[36]

A similar provision was inserted in respect of a time limit for exercise of remedies in the case of non-conformity of the digital content or digital service with the contract in the following wording:

The consumer has the right to submit a claim to the seller or service provider regarding non-compliance of the product, service, digital content or digital service with the terms of the contract within two years from the day of delivery or receipt of the product, digital content or digital service.[37]

As one may notice from both provisions, the Latvian legislator provided for a time limit in both provisions and treated it as a preclusionary period and not of the character of limitation period. Such a response from the Latvian legislator is reasonable as it continues the existing approach by exploiting preclusionary time limits in the case for liability of the trader for compliance with the contract or, speaking broadly, the seller or service provider. By comparison, the Civil Law concerning the liability of alienators also provides time limits which are of the preclusionary nature.[38] Therefore, the Latvian legislator's approach is consistent with its previous approach and may be upheld that such approach was followed also during the implementation of the Digital Content Directive.

As regards the length of the time period, the explanatory part of the draft Amendment Act stated that this term is envisaged by ensuring a balance of interests and it complies with the existing regulation.[39]

2. Violation of third-party rights

The Amendment Act provides for remedies in the case of non-compliance of the digital content or digital service with the contract (Article 29 of the Amendment Act). However, the Latvian legislator did not use a possibility envisaged by Article 10 of the Digital Content Directive and did not provide that a violation of rights of a third party liable for prevention or limitation of the use of a digital content or digital service may lead to invalidity of the contract. Interestingly that the explanatory part of the draft Amendment Act did not even assess whether the regulation included in the draft Act complies with Article 10 of the Directive. This situation may be explained by the fact that the Latvian legislator obviously treated the discussed Directive's provision as based on a pure national legislator's choice which was not exploited.

3. Withdrawal of the consent for processing personal data

The Amendment Act deals with withdrawal of the consent of the consumer for processing his or her personal data in a separate provision. This provision states as follows:

The provisions of this Act regarding any personal data in contracts, according to which the seller or service provider [covering also a trader supplying a digital content or digital service] delivers or undertakes to deliver digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price or provides or undertakes to provide personal data, shall be applied if the protection of personal data not specified otherwise in the regulatory special norms.[40]

This provision clearly states that the Consumer Rights Protection Act does not provide any special rule in this situation. Yet the Act refers to relevant provisions included in the GDPR

discussed previously in conjunction with a respective provision in the Directive and national rules on data protection. Such a response from the Latvian legislator is adequate as it allows to avoid overlapping regulation of data protection and remains the existing regulation on data protection applicable also in respect of such personal data submitted in relation to Supply of digital content or digital service.

4. A liable person for the trader's right of redress

The Amendment Act deals also with determination of a liable person for the trader's right of redress. The Latvian legislator continued the previous approach and extended it to the trader of digital content or digital service. Such approach took place by inserting words 'digital content or digital service' in the existing regulation included in the Consumer Rights Protection Act in such a way extending the existing regulation also to digital content and digital service.[41] Thus, the trader, who has compensated a consumer for losses caused to the consumer or repaid the amount of money paid for the digital content or digital service, has a right of recourse against the person from whom the goods or materials were purchased.[42] Likewise, if conformity of the digital content or digital service with the contract has been caused due to the actions or inaction of the manufacturer, trader, distributor, or other person, the trader or the service provider is entitled bring a recourse claim against the relevant persons.[43] Yet the settlement reached by the trader with a third person on elimination of the defects of digital content or digital service, does not release that trader from direct liability towards the consumer.[44]

Such a response from the Latvian legislator should be perceived as reasonable and adequate. The Latvian legislator did not create a separate liability regime for right of redress in the case of supply of digital content or digital service but extended existing regulation to digital content and digital service instead. Yet it should be noted that such an extension is based on a provision from the Digital Content Directive discussed above. Therefore, application of above national legal provisions should be carried out in the view of that Directive's provision.

IV. CONCLUSION

The article analyses those few possibilities (envisaged in Article 10, second and third subparagraphs of Article 11(2), second subparagraph of Article 11(3) and Article 20 of the Digital Content Directive) of a national legislator envisaged by the Digital Content Directive concerning the regulation on supply of digital content or digital service. These possibilities are just narrow situations when a national legislation may adopt its own provisions either because the Directive explicitly allows it as it is in the case of the first two possibilities or indicates that a particular issue should be dealt with at the national level as it is in the case of the third possibility). The response of the Latvian legislator concerning the use of these possibilities was rather reserved as it does use only possibility to regulate the liable person in the right of redress which is a matter left for a national competence and its regulation, therefore, at the national level was unavoidable necessity for the Latvian legislator. Therefore, one may arrive at the conclusion that the existing regulation on supply of digital content and digital service in Latvia will be solely based on the regulation overtaken from the Directive except the regulation

concerning the right of redress left for the national legislator and regulated by the Latvian legislator.

[1] Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, 22 May 2019, p. 1. [Digital Content Directive].

[2] For a discussion of this reform, see, for instance, P. GILIKER. "Adopting a Smart Approach to EU Legislation: Why Has It Proven So Difficult to Introduce a Directive on Contracts for the Supply of Digital Content?", in T.-E. SYNODINOU, P. JOUGLEUX, C. MARKOU, T. PRASTITOU (EDS.), *EU Internet Law in the Digital Era*, Cham, Springer, 2020, pp.299-320.

[3] Yet this differentiation is not always an easy task (see, for instance, K. SEIN, "The Applicability of the Digital Content Directive and Sales of Goods Directive to Goods with Digital Elements", *Juridica*, 2021, pp.23-31).

[4] P. GILIKER. "Adopting a Smart Approach to EU Legislation: Why Has It Proven So Difficult to Introduce a Directive on Contracts for the Supply of Digital Content?", in T.-E. SYNODINOU, P. JOUGLEUX, C. MARKOU, T. PRASTITOU (EDS.), *EU Internet Law in the Digital Era*, Cham, Springer, 2020, pp.299-320.

[5] For a general overview of the Digital Content Directive, see, for instance, H. BEALE, "Digital Content Directive And Rules For Contracts On Continuous Supply", *Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC)*, n° 3, 2021, pp. 96-110.

[6] Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, 22 May 2019, p. 28 [Consumer Sale Directive 2019].

[7] Article 4 Digital Content Directive.

[8] For the Digital Content Directive, see, for instance, Article 3(5) of that Directive.

[9] Article 3(10) Digital Content Directive.

[10] V. MANTROV, "Jaunā patērētāja pirkuma direktīva (Direktīva 2019/771): izaicinājumi un iespējas Latvijas likumdevējam New Consumer Sales Directive (Directive 2019/771): Challenges and Possibilities for Latvian Legislator, in: Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās", in *Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās. Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums / Application of the International and European Union law in the national courts. Collection of research papers of the 78th International Scientific Conference of the University of Latvia*, Rīga: LU Akadēmiskais apgāds, 2020, 319.-329.lpp.

[11] V. MANTROV, R. BIRSTONAS, J. Karklins, A. Kelli, I. Kull, A. Buka, I. Barkane, Z. Davida. The Implementation of the New Consumer Sales Directives in the Baltic States: A Step Towards Further Harmonisation of Consumer Sales, in: *New Legal Reality: Challenges and Perspectives II. The 8th International Scientific Conference of the Faculty of Law of the University of Latvia, 21–22 October 2021, Riga. Collection of Research Papers*, Riga: University of Latvia Press, 2022, pp.511-512.

[12] Law of March 18, 1999, Consumer Rights Protection Act. Its official translation into English available at <https://vvc.gov.lv/image/catalog/dokumenti/Consumer%20Rights%20Protection%20Law.docx>.

[13] V. MANTROV, R. BIRSTONAS, J. Karklins, A. Kelli, I. Kull, A. Buka, I. Barkane, Z. Davida. The Implementation of the New Consumer Sales Directives in the Baltic States: A Step Towards Further Harmonisation of Consumer Sales, in: *New Legal Reality: Challenges and Perspectives II. The 8th International Scientific Conference of the Faculty of Law of the University of Latvia, 21–22 October 2021, Riga. Collection of Research Papers*, Riga: University of Latvia Press, 2022, p.511.

[14] Article 4 Digital Content Directive.

[15] Article 11(2) Digital Content Directive.

[16] See F. ZOLL, “Article 11: Liability of the trader”, in R. SCHULZE, D. STAUDENMAYER, *EU Digital Law: Article-by-Article Commentary*, Baden-Baden, Nomos, 2020, p.206.

[17] Article 11(2) second subparagraph Digital Content Directive.

[18] Digital Content Directive, preamble, Recital 56.

[19] Article 11(2) third sub-paragraph Digital Content Directive.

[20] Digital Content Directive, preamble, Recital 58.

[21] See also For a discussion of Article 20 of the Digital Content Directive, see D. MOŽINA, “Article 20: Right of redress”, in R. SCHULZE, D. STAUDENMAYER, *EU Digital Law: Article-by-Article Commentary*, Baden-Baden, Nomos, 2020, p.209.

[22] Article 11(3) second subparagraph Digital Content Directive.

[23] Article Digital Content Directive, preamble, Recital 40.

[24] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 04 May 2016, p. 1.

[25] Digital Content Directive, preamble, Recital 39.

[26] For a discussion of Article 20 of the Digital Content Directive, see D. MOŽINA, “Article 20: Right of redress”, in R. SCHULZE, D. STAUDENMAYER, *EU Digital Law: Article-by-Article Commentary*, Baden-Baden, Nomos, 2020, pp.321-329.

[27] Article 20 second sentence Digital Content Directive.

[28] For a brief discussion of the use of these possibilities in the Baltic region in respect of the three Baltic States, see V. MANTROV, R. BIRSTONAS, J. Karklins, A. Kelli, I. Kull, A. Buka, I. Barkane, Z. Davida. The Implementation of the New Consumer Sales Directives in the Baltic States: A Step Towards Further Harmonisation of Consumer Sales, in: *New Legal Reality: Challenges and Perspectives II. The 8th International Scientific Conference of the Faculty of Law of the University of Latvia, 21–22 October 2021, Riga. Collection of Research Papers*, Riga: University of Latvia Press, 2022, pp.511-512.

[29] Article 33 Consumer Rights Protection Act.

[30] Materials concerning the draft Amendment Act are available on the webpage of the Latvian Parliament, available at <https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/webSasaiste?OpenView&restricttcategory=1179/Lp13>.

[31] See, for instance, J. KARKLINS, V.MANTROV, “The Place of Contract for Digital Thing in Latvian Contract Law Within the Context of the Consumer Sale Directives 2019”, *Journal of the University of Latvia 'Law'*, 2021, No 14, pp. 68-79.

[32] Ziņojums par likumprojekta “Grozījumi Patērētāju tiesību aizsardzības likumā” (Nr. 1179/Lp13) zinātnisko sākotnējo izvērtējumu (ex ante) [Report on the Scientific Preliminary Assessment (ex ante) of the Draft Law “Amendments to the Consumer Rights Protection Law” (No. 1179/Lp13)]. Available in Latvian at <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/0FD2149542AA3059C2258775006312BD?OpenDocument>

[33] Likumprojekts “Grozījumi Patērētāju tiesību aizsardzības likumā” [Draft Law “Amendments into the Consumer Rights Protection Law”] (Nr.1179/Lp13). Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/946D649B5CF1D56CC22587680040405B?OpenDocument>.

[34] Law of February 17, 2022, On Amendments to the Consumer Rights Protection Act. Its official translation into English is not available.

[35] Article 27(1) first sentence Consumer Rights Protection Act.

[36] Article 16 Amendment Act by supplementing the Consumer Rights Protection Act with a new Article 16.¹ and its Para 3.

[37] Article 21 Amendment Act by expressing Article 27(1) first sentence (as well as the whole Article 27) of the Consumer Rights Protection Act in the new wording.

[38] K. TORGĀNS, J. KĀRKLIŅŠ, V. MANTROV, L. RASNAČS, *Contract Law in Latvia*, AH Alphen aan den Rijn, Wolters Kluwer, 2020, p.208.

[39] Likumprojekts “Grozījumi Patērētāju tiesību aizsardzības likumā” [Draft Law “Amendments into the Consumer Rights Protection Law”] (Nr.1179/Lp13). Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/946D649B5CF1D56CC22587680040405B?OpenDocument>.

[40] Article 2 Amendment Act by supplementing the Consumer Rights Protection Act with a new Para 6 in Article 2.1.

[41] Article 25 Amendment Act.

[42] Article 33(2) Consumer Rights Protection Act.

[43] Article 33(4) Consumer Rights Protection Act.

[44] Article 33(3) Consumer Rights Protection Act.

E-COMMERCE AND THE PROTECTION OF CONSUMERS IN EUROPEAN PRIVATE INTERNATIONAL LAW – SELECTED ISSUES FROM THE ECJ’S CASE LAW

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Summary

The active involvement of consumers in e-commerce and the absence of global uniform standards for their protection increase the importance of private international law norms. The European Union had established special and derogatory solutions for international jurisdiction and applicable law, clearly inspired by substantial objectives: facilitating the (EU) consumers’ access to justice and guaranteeing them a mandatory minimum level of protection. Their intervention depends, however, on the observance of particular conditions: the conclusion of a consumer contract, in specific circumstances related to the professional’s business activity. Along with the interpretative judgments of the European Court of Justice, each of these conditions was associated with nuances and the article carefully reviews them, emphasizing their particularities in the context of e-commerce and their impact for those concerned.

Keywords

E-commerce, international consumer contracts, competent court, applicable law, targeted activities, ECJ case law

I. INTRODUCTORY ASPECTS

The exponential growth of e-commerce and the more and more frequent involvement of consumers in international contracts are realities that no one ignores today. Expression of the European legislator's intention to address the consumers' vulnerability, the EU Regulations Brussels I bis[1] and Rome I[2] devoted them some special, derogatory and pioneering[3] norms[4], that were influenced also by the peculiarities of e-commerce[5]. They admit only restrictively the party autonomy, both as regards the jurisdiction (art. 19 Brussels I bis Regulation) and conflicts of laws[6]. If the parties did not use this freedom, the courts from the consumer's domicile will have jurisdiction (art. 18(1), (2) Brussels I bis) and they will solve the dispute on the basis of their own law (art. 6(3) Rome I), which will facilitate the consumer's access to justice and lower costs[7].

The application of these protective norms is not indefinitely accepted. The European legislator had established a series of requirements, whose non fulfilment entrains a return to the general and more liberal solutions accepted for B2B contracts. These requirements and limitations – concerning the beneficiaries of the norms, the types of contracts concerned and the targeting of the activities – are almost as important as the specific mechanism of the protective rules themselves. Subject to the ECJ's interpretation, with solutions which are not always obvious from the lecture of the texts, they will be scrutinized in this paper; the aim is to clarify their meaning and scope, because they influence the effectiveness of the legal protection of those involved, consumers or professionals alike, and to evaluate their practical implications, especially as regards the (relatively new) context of e-commerce.

II. THE EXISTENCE OF A SPECIFIC CONSUMER CONTRACT

The application of the special PIL norms from Brussels I bis and Rome I Regulations supposes the conclusion of a contract, whose parties are a consumer and a trader. Each of the three concepts will be briefly analysed, emphasizing their essential defining aspects and some problems generated by the online environment.

1. The consumer – an autonomous definition

The beneficiary of the special norms is the consumer; the notion receives a strict[8] and autonomous European definition[9], common to both Regulations[10]: the consumer is necessarily a natural person who concludes the contract for the purpose of satisfying its own needs in terms of private consumption (in opposition with a professional purpose)[11]. To that effect, it should be considered its objective position in the contract, given the nature and object of that contract [12].

A. Financial contracts. A specific category of contracts concluded on the internet, those for financial services or investments, raises problems. The Directive 2002/65/EC on the distance marketing of consumer financial services[13] clarifies that a person can act as a consumer when enters into a financial (credit, insurance, investment) contract; even if the contract concerns

financial instruments that generate special risks related to their features or to the operations to be executed or whose price depends on fluctuations in the financial markets outside the supplier's control and that historical performances are no indicators for future performances, that characterisation can be maintained.

Because the investor aims to obtain profits, the arguments in favour of the existence of a professional purpose and of a different classification of the contract are still possible. The European Court of justice was called to intervene, in *Petruchová*[14], in order to clarify whether a natural person which carried out transactions through a brokerage company (FIBO) on the FOREX market is allowed to rely on the favourable jurisdiction rules from the Section 4 Chapter II of the Brussels 1 bis Regulation. The Court offered an affirmative answer. She remembered that the notion of „consumer” should be interpreted restrictively and only the contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules (para 42). *In casu*, since the investor was a mere student and the investments were not connected with any professional activity, that requirement was considered as met. More importantly, the Court has also clarified that the qualification is independent of the amounts of money involved or of the existence of important risks of financial losses[15] and, equally, of the knowledge, expertise and information held by the investor in a specific field (para 56), of its active conduct on the market, including FOREX market, and of the assuming the risks and liability for the return on his investments (para 57-58).

A supplementary explanation was necessary, since the scopes of application of art. 17-19 Brussels I bis and art. 6 Rome I do not match perfectly. According to the Court, the exclusion from art. 6(4)(d) Rome I as regards the contracts on financial instruments should not influence the procedural protection for consumers guaranteed by the Section 4 Chapter II of the Brussels I bis Regulation (para 61-66). In fact, the exclusion operated in the field of conflicts of laws is not dictated by the non-qualification of the potential investors as consumers. It is based on justifications related to the instruments involved and to the need to ensure their fungible trading and offering on the market (as clarified by Recital 28 Rome I Preamble), so that its reach is limited.

With this nuance, the ECJ's position in *Petruchová* is pertinent also as regards the conflicts of laws. Moreover, the exclusion from art. 6(4)(d) Rome I concerns only the financial instruments; the contracts for financial services, like brokering agreements, other contracts with intermediaries, administration of portfolios, consultancy services for investments, performance of orders for clients are covered by the favourable rules^[16] and the indications offered by the ECJ are of direct and immediate interest for them.

The solution in *Petruchová* was confirmed in *Reliantco*[17]: an individual who concludes a contract for financial investments services, on a platform administered by a financial company, maintains its quality of consumer even if he effectuates a large number of transactions in a short interval of time or invests important amounts of money in these transactions, and even if he is a regular client for services for intermediation of financial services (para 54 and para 57);

once again, the essential element for the qualification is the purpose of the operations, that should not be connected with the professional activity of that person.

The same objective position, centred on the purpose, was followed also in case of a poker game contract concluded online between a natural person and an online games organizer[18]. The Court recalled that for the appreciation of the consumer status, the amounts of gains are irrelevant, even if they allowed to the consumer to satisfy its current living needs (para 35-36); neither important were the time spent on the platform and the knowledge or information that an individual has in the specific field (para 38-40).

If these indications are welcomed, as they clarify the situation when the case is presented in front of a court, for the online traders they are not of big help; they do not allow them to predict precisely whether their counterparty is a consumer or not. The proof of the personal purpose of the contract, made by the consumer, cannot be overturned by the trader who invokes specific (subjective) elements related to its counterparty or on its unawareness or impossibility to predict that personal purpose of the contract.

B. Dual purpose contracts. Sometimes, the contracts concluded by natural persons may have a double purpose, personal and professional, and it should be decided whether the specific favourable rules may intervene in their regard. The negative answer, expressly confirmed by ECJ in *Gruber*[19], *Milivojević*[20] and *Schrems*[21], finds its justification in the derogative nature of the texts and their specific objective – the protection of only the weak parties. The one that concludes a contract (also) for professional purposes is deemed to have enough information and economic power to protect himself; the resources and knowledge cannot be ignored when a party enters in a double purpose – private and professional – contract. The Court admitted an exception to this solution, when the professional purpose plays a marginal, merely negligible role in the economy of the contract (*Gruber*, para 45). This role should be established based on the content, nature and purpose of the contract and also on the objective circumstances of its conclusion. Of course, the national courts have an important role to play, and the ECJ offered precise indications as to their mission (*Gruber*, para 51 and 52).

The distinction between the personal or professional purpose of the contract is sometimes more difficult in the context of social platforms. The ECJ's indications in *Schrems v. Facebook*^[22], in a dispute concerning alleged breaches of the right to data protection, initiated by a natural person against the social media platform, are useful and opportune also in this regard. The action against Facebook Ireland was brought before the Austrian courts of the State of Mr Schrems's domicile, but their jurisdiction was challenged, leading to a preliminary question.

The ECJ reconfirmed the principal solution from previous cases, but also set some rules as regards the situation of social platforms' users. A private Facebook account user does not lose its status as a consumer when he publishes books, give lectures, operates websites, raise funds and is being assigned claims of numerous consumers for the purpose of their enforcement (para 41)[23]; indirectly, it is confirmed that these activities can be considered as having a marginal professional purpose. Also, confirming *Petruchová*, the Court considers that a person cannot

be deprived of its consumer status when he possesses a high level of knowledge and information or acquires a specific expertise in the field covered (paras 39-40).

An additional nuance is brought as regards the services offered by the platforms intended to be used for long periods of time, in case of subsequent changes in their use. Following the previous position of AG M. Bobek[24], the Court considers that the initial status of consumer may be lost if the person changes the predominant personal use of those services (para 37-38). Thus, if in the moment of the dispute, the professional activity on the social media platform is prevalent, the user – initially a consumer – might actually be considered as a professional and deprived of the possibility to rely on the protective norms from the European regulations.

Even if this last position seems more severe, it is not enough to diminish the impact of the *Schrems* judgment, read globally: it allows a liberal interpretation for the concept of consumer, at least in relation with the online platforms (see para 38, compared with *Gruber*). Thus, if the platforms are used as mere instruments for promoting the reputation (even professional), the personal purpose and usage are prevalent, the user being considered as a consumer[25]; conversely, if they are used for professional benefits, for example, because the user performs paid marketing activities or recruits clients for the products sold or services provided, the professional status might be retained.

The idea of an eventual evolution of the qualification is also found in *A.B., B.B. vs Personal Exchange International Ltd*[26], a case involving a person who spent around 9 hours daily on an on-line gaming platform. After recalling that „*a user of such services may rely on his or her status as a ‘consumer’ only if the predominately non-professional use of those services, for which he or she initially concluded a contract, has not subsequently become predominantly professional*” (para 42), the Court offered specific clarifications, taking into account also the solutions found in other EU texts, precisely in the Directive 2005/29 on unfair commercial practices and the Directive 2011/83 on consumers’ rights. Even if the regularity of the activity might be taken into account for the classification of a person as a professional (opposed to a consumer), this criterion is neither unique, nor determinant *per se* ; it might count if the activity would give rise to the sale of goods or a supply of services to third parties or would have been officially declared[27] (but this was not the case for the client of the online gaming platform) : thus, „*a natural person domiciled in a Member State who, first, has concluded with a company established in another Member State a contract to play poker on the Internet, containing general terms and conditions determined by that company, and, secondly, has neither officially declared such activity nor offered it to third parties as a paid service does not lose the status of a ‘consumer’ within the meaning of that provision, even if that person plays the game for a large number of hours per day and receives substantial winnings from that game*” (para 50 and operative part).

C. *The platforms of collaborative economy*[28], like Ebay, Airbnb, Uber, may also generate uncertainties, since, at least at the first sight, the status of the participants might be unclear. In their relation with the platform, the users having accounts which facilitate their activity might be qualified either professionals or consumers (and sometimes employees[29]); the same

characterisation is possible in principle also as regards the contracts concluded with other users, through the platform.

Those invoking the benefit of the protective norms bear the burden as regards the proof for the specific legal requirements, the status of consumer included (*Gruber*, para 46). Thus, in the relation with the platform used for promoting its product, the user should prove that he acted for a non-professional purpose (or that the professional purpose is totally negligible and marginal). Also, in the relation with the client to which he sold the assets or provided the services and who claims the application of the protective norms, after proving its consumer status, the user registered on the platform should eventually prove that he is a mere particular and not a professional, so that the provisions of art. 17-19 of Brussels I bis Regulation or of art. 6 of Rome I Regulation, that operates only for B2C relations, and not also in C2C relation, cannot be opposed to him.

The issue of the qualification of a person who offers goods or peer-to-peer services on a collaborative platform becomes highly important; it is expressly addressed by the EU Commission Communication called *A European agenda for the collaborative economy*^[30]. Recognising the existence of possible differences among the Members States, the Commission offers a list of criteria which, even if taken in isolation, are not fully revealing, their combination might be helpful and facilitate the qualification. The first indicator is the frequency of the services: the occasional (marginal, accessory) provision of services makes it unlikely that the user qualifies as a professional; however, higher their frequency, easier is to retain a different position. The second indicator is the profit-seeking motive: if the price requested is the mere compensation of the costs incurred, probably the user will not be a professional; conversely, if he seeks the profits, the lucrative purpose is present and the qualification may change^[31]. The last indicator is the level of turnover generated from the platform: higher it is, easier will be that the user qualifies as a trader. Certainly, at a first sight, these indicators are pertinent and useful. But the practical reality is not always in nuances of white or black so their application will not always be easy.

D. The associations for the consumers' protection. A supplementary issue that needs to be addressed is whether the protective provisions from art. 17-19 of the Brussels 1 bis and art. 6 of the Rome I Regulation benefit also to the associations for the consumers' protection or to those acting as the assignees of the consumers' rights.

As regards the jurisdiction, the ECJ has offered a negative answer. A legal person – such an association – cannot be classified as consumer and is not entitled to benefit from the protective norms, even if it does not follow a lucrative purpose^[32]. Similarly, a consumer to whom the claims of other consumers have been assigned cannot prevail of the favourable forum from art. 18 of the Regulation 1215/2012 (the courts from its own domicile) in the dispute against the professional. The issue was expressly referred to the ECJ in *Schrems* case, who refused a broad interpretation: the fact that the assignee is, in any event, able to bring proceedings before the courts of his domicile on the basis of claims pursuant to rights vested in him personally under a contract concluded with the defendant, similar to those which have been assigned to him, is not such as to bring those assigned claims also within the jurisdiction of that court (*Schrems*,

para 47); the assignment cannot create a special forum for the consumer to whom those claims have been assigned.

Such a solution is sufficiently justified by the effective position of the consumer in the dispute and by the need to limit the generalisation of a *forum actoris*; it also helps to maintain the predictability in the functioning of the protective jurisdiction rules. Nevertheless, it cannot automatically be transposed as regards the conflicts of laws[33].

The governing law should normally be determined from the moment of the conclusion of the contract (except when the parties decided to modify it) and should be established independently of the identity of the person who brings court proceedings for the protection of the corresponding rights. The ECJ expressly clarified the issue in *VKI v. Amazon EU Sàrl*[34], a case concerning the interpretation of Rome I and II Regulations in the context of the determination of the law governing an action for cessation of the utilisation of unfair terms by the Amazon platform in its general standard terms[35]. A distinction was made. As regards the cessation action, the Court reaffirmed the extra-contractual classification retained in *Henkel*[36] for jurisdiction issues, with a specific nuance for conflicts of laws[37]. As regards the law applicable to the unfairness of the terms, the Court returned, conversely, to the provisions of Rome I Regulation: „*the allegedly unfair terms which are the subject of the action for an injunction in the main proceedings are, for the consumers to whom they are addressed, in the nature of contractual obligations*” (para 50). Since the court proceedings were started by an association for the consumers’ protection, the Court had to decide whether art. 6 is operating or not. The answer offered was affirmative : the law applicable as regards the appreciation of the unfairness of terms from consumers’ contracts should be determined according to art. 6 Rome I, regardless whether the court proceedings are started by the consumer or by an association for the consumers’ protection; the solution is justified by the need to ensure the coherence and stability of the governing law, regardless the type of action (individual or collective) started for the establishment of the unfairness of the contractual terms (para 53-56) and it is welcomed.

2. The professional

For the applicability of the protective rules from Brussels I bis and Rome I, it is necessary that the consumer contracted with a professional; the special solutions are operating only for B2C contracts and not for C2C contracts[38]. The trader is a person acting for trade or professional purposes, regardless whether it is registered or not as such in a specific registry. It may be a natural or a legal person and the activities performed may be purely commercial (sales, provisions of services) or liberal (law, medicine, architecture).

Some discussions are possible as regards the natural persons. When they might/should be considered as professionals? The registration in a professional registry facilitates the classification; in its absence, some uncertainties persist and the ECJ tries to reduce them. In *Kamenova*[39], the Court has offered some indications on the classification of a person offering new and second-hand products on an on-line platform. Even if the interpreted text was the art. 2.2 of the Directive 2011/83, these are relevant also for private international law cases. After

mentioning the legal definition of the trader, the Court analysed it in opposition with the concept of consumer, a person which is placed into an inferior and vulnerable situation, weaker from an economical point of view and less experienced than its counterparty. She opted for a functional approach, requiring a case-by-case analysis of the purpose of the contractual relation (para 37) and enumerated a list of aspects that may be taken into account for the classification. The national courts should verify *“whether the sale on the online platform was carried out in an organised manner, whether that sale was intended to generate profit, whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller’s commercial or professional activity, whether the seller was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity, whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods”* (para 38). This long list is not exhaustive, nor exclusive, which means, in the Courts’ opinion, that the presence of one of these criteria does not determine *per se* the classification that should be retained for the on-line seller[40]. More convergent indicators exist in the opposite sense, the answer might change. The purpose followed is essential and it should be attentively scrutinized by the national courts.

Sometimes, in order to protect the consumers involved in international contracts, the ECJ deliberately enlarged the scope of application of the protective texts, offering surprising interpretations of the concepts involved. Such an example is *Maletic*[41], rendered in relation with a contract by which two consumers domiciled in Austria brought from the German site lastminute.com a package for tourist services in Egypt, a package organised by TUI, an Austrian company. Because of some disturbances affecting their trip, they addressed the Austrian courts, from their domicile, with an action against the German agent and the Austrian organiser of the package. Having to establish whether the jurisdiction in relation with the last can be established on the basis of the Brussels I bis Regulation, the Austrian court referred the ECJ a preliminary question on the meaning of the expression „the other party to the contract” (found nowadays in art. 18). In the Court’s opinion, given the indissociable link between the two contractual legal relations, with the agency and with the organiser of the package and the objective of the consumers’ protection followed by the legal text, *„the concept of ‘other party to the contract’... must be interpreted as meaning, [...], that it also covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled”* (para 32). The solution might have been explained through the specific rules for travel packages, but is more surprising from the perspective of the rules on agency (pertinent in our opinion, the agency acting as an agent of the travel operator) or subcontracting (apparently envisaged by the Austrian court, who seemed to analyse the travel operator as the entity performing the contract

concluded by the travel agent). The Court did not enter into details on these issues, preferring to insist on the objective of the consumers' protection as weak parties and on the need to reduce the concurring proceedings; by avoiding the discussion on the merits, the judgment appears unfortunately as summarily reasoned and is not very convincing.

3. The conclusion of a contract

The protective rules will be applied only if the consumer effectively concluded, in the technical sense, a contract with the professional. Three types of situations determined clarifying interventions from ECJ.

A. Advertising lotteries. For the advertising lotteries, the Court was favourable to a liberal interpretation of the special norms, even with some nuances, and to a contractual classification of the action. In *Rudolf Gabriel*[42], the Court considered that, when through a misleading advertising the vendor presented the order as constituting the prerequisite for the grant of a promised financial benefit, where the consumer place that order, the parties are concluding a consumer contract; since the prize was the essential or even exclusive reason for the contract, the consumer's request of remittance of the prize is extremely closely connected with that contract, from which it is indissociable and, consequently, he may rely in the corresponding action on the favourable rules from (now) Section 4, Chapter II of the Regulation 1215/2012 (para 54).

When the remittance of the prize is not conditional upon placing an order, the consumer having the possibility to request the goods for trial, without any purchase obligation, a distinction should be made. According to ECJ in *Engler*, if the client does not place the order, he will not be considered as a consumer and he will not be able to rely on the favourable rules for consumers' contract when he claims the prize in court[43]. If the order is placed, a consumer contract is concluded between the parties. According to the Court in *Ilsinger*, there is no need that some reciprocal promises were assumed by the parties; on the contrary, for the operation of the protective jurisdiction rules, it is enough that one of the parties accepts a firm, clear and precise offer from its counterparty, without assuming in turn any obligation[44].

B. The violation of the pre-contractual obligation of information. Additional clarifications were recently brought by the ECJ in *Reliantco* case, in which the issue of the competent court in relation with an eventual *culpa in contrahendo* (deliberate misleading of the consumer and non-fulfilment of the obligation of pre-contractual information) related with an international consumer contract was directly raised. The Court had to clarify whether the special rules for consumer contracts are applicable or not in case of such dispute. Preoccupied to prevent the multiplication of the competent fora, aspect that would have disadvantaged the weak party and would have affected the sound administration of justice, the Court considered that, despite the extra-contractual basis of the claim, the consumer may rely on the special protective rules, especially those regarding the jurisdiction of the courts from its domicile, when that claim/action is indissolubly linked to the contract effectively concluded with the professional (para 73).

The solution confirms the line in the previous cases on advertising lotteries, with which it shares common aspects: the evoked cases concerned a *culpa in contrahendo* and had an extra-contractual fundament in substantive law. The Court ignores this extra-contractual fundament, both as regards the prize notifications and the violation of the information obligation, and appreciates that the application of the favourable jurisdiction rules on consumer contracts is possible if the action is closely connected with the contract concluded between the consumer and the trader. The scope of application of the rules from the Section 4 Chapter II, devoted to operate for consumers contracts, is once again extended.

The extension is more evident than that made in *Gabriel*, where the action for the remittance of the prize might have been assimilated to an action for the performance of the assumed engagements, the jurisdiction of the courts of the consumers' domicile being thus justified. In *Reliantco*, the dispute was not related with the performance of the contract, but concerned the professional's liability for not fulfilling its pre-contractual obligation of information, counselling and warning the consumer on the risks entrained. The ECJ accepted the jurisdiction of the courts from the consumer's domicile, insisting, among other, on the sufficient connection of the action with the contract concluded between the parties[45]; given the details of the case, these will be competent to decide not only on the eventual pre-contractual liability of the trader, but also on the nullity of some of the clauses of contract, nullity dictated precisely by that *culpa in contrahendo* (see para 28 of the judgment, exposing the details on the consumer's action). Undoubtedly favourable to the consumers, the solution is also surprising.

Even if, for the classification of the rights/actions for jurisdiction and conflicts of law issues, the uniformity would be ideal, it is not always evident or easy to achieve. For example, as regards the prize notifications, the issue whether a contract was concluded should be determined on the basis of *lex contractus* - the law from the consumer's habitual residence (art. 6 and art. 10 Rome I). Even assuming the existence of a contract, all the difficulties are not eliminated, since the consumer's claim is related to the contract, but has an extra-contractual fundament; the justifications in favour of *lex contractus* and *lex delicti* are equally important. The *lex contractus* normally governs the consequences of the non-performance of the engagements assumed and might pretend application since the ECJ seems to consider that the claim for the payment of the prize is a claim for the execution of the contract; conversely, the *lex delicti* intervenes for the reparation of a prejudice determined by a conduct representing the violation of a legal obligation, like the one of refraining from misleading advertising. Because the substantive law, which cannot be ignored, did not establish a *contractual* obligation for the professional to deliver the prize, but oblige to it as a consequence of a tortious conduct, it might be possible to consider that the conflict of laws rules for extra-contractual matters are more appropriate[46]. An argument in favour of this solution might be extracted from the *Reliantco*, where the ECJ expressly accepted that the courts from the consumer's domicile, competent to hear disputes for contractual matters, are also competent for the dispute, indissolubly linked with the consumer contract, through which the consumer seeks to engage the professional's liability for *culpa in contrahendo*, even if, from a conflicts of laws perspective, this one is extra-contractual (para 70, *Reliantco*)[47].

C. Chain of contracts. Difficulties may also appear when the consumer wants to start court proceedings against one of the professionals involved in a chain of contracts, other than its direct partner. In such cases, the jurisdiction rules for consumer contracts are not applicable, a solution imposed by the ECJ in *Kolassa*[48]. Following a restrictive interpretation and evoking the need for predictability as regards the jurisdiction, the Court insisted on the necessary conclusion of the consumer contract precisely with the professional against whom the proceedings are directed. This requirement is not met in case of a chain of contracts, entraining the transmission to the consumer of (only) some rights and obligations of the concerned professional[49]. The solution is not very favourable to the consumer, who will be obliged to rely on the rules from art. 7(2) Brussels I bis, for the extra-contractual liability, with all the inconvenience raised by its application; nevertheless, it is coherent with the interpretation retained by the Court as regards the expression „in contractual matters”, found in art. 7(1) of the Regulation.

For similar reasons, the same position should be followed for conflicts of law issues. Since the final consumer has not a direct contractual link with the trader from the other side of the chain[50], the action against the last should not be considered as stemming from a consumer contract; the law governing the claim in liability should be thus determined on the basis of the rules from Rome II Regulation[51].

4. Excluded contracts

Even if the European legislator acted constantly in the sense of ensuring a high level of protection for (as many) consumers, some consumer contracts are excluded from the scope of the protective rules[52]. As regards the jurisdiction, the special norms from art. 17-19 of the Brussels I bis Regulation are not operating for (some) transportation contracts (art. 17(3)) and for insurance contracts (subject to rules from Section 3 Chapter II of the Regulation). For the conflict of laws, the situation is more nuanced. The Rome Convention being lacunary and unable to respond to the European policies for the consumers' protection, its special rules were significantly reformed in Rome I Regulation, which covers in principle all types of consumer contracts[53]. Some of them are still excluded - transportation contracts (other than package travel contracts), contracts concerning rights or tenancies over immovables[54] (other than time-sharing contracts), contracts on financial instruments (already mentioned) and contracts concluded within a multilateral system - art. 6(4) Rome I.

The exclusion of contracts performed integrally in another State than that from the consumers' habitual residence, also mentioned by art. 6(4) Rome I, may raise uncertainties as regards the services provided online; they seem to be dissipated after the intervention of the ECJ in *VKI v. TVP Treuhand*[55], a case concerning the issue whether the exclusion from art. 5(4)(b) of the Rome Convention (now art. 6(4)(a) of the Rome 1) covers a fiducia contract for services to be performed at a distance. The place for the provision of services, essential for the operability of the rule, is a preliminary matter that the Court decided to clarify independently from the applicable law. Evoking the objective of the consumers' protection, pursued by art. 6, and the possibility of its frustration through a contractual clause on that place, pre-drafted by the professional, the ECJ considered that for the fulfilment of that requirement it is necessary to be

ascertained “*whether it follows from the very nature of the contracted services that they can be supplied, as a whole, only outside the State in which the consumer has his habitual residence*” (para 51). In other words, services can be considered as provided exclusively outside the State of the consumer’s habitual residence only where „*the consumer has no possibility of receiving them in his State of residence and must travel abroad in order to do so*” (para 52)[56]. With this, it becomes clear that the exclusion from art. 6(4)(a) is not applicable to the contracts for online services, which may be offered and performed without being necessary for the consumer to move from its State in order to obtain them. The broad interpretation offered by the ECJ is welcomed; it ensures an extensive application of the art. 6(1) and (2) Rome I and guarantees a minimum standard of protection for the consumers involved in electronic contracts for services.

III. THE CIRCUMSTANCES IN WHICH THE FAVOURABLE RULES APPLY

The second general requirement for the application of the special protective norms for consumers, found both in art. 17(1)(c) of Brussels I bis and art. 6 of Rome I Regulation, is related with the professional’s business activity: it must be pursued or directed (also) to the State of the consumer’s habitual residence (1) and the concluded contract should enter into the scope of that activity (2).

1. Activities pursued or directed to the consumer’s State

The legislator’s intention behind this requirement was to modernize the texts in the light of the development of the techniques for contracting at a distance[57], and especially of the internet, which is habitually used by consumers; the correlation of the solutions for jurisdiction and conflict of laws issues was also necessary[58], for an improved coherence of the European private international law norms.

The pursuit of an activity. The pursuit of an activity in the consumer’s State is less problematic and supposes, non-exhaustively, the existence of an establishment (like a branch), of a temporary presence (like the participation in fairs or exposition) or the use of professional representatives acting in the name and on behalf of the trader in the consumer’s State[59].

The targeting. The second alternative from the first requirement – the targeting of activities – is more problematic[60]. It was the technique through which the EU legislator extended the protection offered by the special norms also to those cases in which the professional or its employees are not physically present within the consumer’ State. Troublesome on the internet, the concept is not receiving a clear legal definition[61]. The doctrine considers that the directed activity concerns the trader’s marketing strategy and the methods used by him, but does not equal publicity, which is only one of these methods, and neither necessitates an organised system of distance sales (like in art. 2 of the Directive 2011/83). The mere conclusion of an isolated contract is not enough to deduce the targeting; this contract should be itself the result of the directed activities, which should be separately demonstrated, independently and based on all of the circumstances of the case[62].

In the absence of a legal definition, the ECJ was rapidly requested to intervene for clarification. In *Pammer*[63], a case concerning the interpretation of the targeting criterion in case of electronic contracts, the Court refused to take into consideration the mere accessibility of internet sites and insisted on the method of the fascicule of indices[64]. As regards the websites, it supposes to be established the direct or implicit intent of the professional to do business on the market of State of the consumer's domicile[65], verified on an objective basis, by taking into account the position of a normal client on internet and all the relevant circumstances of the case. Such a solution ensures a balance between the protection granted to the consumers and the respect of the predictability for the professionals and supports the legal certainty.

Interactive websites. If the websites are interactive and facilitate the placement of orders, offering indications on payments in foreign currency or on cross border deliveries, the targeting is more easily established[66].

The utilisation of a specific extension for a domain name (like .fr, .ro or .es) is a firm indication in the sense of targeting the clients from those States (France, Romania, Spain). The corresponding sites may nevertheless direct their activities also to other States than those indicated by the extension[67], a hypothesis directly mentioned in the legal texts; for example, sites like amazon.it, amazon.co.uk or mobile.de target directly clients and sell products in Romania and they may expect that, in the event of a dispute, the Romanian court will intervene and apply the Romanian law. When the sites are using extensions like .com, .net or .shop, the verification of the directed activities should be done based on other criteria from those mentioned by the ECJ in its case law (direct mentions made by the professional on the site, the utilisation of some on-line referencing services, the possibility of utilisation of the language or of the currency from the consumer's state ...). The mere mention on a site of the contact details of the owner, like the phone number or the email address, should be less valued since, according to the EU E-commerce Directive, any professional activating online should provide that information (art. 5(1)(c))

The targeting is the most frequently realised through advertising intentionally oriented to clients from a specific State. Correlatively, for the advertising which fortuitously reaches a specific State and a number of local clients react, the requirement of targeting should not be considered as fulfilled (other indicators being absent). For the on-line activities, this means that when a trader sends advertising mails or spams, there is targeting only as regards the states purposefully addressed (para 75, *Pammer*) and not as regards the states where the advertising arrives[68]. Thus, if a professional spams through e-mail clients from Romania and afterwards, while being in Greece, Cyprus or Malta, they access those emails with their local friends and order products or services (books, games, gambling), the requirement of targeting will not be met as regards the clients from Greece, Cyprus or Malta.

Passive websites. If the website is passive and does not offer the possibility of placing orders, but merely offers information on the trader's products and services, the situation is nuanced. The initial idea of the European Commission, mentioned in the Common Declaration of the Council and of the European Commission on art. 15 of the Brussels I Regulation (Recital 24 final), was to make a distinction between the active and the passive sites and exclude the last

from those that may be used for targeting. A series of arguments undermine such a solution, explaining why it was not retained: (a) it would impose considering technical elements, but the technology is not always available and easily usable by everybody, (b) the definition of active/passive sites is evolving, (c) a risk of confusion exists between the activity/the passivity of the site and activity or passivity of the consumer.

What should matter for characterizing the targeting is the commercial intention of the trader, doubled by a consistent conduct, and not merely the activity/passivity of the website. When, given the information on a passive site, the consumers place mail orders, which are subsequently accepted by the professional, who is aware that he should deliver the products in a specific country, the automatic refusal to apply the protective norms given the mere passivity of the site is not justified[69].

A global and circumstantial analysis of the professional's conduct should be done also in this case, in order to establish its real intention. The mere passivity of the site or a disclaimer in the sense that it does not concern consumers from a specific country should not be enough; the professional's subsequent conduct should be also consistent with this. If the professional wants to prevent the application of the protective norms which designate the courts and the law from the consumer's State, he should implement technical measures to that effect and eventually refuse clients from that State[70].

Targeting made through the intermediary's website. The *Pammer* judgment is relevant also from another point of view; the consumer did not contract directly with the professional, but merely placed the order using the website of a third party acting in the name and on the behalf of the professional. Because it was the site of the intermediary acting actively on the market of the consumer's State, the trader contested the fulfilment of the targeting criterion on its part. He was not successful, the Court appreciating that, since the intermediary acted in the name and on behalf of the trader, the fact that the webpage realising the targeting and which allowed the conclusion of the contract belonged to him was irrelevant (para 89, *Pammer*).

The details of the relation between the professional and the intermediary are not known; it is not clear whether this one acted on different foreign markets at the professional indication, if he communicated to him where he operates, if he used or not the commercial signs of the professional. Less the professional is involved in the international promoting activity realised by the intermediary through its webpage, less justified appears to assume that the targeting criterion is met. Unfortunately, the ECJ did not do such a distinction in *Pammer* and offered a single (and vague) indication: „*It is for the relevant national court to ascertain whether the trader was or should have been aware of the international dimension of the intermediary company's activity and how the intermediary company and the trader were linked*” (para 89); if all that matters is the mere awareness of the professional of the internationally directed activity of the intermediary and the fact that he acts on behalf of the professional, the solution is highly favourable to the consumer and sometimes surprising.

2. Contracts entering into the scope of the pursued or directed activities

As per the second requirement mentioned by the legal texts, the consumer contract should enter into the scope of the targeted activities. The requirement, also found in Recital 25 Rome I Preamble, aims to ensure the necessary and direct link between the contract concluded and the professional's activities and also a minimum of predictability for those interested[71]. The ECJ had a very liberal interpretation in its regard.

For example, in *Emrek*[72], she decided that the application of the special jurisdiction rules for consumers is not conditional on a causal link between the means employed by the trader to direct its commercial or professional activities to the consumer's State, namely a website, and the conclusion of the contract. Such a causality requirement would have been more encumbering for the consumer, obliged to make the corresponding proof and the Court eliminated it. Thus, the conclusion of the contract with the consumer might not be the result of the directed activities; if the targeting exists, but is made through other channels or means than those who were utilised for concluding the specific contract, the favourable rules from art. 17-19 from Brussels I bis or art. 6 Rome I Regulation can be applied.

Also, in *Hobohm*[73], the Court accepted the operation of the protective norms even for contracts not stemming directly from the directed activities. The factual situation involved two legally independent contracts between the same parties – a brokerage contract and a transaction-management contract –, only the first being concluded within the context of directed activities. The Court accepted the application of the favourable rules also as regards the second one, establishing a specific condition: the existence of a close link between this contract and a previous one, concluded by the same parties. The Court reserved some marge of appreciation to the national courts, that should verify the identity of parties, the close link between the contracts and, especially *whether their economic objective is identical and whether the second contract complements the first one, in that it seeks to make it possible for the economic objective of that first contract to be achieved*. A liberal position, favourable to the consumers, is once more evident.

IV. CONCLUSIONS

The EU private international law norms, devoted to guaranteeing the consumers the effective benefit of the substantive provisions found in the national transposition laws of the EU directives, are applicable indistinctively to consumers contracts, regardless whether concluded electronically or not[74], at a distance or not. They are not limited to cases connected exclusively with the EU Member States. Especially after the reforms from 2012, it is possible for the consumers to address the courts from their (European) domicile, regardless the domiciliation of the trader, their access to justice being facilitated. This extension is welcomed in a context of global commerce boosted by technology: a mere localisation of the professional outside the EU would have allowed him to escape the jurisdiction of the EU courts for the disputes with EU consumers, while doing active business locally. Also, the substantive mandatory provisions of European origin may frequently receive application. Some of the requirements accompanying the conflicts of laws norms set are natural and dictated by the mere

object of the rules: the protection is not justified beyond the consumer contracts, so as a specific attention is needed in the qualification process. Some others are imposed by specific PIL considerations and by the need to conciliate substantive justice issues (like consumers' protection and facilitation of their access to justice) and aspects related to the proximity and to the adequate coordination between the different national laws: the protection is justified only when the professional purposefully directed its activities to the consumer's State.

These requirements, frequently interpreted liberally and obviously *in favorem consumatoris*[75], are of major interest for the professionals. The EU private international law norms will have an important impact for all the e-commerce companies, regardless of their domicile, in the EU or abroad. With the targeting criterion, the intention of the professional to operate on a specific market, deduced from its objective conduct, becomes essential; it works as a predictability factor[76] and legitimises the position of the EU legislator. The solutions retained, even severe, are reflecting a balance between the consumers' protection and the interests of the professionals involved in the e-commerce: a better consumers' protection sustains their confidence in the electronic environment for contracting; correlatively, the e-commerce is in a constant growth, for the professionals' benefit.

[1] Regulation 1215/2012 on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters, JO L 351, 20.12.2012.

[2] Regulation 593/2008 on the law applicable to contractual obligations (Roma I), JO L 177, 4.7.2008.

[3] Z.S. TANG, „Consumer contracts and the Internet in EU private international law”, in A. SAVIN, J. TRZASKOWSKI (eds.), *Research Handbook on EU Internet Law*, Elgar, 2014, p. 254, sp. p. 259.

[4] The stake as regards the jurisdiction and applicable law in international consumers contracts is still high, despite the harmonising efforts made at the EU level. Even in Europe, the differences between the national legislations are still important. They are accepted including by the directives of new generation; for example, the Directive 771/2019 on certain aspects concerning contracts for the sale of goods (JO L 136, 22.5.2019) allows a margin of appreciation of the Member States in the transposition process as regards the corrective measures in case of non-conformity (art. 13(5), (6)), the commercial guarantees (art. 17(4)), the modalities for return and reimbursement in case of termination of the contract (art. 16).

[5] The requirement of the targeting of the professional's activities, found both in art. 17(1)(c) Brussels 1 bis and art. 6 Rome I Regulation, is an example of this influence.

[6] The choice of law clauses are in principle acceptable, but the consumer is allowed to claim the application of the substantive mandatory provisions from the State of its habitual residence (art. 6(2) Rome I Regulation).

[7] The (legislative) option for the application of the law of the State from the consumer's habitual residence is not justified directly by the substantive content of this law (more favourable to the consumer), but by the need to respect the parties' expectations and the accessibility of the content of this law - S. Francq, „Le droit international privé comme outil de régulation du marché intérieur: la consommation”, in M. AUDIT, H. MUIR-WATT, E. PATAUT, *Conflits de lois et régulation économique*, LGDJ, 2008, p. 115, para 300.

[8] ECJ, 19 January 1993, C-89/91, *Shearson Lehman Hutton*, para 17.

[9] R. PLENDER, M. WILDERSPIN, *The European Private International Law of Obligations*, 3rd ed., Sweet & Maxwell, 2009, p. 228, no. 9.011.

[10] Recital 7, Rome I Preamble. The ECJ's indications for the interpretation of the Brussels 1 (bis) Regulation or its predecessors will be relevant also as regards the Rome I Regulation, a welcomed solution which ensures the legal certainty for the parties and facilitates the uniform interpretations, the clarity and coherence of the solutions (important aspects, especially for e-commerce) - R. PLENDER, M. WILDERSPIN, *op. cit.*, p. 229, no 9.015 et seq.

[11] The origin of this definition is considered to be ECJ' decision from 21 June 1978, C-150/77, *Bertrand* (para 21). It also corresponds to the definitions found in different EU directives.

[12] ECJ, 14 March 2013, C-419/11, *Česká spořitelna*; CJCE, 3 July 1997, C-269/95, *Benincasa*. The same individual can be sometimes a professional and other times a consumer, depending on the purpose of the concluded contract - ECJ, 3 September 2015, C-110/14, *Costea*: a lawyer who concludes a loan contract will be a consumer if he borrowed the money for personal purposes and a professional, if he acted for professional purposes.

[13] *OJ L 271*, 9.10.2002, p. 16–24.

[14] ECJ, 3 October 2019, C-208/18, *Petruchová*.

[15] Considering some specific values in this regard would have contradicted both the legal texts (which do not establish such thresholds for their operation) and the objectives of certainty and predictability followed by the EU legislator – *Petruchova*, para 51 and seq.

[16] See Recital 26, Rome I Preamble.

[17] ECJ, 2 April 2020, C-500/18, *A.U. vs Reliantco Investments*.

[18] ECJ, 10 December 2020, C-774/19, *A.B., B.B. vs Personal Exchange International Ltd.*

[19] ECJ, 20 January 2005, C-464/01, *Gruber*.

[20] ECJ, 14 February 2019, C-630/17, *Milivojević*.

[21] ECJ, 25 January 2018, C-498/16, *Schrems v. Facebook*.

[22] ECJ, 25 January 2018, C-498/16, *Schrems v. Facebook*.

[23] A supplementary requirement appears in the AG Bobek Conclusions (from 14.11.2017): the dispute in which the user rely on the consumer status should be related with the activity on that private account; if it is generated by the activity on the professional page, the solution is different (para 26).

[24] In its Conclusions (para 40), the AG raises doubts about the existence of a personal purpose when, despite an initial utilisation of the e-mail account for personal communications, a user changed this utilisation into one for (preponderantly or exclusively) professional activity.

[25] Indirectly, the Court also confirmed that the protective rules can be applied not only to the consumer pay with money, directly, for the digital services or products, but also when he agrees for the collection, by the professional of some personal data and information, that will later be exploited.

[26] ECJ, 10 December 2020, C-774/19, *A.B., B.B. vs Personal Exchange International Ltd.*

[27] This registration, determined by an eventual control from the fiscal authorities in relation with the non-declared benefits obtained from the regular activities, is able to minimize in practice the importance of the second requirement mentioned by the court (offering assets or services to third parties, a requirement which is rarely met in practice in the field of online games).

[28] See the definition and the explanations offered by the European Commission in relation with this concept: „For the purposes of this Communication, the term “collaborative economy” refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of

actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ('professional services providers'); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms')" - *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, "A European agenda for the collaborative economy", Brussels, 2.6.2016 COM(2016) 356 final (p. 3).

[29] ECJ, 20 April 2020, C-692/19, Yodel.

[30] Communication from the Commission..., *op. cit.*, p. 9-10.

[31] According to the EU Commission, *op. cit.*, p. 10, in principle, the persons that merely exchange assets (like in case of *home swapping*) or services (like in case of *time banks*) should not qualify as traders.

[32] ECJ, 19 January 1993, C-89/91, *Shearson Lehman Hutton*; ECJ, 1 October 2002, C-167/00, *Henkel*, para 41.

[33] M. WILDERSPIN, „Article 6”, in (eds). U. MAGNUS, P. MANKOWSKI, *Rome I Regulation. European Commentaries on Private international Law*, Otto Schmidt, 2017, p. 461-462, no.18.

[34] ECJ, 28 July 2016, C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl*.

[35] In *VKI v. Amazon*, the ECJ had the occasion to intervene on the issue of the unfairness of a choice of law clause designating the law of the professional, found in the general terms that the online e-commerce platform Amazon and applied also for international consumer contracts. The Court recalled that such clause is admissible under art. 6, but it also may be invalidated as unfair when „it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties” (para 67), and more precisely, when “it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term” (para 71). Given this, in order to avoid a rapid invalidation of their *electio juris* clauses, the professionals should consider their redrafting; the information of the consumers about their possibility to rely, in specific circumstances, of the law of the State from their habitual residence appears as an indispensable requirement.

[36] ECJ, 1 October 2002, C-167/00, *Henkel*, para 50.

[37] ECJ, *VKI v. Amazon*, para 39: „an action for an injunction under Directive 2009/22 relates to a non-contractual obligation arising out of a tort/delict within the meaning of Chapter II of the Rome II Regulation”; „unfair competition within the meaning of Article 6(1) of the Rome II Regulation covers the use of unfair terms inserted into general terms and conditions, as this is likely to affect the collective interests of consumers as a group and hence to influence the conditions of competition on the market” (para 42), so that the solution should be that of the application of the law of the state in which the collective interests of consumers are affected, and more precisely, then country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended by the relevant consumer protection association by means of that action. The application of the exception clause from art. 4(3) Rome II Regulation is expressly refused (para 44-47).

[38] For the C2C contracts, there is no imbalance between the parties, so that the intervention of the protective rules, which aim to compensate the vulnerability of one party and its lack of information and experience vis a vis the other, is not justified; see ECJ, 5 December 2013, C-508/12, *W. Vapenik*. This precision is important especially as regards the platforms for collaborative economy; based on *Kamenova* (ECJ, 4 October 2018, C-105/17), it will be relatively easy for a user which is not registered as a professional at the Trade Registry to prove that he did not act in this quality and to avoid the jurisdiction of the courts and the application of the laws from the State of its counterparty.

[39] ECJ, 4 October 2018, C-105/17, *Kamenova*.

[40] ECJ, *Kamenova*, para 40: „the mere fact that the sale is intended to generate profit or that a person publishes, simultaneously, on an online platform a number of advertisements offering new and second-hand goods for sale is not sufficient, by itself, to classify that person as a trader”.

[41] ECJ, 14 November 2013, C-478/12, *Maletic*.

[42] ECJ, 11 July 2002, C-96/00, *R. Gabriel*.

[43] ECJ, 20 January 2005, C-27/02, *Engler*. On the contrary, the applicability of art. 5(1) Brussels Convention (now art 7(1) Brussels 1 Regulation), does not depend on the conclusion of a contract, but on the existence of a freely assumed obligation of one party toward the other, which is the case when the trader addresses to the consumer on its own initiative a letter a letter designating the consumer by name as the winner of a prize, which is afterwards accepted; consequently, the Court decides that the action for claiming the prize is a contractual and that provision may be applied for determining the competent court.

[44] ECJ, 14 May 2009, C-180/06, *Ilsinger*, para 54.

[45] With this position, a question arises as whether for other cases of *culpa in contrahendo* (different than the violation of the information obligation), the jurisdiction of the courts from the consumers' domicile can be accepted, considering as abandoned the older jurisprudence of the Court (like *Tacconi*, 17 September 2002, C-334/00). The answer is not evident; but as long as a consumer contract was not concluded (eventually because of abusive termination of negotiations), the special rules from the Section 4 Chapter II could not be applied.

[46] The stake is not very high, since both art. 6 from Rome I and Rome II Regulations designate the same law (the law from the habitual residence of the consumer), minimizing the difficulties generated by the precise classification of the action.

[47] The same action may be differently classified as regards the jurisdiction and the applicable law, an aspect which is not satisfactory. In *Reliantco*, the Court tried to minimize the inconveniences, showing that despite the extra-contractual classification of the action from a conflicts of laws perspective, art. 12(1) of Rome II Regulation allows the application of the *lex contractus* (the law from the consumer's habitual residence) and ensures the coincidence between the competent court and the applicable law.

[48] ECJ, 28 January 2015, *Kolassa*, C-375/13.

[49] ECJ, *Kolassa*, para 35: „an applicant who, as a consumer, has acquired a bearer bond from a third-party professional, without a contract having been concluded between that consumer and the issuer of the bond, which it is for the national court to verify, may not invoke jurisdiction under that provision for the purposes of an action brought against the issuer of the bond on the basis of the bond conditions, breach of the information and control obligations and liability for the prospectus”.

[50] See *mutatis mutandis*, ECJ, 7 February 2013, C-543/10, *Refcomp*.

[51] On the difficulties related to the application of the Rome II Regulation, see M. LEHMANN, “Prospectus Liability and Private International Law - Assessing the Landscape After the CJEU Kolassa Ruling (Case C-375/13)”, *J. PIL.*, 2016, vol. 11, issue 2, p. 318 and seq (at D.).

[52] Z.S. TANG, *op. cit.*, p. 262-265.

[53] On the extension of the rule, see P. MANKOWSKI, “Consumer Contracts under Article 6 of the Rome I Regulation”, in E. CASHIN-RITAINE, A. BONOMI (coord.), *Le nouveau règlement européen Rome I relatif à la loi applicable aux obligations contractuelles*, *op. cit.*, p. 121, sp. p. 123-125 and 143-158.

[54] The exclusion is relevant, for example, as regards the renting contracts concluded on P2P platforms, like Airbnb and is important since it might be difficult to determine whether the owners are really professionals or not.

[55] ECJ, 3 October 2019, C-272/18, *Verein für Konsumenteninformation v. TVP Treuhand*.

[56] The court also offered a list of indications useful to the national courts in the process of implementing that solution; she considered that „fact that the amounts required for subscription to the partnership were paid into fiduciary accounts held by TVP in Austria, that it paid dividends to Austrian consumers into Austrian accounts, that it fulfils its information obligations arising from the trust agreement by sending reports on its fiduciary management to Austrian consumers in Austria and that it has a website for Austrian consumers on which they may consult information and exercise their voting rights tend to show [...] that those services are supplied at a distance in the country in which the consumer is resident” (para 53). Some of them may be generalized, and the limits of the exclusion from art. 6(4)(a) of the Regulation are thus better affirmed.

[57] R. PLENDER, M. WILDERSPIN, *op. cit.*, p. 242, no. 9.051.

[58] Recital 24, Rome I Preamble.

[59] The mere displacement of the trader or of its representatives in that State, after the conclusion of the contract and for the purpose of its performance, is not enough in this regard.

[60] On the difficulties for the implementation of this criterion, see P. MANKOWSKI, „Consumer Contracts under Article 6 of the Rome I Regulation”, *op. cit.*, p. 121, sp. p. 127-137.

[61] Such a definition would have been a difficult one, since it would have to ensure a delicate balance between a broad position (risky for business) and more restrictive one (disadvantageous for consumers)

[62] P. KINDLER, *op. cit.*, p. 177. See also ECJ, *Pammer*, para 92.

[63] ECJ, 7 December 2010, *Pammer & Alpenhof*, C-585/08 and C-144/09.

[64] ECJ, *Pammer* : „The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists (para 93). On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established (para 94)”

[65] See in the same sense the Recital 24 final, Rome I Preamble, citing the Common Declaration of the Commission and the Council on art. 15 of Brussels 1 bis Regulation.

[66] P. KINDLER, *op. cit.*, p. 179-180.

[67] Directing the activities on the internet is not dependent on the States' frontiers, but on cultural, linguistic or interest communities - P. KINDLER, *op. cit.*, p. 180.

[68] P. KINDLER, *op. cit.*, p. 179; see also, *Pammer*, para 68: unlike the classic forms of advertising, the trader's intention to direct its activities to a specific state „is not always present in the case of advertising by means of the internet. Since this method of communication inherently has a worldwide reach, advertising on a website by a trader is in principle accessible in all States, and, therefore, throughout the European Union, without any need to incur additional expenditure and irrespective of the intention or otherwise of the trader to target consumers outside the territory of the State in which it is established”. Because of this, the mere accessibility, in a State, of the site where the professional presents its activity and products, is not enough to characterize the targeting.

[69] Z.S. TANG, *op. cit.*, p. 270. R. PLENDER, M. WILDERSPIN, *op. cit.*, p. 246, no. 9.058. Even if the simple indication of the mail address or of a phone number with an international prefix are relatively weak indicators for targeting (para 79, *Pammer*), especially if the website is not interactive, the acceptance of orders placed by e-mail by clients from a specific country may reveal, in fact, the professional's will to direct its activities to that country.

[70] Z.S. TANG, *op. cit.*, p. 270.

[71] Art. 6 does not include a predictability clause (for the professional), that would have limited the application of the favourable rules.

[72] ECJ, 17 October 2013, C-218/12, *Emrek*.

[73] ECJ, 23 December 2015, C-297/14, *Hobohm*.

[74] Such a solution is welcomed since the environment for the conclusion of the performance of the contract should not influence the level for the consumer's protection; equally, a double set of norms would have increased the uncertainties for both traders and consumers.

[75] See ECJ's decisions in cases C-498/16, *M. Schrems*; C-478/12, *Maletic*; C-218/12, *Emrek*; C-297/14, *Hobohm*.

[76] If a trader directs its activities to the European market, he has to accept the eventual jurisdiction of the European courts and to obey the substantive rules for the consumers protection from the concerned States.

FACEBOOK GOES “*ALL IN*”
PERSONAL DATA TRANSFER AND CONSUMER PROTECTION IN THE
EUROPEAN UNION AFTER SCHREMS I & II JUDGMENTS – *STATU QUO*
AND FUTURE PERSPECTIVES

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Summary

Facebook, and Meta Platforms Ireland, are once again in the centre of attention after the decision of the Irish Data Protection Commissioner to suspend the personal data transfer of the European social media users-consumers to the US. This is the expected outcome of a process that was initiated by the activist Max Schrems, that has been taken twice before the ECJ for preliminary rulings, resulting in an extraordinary setback for the operations of the American company. This paper will go through the precedents of the case and the foreseeable next steps in the case after Facebook’s threat of suspending operations if the Irish Commissioner’s decision remained firm. Finally, the focus will be placed in the new Trans-Atlantic Data Privacy Framework that is currently being negotiated between the US and the EU.

Keywords

Personal data protection, international law, Facebook, GDPR, trans-atlantic data privacy framework.

I. CONTEXT

“Europeans risk seeing social media services Facebook and Instagram shut down this summer”[1]. This is (so far, in July 2022) the last (terrifying for many social media users-consumers) piece of news in the legal and political war between the American multinational Meta (Facebook and Instagram’s parent company) and the Irish data protection authorities about the possibility of transferring personal data of EU Meta users to the United States, after the claims of Max Schrems, an Austrian user -and consumer[2]- of Facebook social media platform.

This controversy emerged with the case Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems (Schrems II) of 16 July 2020[3]-, that responded to a preliminary ruling from the High Court of Ireland regarding the application to the case the General Data Protection Regulation[4] (GDPR) -that repealed and replaced the Directive 95/46[5]- and the Charter of Fundamental Rights of the European Union[6] considering some surveillance programs authorized by US laws, that allow its authorities to get access to personal data of non-EU users, as incompatible with fundamental privacy and judicial access rights of EU consumers-users.

With this “foreseeable”[7] judgment the ECJ declared invalid the so called “Privacy Shield Program”[8], an instrument administered by the US Department of Commerce’s International Trade Administration (designed in cooperation with the European Commission and the Swiss Administration[9]) supposed to create a common framework for the US, EU and Switzerland regarding the personal data protection standards, called to enhance commerce between these territories and providing certainty to the users or customers of the companies affected by the program and registered to participate in it[10]. Indeed, the program is based on the willingness of the companies to self-certify according to its principles.

From the European consumer protection perspective, the creation of the “*Privacy Shield*” was supposed to guarantee compliance with EU standards on both sides of the Atlantic. Its adequacy with EU law requirements was actually confirmed by Commission with an Adequacy decision[11] (or “Privacy Shield Decision”) of 12 July 2016, that was invalidated by the aforementioned ECJ judgment for contravening, paradoxically, the privacy principles established by the European legislator in the GDPR.

Some months after the ECJ judgment, on 8 September 2020, the Swiss Federal Data Protection and Information Commissioner (FDPIC) of Switzerland issued an opinion that replicated the Irish Commissioners’ and ECJ’s criteria, considering the Privacy Shield “does not provide an adequate level of protection for data transfer from Switzerland to the US pursuant to the Federal Act on Data Protection (FADP).[12]”

Besides, the contracts in question are affected by the Standard Contractual Clauses (SCC)[13], an interesting tool created by the EU legislator to make sure that contracting parties abide by

the provisions of the GDPR. The problem is that these clauses only affect the relationship between controllers and processors of the data, and they do not have to be taken into account by third country authorities. In other words, even though Meta abides by the GDPR, by transferring the data to the US, those authorities (in the absence of a harmonized international legal framework) can take actions that contravene the European Regulation and consequently the rights of EU consumers.

The main problem derived from the legal power conferred to US authorities to get access to non-US citizens personal data, which clashed with the European notion of privacy established by our legislation and the Charter of Fundamental Rights of the European Union.

However, some years ago, European data privacy legislation -the first Directive[14], predecessor of the current regulation- was perceived as the path forward for some US scholars[15], hoping that it would result in a rise in privacy standards in that country that did not seem to materialise.

As we will see, the current scenario is not new, but a remake of the controversy surrounding this very same matter of personal data under the “International Safe Harbour Privacy Principles”, elaborated in the late 1990s between the same parties and also supported by the European Commission in its Decision of 26 July 2000[16] and later annulled by the European Court of Justice in the landmark “*Schrems I*” judgment.

So, in the following pages we will analyse the arguments of the Court to annul “The Privacy Shield” and how likely it is that the “all in” of Meta becomes a realistic possibility for the thousand of users of the company. Moreover, we will describe the latest political moves and the current status of the negotiations between the US Administration and the European Commission, focused on reaching a much-needed agreement in this area.

II. PERSONAL DATA TRADE – AN OVERVIEW –

The case of Facebook analysed in the present study and the subsequent legal and political turmoil brings to light an issue whose economical relevance we are only beginning to become aware of.

Indeed, chances are that the “all in” proposed by the American company[17] is nothing but a gigantic bluff, since the revenues generated by the millions of European users were close to 30 billion in 2021.

With this threat, Meta Platforms Inc. initiated a genuine political -lobbying- fight in order to modify the current data transfer regulatory framework in European soil. The reason for that is the actual importance of personal data of the users for the revenue figures of these companies.

So first, we must bear in mind how these enterprises generate revenue in order to understand the issue. Meta, whose flagships are Facebook and Instagram, make money -expressed in a simple way- out of publicity. But how companies advertise in social media is a rather complex matter in which personalised advertising -or “behavioural targeting”[18]- is considered one of

the most effective to engage the potential consumers. And what is the key for this personalised advertising system to work? Of course, it is essential for companies like Facebook to be able to use the enormous amount of data we “freely” share with them as they please.

We believe that we have access to the services provided by these companies for free, but the average consumer-social media user is probably not aware of how much their personal data is worth, making every one of us an asset for the companies, that is “the price we pay”[19]. By sharing our personal information advertisers hope to make more money, so, depending on the profile of the user and how much information is willing to share online, regular citizens represent a huge source of income.

Indeed, “Facebook and Google do not sell anything to Internet users, instead they sell billions of users to advertisers' ", that's the explanation for the direct correlation between number of users and revenue of the companies[20].

III. THE JUDGEMENT OF THE ECJ OF 16 JULY 2020 – “SCHREMS II”

1. **Precedents and factual framework**

Max Schrems, an Austrian citizen, Facebook user, signed a contract with Meta Platforms Ireland Ltd., European branch of Meta Platforms Inc (US). This company transfers personal data of their many users to the latter in the US, where they process them.

Mr. Schrems, concerned by the use of this data by US authorities, formulated a complaint to the Data Protection Commissioner (DPC or Commissioner[21]) seeking for the prohibition for Facebook to send data to the US since, he considered, “the law and practice in force in that country did not ensure adequate protection of the personal data held in its territory against the surveillance activities in which the public authorities were engaged”[22]. Concerns for Mr. Schrems arose after the well-known revelations of Mr. Edward Snowden in regarding the global surveillance programs of the NSA (National Security Agency of the US) could get access to these data with legal authorisation.

The DPC rejected the complaint considering that EU authorities granted an adequate protection level in the aforementioned Decision 2000/520[23] (Safe Harbour Principles). Mr. Schrems initiated judicial proceedings before The High Court of Ireland that requested for preliminary ruling to the ECJ. As we have previously indicated, the Decision was considered invalid by the Court in its 6 October 2015 judgment (*Schrems I*)[24] and consequently the rejection to Mr. Schrems complaint was also annulled. With this first judgment, the ECJs figure gets strengthened, by establishing that certain red lines cannot be crossed even by the European Commission's legislative acts[25].

After that, the Commissioner asked Mr. Schrems to reformulate his complaint, in which the claimant insisted on the prohibition of data transfer to the US, referring to the monitoring programmes followed by US authorities (NSA and FBI) and the incompatibility of those with the Charter of Fundamental Rights of the European Union, specifically articles 7, 8 and 47. Those articles guarantee “respect for private and family life” (art. 7), “protection of personal

data” (art. 8) and “Right to an effective remedy and to a fair trial” for the citizens of contracting states of the Charter.

In this second procedure a deeper investigation was conducted by the Commissioner and conclusions were aligned with Mr. Schrems’ arguments, confirming the incompatibility of US authorities’ legal power to intervene EU citizens’ personal data with the rights introduced by the Charter[26]. Additionally, the legal framework provided by the SCCs, that only affect the contractual parties, did not bind US authorities, not giving an effective solution to the issue.

Back to the US authorities’ power to intervene personal data, as stated by the European Court[27], is introduced in the US legislation by section 702 of the FISA (Foreign Intelligence Surveillance Act of 1978) Amendments Acts 2008 and the Executive Order 12333[28]. The first one, for instance, explicitly enables the US government to conduct “targeted surveillance” of foreign persons located outside the US to get intelligence information. The EO 12333 grants the NSA access to underwater cables on the floor of the Atlantic to collect and retain data flowing to the US before even arriving. Moreover, the fourth amendment of the US Constitution[29], does not cover non-US citizens, creating a scenario in which EU citizens are more vulnerable to these intrusions in their privacy.

In this context, the High Court formulates a series of questions to the ECJ[30] in order to determine if, in short, the privacy rights of EU citizens are jeopardised by the free transference of data of a private company to the US. In the following pages we will analyse the main arguments of the Court responding to these questions focusing on those that might have an effect on European users-consumers of social media.

2. Arguments of the European Court and legal framework applicable to the case

2.1. Applicability of the General Data Protection Regulation (GDPR)

The first important issue is the potential applicability of the European GDPR to cases like the one we are analysing in this paper.

Specifically, articles 2.1 and 2.2 of the Regulation describe the situations in which the Regulation shall not apply. According to article 2.1, the Regulation applies to “the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system”. Excluded matters, according to article 2.2., consist of the processing of personal data:

- a. in the course of an activity which falls outside the scope of Union law;*
- b. by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;*
- c. by a natural person in the course of a purely personal or household activity;*

- d. *by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.*

Moreover, article 4.2. defines “processing” in a way that coincides, according to the European Court[31], with transferring data from a member state to a non-member state the way Facebook and other companies do. Indeed, the definition of processing is the following: “*operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;*”. The operation of Meta and Facebook Ireland do not fall either in the exclusion clauses of article 2, so the Court states the applicability of the European Regulation to the case.[32]

The second, and essential questions, refer to the level of protection required by the GDPR to data transfers like the one in question, based on articles 45, 46.1 and 46.2.

Well, the text of article 45 referring to data transfers to third countries establishes that these may only take place “where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection”. Moreover, this article should be read in combination with article 44 that confirms that in international transfers “the level of protection of natural persons guaranteed by this Regulation ” cannot be undermined. In other words, European standards regarding the processing of personal data of EU citizens must always prevail, even when these data are not processed on European soil. With this provision the European legislator provides the EU with a strong legislative instrument to assure privacy for its citizens.

To make sure that these standards are met, the Commission has the sole power to authorise the data transfer when it considers that the third country in question provides “a level of protection essentially equivalent to that which is guaranteed within the European Union[33]”, system that, as we will see, has received some criticism.

At this point, the Charter enters an appearance since its applicability is also in question before the Court and the Court does confirm[34] the applicability of the rights guaranteed by the Charter as a basic principle applicable to situations like the one in question in the present case.

In conclusion, the ECJ considers that cited European provisions regarding personal data processing, that should be “*read in the light of the Charter*”[35], in third countries can be applied by the referring court to the case.

2.2. Powers of the Data Protection Commissioner and the validity of “*Privacy Shield Decision*” and the “SCC”s.

In this context, the fundamental issue that must be resolved by the ECJ refers to the national supervisory authority that hears the complains and must carry out the investigation to determine whether the third country that receives the data can ensure the same level of protection of European law, meaning that the provisions of the GDPR and the Charter are not violated in the indicated terms.

Competence to do so is conferred to the Commissioner, in our case, by article 58 GDPR, that not only introduces investigative powers, but also corrective (58.2) and authorisation-advisory powers (58.3). Among the corrective powers the Regulation contemplates the possibility “to order the controller or the processor to comply with the data subject’s requests to exercise his or her rights pursuant to this Regulation” or to “order the suspension of data flows to a recipient in a third country or to an international organisation”, that clearly could be applicable in this case. But, the Commissioner must deal with the existence of some binding European legal instruments, the aforementioned SCCs and the presumption of validity created by the Privacy Shield decision.

2.2.1. Validity of SCC Clauses

Thus, the supervisory authority in our case, the Irish Data Protection Commissioner, should[36] “suspend or prohibit” transfer of personal data to third countries if it thinks that “the standard data protection clauses are not or cannot be complied with in that third country”.

And this is another important aspect to be considered, the court makes clear that SCCs, and SCC Decision[37], are valid but do not determine the validity of the data transfer, since they only affect the contracting parties that are not responsible for the potential privacy violations of the local authorities of the countries they operate in (the US in our case).

Indeed, the use of the SCC by the parties does not generate the presumption that the rights protected by European provisions are indeed taken into account in the third country. We must bear in mind that the SCC Decision (like the Privacy Shield Decision we will analyse right away), as we have stated, is binding for all European member states, but in any case binding US authorities.

When the “controller” -Meta Platforms Ireland-, established in a member state and the recipient, Meta Platforms Inc., incorporate the SCCs to their contract, both companies are supposed to comply with the clause and, consequently, with the GDPR. Operates as a really useful *lex mercatoria* or *soft law* instrument to ensure a first level of adequacy with EU law, but it could not be enough[38], since US authorities have no obligation under de SCCs.

Unlike the situation with the Privacy Shield Decision (that we will analyse in the following paragraphs), in which the Commission has adopted the text as a sort of bilateral treaty referring specifically to the US, the SCC Decision and, thus, the clauses included in the annex of that text, are a general text in which there has not been an exhaustive adequacy examination of the specific legislation of any third country, potential recipient of the personal data in question.

So, in short, the Court considers these clauses “effective mechanisms”[39] to ensure the suspension of data transfers to recipients that do not comply with the obligation established by the clauses. But, since in this case issues derive from the illegitimate (in the light of European legislation) to Europeans’ personal data, the validity of the SCC decision or the clauses included in the text is not to be questioned.

2.2.2. Validity of the Privacy Shield Decision

The context is significantly different when we refer to the Adequacy Decision adopted by the Commission. Actually, one of the strong arguments of Facebook Ireland[40] is that the Adequacy Decision, as it is binding for the Commissioner, confirms the adequacy of the data transfer to the US from the European Union. Indeed, article 1.1 of the Decision states that “the United States ensures an adequate level of protection for personal data transferred from the [European] Union to organisations in the United States under the EU-U.S. Privacy Shield”.

We must bear in mind, as we have stated, that the mere possibility of exporting personal data, as a principle, is not permitted by the GDPR, unless the Commission authorises it[41]. This adequacy decision system has been criticized by some scholars[42] for considering them more of a geo-political strategy rather than an actual safeguard to the rights of the Europeans. Furthermore, some authors argue it could even go against the international trade laws established by the WTO[43].

This is, in any case, a rather understandable strategy by the American based company and there is no denying that the fact that the Commission elaborates a joint text with a foreign nation referring to the data transfer between the EU and that nation generates a high degree of certainty about the adequacy of that transfer and the respect for the rights of both parties. In this context, the big question was whether this Adequacy Decision should in any case prevail over Irish Commissioners investigation and conclusions, mainly if the conclusions go against the supposed adequacy established by the Decision.

To solve this issue, firstly, the Court resorts to article 288 TFEU[44] that determines the legal nature of the “Decision”, considering it “binding in its entirety” in all member states, so it must, in principle, be respected by all internal authorities, including supervisory authorities like the one addressed in this case. In other words, in order to prohibit the data flow as it is claimed to the Irish Commissioner the Commissions’ Decision must be declared invalid by the ECJ.

Nevertheless, “a Commission adequacy decision adopted pursuant to Article 45(3) of the GDPR cannot prevent persons whose personal data has been or could be transferred to a third country from lodging a complaint”[45], in which case the supervisory authority with all his supervisory powers intact, could carry out the investigation and initiate the corresponding legal action before the competent national court that should bring the question to the ECJ, like in the present case or “*Schrems I*” before it. Thus, the national supervisory authorities still hold great power, even if they cannot enable prohibitions *motu proprio*.

2.3. Does US domestic law provide an equivalent level of protection?

The ECJ resorts to the investigation of the Commissioner and the referring Irish court to question the level of protection provided by US law to personal data transferred from the EU.

Specifically, the Irish court holds that “the law of that third country does not provide for the necessary limitations and safeguards with regard to the interferences authorised by its national legislation and does not ensure effective judicial protection against such interferences”, referring to the legally contemplated intrusions explained in this article. Furthermore, some concerns were actually pointed out by the Article 29 Data Protection Working Party (WP29) in its opinion of 13 April 2016[46].

Article 7 and 8 of the ECHR guarantee respect for private and family life and protection of personal data. The aforementioned legal capacities of some public authorities of the US to get access to personal data - Section 702 of the FISA and on E.O. 12333- “*constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter*”[47].

Additionally, the judicial protection introduced by article 47 of the ECHR[48] is not guaranteed by the Privacy Shield, since the judicial protection for the matters covered by the decision is personalised in the figure of the “Privacy Shield Ombudsperson”, a new figure introduced after the failure of the Safe Harbour that has been criticised by the academia considering it no more than a “fig leaf”[49] -also questioned by the aforementioned WP29[50]-, that cannot provide sufficient response to the Europeans’ whose data are transferred to the US.

Moreover, recital 115 of the Privacy Shield Decision itself states that the available causes of action for non-U.S. persons before US courts are very limited, with the consequent inadmissibility of many claims based on the regulatory framework of the surveillance programs, “which restricts access to ordinary courts” and, thus, the right to an effective remedy guaranteed by the Chart.

Additionally, section 702 of the FISA, for instance, includes no limitations for surveillance programs on non-US nationals and constitutes an “interference with fundamental rights”[51] that does not provide a level of protection equivalent to that guaranteed by the ECHR. Neither this nor the Executive Order 12333 “correlate to the minimum safeguards resulting, under EU law, from the principle of proportionality, with the consequence that the surveillance programmes based on those provisions cannot be regarded as limited to what is strictly necessary”[52].

In a dense and complex argumentation, the Court dissects the aforementioned US surveillance programs and concludes that they do not match with the “adequate level of protection” stated by article 1 of the Privacy Shield Decision, since they do not comply with articles 7,8 and 47 of the ECHR and article 45 of the GDPR. The Court also considers article 1 “inseparable”[53], it extends the invalidity to the whole text of the Decision.

2.4. Schrems II judgment – conclusions of the European Court of Justice

In its conclusions the Court, applying the argumentation above, states the following fundamental ideas:

The General Data Protection Regulation is indeed applicable to the case of a data transfer from a European company to a company based in a third state.

The processing of the data transferred from the EU must be granted a level of protection equivalent to that provided by EU law.

The Adequacy Decision elaborated by the European Commission and US authorities is binding legal instrument for all member states and their institutions, so in presence of it the national supervisory authority will suspend its proceedings, resorting to the competent courts if it thinks that despite the adequacy decision there is not a sufficient level of protection in the processing country to which data is transferred. In this regard, the Court considers invalid the “Privacy Shield Decision”, considering that surveillance programs in place in the US contravene EU Law. Besides, there is a high risk of lack of legal protection, since those same US provisions do not always provide access to the Courts for non-US citizens.

IV. NEXT STEPS IN THE CASE

Following the invalidation of the EU-US “Privacy Shield”, the battle was not over yet, since it was still to be determined the final decision of the Irish commissioner in the light of the judgment that gave her *carte blanche* to insist on the data transfer prohibition. In this regard, the Commissioner sent the draft decision to the EU data protection authorities confirming the suspension of data transfers from Meta Platforms Ireland to Meta Platforms Inc. in the US.

With this draft decision another face of the battle begins. According to article 60 of the GDPR the Irish authority has submitted “a draft decision to the other supervisory authorities concerned for their opinion”, but not only that, it must “take due account of their views”. The same provision (art. 60.4) provides a period of four weeks in which any of the other supervisory authorities can express “a relevant and reasoned objection” to the decision.

If this objection is submitted, the Irish supervisory authority will have two options; accept and follow the objection or if it “is of the opinion that the objection is not relevant or reasoned” should submit the issue to the so-called “consistency mechanism” introduced by article 63. This is a mechanism that was created to ensure a consistent application of the Regulation throughout the member states always -apart from the aforementioned- in situations, *inter alia*, where the measure taken by one national authority has effects beyond the borders of that issuing member state.

In the first scenario, the reformulated draft opinion will have to be sent to the other states’ authorities (art. 60.5) that will have two weeks to review and accept or make any additional objection to the decision. If there was a controversy between different states’ authorities, the consistency mechanism will also be activated.

In this regard, article 64 introduces the figure of the “Board”. This board, in which the Commission has a say, must (mandatory nature) issue an opinion regarding some specific matters[55]. Besides, the Chair of the Board, the Commission or any other national supervisory authority can request the examination of the case by the Board in cases that affect more than one Member State, like we have stated.

Additionally, the Board has broad dispute resolution powers (art. 65) and will adopt binding decisions referring to cases in which another supervisory authority has raised an objection to a draft decision and the leading supervisory authority “has not followed the objection or has rejected such an objection as being not relevant or reasoned”. Also, the dispute resolution mechanism will act when there are “*conflicting views on which of the supervisory authorities concerned is competent for the main establishment*” and when the supervisory authority does not request the opinion of the Board in the aforementioned cases of article 64.1, or “does not follow the opinion of the Board issued under Article 64”.

So, this is the situation at this point after the draft decision of the Irish authority, and no objection has come public so far[56].

So, what can we expect now? Should European consumers -millions of Meta users- be worried? Short answer, despite the threats cited in the beginning of this paper, probably not.

V. THE NEW POLITICAL AGREEMENT BETWEEN THE EU AND THE US ON DATA TRANSFERS

We are witnessing, after all, a huge political and diplomatic issue more than a legal one. After two attempts of creating an effective bilateral framework for data transfers between the European Union and the United States, the “Safe Harbour Principles” and the “Privacy Shield”, both of which have stumbled upon the European Court of Justice, a third (and hopefully final) negotiation is currently being held between Washington and Brussels’ authorities, even though both parties have followed rather different paths in the last decades regarding the issue in question -the EU has strengthened its regulatory framework with the GDPR instead of the previous and weaker Directive, but this legal approach has not been followed by an equivalent mechanism in the US-.

Recently, on 25 March 2022, the European Commission published a press release with the following heading: “European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework” -that hit some headlines[58]- and described a principle of agreement that aims to “address the concerns raised by the Court of Justice of the European Union in the Schrems II decision of July 2020.”

Undoubtedly the focus is placed on the American side, considering that the arguments of the Irish Commissioner pointed at the legislation authorizing surveillance programs on non-US citizens as the main concern regarding the transfer of data to the US.

In that regard, the new framework claims to be an “unprecedented commitment on the U.S. side to implement reforms that will strengthen the privacy and civil liberties protections

applicable to U.S. signals intelligence activities”. Specifically, about the two main concerns cited in the Schrems II judgment -the actual access to personal data outside the constitutional limitations of the fourth amendment granted for US citizens and the lack of access to justice in many cases- the joint statement indicates that the US will establish:

“New safeguards to ensure that signals surveillance activities are necessary and proportionate in the pursuit of defined national security objectives.”

“Two-level independent redress mechanism with binding authority to direct remedial measures and enhance rigorous and layered oversight of signals intelligence activities to ensure compliance with limitations on surveillance activities.”

Will this refurbished “privacy framework” finally cool down the relentless war of Mr. Schrems and other privacy activists? Time will tell.

VI. CONCLUSIONS

Panem et circences -bread and circus-, is what ancient Roman authorities provided for the people in troubled times. Due to the skyrocketing inflation, “*bread*” (or any food for that matter) is getting expensive, so people might need more “*circus*”. And what is nowadays’ circus if not smartphones and social media apps? The new “*opium of the people*”, represented to a large degree by Meta and its companies, is likely to keep operating in the European Union despite all the hype created by their hard to believe threats.

In any case, after the two reprimands of the European Court of Justice to the agreements between EU and the US, one thing is clear, in a world where personal data is a really valuable intangible commodity -the new framework affects a transatlantic business of nearly 7.1 billion dollars according to US President Joe Biden[59]-, a reliable harmonized regulatory framework is essential.

To this end, European SCC clauses are indeed useful tools. In the last release[60] of two new sets of updated clauses text claims to “take into account Schrems II” judgment in order to provide a high level of data protection. But, as we have seen in this paper, as they only compel contractual parties, SCCs are not enough.

Thus, in our view, big multilateral agreements -ideally reaching consensus on a global scale and avoiding the so-called European “legal colonialism”[61]- are the key to guarantee that the fundamental privacy rights -not only of European citizens- are protected. New negotiations should lead to a new scenario with a reinforced “structure of democratic governance and rule of law (...) on both sides of the Atlantic”[62].

However, the huge defencelessness created by that loophole called “national security”, will always represent a threat to privacy and other fundamental rights worldwide.

[1] <https://www.politico.eu/article/europe-faces-facebook-blackout-instagram-meta-data-protection/>

[2] Judgment of the European Court of Justice, 25 January 2018, case C-498/16, Maximilian Schrems v Facebook Ireland Limited granted the “consumer” status of Mr. Schrems. See: C. M. Caamiña Domínguez, “Internet Consumer: Case c-498/16, Maximilian Schrems v. Facebook Ireland Limited”, *Cuadernos de Derecho Transnacional*, March 2019, Vol. 11, Nº 1, pp. 711-721.

[3] Judgment of the European Court of Justice, 16 July 2020, Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems, Case C-311/18.

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance): <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

[5] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50.

[6] Specifically, articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, 2012/C 326/02.

[7] R. Á. Costello, “Schrems II: Everything Is Illuminated?”, *European Papers*, Vol. 5, 2020, No 2, pp. 1045-1059, p. 1046.

[8] <https://www.privacyshield.gov/welcome>

[9] On September 8th, 2020, the Swiss Federal Data Protection and Information Commissioner (FDPIC) of Switzerland issued an opinion that replicated the Irish Commissioners’ criteria, *considering*

[10] *The official website of the program publishes the list of companies, see: <https://www.privacyshield.gov/list>*

[11] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) (Text with EEA relevance): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.207.01.0001.01.ENG

[12] See: <https://www.edoeb.admin.ch/edoeb/en/home/latest-news/media/medienmitteilungen.msg-id-80318.html>

[13] Created after Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council, OJ L 39, 12.2.2010, p. 5–18. Last reformulation 4 June 2021: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en

[14] Directive 95/46, cited.

[15] G. Schaffer, “Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Data Privacy Standards”, *Yale Journal of International Law*, Vol. 25, Winter 2000.

[16] 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

[17] See footnote 1.

[18] B. Roessler, D. Mokrosinska, “Social Dimensions of Privacy: Interdisciplinary Perspectives”, *Cambridge University Press*, 26 June 2015, p. 141.

[19] B. Ehrenberg, “How much is your personal data worth?”, *The Guardian*, April 22 2014:

[20] A. Becerril, “The value of our personal data in the Big Data and the Internet of all Things Era”, *ADCAIJ: Advances in Distributed Computing and Artificial Intelligence Journal*, Regular Issue, Vol. 7 N. 2 (2018), pp. 71-80, p. 72.

[21] Currently Helen Dixon, see: <https://www.dataprotection.ie/>

[22] Schrems II judgment, paragraph 52.

[23] See footnote 16.

[24] judgment of the European Court of Justice of 6 October 2015, C-362/14, “Schrems I”. For a deeper analysis see: P.A. de Miguel Asensio, “Aspectos internacionales de la protección de datos, las sentencias Schrems y Weltimmo del Tribunal de Justicia”, *La Ley Unión Europea*, , número 31, 2015; E. Uría Gavilán, “Derechos fundamentales versus vigilancia masiva”, *Revista de Derecho Comunitario Europeo*, 53, 2016, pp. 261-282.

[25] E. Uria Gavilán, cited, p. 282.

[26] See: <https://www.dni.gov/files/icotr/Section702-Basics-Infographic.pdf>, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1286>

[27] Schrems II judgment, paragraph 60.

[28] Executive Order 12333—“United States intelligence activities”. Source: The provisions of Executive Order 12333 of Dec. 4, 1981, appear at 46 FR 59941, 3 CFR, 1981 Comp., p. 200. See; <https://www.archives.gov/federal-register/codification/executive-order/12333.html>

[29] “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

[30] See Schrems II judgment, paragraph 68.

[31] Ibid., paragraph 83.

[32] Ibid., paragraph 89.

[33] Ibid., paragraph 96.

[34] Ibid., paragraph 101.

[35] Ibid., paragraph 105.

[36] Opinion of Advocate General in Schrems II case, paragraph 148, confirmed by the ECJ in paragraph 113 of Schrems II judgment.

[37] See *supra*.

[38] So does the Court state in Schrems II judgment, paragraph 126.

[39] Ibid. paragraph 148.

[40] Ibid. paragraph 152.

[41] Art. 44 GDPR.

[42] C. Kuner, “Developing an Adequate Legal Framework for International Data Transfers”, in S. Gutwirth (ed.), *Reinventing Data Protection?*, Springer, 2009, pp. 271 and next; J.X. Dhont, “Schrems II. The EU adequacy regime in existential crisis?”, *Maastricht Journal of European and Comparative Law* 2019, Vol. 26(5), pp. 597–601.

[43] Specifically, the General Agreement on Trade in Services (or GATS), see: C.L. Reyes, “WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive”, *Melbourne Journal of International Law* (2011), p. 20.

[44] Consolidated versions of the Treaty on the Functioning of the European Union. Official Journal C 326 , 26/10/2012 P. 0001 – 0390. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

[45] Schrems II judgment, paragraph 119.

[46] Article 29 data protection working party: Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision, adopted on 13 April 2016.

[47] Ibid. paragraph 171.

[48] Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

[49] R. Á. Costello, cited., p. 1059.

[50] Opinion of the Article 29 Working Party, cited, p. 46.

[51] Opinion of Advocate General in Schrems II, paragraphs 291, 292 and 297.

[52] Schrems II judgment, paragraphs 184 and 185.

[53] Ibid. paragraph 200.

[55] See article 64.1 GDPR.

[56] As on 22nd of July 2022.

[58] *Inter alia*: <https://www.politico.eu/article/eu-us-strike-preliminary-deal-to-unlock-transatlantic-data-flows/>

[59] See “La UE y EE UU llegan a un acuerdo para poder transferir datos personales con garantías para la privacidad”, *Diario Cinco Días*, Madrid, 22nd of March 2022.

[60] See footnote 13.

[61] J. X. Dhont, cited, p. 599.

[62] M. Rotenberg, “Schrems II, from Snowden to China: Toward a new alignment on transatlantic data protection”, *European Law Journal*, Vol. 26, N°. 1-2, 2020, pp. 141-152, p. 152.

DO CENTRAL BANK DIGITAL CURRENCIES (CBDC) PROTECT THE CONSUMER OR ARE THEY A MIRAGE?^[1]

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Summary

Consumers are using cash less and less, and the use of private money, through companies such as Visa, Mastercard or Paypal, is increasing considerably. On the one hand, cryptocurrencies, such as bitcoin, were created in 2008, and on the other hand, private digital currencies backed by large technology companies are coming onto the market. And right now, feasibility projects for digital currencies are being studied by central banks. Indeed, consumers seem not to distinguish between private and public digital currencies, while giving up their privacy, despite the adoption of the European Data Protection Regulation in Europe.

Do CBDCs protect the consumer or are they a mirage? Can these digital currencies, with their centralization, represent a monopoly? Is controlling money a way of controlling the market, and suppressing the freedom of the individual? This article aims to answer these questions.

Keywords

CBDC, centralization, consumer, monopoly, bitcoin, GDPR.

I. CONTEXT: THE CBDC

Today, most money circulates in digital form. For example, with respect to US dollars, only 11% of the dollars issued is physical money, and the rest, approximately \$14 trillion, is digital [2]. In the UK, 97% of money is currently created by banks and only 3% is created by the government [3].

The origin of digital currencies, and cryptocurrencies, dates to 1983, when the American cryptographer David Chaum[4] developed an early cryptographic system called eCash[5]. It was conceived as an anonymous cryptographic electronic money [6], or electronic cash system. It was implemented as a micro-payment system in a US bank from 1995 to 1998, although it did not prosper. And credit card payments emerged and became the dominant online payment method.

An important milestone was reached in 2008. Satoshi Nakamoto created the first cryptocurrency, Bitcoin, for a *peer-to-peer* (P2P) digital money system. Bitcoin is a means of payment, a store of value, a unit of account, it is impossible to confiscate, private, portable, censorship-resistant and finite [7]. 21 million bitcoins will be created through the work of miners, who generate the blocks, which are authenticated by the nodes.

In this escalating digital disruption, central banks have begun to study and consider the issuance of centralized digital currencies, controlled by the central banks themselves, and private digital currencies are also emerging, created by large technology companies that centralize the issuance of these new digital currencies [8].

In June 2021, the G7 member countries [9] approved thirteen public policy principles endorsing the creation of digital currencies by the countries' central banks. The G7 intends that "*these digital currencies should guarantee privacy, transparency and data protection*". A central bank digital currency, known as a *central bank digital currency* (CBDC), is a new form of central bank money available to the public that can be highly disruptive compared to the traditional system. The more a CBDC competes with traditional bank deposits, the greater the threat to bank funding, with a possible adverse impact on bank lending and economic activity [10]. If developments continue in this direction, banks will have to adapt to survive.

Some central banks have already adopted pilot projects for their own digital currencies, but none of them have yet been fully implemented. On 20 October 2020, the world's first CBDC, the *Sand Dollar*, was put into circulation in the Bahamas for Bahamian residents. The digital version of the Bahamian dollar is issued by the Central Bank of the Bahamas, much like cash and conventional currencies, and residents can access it through a mobile app or by using a physical payment card.

In 2021, Nigeria became the first African nation to launch a digital currency: the *e-Naira*. The virtual currency uses the same blockchain technology as Bitcoin. But unlike the cryptocurrency and its peers, which are decentralized, the *e-Naira* is issued and backed by the Nigerian central

bank. The currency is not a financial asset and derives its value from the official currency. Moreover, transactions in digital naira are, in principle, fully traceable.

The Eastern Caribbean Central Bank has also launched its digital currency, the *DCash*, for Antigua and Barbuda, Grenada, St Lucia, St Kitts and Nevis, with the intention of extending it to the whole region. Similarly, the National Bank of the People's Republic of China made the international debut of its electronic yuan (*e-CNY*) [11] at the 2022 Winter Olympics, and the Bank of Sweden is at an advanced stage of implementing its *e-krona*. Other countries such as Denmark, Norway, Brazil, Ecuador, Cambodia (with *Bakong*), Iceland, South Africa, Ukraine, Uruguay, Israel, and Switzerland are also considering adopting a CBDC.

The digital currency of a state, or central bank, will have similar technological characteristics to other digital currencies, but also important differences. Bitcoin, and other cryptocurrencies, are digital assets that are created from computer operations, and their transactions are recorded and validated in chains of servers (*blockchains*)[12], which operate independently, through a digital ledger (*Distributed Ledger Technology*)[13], secured with cryptography. They are used as a means of payment or exchange, to access a product or service. Coins with stabilising algorithms, those linked to the dollar or, eventually, to a set of currencies, are called *stablecoins* and are intended to be more attractive as a means of transaction and store of value.

A fundamental difference between private and sovereign currencies is that the latter are issued by a central bank. This implies that they must be legal and enforceable tender. The issuer, in this case, must promote policies aimed at maintaining the stability of the currency (as stated in the mandates of central banks) and should have a policy of controlling its own currency against other currencies, dealing with short-term speculative exchange rate variations.

Beyond private digital currencies, which include cryptocurrencies, private digital currencies are being developed that depend on large technological and multinational companies, such as VISA, Mastercard, or even currencies that are being created under the umbrella of other companies, such as Facebook or Amazon [14].

CBDC is a new type of fiat currency, over which the central bank has full control. Such a central bank could come to have detailed control over the monetary base and could easily issue new money. CBDCs would influence not only monetary policy, giving central banks tools not used before in financial history, but also payment systems, which entails risks.

Among the objectives of CBDCs is to create a protocol that ensures faster payments, especially when cross-border payments are involved. A CBDC involves a central regulator who sets the rules of the protocol, and can be changed at will, and as often as necessary, by whoever administers the currency, which can be dangerous. The greater the power of the central regulator, the greater the damage that can be done to the country's economic and financial policy. CBDCs are linked to states, governments or federations and experience shows how these financial tools have been used as weapons between states[15].

II. CBDC REGULATION IN EUROPE

The European treaties do not explicitly provide for the possibility for the European Central Bank (ECB) to issue central bank digital currencies [16]. Unless it is seen as a technical procedure used to carry out the ECB's normal tasks, the issuance of CBDCs would have to be integrated into the provisions of the existing treaties, to avoid having to amend the legal texts.

However, if it were necessary to amend the treaties, this would, in principle, must be done by means of a new treaty, with the difficulties associated with the need for unanimity and the ratification processes in the Member States.

Exceptionally, under Article 129.3° TFEU, the Statute of the European System of Central Banks and of the ECB may be amended by the legislative procedure. However, the exception is restricted to a limited number of Articles of the Statute, including Article 17 on the opening of accounts, and authorises only marginal amendments to the content.

In the increasingly realistic scenario of a CBDC being issued, not as a mere technical procedure but as a currency, two alternatives would be possible. First, Article 128 of the TFEU gives the ECB the right to authorise the European Central Bank and the national central banks to issue banknotes in the European Union and specifies that the banknotes issued by the ECB and the national central banks shall be the only banknotes that are legal tender in the European Union. The CBDC could also be equated with a digital form of banknotes, according to Article 128 TFEU.

It seems that the legislators never imagined that banknotes and coins could at some point cease to be physical and tangible [17]. And if that were to happen, the jurisprudence of the CJEU could perhaps come to appreciate a looser interpretation of the treaties.

Second, the issuance of a CBDC could be included in one of the basic tasks of the European system of central banks, within the scope of Article 127.2° of the TFEU. In this case, it would have to be demonstrated that such issuance was necessary to maintain the ability to conduct monetary policy, or to promote the smooth operation of payment systems.

With regard to the issuance of legal tender, only banknotes issued by the Eurosystem (Article 128), and coins, (Article 11 of Council Regulation 974/98), are legal tender in the euro area. Assuming it were possible to introduce a CBDC, which would be equivalent to a digital form of banknotes, under Article 128 TFEU, it would automatically be considered legal tender.

If a CBDC eventually becomes legal tender, users will need to have the appropriate technological equipment to be able to use them, which raises issues of inequality. In this respect, it should be up to the public authorities themselves to provide individuals with the material resources to use them.

III. CENTRALISATION VERSUS DECENTRALISATION

Decentralization implies that power is distributed, and functions do not depend on a central authority, but on many units that do not depend on a single will. Decentralized or peer-to-peer networks are participatory systems that reject single centralised power. When it comes to digital currencies, Bitcoin is the paradigm of decentralization [18].

Initially, digital currencies were created as decentralized systems, but then central bank digital currencies were created to counteract the decentralization process. The creation of CBDCs is a way of returning control to governments, states and the central banks that work with them [19].

The ability to transact reliably without a central authority is not something that centralized financial networks can offer. If central banks are to achieve adoption of their CBDCs, they will need to design a transparent infrastructure that fosters user confidence.

Article 102 TFEU prohibits monopolies when it establishes "*the prohibition of abuse of dominance which may restrict the market...*".

When thinking about central banks' digital currencies, there is a serious threat, resulting from the concentration of power they represent in the decision-makers (central banks), the executive powers (when the independence of the three powers is blurred) and in the large private technological companies, which will be necessary to develop and implement these digital currencies.

On the other hand, CBDCs represent a banking sector with the power to set the prices of digital money, banks issuing deposit liabilities, which can be materialized in cash and CBDCs [20]. Digital currencies issued by the private sector (banks, technology companies and large corporations) could become widely used, which would weaken the effectiveness of public monetary policy, as monetary control would be exercised de facto by the system or institution managing this new currency.

This situation is particularly relevant in the case of private initiatives (Amazon or Facebook), because the market power of these companies can make their digital currency acquire a global reach, and this could lead to the replacement of some state currencies, which would have implications for the economic and financial policy of countries.

However, it is difficult for a country's legal tender to be displaced, only in very exceptional cases could it be considered, and that would be in those cases where the country's own monetary authority becomes very deteriorated [21].

If CBDC were to be introduced through national central banks, the European Central Bank would be competing with private commercial banks [22]. This competition could be considered unfair based on the European Central Bank's exclusive power to issue legal tender, and the public nature of the national central banks.

To close the centralization versus decentralization section, in 2008, Satoshi Nakamoto created the first cryptocurrency: Bitcoin [23]. The Bitcoin protocol is open source, developed without the presence of an owner or coordinator who can dictate changes to the software, which can be freely adopted by users who will or will not update their Bitcoin nodes, and which requires approval by most of the network of nodes to be valid [24].

Bitcoin knows no borders and is the first truly neutral payment network. BTC does not need trusted intermediaries, such as a bank or a central government, because it operates without them. The system's protocol is based on competition between miners, which makes a coordinated attack virtually impossible [25]. Nor will anyone's permission be required to use the Bitcoin protocol. Users will be free to exchange BTC with whomever they want, wherever they want, whenever they want. Bitcoin has an inflexible monetary policy, and is composed of 21 million units, it is finite [26]. BTC represents the financial sovereignty of the individual, is accessible to all and is based on decentralization [27].

IV. THE CONSUMER VIS-À-VIS THE CBDC.

The TFEU regulates European Union economic policy as an exclusive competence of the Union. Exclusive competences are those in which only the EU can legislate and adopt legally binding acts. Member States may adopt binding acts only if the European Union expressly authorizes them to do so. Otherwise, they may not do so (Article 2.1° TFEU).

The matters over which the European Union has exclusive competence are "the customs union, *the rules on competition for the functioning of the internal market, the monetary policy of the Member States whose currency is the euro*, the conservation of marine biological resources under the common fisheries policy and the common commercial policy" (Article 3 TFEU). Both economic policy and competition policy are exclusive competences, where the States may only legislate if the European Union does not do so, which represents a significant transfer of state sovereignty to the Union on issues of vital importance for the proper functioning of the market and the economy.

In Europe, the European System of Central Banks (ESCB) comprises the European Central Bank and the national central banks of all Member States. The primary objective of the ESCB is to maintain price stability and act in accordance with the principle of an open market economy with free competition, promoting an efficient allocation of resources (Article 127.1° TFEU).

If governments, through their central banks, incentivize and promote the use of central banks' digital currencies, users will have to be provided with innovative technological mechanisms, in line with the digital currencies themselves, to be able to receive and pay with them. This will create an inequality between individuals that will ultimately oblige the state to provide users with the means to use them, so as not to exclude anyone. Because digital currencies are being created with blockchain technology [28] and it will be the responsibility of states to make it accessible to all users if they continue to encourage and promote its use.

If we think of the consumer, the end user of these central bank digital currencies, we can see how, to use these centralized digital currencies, he or she will have to give up, at the very least, his or her privacy and personal data. A central bank digital currency in anonymity is unacceptable. The digital identity of the person using it will always be required.

Privacy in economic transactions is important because it protects users from the abuse of government surveillance. Mass surveillance programs are problematic, even if individuals believe they have nothing to hide, simply because of the potential for error and abuse, particularly if the programs lack transparency and accountability [29]. Transaction privacy protects users against data exploitation by payment service providers and the counterparty to the transaction, ruling out the possibility of subsequent opportunistic behaviour, or against security risks, due to failures in the protection of customer data [30].

Privacy must be respected in case a CBDC is issued. The applicable data privacy rules, established at European level, must be strictly enforced, as well as several consumer protection rules, which are in addition to the risks linked more generally to the legal liability of the issuer, in general to the legal liability of the issuing central bank [31].

The payment services industry is subject to strong economies of scale and adoption by new users becomes more attractive the larger the number of users in the system. This dynamic inevitably tends to concentrate the market in a small number of providers, potentially leading to natural monopolies [32]. The trend towards a cashless society may ultimately lead to a vulnerable society, if the payments market is concentrated in a small number of players, services, and private infrastructures [33].

If CBDC were to be introduced through national central banks, the European Central Bank would be competing with private commercial banks [34]. This competition could be considered unfair based on the ECB's exclusive power to issue legal tender and the public nature of national central banks.

There is also the risk of creating monopolies by concentrating decisions in a few hands: in the government (executive) and the central bank of a country. Monopolies are infringements of competition policy, which should ultimately protect consumers. By creating monopolies, consumers and users are left defenseless.

The digitization of the economy will continue, which could exacerbate competition problems in markets dominated by digital platforms, including the payments market [35].

It follows from the above that there is a need for specific consumer protection against monopolies and centralization of digital currencies, against risks of financial loss, against security risks for users, and equal access of users to CBDCs.

V. CHALLENGES AND THREATS OF CBDC.

Digital currencies, which include cryptocurrencies, private digital currencies, and central banks' public digital currencies, have an important competitive advantage, which lies in the technological superiority and convenience of the services they offer thanks to the cross-cutting nature of their operations and data handling. Digital currencies all require technological progress and reduce cross-border transaction costs. They will make paying for international transactions much faster and cheaper.

The introduction of a digital currency has economic and social impacts, including financial inclusion, by reducing the cost of handling cash for low-income households and small businesses that do not operate in the traditional financial system. Digital currencies avoid printing on paper, thus contributing to the environment. They also facilitate currency exchanges and the absence of intermediaries.

Specifically, a central bank digital currency will require a significant infrastructure to channel payments, it will need to work on *ledger sheets* where coins and transactions are recorded, as well as a sufficiently large network of electronic devices for the public to use the currency. The issuance of a sovereign digital currency requires technological and political coordination between states to ensure the interconnection and interoperability of national money and financial markets under new technological conditions. This raises the need for cooperation in the choice of technologies in an international environment. However, it poses another major threat, which is the concentration of state and technological monopolies that will ultimately be able to abolish digital currencies with a single *click* or create new ones.

One financial stability issue that may arise with CBDCs is the disintermediation of the banking sector. The sale and circulation of CBDCs could facilitate the hoarding of large amounts of central bank money. This could negatively affect banks' deposit funding because the public would have less money in the form of bank deposits [36].

Currently, alternative retail payment systems (credit or debit cards) are privately owned and foreign owned. In Europe, most international card payments use Visa or MasterCard [37].

The payment system is a critical infrastructure backbone of the economy. The slightest instability would have severe consequences for society and pose a major threat to national and international security. Currently, private digital money is backed by central banks' (public) cash, but its use is increasingly residual. Depending on their design, central bank digital currencies could serve as a back-up system for the existing private cash-based electronic payment system. This back-up function becomes particularly relevant as digital disruption risks, such as cyber-attacks or operational problems, become more important [38].

Today, the increasing frequency of digital payments means an increase in the use of private money to the detriment of public money. In many cases, consumers do not perceive the difference between the uses of one and the other, due to institutions, such as deposit guarantee

funds, which insure users' private bank accounts. However, this aspect is important to ensure the proper functioning of the payment system and the economy [39]. FinTech and BigTech companies are disrupting the traditional business model of retail banking.

Another threat is the absolute loss of privacy of the individual using them, because while it is presented, by governments, central banks and the media, as an opportunity to prevent money laundering and terrorism, and to achieve transparency and user security, the EU has gone to great lengths to pass European legislation, the General Data Protection Regulation 2016/679 (GDPR), which protects the individual with regard to their personal and private data, and yet then obliges them to hand it over in its entirety because otherwise the digital identity and payment system itself drives them out of the market[40]. It can be used as a political instrument, and this is a worrying prospect if used by an authoritarian government.

A CBDC system is not conceivable without a prior digital identity. A virtual wallet cannot be opened without providing the identity of the subject to the responsible system. The loss of privacy will be absolute. CBDCs are seen as a tool in the hands of governments that will thus be able to increase interventionism in monetary policy, with economic and social consequences that will affect privacy and the rights of the individual. CBDCs have no limit and can be issued and burned at the command of the person administering them, and this entails risks of absolute control and concentration of power never seen in the economic history of any country.

VI. FINAL CONSIDERATIONS

First. There is a trend towards digitalization in everything, and in the economy even more so, and there is no doubt that it has innumerable advantages, such as the inclusion of a certain population, at a poverty level, who cannot access a bank account, but who can access digital currencies. These digital currencies bring environmental benefits, as they do not require paper printing. And they ensure much quicker and cheaper transactions, which are valued in a global trade that reaches everyone.

Second. Some individual behaviours, as consumers, it is advisable to continue practising, such as continuing to use (public) cash so that it never disappears. Renouncing cash, and its use, is a way of reducing the subject's independence and autonomy, because it will be *someone else* who authorizes, or not, the use of our digital money. From the moment that one is not the custodian of one's economy, one is not free.

Centralized digital currencies should be very well regulated, precisely so that they are not abused by the executive authorities or central banks. International private law is a discipline that is very protective of consumers. And so does competition policy. Not everything that is adopted in relation to central banks' digital currencies is good for the consumer. The consumer cannot be conditioned to have to give up all his or her personal information to do something. The consumer must be the focus of all legislation that is developed around digital currencies. Much more care must be taken in regulating those digital currencies held by central banks, which are centralized [41] and which can subjugate people by the mere fact that they are the caretakers and custodians of the money earned by individuals. The European Data Protection

Regulation must be strictly enforced. Having to authorize the transfer of our data, and our privacy, for the system to accept us, is a way of unprotecting the privacy and rights of the user.

The creation of a central bank digital currency is not only a technical issue of monetary or financial or technological order, but also not only a question of transparency and cost savings, but it is also not only about agility and cheapness, and it is not only about inclusion of all social strata. The creation of central digital currencies is also about power within nation states, between the state and private financial actors, and between the state and society.

Third. If the near future were to lead us to a scenario, quite likely, in which the use of cash would be practically residual, and in which banks would compete fiercely for users' money, a stable digital currency with a global reach could position itself as the main competitor in the means of payment sector. Against this backdrop, traditional banks as we know them would have to transform themselves to survive. With the emergence of Bitcoin and digital currencies recently proposed by large technology companies, central banks face increasing competition from players offering their own private digital alternative to public cash [42].

Ideally, a CBDC could coexist with cash as a common good, respectful of privacy, under the individual control of citizens. And in this way, central banks could avoid significant disruptions to their monetary policies and to the financial stability of their countries.

Fourth. Centralization and its possible drift, the lack of privacy of our personal data and the information we provide about our consumption are major challenges. The idea of Chinese social credit [43], if you are a good citizen, we let you have your money, and even give you rewards for it, is being accepted as a matter of course, and it is very dangerous.

In other words, there is a real threat of an absolute power of concentration on a matter that will determine the survival of society and the rights of citizens, because it will be a central authority that will decide on your digital assets and values and will also be able to sanction you, without any authorization or judicial decision, because it has control over the issuing or deletion of these digital currencies, and which are centralized in someone, who should behave with integrity, coherence and solvency....

Fifth. Diversification makes sense. Bitcoin symbolizes financial sovereignty and decentralization, representing the most equitable and scalable approach to the economic and financial system possible. Bitcoin is a cryptocurrency that requires nodes to authorize transactions, is incorruptible, unfalsifiable, and impossible to counterfeit, and returns financial sovereignty to individuals. As some authors point out, bitcoin has become a fundamental human right [44]. If we were to reach a cashless society based on CBDC, more and more people would understand the importance of a protocol like Bitcoin, which does not discriminate and guarantees anyone the freedom to transfer value.

Sixth. And questions remain to be answered... how will tourists be able to pay in a foreign country that has adopted CBDC?[45] will the payment made by tourists be an exception to the rules promoting digital identity and the fight against money laundering and the financing of terrorism? Will these CBDCs be centralized worldwide? Will the decision-making monopoly be global? will CBDCs have an expiry date, to prevent the subject from saving money, as they are experimenting with the Chinese e-yuan?

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ONLINE MARKETPLACES AND THE B2P2C REGULATORY MODEL

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Summary

To prevent legal uncertainties as well as to develop consumer protection fit for this ‘new’ business model this contribution advocates for a new/additional approach to intermediary platforms and more specifically online marketplaces. The ‘new’ business model of online marketplaces gives rise to two main regulatory challenges: The challenge of fitting the business model into the traditional contractual paradigm of two-party contracts and the ‘disruption’ of the market.

Keywords

Consumer protection, business to customer, online marketplace, platform, digital.

I. INTRODUCTION

To prevent legal uncertainties as well as to develop consumer protection fit for this ‘new’ business model this contribution advocates for a new/additional approach to intermediary platforms and more specifically online marketplaces. The ‘new’ business model of online marketplaces gives rise to two main regulatory challenges: The challenge of fitting the business model into the traditional contractual paradigm of two-party contracts and the ‘disruption’ of the market. In consumer contract law, the two-party contract regulation deals with unequal parties, market-rational[1], risk distribution and more. Some attempts to address the triangular contractual set-up of online marketplaces have been made, but maybe it is time to perceive this intermediary business set-up (this diversification of the distribution chain) in its own form/rights – the $\Delta B2P2C$ contractual relationship. Some regulation has been provided on online marketplaces as market players. The proposed DMA[2] and DSA[3] are clear examples of this. This contribution will use the big paintbrush and map out how legislation deals with online marketplaces as a party to a contract and as a market player respectively. The ambition is not to analyse in detail all the different challenges, but rather to point out some relevant issues to form the basis of perceiving the $\Delta B2P2C$ model as an integrated three-sided contractual model.

II. CONSUMER PROTECTION

Several scholars have discussed the notion of consumer protection in the EU.[4] All agree that consumer protection in the EU is not so much perceived as a protection from a social (fairness) point of view but rather a precondition for the effective functioning of the internal market. The specific EU consumer protection legislation refers to the dual purpose of an effective market and a high level of protection for the consumer. Consumer protection is achieved through two types of actions which are either a by-product/indirect protection stemming from competition and antitrust law or separate legislation granting specific rights.[5] The latter can be said to have two aims: One is to empower the consumer to become a strong (worthy) opponent, playing his/her part in the market (market-rational legislation) and the other is to ensure fairness (market-distribution).

Several approaches can be taken to present EU consumer protection. From a traditional public/private law point of view, consumers are protected collectively or individually respectively. Although the distinction between public and private law is discussed and sometimes unclear (and non-existing/not expressed in the EU), relevant for consumer protection is how the protection is sanctioned. Individual remedies aim to restore a faulty contract (unfair contract terms, lack of conformity) and the protection is thus to restore and can be perceived as retrospective. Public law sanctions such as fines and injunctions have a more prospective aim through the penal and preventive sanctions. As with all laws, the focal point is, whether there are resources to enforce these sanctions which for consumer protection is a challenge.[6] Enforcement of consumer protection depends on resourceful consumers (the

individual rights) and resourceful enforcement institutions (public sanctions) (e.g. Consumer Ombudsman) and both depend on an effective procedural set-up. This can be a challenge internally in the Member State but is further complicated in cross-border transactions.

Another approach in which to present consumer protection is through a timeline starting with pre-contractual regulation and continuing to the regulation of the contract itself and finally ending up with post-contractual legislation. Pre-contractual consumer protection in the broad sense covers health (product content, environmental production standards etc.) and safety (e.g. safety standards) as well as competition law and specific pre-contractual information duties. In his contribution, only the two latter are relevant. Post-contractual protection covers legislation on remedies/sanctions and ‘cooling-off period’ as well as product liability and enforcement. Regulation of the content of the contract has mainly been through the concept of fairness, however, regarding online marketplaces, there seems to be a more intrusive approach in the proposal of the DMA. Regulation of the conclusion of contracts is left to the Member States.

The EU aims to create a well-functioning market by opening up the market – in principle so that the market can develop freely with equal access and a level playing field.[7] This is secured primarily through competition law based on free movement rights. Where the market fails to be effective, additional legislation is passed to try to correct this market failure and thus for example drive out rogue traders and prevent oppressive traders or compensate for unequal bargaining power. The latest proposal of the DMA can be seen as exactly such an attempt to correct market failure caused by the ‘new’ business models of intermediary platforms such as online marketplaces.[8] Consumers are understood to be beneficiaries of a well-functioning market as this will provide choice and presumably also benefits regarding price/quality.[9] Genuine consumer choice is seen as a very important part of consumer protection, and giving the consumers choices are said to be the prerequisite for the power to take decisions at all.[10] Having choices, however, demands a lot of the consumer if the final choice is to reflect the ‘right’ choice and thus play a part in developing an effective market. Without going too much into detail about the emphasis on consumer choice in the EU, the relevance and value of choices are preconditioned by a somewhat resourceful and rational consumer. The more complex products and choices, the more pressing demand for a capable consumer. Thus, the consumer needs to have the capacity to process information about the choice and act rationally in response to it. This notion of a consumer is somewhat an illusion detached from consumer behaviour.[11] However, it is a part of the basic contract law concept of private autonomy. In order to *make* these choices, the rational consumer needs information (the informed consumer). The information will give the consumers knowledge and create awareness which will ultimately empower the consumers to make choices, claim their rights and boost their trust. Ensuring and making choices are mainly relevant in the pre-contractual phase. Regarding the content of the contract as well as post-contractual remedies, we find regulation of a more risk-distributing kind (conformity, fairness) which constitutes a function of consumer protection as protecting social welfare. Here the focus is more on rights than on choice. However, as with choice, claiming your rights also preconditions a resourceful consumer who knows his/her rights and who has the time, energy and will to pursue them.

II. ONLINE MARKETPLACES

3.1 Legal definition

EU law has formulated a legal definition of ‘online marketplaces’ as a subgroup of online intermediary platforms. Most relevant for this contribution, the concept and its definition are found in the DCD [12] and the SGD[13] in addition to the Modernization Directive[14] amending the CRD[15] and the UCPD[16]. Most recently the concept is mentioned in the DSA and DMA as subgroups of online platforms but not defined specifically. An online marketplace “means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers.”[17] The definition is slightly updated and made more technologically neutral (e.g. ‘software’ instead of ‘website’ inspired by Regulation 302/2018 on addressing unjustified geo-blocking etc.), but otherwise, the definition is the same as in Regulation 524/2013 on online dispute resolution for consumer disputes (the ODR directive) and Directive 2016/1148 concerning measures for a high common level of security of network and information systems across the Union.[18]

The concept of ‘online marketplaces’ covers only multi-sided platforms which means that traders with a web page selling their own goods and services are *not* included in the definition. The legal definition clearly states that to be regarded as an online marketplace, the marketplace must provide the option to *conclude* the contract between the consumer and his/her counterparty. Consequently, platforms are *not* included in the definition if they merely provide a list of possible contracting parties without giving the opportunity to *conclude* the contract on the marketplace platform.

The definition clearly states that one party to the main contract must be a consumer. The other party can be *either* another consumer (C2C contract) or a trader (B2C contract). From the wording of the definition, it is not clear, but it seems to be presumed in the provisions specifically applicable to online marketplaces at least in the Modernization Directive that the consumer is to be the *buyer* in the main contract. The new article 6a (1) (b-d) of the consumer rights directive refers to “... the third party offering the goods, services or digital content ...”. This ‘third party’ is the contracting party to the consumer in the main contract, and thus, these provisions clearly perceive the consumer as the buyer. This perception is in line with EU consumer legislation in general.

The legal definition does not dictate what kind of service the online marketplace must supply, as long as two users can conclude a contract through the marketplace and the marketplace uses some kind of software to do it. In regards to the interaction with the e-commerce directive [19] one must assume that the concept of an ‘online marketplace’ is overlapping with the concept of ‘an information society service’ but ‘online marketplaces’ also encompasses marketplaces that are not ‘information society services’. In C-434/15 *Asociación Profesional Elite Taxi* (Uber Spain) [20], the ECJ ruled that Uber was *not* an information society service because the activity of the drivers was ‘...inherently linked to a transport service...’ and was thus classified

as ‘a service in the field of transport’. Contrary to this, the ECJ ruled in C-390/18 *Airbnb Ireland* [21] that Airbnb is an information society service presumably primarily based on the fact that Airbnb also provided ‘...services ancillary to that intermediation service.’ There is little doubt that Airbnb is an online marketplace but whether labour platforms are too depends on how the relationship between the platform and the workers is defined. If (as stated as most labour platforms) the workers are independent contractors, the platform is a marketplace. But if the workers are regarded as employees of the platform,[22] the platform is the contracting party in the main contract with the consumer (a two-sided contract) and the platform will not be a marketplace. An online marketplace seems not to require to be remunerated for its services. However, the online marketplace must be operated by or on behalf of a *trader*, which means that the online marketplace cannot be an NGO or other non-traders. It must be assumed that a trader aims to profit either through remuneration or otherwise (e.g. selling collected data or ads).

3.2 Functions

Online marketplaces are said to be critical economic operators themselves,[23] fostering innovation,[24] being organisers of the internet ‘ecosystem’ and being important to the effective functioning of the digital single market [25] with the opportunities and challenges this entails.[26] The Commission has stated that online marketplaces foster innovation and growth in the digital economy and gives new market opportunities, especially to SMEs. They provide access to information, content and online trading. Almost half (42%) of the SMV respondents in the Eurobarometer 439 of 2016 expressed that they use online marketplaces to sell their products or services.[27] Thus, there is no doubt that online marketplaces play a major part in the market, and because of their business model, they have multiple functions[28] which to some extent is a novelty and which comes with both advantages and disadvantages for the market and the consumers.[29] As *distributors*, they are relevant to consumers because they increase consumer choice, which is presumed to be a positive thing providing that the choices are not controlled or manipulated. The online marketplaces are intermediate between the consumer and another party making trading more effective by facilitating the transactions. They *harvest* data, which can be used to enhance consumer experience but of course, also can be used to the detriment of the consumer for example by developing dark patterns [30]. Online marketplaces can also have the role of *gatekeepers*, either in the meaning of guarding the gate to a market which is a challenge for competition or in the meaning of guarding a gate helping the regulators achieve their regulatory goals such as preventing infringement of 3rd party rights, enforce and control maximum days of rentals, taxation etc. An example of the latter is a special rule in Denmark that gives the consumers who rent out accommodation through tax-reporting intermediary platforms a tax benefit compared to consumers who do not use these platforms.[31] The online marketplaces are also called ‘*new governors*’.[32] They set their own framework for the contracts (remote control them) and thus control the behaviour of the users both on the platform but potentially also with consequences for the behaviour outside the platform (e.g. limit sales through other channels). They facilitate feedback mechanisms and provide reputational enforcement systems.[33] Utilising the opportunities of technology, a marketplace can thus control and nudge its users to an extent not seen before. As the role of

governors, the online marketplaces challenge the market, especially when large online marketplaces emerge, almost monopolising the market. Because the two-sided business model is dependent on critical mass, the platforms that manage to achieve this first will have a massive advantage over new online marketplaces. Presumably, the platform will mainly construct the framework of their online marketplace to benefit themselves with little thought of what will benefit the market (or society!). Each of the functions mentioned above challenges the market and consumer protection differently and requires different (regulatory?) initiatives.

3.3 A market player

When online marketplaces are regulated in the role of a market player with the multiple functions mentioned above, the benefits for consumers as mentioned will often be of an indirect nature such as promoting increased choice by limiting market failure.

Looking at online marketplaces from the perspective of a market player, one can divide the regulation into at least three categories: Competition law, market failure measures (regulation that forbids certain actions, prevents anti-competitive and anti-integration practices in the private sector) and market-rational law (regulation that makes sure to boost the potential business partners to make them play their part as market players).

Regarding the first category, online marketplaces must abide by general competition and antitrust law which also form the base for establishing their business in the first place. To secure a fair competition, legislative initiatives like the UCPD provide general provisions to ensure fair commercial practice so that businesses can compete on an equal playing field. However, as mentioned, for the business model of online marketplaces this regulation has proven to be insufficient to ensure an effective market because of the potentially high degree of control the marketplace has over its contractual partners – the users of the marketplace – which affects the mobility of the users and thus the contestability of the marketplace.[34] This control combined with the great benefits of their extreme scale economies make the market work ineffectively. To restore an effective market around online marketplaces, extensive detailed regulation has been drafted in the proposed DMA.[35] The DMA provides detailed requirements (business practice regulation) for large undertakings who provide core platforms (named ‘gatekeepers’ in the proposal)[36] (here in the meaning of guarding the gate to the market) to prevent the online marketplaces from exploiting their advantageous situation as gatekeepers and governors. See for example DMA art. 5 (1) litra b which prohibits the gatekeeper from limiting and controlling their users’ sales on other platforms. Along the same line see Article 5 (1) litra d which prohibits the gatekeepers directly or indirectly[37] from questioning the practice of the gatekeeper (eg. filing complaints). The proposal of the DSA provides regulation to support the online marketplaces’ role of gatekeeper as the guard of a gate keeping out illegal and unsafe activity and other unwanted behaviour such as targeted advertising of minors, revenge porn, disinformation etc. The purpose of this DSA is therefore not primarily related to regulating platforms (“information society services and especially intermediary services”) from an effective market perspective but more from the perspective of “society as a whole”[38] or as is stated in Recital 4 “... in order to safeguard and improve the functioning of the internal

market...”. The DSA oblige large platforms to cooperate with the authorities, report on various activities, and provide notice and action mechanisms. Large platforms for example have a duty to collect information on the platform traders, to accept trusted flaggers, to set up complaint handling mechanisms for decisions made by the platform and measures to avoid misuse and to report threats to the life or safety of a person. For very large platforms additional requirements are laid down such as audits and measures to prevent risk. In its function as an intermediary with access to the communication between the users but less relevant for consumer protection on online marketplaces, the EU also focus on societal considerations in the form of initiatives regarding hate speech, disinformation, voting manipulation etc [39]

Regulating the online marketplace’s roles as gatekeeper and governor opens up the market and might even benefit from delegating a ‘watchdog’ activity, but from a market-rational point of view, the market will not work effectively, if the other market players are not compatible opponents/business partners. Thus, to make the users able to play their part, the EU has provided an extensive amount of information duties for digital platforms adding even more duties if the platform is an online marketplace. Not including sector-specific regulation and data-protection regulation, the information duties are found in particular in the CRD and UCPD as well as the e-commerce directive (soon in the DSA) and the P2B Regulation [40]. As mentioned earlier, the purpose of providing information to the consumer is to balance out the unequal level of information and thus create knowledge and awareness to give rise to the ‘informed consumer’ who will use this knowledge and awareness to make rational choices. The information duties could previously be divided into three categories: Rights, product, and contract partner. After the emergence and increase of digital platforms, one additional category can be added: transparency of listings/ratings. Specifically, regarding two-sided platforms, a fourth category can be added which is mobility. All these information duties (if read and understood) will provide the consumer with the information needed to evaluate initially whether he/she wants to enter into a user-contract with the online marketplace and hereafter, whether he/she wants to make a transaction through the marketplace.

3.4 A party to a contract

The online marketplace has become a powerful market player which has been attempted to be dealt with in different ways as mentioned above. Not separate from the perspective of the market player but overlapping, the online marketplace can also be observed from a contractual perspective.

There are always three key contracts in two-sided platforms whereas, as of now, the online marketplace is only explicitly a party to two of them, the two user contracts. The user contracts are the contracts the users enter into with the online marketplace (or rightly the provider of the online marketplace). These contracts regard the terms and conditions of using the online marketplace service. The main contract is between the supplier-and the consumer (the intermediated contract) and regards the goods/services posted on the platform by the supplier-user.

The starting point in contract law is freedom of contract. One is free to decide who to contract with and what about. But regarding consumer contracts, this might be somewhat of an overstatement, as there are several restrictions on consumer contracts. The information duties have already been mentioned. Most of these apply to the pre-contractual phase, but some are also relevant for the content of the contract and the post-contractual phase. And moving into the area of regulating the content of the contract as well as the post-contractual phase, one could argue that here not only market (economy) considerations apply but also more normative ideas of distribution of risk or fairness. However, also distribution of risk and fairness can be seen as a form of market-correcting activity. Such social welfare considerations create trust and trust is crucial to an effective market.

3.5 The user contracts

The user contracts are contracts where the users get access to the service of the online marketplace. The primary product of the online marketplace is the intermediation service which can lead to the entering into the main contract. In addition, the marketplace can provide accessory services to the intermediary service and sell its own goods/service (non-intermediated e-trade). The focus of this contribution is on the intermediation service. The main added value for the users of an online marketplace is the reduction in search and transaction costs caused by the facilitation of the contract and also very importantly the otherwise impossible access to a large quantity of potential available contract partners.[41]

If the supplier-user is a consumer (and not a trader), the user contract with the online marketplace is a P2C contract and is covered by applicable consumer protection legislation as a normal B2C digital service contract. If the supplier-user is a trader, the user contract is a P2B contract. Whether the user contract in all instances actually qualifies as a ‘contract’ and therefore is covered by contract law rules is not clear and could differ in different Member States,[42] however, this must probably be assumed to be the case.[43] If the concept of ‘contract’ in Member States is based on an exchange of ‘payment’ of some sort, this might be challenged as the online marketplace platforms have different profit-generating schemes where some are related to the use of the marketplace (subscription), some relate to the transaction between the users (commission), others are based on selling collected data or selling ads, and some have a combination of schemes. The directive on digital content and digital services (DCD) explicitly accepts personal data as counter-performance which means that under the scope of this directive, consumers can claim remedies for lack of performance when they have used personal data as counter-performance. Personal data is regarded as ‘counter-performance’ *unless* the information is collected by the marketplace exclusively to enable the supply of the digital content or the digital service, or for the sole purpose of meeting legal requirements.[44]

One could argue that the exact time of conclusion of a contract with an online marketplace could vary. There is probably little doubt that there is a service contract between the online marketplace and the two users when the users make a transaction with each other through the platform. But prior to that, the service contract can be concluded when the user creates a user profile or even earlier when a user enters/downloads the software used by the online

marketplace. This will depend on the set-up by the marketplace. The author has not come across any cases where this distinction has proven relevant, so it will probably remain a theoretical question rather than a practical one. Also, it should be kept in mind that most information duties are pre-contractual and thus, do not depend on a concluded contract to apply as long as the information is given prior to the contract.

3.6 P2B

The platform-to-business-user-contract (P2B) is explicitly regulated in the P2B Regulation.[45] This Regulation features elements of fairness of contracts such as specific requirements for modifications of the service contract and transparency such as information on parameters of listings. For the large platforms, the DMA provides a list of limitations to the contracts such as a ban on limiting the business-user from selling his/her products in other ways. The aim is clearly to protect the business-user against the aforementioned potential control and power which the marketplace holds on basically everything regarding the business such as its access to the marketplace, the product to be sold, the information to be given, the listings etc. Thus, even though this contract is a B2B contract, the EU has acknowledged the imbalance between the parties to the detriment of an effective market, and tried to correct it. This is also seen as an (indirect) protection of the consumer who will most likely benefit from a less platform-initiated restrictive regime of their potential counterparties.

One of the most debated pieces of regulation regarding P2B contracts is the e-commerce directive's Article 14 (soon to be found in Chapter II of the DSA) exemption rule on liability for infringements of 3rd party rights and other illegal content/information.[46] Chapter II of the DSA presupposes that an intermediary service is (joint) liable for the information provided through the service by a supplier-user if certain requirements of activity of the platform are met. It is argued that the exemption rule also applies to P2B contracts for online marketplaces if the requirements are met.^[47] The DSA does not lay down an obligation to monitor the information provided by the supplier-user.[48] However, for large platforms, there seem to be a duty to "make reasonably efforts to randomly check whether the products or services offered have been identified as being illegal in any official, freely accessible and machine-readable online database or online interface."^[49]

3.7 P2C

In the case where the users (supplier or buyer) are consumers, obviously consumer protection regulation applies in their user contract with the marketplace. This entails for example that the provisions on lack of conformity, updating requirements and remedies found in the DCD apply. Also, the ubiquitous UCTD [50] applies, granting the consumer protection against unfair terms. Both protection laws of course need an active consumer to claim his/her rights. These individual rights are supplemented by the UCPD which in Denmark solely is sanctioned with fines, but contrary to the DCD and the UCTD, the UCPD does not require a contract between the parties and does not specifically adapt individual remedies. Individual remedies for example for misleading commercial practice are thus left to the Member States to work out in detail. After the amendments enacted by the Modernization Directive, the UCPD, however,

states that the Member States must ensure that consumers have "access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract." [51] Apart from several information duties, the CRD provides the right of withdrawal which applies both to the main contract but also to the user-contract. In service-contracts between a marketplace and a consumer, this right of withdrawal, however, is only relevant if there is some kind of monetary payment, which the consumer wants back. Otherwise, because of the concept of the marketplace's services, the consumer can just stop using the service. If the right of withdrawal is applicable and relevant, the relevance is reduced by the fact that if the counter-performance of a digital service contract is personal data as mentioned earlier, there must be a standing right to rescind from the contract if the user wishes to withdraw his/her consent to collect his/her personal data. [52]

There seems to be an understanding that the online marketplace is liable for the information they produce and control but is not automatically liable for information provided by the supplier-user. [53] In the DSA recital 18, it is stated that information provided by the platform or developed under its editorial falls under the responsibility of the online marketplace.

3.8 The main contract?

There is no legal support as of now to state that the online marketplace is a part of the main contract between the two users. However, there are three ways in which the marketplace could be considered either the seller 'by reality' (and then not legally an online marketplace at all!) or by appearance or at least be jointly liable with the seller-user for the performance of the main contract.

3.9 Not an online marketplace at all!

The definition of an online marketplace seems to assume that the marketplace acts as an intermediary regarding the main contract and thus, that there is a triangular contractual setup as described above. Thus, whether the marketplace is an intermediary must be established to know whether the platform is covered by the definition. There are no clear criteria for the concept of 'intermediary' in its distinction from a supplier of the underlying product, but some of the online marketplaces might not qualify even if self-defined as an intermediary. This distinction might be difficult, particularly regarding labour platforms. [54] Especially if the labour platform only intermediates a specific kind of labour. The Commission gives a general guideline the 'A European agenda for the collaborative economy'. [55] Here, the Commission lists some key criteria for assessing when a collaborative platform is regarded as providing the underlying service. If a platform meets all these criteria, there is '...strong indication that the collaborative platform exercises significant influence or control over the provider of the underlying service, which may in turn indicate that it should be considered as also providing the underlying service...'. In Uber Spain [56], the ECJ did not take a stand on this issue regarding Uber, as the ruling merely decided on whether Uber was an (intermediary digital) service or a provider of transportation. [57] See also the section on the legal definition of an online marketplace above. Ultimately, the EU does not rule out that a platform, despite its self-

definition, can be regarded *not* to be an online marketplace if the reality of the business set-up is of a normal e-trade transaction.

3.10 The appearance of the ‘seller’

The starting point of a contract is that the parties of the contract are those who conclude the contract (direct representation). An exemption to this principle is the possibility of using other representation such as agents or other intermediaries. As it is an exemption, it is necessary for the contracting party to be made aware of such a representation to be able to know who his/her counterparty is. The well-known ruling of Wathelet C-147/15[58] consolidated this need for information and ruled that an intermediary could be perceived as the seller if the intermediary failed to disclose sufficiently of the intermediary merely being a representative/intermediary for the supplier-user. Along the same line, in the DSA art. 5(3), it is explicitly stated that if the average consumer believes that the marketplace (or a supplier-user acting under its authority or control) is the provider of a piece of information, then the exemption from liability of hosting this information does not apply. Not displaying clearly the identity of the supplier-user could cause such a belief.[59] In the DCD (as well as the SGD ^[60]), it is left up to the Member States to expand the scope of ‘trader’ adding such a presumption rule.^[61]

3. 11 ‘Acting on behalf of’

In several consumer protection directives (CRD, DSD, SGD, UCPD) a trader “means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.”[62] Several legal scholars have discussed whether online marketplaces act ‘on behalf of’ the supplier-users.^[63] Unfortunately, there seems to be *no* clear answer and the reader must be referred to the inconclusive discussions in the literature.[64] The online marketplace is clearly a trader in the user-contracts and has to comply with all information duties etc. regarding this intermediating service plus any accessory services. The problem arises when the activity on the marketplace regards the sale of goods/services in the *main contract*. One could argue that it can be derived from Wathelet (indirectly) that the marketplace is only the trader of the main contract, if such impression is given to the average consumer. However, this does not solve whether the marketplace acts ‘on behalf of’ the supplier-user. As the legal scholars have pointed out, there seem to be conflicting clues in case law, directives and guidance papers which opens for stating this author’s own opinion. On the one hand, it seems quite ‘fierce’ to drag the online marketplace into every main contract concluded through the marketplace if the marketplaces were to be perceived as acting on behalf of all their supplier-users. This position might result in making it impossible to make a profit and thus quite unattractive to create and run an online marketplace. On the other hand, it seems blatant that the online marketplace is the nearest to comply with many of the duties laid upon a trader of the main contract – especially pre-contractual information duties. In Denmark, a pragmatic solution seems to have been chosen. Thus, the Danish Sea- and Trade Court has ruled that the precontractual information duties pursuant to the CRD regarding for example the right of withdrawal should be placed on the intermediary platform.[65] The court did not discuss whether the supplier-

user should *also* comply with the information duties and thus that the two parties share the responsibility. Also, the court did not elaborate on where to draw the line of the obligations of the intermediary platform, but it was made clear that the platform was *not* the trader in the main contract. This solution could also be an innovative interpretation of the concept of ‘acting on behalf of’, as one could argue that when performing the service as intermediary which entails promoting and facilitating posts of the supplier-user’s products, then this is actions ‘on behalf of the supplier-user’. But when it comes to the delivery and quality of the product of the main contract, then the marketplace is not acting ‘on behalf of’. This seems to be the pragmatic solution until the consumer protection rules clearly state their point of view on the matter.

In the DSA, Article 24d obligates the (large) online platform to provide an opportunity (‘compliance by design’) for the supplier-users (the traders) to comply with ‘their obligations regarding pre-contractual information’. Here, it is clear that the DSA regards the supplier-user as the addressee of the obligation to provide the pre-contractual information.

3.12 AB2P2C

The role as intermediary [66] does not (always) fit into the existing legal perceptions of commercial agent [67] or representative.[68] Also, the considerations behind the regulation of ‘agents’ as the object of protection do not fit the purpose of regulating intermediaries as they are seen as the strong party in contrast to the ‘agent’. An intermediary such as an online marketplace seems to be an independent concept to be defined legally depending on the context it is a part of. In the consumer protection legislation, not much focus has been on the particular features of the triangular business model involving intermediary platforms (including online marketplaces). Basically, the existing consumer protection applies to the *main* contract, provided that the seller is a trader, and to the *user* contract between the consumer-user and the platform. There are no provisions directly linking the online marketplace to the main contract apart from the above mentioned examples where the online marketplace ‘becomes’ the trader.

In the following, the scarce pieces of regulation that do consider elements of the triangular contractual set-up will be presented.

Some of the amendments made to the CRD by the modernization directive specifically target the triangular setup acknowledging that in order to make an informed choice, the consumer depends on the online marketplace to provide information e.g. on how the ranking of offers is produced and whether the main contracting party is another consumer or a trader.[69] The latter information can be based on disclosure of the supplier-user. In addition, if the main contracting party is a consumer, the marketplace must inform, that the EU consumer rights do not apply. In Denmark, however, these consumer rights *do* apply in most cases irrespectively of whether the supplier-user is a business or a private person (a consumer). Denmark has chosen to let C2C main contracts intermediated by an active intermediary be regarded as a B2C contract in the civil law consumer protection legislation, thus consequently requiring the consumer-seller to comply with all civil law consumer protection legislation as if he/she was a trader (the intermediary rule).[70] The *platform* is still not a part of the main contract, but as mentioned earlier in Denmark, some pre-contractual duties such as the duty to inform about the right of

withdrawal have been put upon the intermediaries (together with the seller) and sanctioned with fines if not applied with.[71] As mentioned, the purpose of the information duties is to create the informed consumer and thus boost the internal market, but the novelty regarding the new information duties in the CRD is, that they are laid upon the platform to give to the consumer-user, and the consumer is *not bound* by the main contract if the information is not given (“Before a consumer is bound by a distance contract...”).[72] Thus, the information duty of the *marketplace* has a direct effect on the validity of the main contract. Surprisingly, the Danish legislators have left out the important part of ‘before the consumer is bound’, so the Danish implementing provision merely states that the online marketplace must provide the information. Thus, there seem to be no contractual consequences for not providing the information.

Also, as a novelty, the new information duties in the CRD also apply where the main contract is a C2C contract and not just in the case of a B2C contract. C2C contracts are usually not covered by consumer protection legislation. As the new information requirements are about how the sellers are ranked and whether they are consumers, it makes sense to make these pre-contractual information duties also apply to main contracts between two consumers. This does however not change the fact that all other consumer protection legislation will not apply to the C2C main contract – not even other pre-contractual information duties. The built-in challenge of an information duty about the status of the supplier-user as either a consumer or a business is that the legal concept of ‘consumer’ is the basis of many disputes. If it is hard for lawyers to place persons in one or the other category, it seems inefficient to ask the supplier-user to categorise himself/herself as either a consumer or a trader.

Apart from the information duties, according to the DSA, the online marketplace must as mentioned make it possible for the supplier-user to comply with their obligations regarding pre-contractual information.[73] This requirement seems to be just a practical provision, but one could ask, what the consequences are if this possibility is *not* given to the supplier-user. The DSA states in Article 24d (3) that the large platforms shall make best efforts to assess whether business-users have provided the listed information prior to allowing the user to offer products on the platform. Along the same line, the DSA states in Article 24 (2) that the large platform must provide supplier-users with a functionality to declare their content ‘commercial communication’ (an influencer provision?). The second paragraph goes even further and obligates the platform to *ensure* that the receiving user understands this declaration.

Another very relevant use of the $\Delta B2P2C$ model is to apply an entry check when registering on the marketplace. The DSA proposes such an initiative for the larger platforms in Article 24c[74], according to which the online platforms must collect and assess specific pieces of information (e.g. ID, place of registration, payment account details) from the trader-user before he/she can offer a product on the platform. Parts of the information must be made available for the buyer-user. Liability for the accuracy of the information provided stays with the business-user but the platform must act if the business-user does not provide the information or if the platform believes the information to be inaccurate.

For very large platforms, the DSA provides provisions for online platforms in their role as gatekeepers in the meaning of guarding against illegal content/goods etc. The platforms must carry out risk assessments regarding illegal content, fundamental rights, democratic threats (e.g. electoral processes), gender-based rights etc. The assessment primarily relates to the effect of the design of their different technological systems.[75]

In the ODR regulation^[76], it is explicitly stated in article 14(1) that online marketplace must provide a link to the Online Dispute Resolution platform but other information duties in this directive seem only to be linked to the platform in its role as trader and not intermediary.

I. ΔB2P2C – THE ONLINE MARKETPLACE MODEL

The previous section showed that some legislation can be identified taking specifically the ΔB2P2C model into consideration. This is mainly the case with the latest regulation such as the DMA, DSA and the Modernization Directive.

The expression ‘ΔB2P2C’ is meant to stand for the triangular business model of online marketplaces. The B stands for the seller-supplier being a business. It can also be a consumer if the main contract is concluded between two private parties. Whether it is a business or a private person of course has to be clear when regulating the model. The P stands for the platform which in this case is the online marketplace. The P could also be other platforms but the concept of ‘platforms’ encompasses too many variants, and it is easier to discuss a legal frame when the category is more cut to.

Whether there is a need to regulate the ΔB2P2C is basically a normative question to be decided by legislators. Some legislation has been provided mainly from the perspective of the online marketplace as a market player. But if one were to play with the idea of looking at ΔB2P2C with the same considerations as a two-party contract, a main concern comes to mind which is the allocation of risk. Risk is here understood primarily as the contractual and thus economic risk of contracting. Without distribution of risk, the stronger party is most likely to benefit from the contract at the expense of the weaker party – as is known in the two-party contract. Because of the business model, the online platform must be considered the strong party and the users as the weaker parties. The business-seller might be the strong party in a two-party main contract, but the powerful intermediary is able to control the business and thus to a certain extent deprive it of this power. Some market-rational and market-correcting actions have already been made but none of the regulatory initiatives has distributed the contractual risks of the main contract to the online marketplace. From an economic contractual point of view, one could claim that risk and the possibility of profit should somehow match. At least the larger, settled online marketplaces seem to have very little risk and the potential for very high profit. Of course, looking at each transaction separately will not paint the picture of a high profit for the online marketplaces which disturbs the traditional way of thinking about two-party contracts. However, the effort of the online marketplace in each transaction is also little, so the proportions of effort and profit fit well enough. This way of thinking about fairness is also represented in the DMA art. 12, (5) *litra a* which allows the Commission to adopt further

restrictions if they find an imbalance in the rights and obligations disproportionate to the service performed by the platform.

In the case of the $\Delta B2P2C$ business model, there seems to be very little risk on the online platform compared to the large potential for profit, so if the total risk of the $\Delta B2P2C$ should be divided between the three interdependent parties, more risk should be placed on the online marketplace. A model of such allocated risk is drafted in the European Law Institute Model Rules on Online Intermediary Platforms (ELI Model Rules), art. 20.[77] This model adds a precondition for placing more risk on the online intermediary platform. The precondition concerns control and is formulated as a requirement of predominant influence performed by the intermediary on the seller-user. If this predominant influence is performed, the platform becomes jointly liable with the seller-user for the performance of the main contract.[78] The challenge with this precondition is of course to establish when the influence is predominant. For this, the ELI Model Rules list some elements that may be considered such as whether terms of the main contract are essentially determined by the platform or whether the price to be paid by the buyer-user is set by the platform. As with most regulations not based on objective criteria, this model has the disadvantage of being dependent on the platforms to correctly define themselves or secondly (and much more expensive), having national institutions monitor the platforms in order to correctly define them. In the DSA a similar distribution of risk is made. In Recital 22a it is stated that the exemption of liability of hosting illegal content in the DSA does not apply when a business-user acts under the authority of the platform. An example of such authority is if the platform determines the price of the goods/services of the main contract.

When distributing risk, one should be aware that this does not necessarily lead to more welfare for the consumer if that is the aim. The online marketplaces might raise their prices (or in other ways compensate for their increased risk) making the consumer pay for the extra consumer protection. The added consumer protection can then be regarded as a type of insurance scheme. This is no novelty as this also happens with other risk distribution initiatives in the two-party contract such as provisions on lack of conformity and product liability.

Risk allocation initiatives often have a post-contractual nature. The pre-contractual information duties could of course also be better fitted to the $\Delta B2P2C$. A starting point would be to make clear when the information duties apply to the online marketplace, the supplier-user or both. Here the element of control might be relevant again. The online marketplace can control the flow of information which speaks in favour of imposing at least the more general information duties on the marketplace. The information duties regarding the product might be more relevant to put on the supplier-seller.

When the supplier-user is a private person changing the lettering in the model to a $\Delta C2P2C$ model, consumer protection regulation does not apply to the main contract. However, if there is a professional intermediary, one could consider somehow protecting the main contract. Such an intervention could also be based on risk. The DMA does not exclude the possibility of qualifying undertakings providing core platform service where both users are ‘end users’ as ‘gatekeepers’ which will then result in detailed protection for example regarding mobility.[79]

Apart from the abovementioned suggestions which mainly relate to contractual initiatives, one could also consider if the gatekeeper's role in the sense of guarding the gate to prevent illegal activity on the online marketplaces could be exploited further at least regarding the larger marketplaces. This is to a certain extent on its way through the DSA addressing issues such as democracy, cyber violence and protection of minors. As a surprising novelty, the DSA also proposes a 'crisis response mechanism' for very large platforms.[80] With such an initiative, the EU has acknowledged the influence of some of these platforms and even though provisions as this presumably mainly is relevant for communication platforms, the provision still applies to online marketplaces as well. Another agenda to be considered could be sustainability.

Driving agendas and allocating risks will always risk being perceived as too paternalistic. However, self-regulation can only do so much[81] and the extensive regulation of the online marketplaces as market players indicates that the market could not regulate itself sufficiently effectively. Maybe the right balance has been struck with the new initiatives (DMA, DSA) but if there is no further need for specific regulation on the $\Delta B2P2C$ business model, at least some clarification on the applicability of the existing (and 'older') consumer law is needed in order to make it fit into the $\Delta B2P2C$.

Above is mentioned some considerations to be done regarding $\Delta B2P2C$. However, before action is taken, other more fundamental questions could be asked. What do we want from these business models? How do they affect physical trade and how do they disrupt labour law etc.? One question that seemed to have been handled is how the online market platforms affect online competition but there are more questions to be asked and answered.

[1] See an in depth structured presentation of consumer welfare where the concept of 'market-rationalism' is presented T. Wilhelmsson, *Welfarism in contract law*, *European Law Journal*, vol. 10, no. 6, 2014, p 712-733.

[2] Proposal for a Regulation on contestable and fair markets in the digital sector (COM(2020) 842 final)(DMA).

[3] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (DSA). Expected to be in effect in 2024. Latest politically agreed-upon version is PE-CONS No/YY 2020/0361(COD).

[4] E.g. G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law*, 2018, Routledge, London; C. Twigg-Flesner (eds.), *Research Handbook on EU Consumer and Contract Law*, 2016, Elgar, Cheltenham; *EU Consumer Law and Policy*, S. Weatherill, *EU Consumer Law and Policy*, 2. ed., 2013, Elgar, Cheltenham; E.van Schagen and S. Weatherill (eds.), *Better Regulation in EU Contract Law – The Fitness Check and the New Deal for Consumers*, 2019, Hart, Oxford; M. Durovic, *International Consumer Law: What Is It All About?*, *Journal of Consumer Policy*, 43 2020, pp 125-143; M. B. M. Loos, *The Modernization of European Consumer Law (Continued): More Meat on the Bone after All*, *European Review of Private law*, 2 2020, pp 407-424.

[5] R. Podzum, *The Digital Markets Act: 'What's in it for Consumers?'* Editorial, *ECML(Journal of European Consumer and Market Law)*, 1/82022, vol. 11, p 3

[6] G. Howells, C. Twigg-Flesner and T. Wilhelmsson, *Rethinking EU Consumer Law*, 2018, Routledge, London, p 290 et seq.

[7] See for example Regulation on contestable and fair markets in the digital sector (COM(2020) 842 final)(DMA) Article 1.

[8] It should be noted that the DMA speaks about 'consumer' protection and benefits for 'the consumer'. However, the legal term used is 'end user' which is presumed to have a broader scope which might fit better with the larger scope of application of the DMA to 'core platform services'.

[9] In this regard DMA Recital 1.

[10] R. Podzum, The Digital Markets Act: 'What's in it for Consumers?' Editorial, *ECML(Journal of European Consumer and Market Law)*, 1/82022, vol. 11, p 2-3.

[11] B. Christoph, The Future of pre-contractual information duties: from behavioural insights to big data, in C. Twigg-Flesner (eds.), *Research Handbook on EU Consumer and Contract Law*, 2016, Elgar, Cheltenham, pp 221-240; J. Trzaskowski, Behavioural Innovations in Marketing Law, in H.-W. Micklitz, A.L. Sibony and F. Esposito, *Research Methods in Consumer Law: A Handbook*, 2018, Elgar, Cheltenham, pp 296-333.

[12] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (DCD).

[13] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (DSG).

[14] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (the Modernization Directive)

[15] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 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 (CRD).

[16] 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 (UCPD).

[17] UCPD art. 2 (n) and CRD art. 2 (e)(17).

[18] The modernization directive, recital 25.

[19] Directive 2000/31/EC on certain legal aspects of information society services.

[20] ECJ 20 December 2017, *Asociación Profesional Elite Taxi vs. Uber Systems Spain SL*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3629402>.

[21] ECJ 19 December 2019, *Aibnb Ireland*, <https://curia.europa.eu/juris/document/document.jsf;jsessionid=6C259D48119D0BC378C8CA2C730E7637?text=&docid=221791&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3627893>.

[22] See for a discussion on workers as employees M. Jull Sørensen, *Intermediary Platforms - The Contractual Legal Framework*, *Nordic Journal of Commercial Law*, 2018 6, pp 62-90. See also IRINA Domurath, *Platforms as contract partners: Uber and beyond*, *Maastricht Journal of European and Comparative Law*, 2018, vol. 25(5) pp 565-581 and

[23] M. B.M. Loos, 'The Modernization of European Consumer Law': A Pig in a Poke?, *ERPL (European Review of Private Law)* 1-2019, p 134.

[24] Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, *Online Platforms and the Digital Single Market - Opportunities and Challenges for Europe*, COM(2016) 172 final.

[25] Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, *Online Platforms and the Digital Single Market - Opportunities and Challenges for Europe*, COM(2016) 172 final, section 1.

[26] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – on the Mid-Term Review on the implementation of the Digital Single Market Strategy: *A Connected Digital Single Market for All*, COM(2017) 228 final, p 7.

[27] Flash Eurobarometer 439 *The use of online marketplaces and search engines by SMEs*, of June 2016 mentioned in: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – on the Mid-Term Review on the implementation of the Digital Single Market Strategy: *A Connected Digital Single Market for All*, COM(2017) 228 final, p 7.

[28] See for a presentation of functions T. Rodríguez de las Heras Ballell, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' 3 Italian LJ 2017, pp 149-176.

[29] See regarding platform roles as when managing the platform T. Rodríguez de las Heras Ballell, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' 3 Italian LJ 2017, p 167 et seq.

[30] In the proposed DSA, a prohibition of such manipulating online interface design is found in Article 23a.

[31] Lovbekendtgørelse 2013-07-03 nr. 949 om udlejning af fast ejendom til ferie- og fritidsformål m.v. og camping m.v. med senere ændringer. See presentation in M. Jull Sørensen and K. Østergaard, 'Tourism Law in Denmark', in Carlos Torres et al. (ed), *Tourism Law in Europe*, [Estoril, Salamanca Paris, Sassari, Milan: ESHTe 2022], pp 127-146, p 131 et seq.

[32] C. Busch, Self-Regulation and Regulatory Intermediation in the Platform Economy (November 30, 2018) in: M. Cantero Gamito & H.-W. Micklitz (eds.) *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes*, [Edward Elgar 2019], p 3 (paper edition) with references.

[33] C. Busch, Self-Regulation and Regulatory Intermediation in the Platform Economy (November 30, 2018) in: M. Cantero Gamito & H.-W. Micklitz (eds.) *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes*, [Edward Elgar 2019], p 3 (paper edition).

[34] See DMA Recital 3-5.

[35] DMA Recital 7-8.

[36] DMA Article 2, 1: 'Gatekeeper' means an undertaking providing core platform services, designated pursuant to Article 3.' Article 3 refers to market impact, important gateways and entrenched and durable positions

[37] 'Indirectly' has been suggested by the Parliament in their proposal of amendments, P9_TA(2021)0499.

[38] DSA Recital 1.

[39] See a list of different initiatives in the area: European Parliamentary Research Service, *Liability of online platforms*, Study, PE 656.318, 2021, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU\(2021\)656318_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf)

[40] Regulation (EU) 2019/1150 (The P2B Regulation).

[41] See for more on the benefits T. Rodríguez de las Heras Ballell, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' 3 Italian LJ 2017, p 162 et seq.

[42] See for example CRD Article 3 (5): "This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive."

[43] The user contracts might not fit the typified contractual model but qualify as service provision contracts cf. T. Rodríguez de las Heras Ballell, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' 3 Italian LJ 2017, p 173.

[44] The DCD, Article 3 (1).

[45] If the seller on the platform is a trader, the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services applies.

[46] See B. Duivenvoorde, The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act, *European Journal of Consumer and Market Law* 2 (2022) p 43-47

[47] B. Duivenvoorde, The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act, *European Journal of Consumer and Market Law* 2 (2022) p 45 et seq. See also C. Wendehorst, Platform Intermediary Services and Duties under

the E-Commerce Directive and the Consumer Rights Directive, *European Journal of Consumer and Market Law*, 1 (216) p 30-33.

[48] DSA Article 7.

[49] The latest agreed document, <https://data.consilium.europa.eu/doc/document/ST-9342-2022-INIT/x/pdf>, Article 24 d (3).

[50] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[51] UCPD Article 11a (a).

[52] H. Udsen, 'Personoplysninger som en modydelse', in H. Henrik Edlund, B. Liin, S. Karstoft and T. Iversen (eds), *Festskrift til Palle Bo Madsen* (Djøf, Copenhagen, 2021) 492.

[53] C. Busch and V. Mak, Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation, *European Journal of Consumer and Market law*, 3 2021, pp 109-115.

[54] V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters, *Platform work and the employment relationship*, International Labour Organization working paper 2021, section 4.1. and 4.2. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_777866.pdf.

[55] Communication from The Commission to The European Parliament, The Council, The European Economic And Social Committee and The Committee of The Regions, *A European agenda for the collaborative economy*, COM(2016) 356 final.

[56] C-434/15 Uber Spain.

[57] I. Domurath, Platforms as contract partners: Uber and beyond, *Maastricht Journal of European and Comparative Law*, 2018, vol. 25(5) pp 569-574. Also discussed in C. Busch and V. Mak, Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation, *European Journal of Consumer and Market law*, 3 2021, pp 109-115.

[58] The decision regarded the old Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

[59] DSA Recital 23.

[60] Directive 2019/771 on certain aspects concerning contracts for the sale of goods (SGD). Commented by D. Staudenmayer, *EU Digital Law: Article-by-Article*, Nomos, Hart and Beck, 2020, p 63 et seq.

[61] The digital content directive, recital 18 and the sale of goods directive, recital 23. In Denmark, it stems from the law of obligation and contracts that a party communicating with another party regarding a contract but not disclosing that they are not the contracting party will be regarded as the contracting party.

[62] In the DCD and UCPD the formulation is slightly different, but it does not seem to change the meaning.

[63] B. Duivenvoorde, The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act, *European Journal of Consumer and Market Law* 2 (2022)

p 31-83 with references. See also I.Domurath, Platforms as contract partners: Uber and beyond, *Maastricht Journal of European and Comparative Law*, 2018, vol. 25(5) pp 565-581. See also CHRISTIANE Wendehorst, Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive, *European Journal of Consumer and Market Law*, 1 (2016) p 30-33.

[64] See the previous footnote.

[65] SØ- og Handelsretten [Sea and Trade Court] 18 June 2009, case N-1-07.

[66] See more on the concept of intermediary with references T. Rodríguez de las Heras Ballell, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' 3 *Italian LJ* 2017, p 165 et seq.

[67] However unclear, EJC, 24 February 2022, C-536/20 *Tiketa vs. M.Š.*, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=E55960774036F3F895479ECC2B3AA4A6?text=&docid=254594&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6146552> seems to regard Tiketa as an agent acting on behalf of Baltic Music. Hence, both Tiketa and Baltic Music can be classified as 'trader' for the purposes of point 2 of Article 2 of Directive 2011/83/EU on consumer rights.

[68] T. Rodríguez de las Heras Ballell, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' 3 *Italian LJ* 2017, p 159.

[69] CRD Article 6a.

[70] M. Jull Sørensen, 'Sharing economy – a private law perspective', in Gemma Rubio Gimeno (eds), A. Orti Vallejo (eds), *Propuestas de regulación de las plataformas de economía colaborativa: perspectivas general y sectoriales* [Spain, Thomson Reuters Aranzadi, 2019], pp 57-79.

M. Jull Sørensen, 'Digitale formidlingsplatforme - formidlingsreglen i dansk forbrugerret', *UfR (Ugeskrift for Retsvæsen)*, UfR 2017B.119, Karnov, pp 119-128. Services that are not digital as well as some sector specific consumer protection are not covered by the intermediary rule.

[71] See for example SØ- og Handelsretten [Sea and Trade Court] 18 June 2009, case N-1-07.

[72] See more on these duties and their sanctions M. Jull Sørensen, Draft: Is the 'New Deal' for consumers a big deal? Consumer protection and online marketplaces, *European Review of Private Law*, 2022 – in process.

[73] DSA Article 24d. Renumbered in the latest agreement on the proposal <https://data.consilium.europa.eu/doc/document/ST-9342-2022-INIT/x/pdf>

[74] Renumbered in the latest agreement on the proposal <https://data.consilium.europa.eu/doc/document/ST-9342-2022-INIT/x/pdf>

[75] DSA Article 26 (2)

[76] Regulation No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (ODR regulation).

[77] https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf. See for comments M. Pecyna, Liability of the Platform Operator for the Non-Performance of Suppliers, in C. Busch, G. Dannemann, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll (eds.), *Discussion Draft of a Directive on Online Intermediary Platforms – Commentary*, 2019, Jagiellonian University Press, p 157-165.

[78] Recently, Poland seems to have been inspired by this model when implementing the DCD.

[79] DMA Recital 15.

[80] DSA Article 27a.

[81] Pursuant to DSA Article 35-36a, the Commission shall encourage and facilitate the drawing up of voluntary codes of conduct in several areas.

RECENT DEVELOPMENTS IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON UNFAIR CONTRACT TERMS: THE INS AND OUTS OF TRANSPARENCY

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Summary

This contribution highlights some recent developments in the case law of the Court of Justice of the European Union concerning unfair contract terms. More in particular the authors focus on recent developments regarding transparency of contract terms in the precontractual, contractual and procedural stage. This paper argues that the Court of Justice of the European Union increasingly emphasizes formal and substantive transparency in the (pre)contractual stage and procedural transparency during proceedings. Both functions of transparency must be clearly distinguished. Formal and substantive transparency are intertwined and introduce new quality standards imposed on sellers and suppliers for the benefit of consumers. Procedural transparency on the other hand must be seen as a new benchmark for national enforcement law.

Keywords

Transparency of contract terms, unfair terms, non-binding to consumers, limitation periods.

I. INTRODUCTION

In this contribution we briefly highlight some recent developments in the case law of the Court of Justice of the European Union concerning unfair contract terms. More particularly we will focus on recent developments regarding formal and substantive transparency (II) and recent developments relating to procedural transparency (III), both in the context of unfair contract terms. On some points our critical appraisal of the evolutions in case law will be illustrated with references to the Belgian context, however, without compromising the general significance of our findings. The major conclusions will be bundled in part IV.

II. TRANSPARENCY OF CONTRACT TERMS

Precontractual information, transparency and unfair contract terms

In the case law of the Court of Justice of the European Union (hereafter ECJ) correct information has been advocated as the red thread for consumer protection, starting from the requirement that before the conclusion of a contract clear and intelligible information on the terms of the contract and the consequences of concluding it^[3] must be provided to consumers.^[4] Since consumers base their transaction decisions on that information, it is of fundamental importance.^[5] This is the logical result of the consumer information model which seeks to combat the information asymmetry that exists between the weaker party (the consumer and his/her level of knowledge) vis-à-vis the stronger seller or supplier.^[6] Transparent information in the precontractual stage and during the negotiation of a contract enables consumers to take informed and prudent decisions.

Within the context of unfair contract terms the absence of bargaining power of consumers is adding to the consumer's weaker position, with consumers agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.^[7]

Article 5 of the UCTD (D. 1993/13/EEC) introduces an obligation on the seller or supplier to draft contract terms in plain, intelligible language. In the preamble of the UCTD ^[8] the European legislator specifies that the consumer must actually be given an opportunity to examine all the terms of the contract.

The transparency of a contract term must be examined in the light of all the relevant information, including the promotional material and information provided in the negotiation of the contract, not only by the seller itself, but also by any other person who, on behalf of that professional, participated in the marketing of the contracts concerned.^[9]

Information is transparent if it is provided to the consumer in a clear and comprehensible manner.^[10] The benchmark consumer is the well-known average consumer who is "reasonably well informed and reasonably observant and circumspect" (taking into account the

consumer's social, cultural and linguistic factors). This consumer, as a market participant, is capable to internalise for his/her own benefit information disclosed by undertakings. The benchmark is also objective in that it applies without having regard to the effective knowledge of the consumer concerned. As a result the average nature of the benchmark consumer sets a certain threshold beyond which the lack of knowledge and understanding can no longer shield the consumer.[11]

In its case law the ECJ gradually read distinctive functions in the transparency requirement. The most prominent functions of transparency are its formal and its substantive function.^[12] Recently the ECJ seems to attach particular importance to procedural transparency (see Part III) that must be clearly distinguished from formal and substantive transparency which are intertwined. The latter functions will be briefly highlighted hereafter.

A) Formal transparency

The formal function of transparency was emphasized for the first time in *RWE Vertrieb*^[13]. In this case relating to provisions allowing the seller to unilaterally change gas prices in a supply contract of natural gas, the ECJ specified referring to recital 20 in the preamble of the UCTD “that the consumer must actually be given an opportunity to examine all the terms of the contract”.^[14] The Court also held in that case that the lack of information on an essential point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of changes.^[15]

Read in combination with the active information duty of the seller or supplier imposed by the Consumer Rights Directive, this means that the consumer must be given an opportunity to examine all the terms of the contract before he is bound. In a recent judgment the Belgian Supreme Court (Court of Cassation) [16] had to interpret this information obligation in a case where a seller stipulated in the general terms and conditions printed on the back of an order form that consumers could only terminate the sales contract subject to payment of 30 % of the total purchase price, except in case of *force majeure*. The Supreme Court first stated that the general precontractual information duty implies that consumers prior to the conclusion of the contract need to gain effective knowledge of the terms and conditions or at least must have the reasonable opportunity of becoming acquainted with the terms and conditions. Turning to the reasonable opportunity the Supreme Court submitted referring to the legislative history of the information duty that it is satisfied if terms and conditions are printed on the back of an order form to which on the front side of the order is referred.^[17] But, the Court importantly added that this general rule does not apply in the case of surprising (abnormal) or excessive contract terms. In the presence of surprising or excessive contract terms the back side print does not allow the consumer to be adequately informed. In those situations the seller or supplier has the duty to explicitly draw the attention of the consumer to this clause, e.g. by printing the clause on the front side of the order form just above the place where the consumer has to sign. In doing so, the Belgian Supreme Court for the first time emphasized the importance of bringing surprising or excessive terms and conditions prominently [18] under the attention of

consumers. It seems that a number of judgments acted as a precursor to the Supreme Court's finding. Thus the Court of Appeal in Antwerp decided that a far-reaching termination clause must be brought to the consumer's attention,[19] and in the same vein, that court also decided that exoneration clauses must follow this fate.[20]

The Supreme Court's judgment must be seen as an important step towards what has been advocated by some legal scholars as a tool to improve the information quality for consumers. They submitted that consumers may well want to make more responsibility themselves with the help of prominently displayed information about core (essential) elements, such as price, characteristics of goods and services, and core consumer rights.[21] Such standardized short and simple information about the core issues of a contract could improve the consumer's understanding of the contract. However, this information does not replace but is rather complementary to the mandated extended disclosure which for instance is needed in case a dispute arises.[22]

Turning back to the ECJ it is remarkable to see how it stretched in subsequent cases the information duty. It thus held that consumers must be informed of their rights that flow from mandatory national law of which they are beneficiaries. This follows from the *Invitel* [23] and *VKI/Amazon* [24] judgments concerning respectively mandatory statutory or regulatory provisions and provisions that cannot be derogated from agreement by virtue of the law which would have been applicable in the absence of choice. In *Naranjo* [25] the ECJ did not contradict the Spanish court's interpretation of the requirement of transparency as not being limited to the requirement for transparency of contractual clauses in relation to the plain and intelligible nature of their drafting, but as extending to their substantive transparency linked to the adequacy of the information supplied to the consumer concerning the extent, both legal and economic, of the consumer's contractual commitment.

B) Substantive transparency

The ECJ has given some very strong guidance on what is required for terms to be plain and intelligible, especially in foreign currency loan cases.[26] The real flesh to the substantive transparency bone came with the *Arpád Kásler*-judgment where the ECJ held with regard to a foreign currency loan that transparency of contract terms could no longer be reduced merely to their being formally and grammatically intelligible.[27] The consumer must also be in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him/her which derive from the contract.[28]

This substantive function of transparency is ever since confirmed by the ECJ.[29] For instance in *Ruxandra Paula Andriciu* the Court emphasized that the consumer must be provided with all the information likely to have a bearing on the extent of his commitment so that he is enabled to estimate in particular the total cost of his contract [30]. In the same vein, the ECJ stressed the importance of the APR in consumer credit contracts in *Pohotovost* [31] and *Maria Bucura*[32]. Informing the consumer of the total cost of credit, in the form of an interest rate calculated according to a single mathematical formula, is of critical importance as it contributes

to the transparency of the market, enables the consumer to compare offers of credit and enables him to assess the extent of his liability.[33]

In recent cases the Court further strengthened the substantive function of transparency, emphasizing in line with *Árpád Kásler*, first, that the foreign currency loan contract should set out transparently the specific functioning of the exchange risk mechanism and, where appropriate, the relationship between that mechanism and that provided for by other contractual terms, and, second, that the information thus provided must enable an average consumer[34] to estimate the total cost of the loan agreement.

In these cases the ECJ seems increasingly prepared to provide specific guidance to the national judges for the assessment of transparency of contract terms. For instance in *BNP Paribas Personal Finance* [35] the ECJ lists a number of factors that are of particular importance for that assessment: the existence of precontractual documentation transmitted to the consumer, the language used in the precontractual and contractual documentation and whether the information regarded as being essential with regard to the nature of the goods or services which are the subject matter of the agreement have been provided.

With regard to precontractual and contractual documentation the ECJ values quantitative simulations, but only in so far as they “are based on sufficient and accurate data and contain objective assessments which are communicated to the consumer in plain, intelligible language”.^[36] According to the ECJ it is only on those conditions that such simulations may enable the seller or supplier to draw the consumer’s attention to the risk of potentially significant adverse economic consequences of the contractual terms at issue.

This means that in the context of a loan agreement denominated in a foreign currency that exposes the consumer to a foreign exchange risk, “the requirement of transparency cannot be satisfied by communicating to the consumer information – even a large amount of information – if that information is based on the assumption that the exchange rate between the account currency and settlement currency will remain stable throughout the term of the agreement”.^[37] It is essential to inform the consumer of the precise economic context liable to have an impact on exchange rate variations. In absence of such information the ECJ concludes that the “consumer was not given the opportunity to understand in concrete terms the potentially serious consequences on his or her financial situation which might result from taking out a loan denominated in a foreign currency”.^[38]

It follows that consumers must receive information which is regarded as essential to the main subject matter of the agreement, among which “details of the risks faced by the borrower in the event of a severe depreciation of the legal tender of the Member State in which the borrower is domiciled and an increase in foreign interest rates” [39]. The ECJ further emphasizes that this essential information must be clear for the consumer. This implies that to satisfy the transparency requirement sufficiently *concrete* information must be provided to the consumer so that he can determine at any time the repayment instalments.^[40] It also implies that the information should pertain to the whole life cycle of the contract so that the consumer

understands, in the event of a severe depreciation of the currency, the actual risk to which he/she is exposed, *throughout the whole term of the agreement*.^[41] Information of a general nature that only partially reflects the economic context and potential risks of the agreement concerned will not pass the transparency test, even when provided in large amounts.^[42]

Furthermore, the ECJ seems to attach great importance to whether the seller or supplier *expressly draws the attention* of the consumer on the existence of specific risks associated with loan agreements denominated in a foreign currency.^[43] The absence thereof may be seen as an important indication for the overall assessment of whether the transparency requirement has been fulfilled. In this regard an interesting parallel may be drawn with the Belgian Supreme Court's judgment highlighted above. Although the ECJ to date only advanced this approach in the more technical context of foreign currency loans, there seems to be no reason to limit its approach to that particular domain. It may therefore arguably be submitted that the main findings relating to the quality of information and transparency have a general bearing.^[44] The ECJ does not (yet?) go as far as to require that essential information or particular risks must be *prominently* brought under the attention of the consumer. However, the Court's emphasis on detailed, concrete information of the risks faced by the consumer and on whether specific risks have been expressly mentioned may be seen as an important step in that direction.^[45] That way the ECJ could bring the evolution towards inundating consumers with information to a halt. With the more selective focus on essential, concrete information about the precise financial impact of terms and conditions, brought expressly to the attention of the consumer, the ECJ gives undertakings a new direction stressing the quality of information (instead of quantity). This evolution will certainly benefit consumers. But undertakings may win from the specific guidance given by the ECJ provided that the benchmark of the average consumer in the light of which transparency must be assessed is adapted accordingly and that the focus on the quality of disclosed information also has a mitigating effect on the information obligations imposed on sellers and suppliers. Hence, the more specific focus of disclosed, qualitative information must be rewarded by judges provided that it is sufficiently clear and understandable for the average consumer. The logical downside is that consumers will not be allowed to hide behind their ignorance if they were prominently and transparently warned about the main/essential financial/economic risks during the lifespan of an agreement, once again on the condition that this has been done in a comprehensible manner for the average consumer.

III. PROCEDURAL TRANSPARENCY AS A NEW BENCHMARK FOR NATIONAL ENFORCEMENT LAW

Above, we hinted towards some sort of procedural impact of the transparency requirement. Three recent examples in the ECJ's case law relating to the enforcement of the UCTD illustrate this evolution. Before going into more details, it should be noted that this procedural aspect of transparency must be distinguished from the formal and substantive aspects of transparency highlighted above,^[46] although they all are grounded in the same basic principle of consumer information.

As pointed out above, formal and substantive transparency can be seen as quality standards which, if not met, do not make contract terms necessarily unfair, nor lead automatically to their non-bindingness. Rather, non-transparent terms (including those relating to the main subject matter of the contract) must be interpreted in favour of the consumer (Article 5 UCTD read in conjunction with Article 4.2 UCTD) and be subject to the unfairness assessment. Yet, there is a neat correlation between transparency and unfairness. Following Article 4.1 UCTD, (lack of) transparency is an important aspect that must be taken into account when assessing whether or not a contractual term is unfair. Nevertheless, it is perfectly possible that a non-transparent contractual term does not bring along a significant imbalance, and conversely a perfectly transparent term may still entail a significant imbalance, and thus qualify as unfair.

Procedural transparency, on the other hand, fulfils a complementary function and sets in our view a benchmark to assess national provisions and systems by means of which consumer law is enforced. It thus further shapes Union law requirements concerning litigants' and courts' behaviour prior to or during judicial proceedings. It requires all litigating parties and courts to act in good faith during proceedings, resulting *inter alia* for litigating parties in an open collaboration (disclosure of documents) and for courts in correctly informing the parties (especially consumers) on their rights. Hence, procedural transparency comes in at a later stage than formal and substantive transparency which refer to the contractual and precontractual phase. Moreover, procedural transparency is not directly grounded in Article 4 UCTD, it rather relates to the procedural relationship between parties. Despite, evidently, the procedural relationship most often (if not always) only exists as a consequence of the (pre)contractual relationship between parties (and problems relating to it), both should be kept clearly distinct from one another. The legal basis for procedural transparency must rather be found in Article 6 UCTD as interpreted by the ECJ. Although the wording of the latter provision as such does not lay down any requirements relating to the way parties and courts should behave in the procedural context, its inventive interpretation in the ECJ case law does.

1. Time limits applicable to claims for repayment of sums paid but undue

A first illustration of the ECJ's inventiveness is that Article 6 UCTD implies that in case the consumer already paid sums based on a contractual term found to be unfair and thus not binding, those sums should be refunded.[47] In the *BNP Paribas Personal Finance* judgment mentioned above, The ECJ gave more insights on the consequences of that interpretation in relation to national time limits within which the claim for repayment should be brought. In the case at issue, French law provided for a limitation period of five years for bringing personal actions (such as the action for repayment), starting from the date on which the holder of a right became aware or should have become aware of the facts entitling him to exercise that right.[48] The referring court held that according to national case law, the specific application of that provision in the context of mortgage loan agreements would imply that the limitation period would start to run from the moment of acceptance by the consumer of the loan offer.[49] The question arose whether or not such a provision and its application as described would be compatible with EU law.

In its answer, the ECJ made a clear distinction between the claim for an unfairness assessment on one hand, and the claim for repayment of sums paid but undue on the basis of unfair terms on the other.[50] As regards the former claim, the Court held that to ensure effective protection of the rights derived from the UCTD, the consumer must be able to raise at any time the unfairness of a contractual term, not only as a defence, but also as an ‘assertive claim’ (authors’ terminology). Hence, an application brought by a consumer for a declaration that a certain term in a contract concluded with a seller or supplier is unfair, cannot be subject to any limitation period.[51] In other words, the consumer’s right to claim a declaration of unfairness is imprescriptible/perpetual.[52] With regard to the claim for repayment, the Court restates that that claim *can* be subject to a limitation period, provided that that period does not make it excessively difficult or practically impossible for the consumer to exercise the rights conferred by the UCTD.[53] Concerning the limitation period under scrutiny, a duration of five years is to be seen as sufficient to enable the consumer to prepare and bring an effective action, provided that it is well established and known in advance.[54] The starting point as mentioned by the referring court (*i.e.* from the acceptance of the loan offer[55]), however, entails a real risk that the consumer will not be able to rely on the rights conferred on him by the UCTD during the limitation period.[56] According to the Court, a limitation period can only be compatible with the principle of effectiveness if the consumer subject to that period has had the opportunity to become aware of his rights before that period begins to run or expires.[57] Since a five year limitation period that starts to run from the moment of acceptance of a loan offer is likely to have expired even before the consumer becomes aware of the unfair nature of a term in the contract at issue, such a period is not capable of affording that consumer effective protection, and thus does not meet the requirements set by the principle of effectiveness.[58]

The ECJ’s approach towards limitation periods for repayment claims in the *BNP Paribas Personal Finance* judgment provides for a first example of what was described above as the procedural transparency benchmark. As the Court highlights, a starting point as the one at issue (*i.e.* acceptance of the loan offer) risks bringing down the protection the UCTD aims to award to consumers, since it makes it possible for the limitation period to expire even before the consumer “*becomes aware of his rights*”. The emphasis the Court puts on consumer information is obvious from the wording of the judgment itself. Hence, for a limitation period to be in conformity with Union law, it cannot start to run before the consumer becomes aware of the unfair nature of a term by which he was bound.[59] Put in terms of procedural transparency, Union law requires national law to be constructed in such a way that time limits can only start to run if a consumer has been well informed of his or her particular legal position, and the consequences thereof. Read together with the Court’s well known case law on *ex officio* application, it will be for the national court before which a claim for a declaration of unfairness has been brought to duly inform the consumer of the consequences of a (potential) unfairness. Should the national court not do so, the consequence will not only be a potential state liability claim,[60] but also that the period within which the claim for repayment must be exercised cannot start to run. That way, the Court adds another layer of protection to the consumer’s right of not being bound by unfair terms, namely the right to be informed about the consequences of an established unfairness and, maybe even more ground breaking, the impossibility of time

limits for claims for repayment to start running before said information is provided to the consumer.

2. Burden of proving a lack of transparency of contract terms

The *BNP Paribas Personal Finance* judgment has one more point of relevance for the present analysis. Relating to enforcement of the UCTD, the judgment not only deals with prescription periods, but also with the burden of proving that a term is plain and intelligible in the sense of Article 4 of that directive (*i.e.* transparency of contract terms). In the case at issue, French law might according to the referring court require the consumers to prove that they were (not) addressees of documents relating to sales techniques and the information enacted in those documents, and that the creditor did (not) use those documents.[61]

Also on this point, the ECJ's response seems to start from the premise of procedural transparency as a necessary requisite for national enforcement law. After, once more, noticing that the UCTD contains no provisions relating to the burden of proof as regards the transparency requirement, as a consequence of which that matter belongs to the 'realm of procedural autonomy',[62] the Court holds that observance of the principle of effectiveness and the attainment of the underlying aim of the directive (*i.e.* protecting consumers by rebalancing the asymmetry between them and their professional counterparties) could not be ensured if the burden of proving that a contractual term is plain and intelligible is borne by the consumer.[63] The effective exercise of the rights conferred by the UCTD cannot be ensured if the consumer were required to prove a negative fact, being that the seller or supplier did *not* provide them with all the necessary information to satisfy the requirement of transparency.[64] On the contrary, the Court holds that that effective exercise may be ensured by requiring, in principle, the seller or supplier to prove that its pre-contractual and contractual obligations, in particular those relating to the requirement of transparency *ex* Article 4 UCTD, have been fulfilled. In doing so, consumer protection may be ensured, without disproportionately interfering with the right of the professional party to a fair trial.[65] As regards documents relating to sales techniques, as discussed above, the obligation on the seller or supplier to prove that its pre-contractual and contractual obligations are fulfilled must also include proof that the information contained in such document has been provided to the consumer, be it by the seller or supplier himself or by any other person who participated on behalf of the latter in marketing the loans at issue.[66] Concerning the latter persons, it is according to the Court ultimately for the seller or supplier to control the channels of distribution for its products, be it with respect to the choice of intermediaries or of marketing material. Hence, the seller or supplier should be able to provide evidence that the documents relating to sales techniques were not used or were no longer used at the date of conclusion of the agreement in order to prove that its pre-contractual and contractual obligations relating to the requirement of transparency have been fulfilled.[67] Concluding, the UCTD must be interpreted as precluding that the burden of proof concerning the transparency of contractual terms is borne by the consumer.

Once more, the driving force behind the Court's findings on the division of the burden of proof seems to be procedural transparency. More precisely, procedural transparency externalises in the fact that although the consumer is the claimant, the consumer's professional counterparty

must openly disclose (i.e. ‘be *transparent* about’) the information in its possession, rather than requiring from the consumer to give something what he does not have, namely proof of whether certain documents essential for the assessment of the transparency requirement were provided. This emanation of the idea of procedural transparency runs against one of the basic principles of division of burden of proof, namely the *actori incumbit probatio-principle* [68]. The reversal of the burden of proof, along with the obligation for the professional counterparty to disclose certain information (i.e. that certain documents were provided to the consumer) if it does not want to bear the consequences of the reversed burden of proof, does, however, comply with the idea of litigating in good faith more than what would be the case should the principle of *actori incumbit probatio* be applied without further ado. Further, it contributes to efficiency considerations, as proving a negative fact does most often require significant – not to say excessive – means and efforts, which the consumer does not have at his disposal. The professional counterparty, on the other hand, is more likely to be able to provide the necessary proof, since from his perspective it suffices in this context to prove a *positive* fact to bring up the truth.[69] Thus, although the Court’s reversal of the burden of proof may seem bold at first sight, there seem to be valid reasons for doing so.

3. Necessity of an express examination of unfairness

A last recent development we want to address, relates to what has in literature been called ‘virtual’ or ‘implicit’ *res judicata*’.[70] What is meant here is that the effect of *res judicata* not only attaches to court decisions concerning aspects of a dispute that *were* the object of the *actual* debate before the court, but also to aspects of that dispute that *could have been* the object of such debate. Whereas there is no court decision explicitly dealing with the latter aspects, since they were not brought up during debates, the idea of virtual *res judicata* implies that later proceedings concerning those aspects are barred, based on the fact that they *could have been brought up* during the former proceedings – but were not –, and consequently are held to be implicitly decided on. *Banco Primus* provides an excellent example, concerning both the mechanism of virtual *res judicata* as well as the ECJ’s reluctance towards it.[71] In that case, according to the referring court’s interpretation of national (Spanish) law, the effect of *res judicata* not only prohibited national courts from re-examining the lawfulness with regard to the UCTD of contractual terms in respect of which a final decision had already been delivered, but also from assessing the potential unfairness of other terms of the same contract, which *could have been* the object of such unfairness assessment, *but were not*.[72] Hence, whereas the first court found Clause 6 of the contract at issue to be unfair, the referring court held that, according to national law, the *res judicata* effect of that judgment precluded the later assessment of Clauses 3 and 6a, even though the first court did not assess those terms’ potential unfairness.[73] The Court rejected such implementation of the principle of *res judicata*, since it would adversely affect the substance of the consumer’s right not to be bound by a term deemed to be unfair *ex* Article 6 UCTD.[74]

In two recent Grand chamber judgments, the Court of Justice had to deal (once more) with the concept of implicit *res judicata*.[75] The tenor of both judgments is nearly identical. Consequently, we will limit ourselves to a short walkthrough of the *Ibercaja Banco*-judgment

of May 17 2022, dealing with the same national context as the one at issue in *Banco Primus*, i.e. the Spanish system. At issue was a mortgage loan agreement concluded in 2005, containing *inter alia* a default interest clause.[76] After the single-family dwelling over which the mortgage securing the loan lay was attributed to the bank in enforcement proceedings in consequence of unpaid instalments, the creditor instigated proceedings, claiming the payment of costs and interests.[77] To that claim the consumer lodged a written objection, stating that the default interest clause and the floor clause were unfair.[78] The court held that the claimed amount of interest had to be awarded, since the *res judicata* effect of the order allowing for the enforcement proceedings to be initiated precluded an examination of the potential unfair nature of the default interest rate clause.[79] Against that decision, the consumers brought an appeal before the referring court, which held that, according to Spanish law, the *ex officio* examination the first court carries through entails ‘a negative assessment’, in the sense that the court does not provide, in the decision authorising the enforcement of the mortgage, any express statement of reasons with regard to terms other than those regarded as unfair. Consequently, the national courts cannot raise the unfairness of the terms at a subsequent stage of the proceedings, and likewise the consumer who does not lodge an objection to enforcement, within the prescribed time limit, cannot raise such unfairness of the terms in the same proceedings or in subsequent declaratory proceedings, following the *res judicata* of the order authorising the execution.[80] Put differently: although the decision allowing the mortgage enforcement did *not* deal with the unfairness of said interest clause, the force of *res judicata* attached to that decision prevented the later initiation of proceedings aiming to deal with that issue.

The ECJ held, in line with *Banco Primus*, that such an implementation of the principle of *res judicata* is not in conformity with Union law. Since the decision by which the initiation of the mortgage enforcement was ordered did not mention a review of the unfairness of certain terms (*inter alia* the interest clause), the consumer was not informed of the existence of that review or, even summarily, of the grounds on which the court found said terms to be fair. As a consequence, the consumers were unable to assess, with full knowledge of the facts, whether or not it was necessary to bring proceedings against that decision.[81] In such circumstances, an effective review of the possible unfairness of contractual terms cannot be guaranteed, given the fact that the force of *res judicata* extends also to judicial decisions which do not indicate such a review.[82] The protection conferred on consumers by the UCTD would be ensured, however, if in a case as the one at issue the national court expressly stated in its decision authorising the mortgage enforcement that it carried out an unfairness assessment of those terms giving rise to the enforcement proceedings, and that assessment, with at least summary reasons, had not revealed the existence of any unfair terms and that, in absence of an objection within the period laid down by national law, the consumer would be time barred from asserting the possible unfairness of those terms.[83]

What the ECJ in fact does, is further shaping the Union law requirements relating to the scope of *res judicata*, through a ‘new’ obligation for national courts to explicitly mention and motivate the unfairness assessment carried out. Doing so, the Court exemplifies the affiliation between the *ex officio*-doctrine on one side and the principle of *res judicata* on the other side. In terms of procedural transparency, the judgment is speaking in two ways. First of all, the

Court requires court decisions holding unfairness assessments to be transparent, in as far as they want to be vested with the force of *res judicata*. The Court seems to indicate that to be in accordance with the UCTD, those decisions need to (i) mention the fact *that* an unfairness assessment took place and (ii) mention the reasoning and results of that assessment. Secondly, the Court requires court decisions to mention the consequences of not lodging objections within the time limits foreseen by national law. Hence, the court is no longer only required to educate consumers into *substantive* law aspects of consumer law (*cf.* the obligation for courts to inform consumers about their right to repayment of sums paid but undue (*supra*)), but also to mere *enforcement* related/*procedural* aspects of consumer law.

IV. CONCLUSION

In this contribution we briefly highlighted some recent developments in the case law of the ECJ concerning unfair contract terms. Transparency has ever been at the core of consumer protection in the pre contractual and contractual stage since consumers base their transaction decisions on that information. In its case law the ECJ gradually read distinctive functions in the transparency requirement.

The most prominent functions of transparency are its formal and its substantive function. In combination with the active information duty of the seller or supplier imposed by the Consumer Rights Directive, formal transparency means that the consumer must be given an opportunity to examine all the terms of the contract before he is bound. In a recent judgment the Belgian Supreme Court confirmed that formal transparency is in principle satisfied if terms and conditions are printed on the back of an order form to which on the front side of the order is referred. But, the Court importantly added that this general rule does not apply in the case of surprising (abnormal) or excessive contract terms. In the presence of surprising or excessive contract terms the back side print does not allow the consumer to be adequately informed. In those situations the seller or supplier has the duty to explicitly draw the attention of the consumer to this clause, e.g. by printing the clause on the front side of the order form just above the place where the consumer has to sign. Also the ECJ stretched in recent judgments the information duty and confirmed that the requirement of transparency is not limited to the requirement for transparency of contractual clauses in relation to the plain and intelligible nature of their drafting, but as extending to their substantive transparency linked to the adequacy of the information supplied to the consumer concerning the extent, both legal and economic, of the consumer's contractual commitment.

This intertwinement of formal and substantive transparency is further strengthened by the ECJ in recent judgments pointing out that consumers must receive information which is regarded as essential to the main subject matter of the agreement and that essential information must be clear for the consumer. This implies that sufficiently *concrete* information must be provided to the consumer in a comprehensible language and that the information should pertain to the *whole life cycle* of the contract so that the consumer fully understands the risks to which he/she is exposed. Furthermore, the ECJ seems to attach great importance to whether the seller or supplier *expressly draws the attention* of the consumer on the existence of specific risks associated with agreements.

Although the ECJ to date only advanced this approach in the more technical context of foreign currency loans, we argue that there seems to be no reason to limit this approach to that particular domain. The recent judgments of the ECJ breathe quality of the information in the (pre)contractual stage. Although the ECJ does not (yet?) go as far as to require that essential information or particular risks must be *prominently* brought under the attention of the consumer, the Court's emphasis on detailed, concrete information of the risks faced by the consumer and on whether specific risks have been expressly mentioned may be seen as an important step in that direction. It is submitted that this arguably could bring the evolution towards inundating consumers with information to a halt. With the more selective focus on essential, concrete information about the precise financial impact of terms and conditions, brought expressly to the attention of the consumer, the ECJ seems to give undertakings a new direction stressing the quality of information (instead of quantity). It is argued in this respect that this evolution may create a win-win for both consumers and undertakings provided that the benchmark of the average consumer in the light of which transparency must be assessed is adapted accordingly and that the focus on the quality of disclosed information also has a mitigating effect on the information obligations imposed on sellers and suppliers.

In another line of recent judgments the ECJ seems to add a complementary function to transparency, namely procedural transparency. Different from the quality standard set by formal and substantive transparency, this function of transparency refers to litigants' and courts' behaviour prior to or during judicial proceedings. We argue on the basis of three developments in recent case law of the ECJ relating to time limits, burden of proof and 'implicit' *res judicata* that this new function of transparency shapes a new benchmark which requires all litigating parties and courts to act in good faith during proceedings, resulting *inter alia* for litigating parties in an open collaboration (disclosure of documents) and for courts in correctly informing the parties (especially consumers) on their rights, absence of which time limits for certain claims will not start running. In grounding procedural transparency on Article 6 UCTD instead of Articles 4 and 5 (dealing with formal and substantive transparency) UCTD, the Court is arguably creating a new benchmark to assess national provisions and systems by means of which consumer law is enforced.

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[2] Judicial trainee, PhD in Law (Ghent University, 2022).

[3] Article 5 of the Consumer Rights Directive (Directive n° 2011/83/EU of 25 October 2011 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, 22 November 2011, p. 260) hints to terms and conditions in consumer contracts whereof consumers must be informed in a clear and intelligible manner before they are bound by the contract. See also Article 6 with regard to distance and off-premises contracts and more particularly on the pre-contractual information duty stemming from that provision, ECJ 24 February 2022, *Tiketa*, n° C-536/20, EU:C:2022:112, para. 42, partim: “*That provision seeks to ensure the communication to consumers, before the conclusion of a contract, both of information concerning the contractual terms and the consequences of that conclusion, allowing consumers to decide whether they wish to be contractually bound to a trader, and of information necessary for proper performance of that contract and, in particular, for the exercise of their rights*”.

[4] It is interesting to note that the Belgian legislator made use of the minimum harmonisation character of the Consumer Rights Directive to impose an obligation on the seller/supplier to inform the consumer before he/she is bound by the contract of the terms and conditions that apply, taking into account the information needs expressed by the consumer. See Article VI.2.7° Belgian Code of Economic Law (CEL). In this regard introductory recital 35 of the Consumer Rights Directive states: “*In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee*”, but surprisingly instantly adds: “*However, taking into account such specific needs should not lead to different levels of consumer protection.*”

[5] On the basis of that information the consumer decides whether he wishes to be contractually bound to a seller or supplier by the terms previously drawn up by the latter; see e.g. ECJ 3 March 2020, *Gómez del Moral Guasch*, n° C-125/18, EU:C:2020:138, para. 49.

[6] See more extensively on the consumer information model, G. STRAETMANS, *Consument en Markt*, Deurne, Kluwer Rechtswetenschappen, 1998, p.637 and G. STRAETMANS, “Information Obligations and Disinformation of Consumers”, in G. STRAETMANS (ed.), *Information Obligations and Disinformation of Consumers*, Springer, 2019, 3-96.

[7] See ECJ 15 March 2012, *Pereničová and Perenič*, n° C-453/10, EU:C:2012:144, para. 27 and ECJ 26 April 2012, *Invitel*, n° C-472/10, EU:C:2012:242, para 33.

[8] Introductory recital 20.

[9] See ECJ 10 June 2021, *BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, EU:C:2021:470, para. 66.

[10] See Article 5 of the Consumer Rights Directive. See also: “*Contracts should be drafted in plain and intelligible language*”, introductory recital 20 of the UCTD.

[11] It must be noted that the ECJ somewhat surprisingly limited this benchmark of the average consumer to the requirement of transparency in the UCTD. For the other aspects regulated by that directive the ECJ seems more lenient so as to include all consumers. The Court stated: “*Il résulte des éléments qui précèdent que la qualification d’une personne en tant que « consommateur », au sens de l’article 2, sous b), de la directive 93/13, ne dépend pas de son comportement, fût-il négligent, lors de la conclusion du contrat de prêt.*” (only available in French, ECJ 10 June 2021, *MN, DN, JN, ZN v. X Bank*, n° C-198/20, EU:C:2021:481, para .27). This means that a more negligent consumer than the average consumer will also be protected by the UCTD, for instance when a court assesses its own motion or otherwise the unfairness of (transparent) contract terms.

[12] See on this point also R. STEENNOT, “Artikel VI.82 WER”, in *Artikelsgewijze commentaar Handels- en Economisch Recht*, Mechelen, Kluwer, 2020 and R. STEENNOT, “Transparantieverplichting in B2C-overeenkomsten: inhoud, bewijslast en verjaring”, *DCCR*, n° 133, 2021, 50-53. Compare with E. TERRY, “Transparantie en algemene voorwaarden – Nood aan hervorming?”, *TPR*, 2017, 34 e.v., M. COMBET, “La protection asymétrique des consommateurs selon les espaces dans L’Union européenne”, in M. COMBET (ed.), *Le droit européen de la consommation dans le XXIe siècle*, Bruylant, 2022, 536-540 and also C.M. PEGLION-ZIKA, “L’influence de la Cour de Justice européenne sur l’appréciation du caractère abusif des clauses des contrats de consommation”, in M. COMBET (ed.), *Le droit européen de la consommation dans le XXIe siècle*, Bruylant, 2022, 295-297.

[13] ECJ 21 March 2013, *RWE Vertrieb v. Verbraucherzentrale Nordrhein-Westfalen*, N° C-125/18, EU:C:2013:180.

[14] See para. 43 of *RWE Vertrieb*.

[15] See para. 51 of *RWE Vertrieb*.

[16] Court of Cassation 18 June 2021, BE:CASS:2021:ARR.20210618.1N.7, also published in *TBBR*, 2021, 532, with comments from A. LENAERTS and in *T. Vred.*, 2021, 560, with annotation by R. STEENNOT.

[17] In the online context the information duty seems to be complied with if the terms and conditions are easily accessible to consumers, *e.g.* through a hyperlink.

[18] Although the Supreme Court does not provide guidance, a term may be qualified as ‘prominent’ if it is brought to the consumer’s attention in such a way that an average consumer would be aware of it.

[19] Antwerp 12 Februari 2018, *RW*, 2018-2019, 1110 and Antwerp 3 April 2017, *RW*, 2017-2018, 741.

[20] Antwerp 5 March 2018, *RABG*, 2019, 902.

[21] See more extensively on this point, building further upon the research outcomes of behavioural scientists, G. STRAETMANS, “Misleading practices, the consumer information model and consumer protection”, *J Eur Consum Mark Law*, 2016, n° 5, pp. 199–210. This approach has also been endorsed more recently by other Belgian scholars, see *e.g.* E. TERRY, “Transparantie en algemene voorwaarden – Nood aan hervorming?”, *TPR*, 2017, pp. 68–69.

[22] See more extensively on this point, G. STRAETMANS, “On misleading practices, the limitations of the communication medium used and the divergent levels of attention of consumers”, *Eur J Cons Law*, 2018, n°2, 329–342.

[23] ECJ 26 April 2012, *Invitel*, n° C-472/10, EU:C:2012:242, para. 29.

[24] ECJ 28 July 2016, *VKI v Amazon*, n° C-191/15, EU:C:2016:612, para. 68.

[25] ECJ 21 December 2016, *Gutiérrez Naranjo e.a.*, n° C-154/15 and C-307/15, EU:C:2016:980, paras. 48–51.

[26] See more extensively on that issue G. HOWELLS and G. STRAETMANS, “The interpretive function of the CJEU and the interrelationship of EU and national levels of consumer protection”, *Perspectives on Federalism*, 2017, n° 2, 180-215.

[27] Both transparency requirements in Article 4 and 5 UCTD must be interpreted equally; see to this extent, ECJ 30 April 2014, *Árpád Kásler*, n° C-26/13, EU:C:2014:282, para.73.

[28] The emphasis on *economic consequences* logically flows from the importance of price in the information model and the transactional decision making process of the consumer. Also the protection against unfair commercial practices is built around practices that negatively impact the economic behaviour of consumers.

[29] See for example ECJ 3 March 2020, *Gómez del Moral Guasch*, n° C-125/18, EU:C:2020:138, para. 50 and the case law cited: “As the system of protection introduced by that directive is based on the idea that consumers are in a weak position vis-à-vis sellers or suppliers, in particular as regards their level of knowledge, the requirement, laid down by the directive, that the contractual terms are to be drafted in plain, intelligible language and, accordingly, that they be transparent, must be understood in a broad sense.”. See also ECJ 27 January 2021, *Dexia Nederland*, n° C-229/19 and C-289/19, EU:C:2021:68, para. 50.

[30] ECJ 20 September 2017, *Ruxandra Paula Andricu e.a.*, n° C-186/16, EU:C:2017:703, para. 45.

[31] ECJ 16 November 2010, *Pohotovost*, n° C-76/10, EU:C:2010:685.

[32] ECJ 9 July 2015, *Maria Bucura*, n° C-348/14, EU:C:2015:447.

[33] In an order of 14 April 2021, the ECJ, interpreting the harmonising impact of Directive 2008/48/EC on consumer credit, allowed Member States to adopt additional rules on the legibility and clarity of contract information. Thus the requirement that the whole credit contract must be presented in a font style no smaller than

size 12 was accepted since it contributed to transparency and legibility (see ECJ 14 April 2021, BNP Paribas Personal Finance SA Paris v. T.G.M., n° C-535/20, EU:C:2021:268, para. 35).

[34] In this respect it is interesting to note that the ECJ in *Van Hove v. CNP Assurances SA* mitigated the obligation to internalize information for the average consumer. The case concerned a combined loan contract with an insurance contract intended to ensure that mortgage loan repayments are covered. The Court emphasized the relevance of the fact that the contract at issue forms part of a broader contractual framework and its bearing on the average consumer's level of attention. The Court said that "the consumer cannot be required, when concluding related contracts, to have the same vigilance regarding the extent of the risks covered by that insurance contract as he would if he had concluded that contract and the loan contracts separately" (see ECJ 23 April 2015, Jean-Claude Van Hove v. CNP Assurances SA, n° C-96/14, EU:C:2015:262.).

[35] See ECJ 10 June 2021, *VB a.o. v. BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, EU:C:2021:470. The Court's approach was confirmed in another judgment of the same date, ECJ 10 June 2021, *BNP Paribas Personal Finance v. VE*, n° C-609/19, EU:C:2021:469.

[36] See *VB a.o. v. BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, para. 73.

[37] See *VB a.o. v. BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, para. 74. Other factors that play a pivotal role in the assessment of transparency are the language used by the financial institution in the pre-contractual and contractual documentation and the existence of misleading, unfair commercial practices in the pre-contractual stage.

[38] See *VB a.o. v. BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, para. 74 .

[39] See *VB a.o. v. BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, para. 68.

[40] See in this regard, ECJ 18 November 2021, *MP, BP v. A*, n° C-212/20, EU:C:2021:934: "*Article 5 of Directive 93/13 must be interpreted as meaning that [...the average consumer] understands, on the basis of clear and intelligible criteria, the way in which the foreign currency exchange rate used to calculate the amount of the repayment instalments is set, in order that that consumer is able to determine himself or herself, at any time, the exchange rate applied by the seller or supplier*" (para. 55, emphasis added). This requirement applies even in absence of ambiguous wording and irrespective of whether the loan agreement has a duration of 40 years. In that regard, the ECJ added that "the long term cannot justify a failure to mention, in the contractual provisions and in the context of the information provided by the seller or supplier at the time of negotiation of the contract, the criteria used by the bank to set the exchange rate that is applicable for calculating the repayment instalments, thereby enabling the consumer to determine that exchange rate at any time." (para. 53, partim).

[41] See *VB a.o. v. BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, para. 72.

[42] In two Orders of 24 March 2022 the ECJ confirmed this rigorous approach towards transparency (see ECJ 24 March 2022, *BNP Paribas Personal Finance v. ZD*, n° C-288/20, EU:C:2022:231, para. 39 and ECJ 24 March 2022, *BNP Paribas Personal Finance v. AN, CN*, n° C-82/20, EU:C:2022:233). Compare also with ECJ 10 June 2021, *BNP Paribas Personal Finance v. VE*, n° C-609/19, EU:C:2021:469, para. 68.

[43] See *VB a.o. v. BNP Paribas Personal Finance*, n° C-776/19 to C-782/19, para. 77.

[44] See more extensively on the impact of this judgment on consumer law as a whole, G. STRAETMANS and J. WERBROUCK, "New jurisprudential levers to combat unfair terms in B2C contracts", *EJCL*, 2022, n° 2, 183-202.

[45] See already on informing consumers in a prominent manner about core issues of a contract and core issues alone, G. STRAETMANS, "Misleading Practices, the Consumer Information Model and Consumer Protection", *Journal of European Consumer and Market Law*, 2016, 199-210.

[46] It must be observed that some authors operate another distinction wherein procedural transparency seems to refer only to the requirement that the consumer must actually be given an opportunity to examine all the terms of the contract (which we categorised as formal transparency).

[47] ECJ 21 December 2016, *Gutiérrez Naranjo e.a.*, n° C-154/15 and C-307/15, EU:C:2016:980, para. 62; ECJ 29 April 2021, *I.W. and RW. V. Bank BPH S.A.*, n° C-19/20, EU:C:2021:341, para. 51.

[48] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 9, referring to Article 2224 of the French Civil Code.

[49] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 17

[50] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 34.

[51] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, paras. 35-38.

[52] See on that matter more elaborate J. WERBROUCK, *De impact van de rechtspraak van het Hof van Justitie inzake de handhaving van consumentenrecht op het nationale recht*, PhD dissertation Ghent University, 2022, n° 217-225; G. STRAETMANS and J. WERBROUCK, “New jurisprudential levers to combat unfair terms in B2C contracts”, *EJCL*, 2022, n° 2, 196-200; M. STORME and J. WERBROUCK, “Invloed van het Europees recht op het Belgische contractenrecht en (in)consistentie van dat laatste met het eerste, *NTBR*, 2022, 127 and 130-131.

[53] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, paras. 39-40.

[54] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, paras. 41-42.

[55] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 44.

[56] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 43.

[57] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 46.

[58] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 47.

[59] As we have argued elsewhere, the consumer can only be deemed aware of his/her rights in the context of the UCTD *in concreto* from the moment a certain term was declared to be unfair by a court decision. Before that moment, there can be no (legal) certainty whether or not the term was actually unfair. See for a more elaborated account G. STRAETMANS and J. WERBROUCK, “New jurisprudential levers to combat unfair terms in B2C contracts”, *EJCL*, 2022, n° 2, 196-200.

[60] See ECJ 28 July 2016, Milena Tomášová, n° C-168/15, EU:C:2016:602, where the Court held that ignorance of national courts’ *ex officio* obligation, may give rise to state liability claims.

[61] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 24, question 7.

[62] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, paras. 80-81.

[63] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 84.

[64] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 85.

[65] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 86.

[66] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 87.

[67] VB a.o. v. BNP Paribas Personal Finance, n° C-776/19 to C-782/19, para. 88.

[68] According to this principle, the claimant has to prove what he is asserting.

[69] See G. STRAETMANS and J. WERBROUCK, “New jurisprudential levers to combat unfair terms in B2C contracts”, *EJCL*, 2022, n° 2, 194-196.

[70] See for the use of the latter terminology also ECJ 17 May 2022, SPV Project 1503 Srl a.o. v YB and Banco di Desio e della Brianza SpA, n° C-693/19 and C-831/19, EU:C:2022:395, paras. 24 and 40.

[71] ECJ 26 Januari 2017, Banco Primus SA v. Jesús Gutiérrez García, n° C-421/14, EU:C:2017:60.

[72] Banco Primus, para. 50.

[73] Banco Primus, paras. 19, 20 and 22.

[74] Banco Primus, para. 51.

[75] ECJ 17 May 2022, SPV Project 1503 Srl a.o. v YB and Banco di Desio e della Brianza SpA, n° C-693/19 and C-831/19, EU:C:2022:395 and ECJ 17 May 2022, L v Unicaja Banco SA ,anciennement Banco de Caja España de Inversiones, Salamanca y Soria, S.A.U., n° C-869/19, EU:C:2022:397.

[76] L v Unicaja Banco SA, paras. 16-17.

[77] L v Unicaja Banco SA, para. 23.

[78] L v Unicaja Banco SA, para. 24.

[79] L v Unicaja Banco SA, para. 29.

[80] L v Unicaja Banco SA, para. 31.

[81] L v Unicaja Banco SA, para. 49.

[82] L v Unicaja Banco SA, para. 50.

[83] L v Unicaja Banco SA, para. 51.

THE CONCEPT OF “AVERAGE CONSUMER” IN THE PRACTICE
OF THE BULGARIAN SUPREME ADMINISTRATIVE COURT
ON THE IMPLEMENTATION OF THE CONSUMER PROTECTION ACT
AND THE DIRECTIVE 2005/29 ON UNFAIR COMMERCIAL PRACTICES

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Summary

The article presents the meaning of the term "average consumer" as created by the case law of the Court of Justice of the EU and an established criterion for assessing the unfair impact of commercial practices on the economic behaviour of consumers in Directive 2005/29. The main criticisms of the approach adopted by the European legislator are indicated. It is investigated how the Supreme Administrative Court in the Republic of Bulgaria in its practice understands and applies the criterion and the test of the "average consumer". Formulated for conclusions and recommendations for the development of European law.

Keywords

Average consumer, unfair commercial practices directive, bulgarian consumers protection act.

I. INTRODUCTION

The term 'average consumer' is central to the correct understanding and application of Directive 2005/29 / EC on unfair commercial practices by traders towards consumers in the internal market (Directive 2005/29) and the regulations implementing its requirements in the national legislation of the European Union Member States. The 'average consumer' is a measure of the impact of a commercial practice on its addressees and its ability to influence their economic behaviour. The concept has been developed in the case law of the Court of Justice of the European Union. The term 'average consumer' first appears in the judgment in Case C-210/96 'Gut Springenheide', but the logic that led to its creation in the CJEU can be traced to earlier judgments, such as those in Case C-210/96 290/90 "Cassis-de-Dijion" and in case C-470/93 "Mars". The CJEU approach is a continuation of the legal traditions in many Member States, such as France, the United Kingdom, Italy, Spain, etc., which in their practice of enforcing competition and consumer laws adopt a similar assessment criterion. At the same time, other countries whose jurisprudence has so far worked with other criteria, such as Germany, which set the "negligent consumer" as a starting point for judgment, had to adjust their approach in line with the requirements of the CJEU.

As often happens with significant achievements of the CJEU practice, the criterion "average consumer" was adopted by the European legislator and is an essential element of the factual composition as the general definition of unfair trade in Art. 5 of Directive 2005/29, as well as the specific definitions of misleading and aggressive commercial practices in Art. 6, 7 and 8 of the Directive.

The creation of a single criterion for assessing the lawful market behaviour of EU traders is crucial for the development of the common market. From this point of view, the approach of the CJEU and the European legislator deserves respect. At the same time, we must bear in mind that this goal cannot be achieved if the law enforcement authorities in the Member States understand and apply the concept of 'average consumer' in different ways and / or deviate from the provisions of European law.

II. THE CONCEPT OF "AVERAGE CONSUMER" IN EU LAW

The objectives of introducing the "average consumer" as an abstract and objective criterion for assessing the impact of traders' behaviour are at the same time to increase legal certainty, ensure a high level of consumer protection and create good conditions for the development of the internal market.

The "average consumer" criterion achieves these high goals by following the principle of proportionality. It requires legislators and law enforcement authorities at EU and Member State level to take into account the interests of traders, legally guaranteed by the freedom of movement of goods and services (Article 26 (2), Article 29 and Article 56 TFEU) and the EU's commitment to ensure a high level of consumer protection within the common market (Article

114 (3), Article 169 TFEU). Finding the appropriate intersection between these conflicting interests, each important for the development of the common market and the EU as a whole, requires extreme precision on the part of law enforcement authorities / courts and specialized administrations /, based on a single approach to create predictability for traders, peace of mind for consumers and lead to the issuance of administrative acts and court decisions that the general public accepts as fair.

Understandably, European law cannot provide detailed guidance on what the average consumer can and cannot do in each individual case. This task must be resolved by national law enforcement authorities, taking into account the specifics of individual cases.

Fundamental to the correct understanding of the criterion is point 18 of the Preamble of Directive 2005/29, which defines the "average consumer" as "relatively well-informed and relatively observant and cautious", while at the same time specifying that in cases where a commercial practice is aimed at particularly vulnerable groups of users, such as children, it is necessary to assess its impact on the basis of the average representative of this group. In addition to containing a general definition of the qualities of the "average consumer", item 18 also contains the following important guidelines:

- The determination of the possibility of a commercial practice affecting the "average consumer" must be carried out by the national law enforcement authorities, which, in addition to the general guidelines contained in Directive 2005/29 and in the case law of the CJEU, must also take into account the specific public, cultural and linguistic factors related to commercial practice in their own country.

- The test to determine the "average user" that national law enforcement authorities must carry out should not be a statistical test. Administrations and courts should use their own judgment to determine the typical reaction of the average user in a particular case, taking into account the case law of the CJEU.

In order to fully meet the requirements laid down in Directive 2005/29, the test to determine the "average consumer" must go through several phases. First, law enforcement authorities must determine the relevant group of consumers that the commercial practice reaches and whose economic behaviour it may affect. They must then derive the characteristics of the average member of that group. This will be the "average user" for the purposes of the particular analysis. Finally, they should analyse the ability of the commercial practice to adversely affect the commercial decision of this average consumer.

III. CRITICISM OF THE EUROPEAN MODEL

The "average consumer" adopted by EU law as a criterion for assessing the impact that a commercial practice may have on consumers has come under serious criticism in several important areas.

The guidelines for the qualities of the "average consumer" in Directive 2005/29 and in the practice of the CJEU are too general. In contrast, the market relations in which consumers and

traders in the common market enter on a daily basis are varied and specific. In addition, users are far from a homogeneous group that can be objectively studied. There are national specificities of a cultural, linguistic and other nature that operate in individual member states, and in some cases also in their individual regions. These circumstances make it very difficult to objectively conduct the "average consumer" test and have the potential to introduce strong subjectivity into law enforcement and hence a high degree of legal uncertainty.

Next, the concept of the "average consumer" has no relation to objective reality, and this further complicates law enforcement authorities and provokes both their sense of justice and that of the addressees of their acts. The main factors that determine the behaviour of the user in a given situation are three - his personal qualities, the product he is interested in and the specifics of the specific situation. These factors affect individual users differently, so empirically deriving general patterns is in many cases impossible.

The results of various psychological studies over the last 50 years show that people, and consumers in particular, rarely act entirely rationally when making their decisions. They are not always sufficiently focused and attentive, tend to overestimate their abilities and underestimate potential risks, often do not seek or underestimate important sources of information (for example, comparative tests of products or recommendations of independent consumer organisations or government authorities), as in at the same time, they trust unreliable sources such as recommendations from acquaintances or even people they do not know and who are certainly not experts (for example, various influencers). Not a small number of consumers base their decisions on circumstances that do not have a rational economic rationale, such as a desire to emulate or a desire to be noticed.

A serious challenge for consumers in today's technological world is the huge amount of information that floods them daily in all possible ways. A significant part of this information overload is the product information that traders provide by law or voluntarily. The average consumer is expected to read carefully all the information about any product they are interested in. In practice, however, this is impossible, as it would mean people would spend hours reading labels and shopping, and few have the time they are willing to invest in such an activity. From this point of view, the reasonable behaviour of the user is not to familiarise himself in detail with the information about each product in which he has a potential interest. This is especially true for low-value products, as well as those that are shopped on a daily basis and that the consumer believes they know. However, it takes it away from the "average user" criterion.

The above circumstances make it extremely difficult for law enforcement authorities, who on the one hand are obliged to adhere to the "average consumer" model, but on the other hand must make not only legal but also fair decisions, which means knowingly or unconsciously, to take into account in their acts the real behaviour of users, often starting from their personal experience in this field. However, this inevitably leads to deviations from the evaluation criteria established by European law and to subjectivity, and from there to legal uncertainty.

IV. LEGAL REGULATION IN THE REPUBLIC OF BULGARIA

The requirements of Directive 2005/29 have been introduced into Bulgarian law in Chapter Four, Section III of the Consumer Protection Act. The provisions are effective from 09.09.2007.

The Commission for Consumer Protection (CCP) is a specialized authority for the detection of unfair commercial practices. When the CCP determines that a given commercial practice is unfair, its chairman issues an order prohibiting its application. The order is subject to appeal before the Administrative Court of Sofia-city (ACSC), and the decision of the ACSC can be appealed to the Supreme Administrative Court (SAC). The decision of the Supreme Court is made by a panel of three judges and is final.

Apart from the order for the prohibition of unfair trade practices, the Criminal Code imposes by means of criminal decrees and pecuniary sanctions on the guilty persons, which, depending on the type and severity of the relevant violation, are in the amount of between BGN 1,000 and 70,000. These penal rulings can be appealed to the district court at the place where the offence was committed, and the decision of the district court is subject to appeal to the territorially competent administrative court.

This model of double sanctions – once through the ban on the application of the commercial practice and a second time through the property sanction, each of which is subject to independent judicial control in two different proceedings that develop before different courts, has been sharply criticized by the theory in two main directions. On the one hand, it creates a high degree of legal uncertainty, since it is quite possible and in practice this happens that, in one proceeding, the prohibition order is upheld, and in the other, the criminal order is set aside and vice versa. Next, the issuance of two separate administrative acts, each of which can be appealed in a separate court process, is inefficient, time-consuming and causes unnecessary expense and effort to both the CCP and the courts, and above all to traders.

Below, in this presentation, we will focus solely on the SAC's case law on appeals against UTP injunctions, as it is the most authoritative court and its decisions affect all other courts in the country.

V. RESEARCH METHODOLOGY

In Bulgaria, there is no publicly available data on how many of all the orders issued by the chairman of the CCP for the prohibition of unfair commercial practices were appealed before the SAC for the period after 2007. It is certainly a huge number of cases, since the CCP is extremely active in uncovering unfair trade practices, and a large part of the orders of the chairman of the CCP are appealed to the court. As can be seen from the annual reports on the activity of the CCP, for the last 15 years the chairman has issued more than 1,400 orders for the prohibition of unfair trade practices.[1].

Our aim within the present study is to verify whether, in its rich practice, the Supreme Court interprets the concept of "average consumer" in accordance with the prescriptions of Directive

2005/29 and the CJEU and whether it performs the test for determining the "average consumer", which Directive 2005/ 29 prescribes.

In order to achieve a statistically significant result, we examined 100 court decisions issued in the period 2012 - 2021, randomly selected. The decisions are on appeal of orders issued on the basis of articles 68d, 68e, 68e. and 68h of the Consumer Protection Act, reflecting Articles 5, 6, 7 and 8 of Directive 2005/29 respectively. We checked in which of them the term "average consumer" appears at all, when it is mentioned only as an element of a cited provision of the law, and in which cases the SAC interpreted the term, arguing the susceptibility of the average consumer to the unfair commercial practice in question.

VI. RESEARCH RESULTS

In 79 of the hundred decisions examined, the SC either did not mention the concept of "average consumer" at all, or referred to it only as part of a quotation of one of the provisions of the Consumer Protection Act, without clarifying its content and without applying the test of its determination in the specific case under consideration.

2. In 16 of the remaining 21 decisions, the analysis of the perceptions of the average consumer is more or less laconic, with the SAC in no way justifying the basis on which it formulates its conclusions. Here are some examples:

Decision No. 3945 of 16.03.2020 by Adm. e. No. 1016/2020:

„The presence of such a sticker (special price) influences the perception of the average consumer to the point of making a purchase of this type of product, which he would not otherwise purchase“.

Decision No. 5700 of 16.04.2019 by Adm. e. No. 1200/2018:

„The use of the word "children's" in combination with the word "dream" ... does not suggest to the average consumer, who is reasonably well informed and reasonably observant and cautious, that there is a connection between the product concerned and the development or health of children. In this case, the brand "child's dream" rather gives a direction to which group of consumers the manufacturer has oriented its product“

Decision No. 6323 of 07.05.2012 by adm. e. No. 12408/2011:

„The fact that a price tag is affixed to each item is sufficient for the consumer and he should not be expected to look for an additional tag affixed elsewhere to verify that this is the actual price ... Even if he notices the second price, the consumer will be confused as to what is the actual price he should pay at the checkout. That is why it is unacceptable to have two different prices for the same good... The result is a commercial decision that the average consumer would not make without the use of commercial practice.“

3. In some decisions, the SAC completely ignored the need to assess the impact of the commercial practice from the perspective of the average consumer and instead carried out the analysis based on its own judgment.

For example, in Decision No. 346 of 12.01.2021 under Adm. e. No. 4204/2020, which refers to a case of unfair practice expressed in the fact that, when selling ready-made food, the trader withdraws the food together with the packaging and thus the consumer pays for the weight of the packaging at a price as if it were a meal, the SAC formally states that *"for the average consumer, paying for packaging is unacceptable and is a prerequisite for changing his economic behaviour"*, but does not examine whether and exactly how the practice is able to change the behaviour of the average consumer. Instead, the court gave its own negative moral assessment of the commercial practice, pointing out that *"honest market practice, as well as the principle of good faith, require the merchant not to include in the weight of the food purchased and the weight of the packaging."*

Other Decision No. 5439 of 11.04.2019 by adm. e. No. 1268/2018, concerns an order for the prohibition of a misleading commercial practice, expressed in the fact that before purchasing a children's watch, the merchant did not provide the user with the essential information that the user / in this case, a parent is required to use the locator function of the child/ to have a mobile phone with Android version 4.2 operating system. or later or iOS 9.0 or later. The decision of the Supreme Court contains the following paragraph: *"The court finds that, although the information about the trial product was on the website of the merchant company, due to the fact that the goods were purchased from the store network and the consumer was served by an employee in the store , it cannot be required of the buyer to familiarise himself with the product information from the merchant's website, since this information should have been provided to him by the employee who made the sale"*. The term "average user" appears in several places in the decision, but nowhere does it analyse what the receptiveness and information needs of the average user are. This judgment is directly superseded by the court's own opinion and assessment.

4. In only 5 cases did the SAC examine the "average user" in more detail, three of which are presented in more detail below. In only one case did the SAC apply the test to determine the "average consumer" as prescribed by Directive 2005/29[2].

A. Decision No. 6565 of 09.05.2012 by adm. e. No. 1290/2012

The decision of the SAC confirms a decision of the ACSC, which revoked the order of the chairman of the CCP on the prohibition of misleading commercial practice.

Actual situation

The trader "Gallus Trade" Ltd. sells a prepackaged processed poultry product. On the front of the package is written "Grilled chicken - marinated quick frozen". On the product label, which is located on the back of the package, the inscription "Marinated meat preparation" is placed. According to the technical terminology of Bulgarian law and Regulation (EC) No. 1234/2007

of 22 October 2007 establishing a common organization of agricultural markets and regarding specific provisions for certain agricultural products, the product falls into the category of "frozen meat preparation". The Chairman of the CCP has issued an order for the prohibition of misleading commercial practice, because according to him, the discrepancy between the name of the product announced on the package and its correct technical name by law, constitutes misleading information for consumers about the nature of the product.

An engineering-technological expertise was heard before the court of first instance, and the expert gave an opinion that the expression "frozen grilled chicken" is a true name, but alone is incomplete for the specific product and the consumer understands only the condition in which it is offered. "Marinated meat preparation" is in accordance with the regulatory requirements, but from this name alone the consumer cannot understand the supply status, as well as the purpose of the product, and in addition, the term "preparation" entered the industry terminology relatively recently and has not yet received enough publicity. According to the expert, "Grilled chicken - marinated, quick frozen" would be the most understandable for the consumer, but the product labelled only with this name would not comply with the regulatory requirements. The expert's conclusion is that the combination of two of the cited names "Marinated meat preparation" and "Grilled chicken - marinated quick-frozen" reflects the truest and most complete nature and composition of the product.

Legal analysis of the Supreme Administrative Court

The Supreme Court considers that the main disputed issue in the case is whether the information about the nature of the goods placed on the packaging of the products is capable of misleading the average consumer. In this regard, the SAC shared the view of the Court of First Instance that inasmuch as both the terms "Marinated Meat Cutlet" and "Grilled Chicken - Marinated Quick Frozen" appeared on the label and packaging, they could be perceived by consumers in the commercial establishment prior to making a decision for purchase. According to the court, the average consumer would very easily derive information about the nature of the product from the terms "roasted chicken", "marinated", "quick frozen", which are positioned so as to be perceived by the consumer together and directly, and the term "meat preparation" is indicated on the label, in close proximity to the price of the product, where the consumer usually focuses when choosing a product. The Court has held that an average consumer is one who is reasonably well informed and reasonably observant, as well as sufficiently intelligent and possessing the knowledge and experience to understand the meaning of the information so presented, taking into account societal, cultural and linguistic factors. Furthermore, the trial court examined the concepts at issue, deriving their content from sources available to the average consumer and in a manner in which the same would use them. In this situation, both the first-instance court and the SAC consider that there is no misleading commercial practice in this case, therefore they cancel the order of the chairman of the CCP.

B. Decision No. 16282 of 29.11.2019 under Adm. e. No. 9032/2018

The decision of the SAC confirms a decision of the ACSC, which confirmed the order of the chairman of the CCP to prohibit misleading commercial practice.

Actual situation

"Nestle Bulgaria" produces biscuits with the trade name "Zhiten Dar", on the label of which a stylistically shaped inscription Petit Beurre is placed. From the correctly declared composition on the back of the package, it can be seen that the product contains palm oil instead of cow's oil. The CCP carried out an investigation at the request of a consumer, and after finding this discrepancy, the President issued an order prohibiting a misleading commercial practice, because the Petit Beurre label suggested to consumers that cow's butter was added to the biscuits, when in fact it was replaced with vegetable palm oil butter. This amounts to misleading consumers as to the nature of the product and is capable of misleading the average consumer. Writing Petit Beurre in a larger font and in a central place on the label may mislead the consumer, as it is visually assumed that the product contains "little butter".

The main argument in the appeal of "Nestle Bulgaria" to the Supreme Court is that neither the CCP nor the court have collected evidence of what the average consumer understands by Petit Beurre biscuits and whether they even understand that translated from French it means "little butter".

Legal analysis of the Supreme Administrative Court

According to the SAC, no additional evidence or deliberate expert conclusions are necessary in this case to establish what the average consumer understands by the name Petit Beurre. The expression "Petit Beurre" is a byword for a type of biscuit that in the mass mind is associated with butter biscuits. The expression is sufficiently familiar, recognizable and associated with the image of the typical butter biscuits of a French recipe and the lack of knowledge of the French language by most people, it cannot overcome the image imposed for decades. According to generally available international studies, French is the fifth most spoken language in the world. It is traditionally studied in Bulgaria, and many culinary phrases and expressions are widely known, including the expression "Petit Beurre". The SAC accepts that after the admission of Bulgaria to the EU and the free access of goods from all European countries to our national market, the average consumer's knowledge of basic concepts, especially about food products, has seriously increased and that the average consumer is well informed and knows basic concepts from the most common European languages, which does not require the collection of deliberate evidence and/or expensive and time-consuming research[3].

One of the members of the judicial panel - judge Pavlina Naydenova - expresses disagreement with this understanding and signs the decision with a dissenting opinion. According to her, the inscription "Petit Beurre" rather indicates that the biscuits are butter-flavoured than that they contain cow's butter, especially since they have been found to contain whole milk and that in the original French recipe the content is whole milk /not butter/. Milk also has butter, but not

only cow's butter is butter, moreover, the content of the product label states that the biscuits contain palm oil, so the average consumer who is relatively well-informed, observant and cautious cannot be deluded. According to Judge Naydenova, the inscription on the packaging of the biscuits is a trade name and cannot be required to correspond exactly to the name of the inserted food products. The starting product of both butter and whole milk powder is the same. Petit Beurre biscuits contain whole milk powder with 26% fat content. Milk fat, as a technical name for cow's butter, is present in the composition through full-fat dry milk, regardless of the fact that milk fat and cow's milk are not identical concepts [4].

C. Decision No. 357 of 12.01.2021 under Adm. e. No. 5504/2020

The decision of the Supreme Administrative Court confirms the decision of the Sofia-city Administrative Court, which confirmed the order of the chairman of the CPC to prohibit misleading commercial practices.

Actual situation

"UniCredit Bulbank" AD is one of the largest and most famous banks in Bulgaria. Its subsidiary "UniCredit Bulbank Consumer Financing" EAD, whose sole owner is "UniCredit Bulbank" AD, offers consumer loans. The Chairman of the CCP issues an order to "UniCredit Bulbank" AD to stop the application of a misleading commercial practice representing a television commercial clip, which may mislead consumers about the identity of the merchant who actually provides the loans. In the video, the phrase "Consumer credit from UniCredit Bulbank" is written in large letters. In the lower corner, the sentence "All consumer credit contracts are provided by UniCredit Consumer Financing EAD, a subsidiary of UniCredit Bulbank EAD", quickly passes in a significantly smaller font. A male voice around the middle of the clip says: "Consumer credit from UniCredit Bulbank", and at the end: "Unicredit Bulbank – bank for the important things". The site where the loan can be applied for is also indicated, namely - www.unicreditbulbank.bg, which is the official website of "UniCredit Bulbank". AD.

In this situation, the chairman of the CCP and the court of first instance consider that the audio and visual images create the overall impression that the loan is provided by the bank "Unicredit Bulbank" AD, and not by its subsidiary indicated in the fast-moving bottom of the advertising clip. In no way is it specified in the clip that the bank is only helping to find the lender's customers. In this sense, the information about the trader who will actually provide the loans, namely - "UniCredit Bulbank Consulting Financing" EAD, was provided in a vague and ambiguous way, which led to its concealment. It is quite possible that the user believes that the funds will be provided to him by UniCredit Bulbank AD, which enjoys a reputation and fame in Bulgaria.

Legal analysis of the Supreme Administrative Court

The Supreme Court considers that, with the factual situation clarified in this way, the controversial issues in the case are several groups:

- Is the information about the person who will actually extend the credit to the consumer "essential"? In this sense - if it was presented in such a way that it was clear to the consumer that the loan agreement would be concluded not with "UniCredit Bulbank" AD, but with "UniCredit Bulbank Consumer Financing" EAD, would his decision be different??
- What is the nature of the concept of "average consumer"? Is it necessary to collect evidence to clarify its content or is it purely legal in nature?
- At what point is the decision to conclude a transaction formed by the user, in view of the specifics of the present case study?

The Supreme Court accepts that the "average consumer" is an objective concept that falls within the scope of the court's legal conclusions and is not subject to proof. Citing the case law of the CJEU in Case C-562/15 Carrefour Hypermarchés SAS/ITM Alimentaire International SASU, C-122/10 Ving Sverige and C-611/14 Canal Digital Danmark, the SAC defined the average consumer as relatively well-informed and relatively observant and cautious, taking into account societal, cultural and linguistic factors. However, being relatively observant, the "average consumer" could not in all cases perceive that it is "UniCredit Bulbank Consumer Financing" EAD, and not the familiar bank "UniCredit Bulbank" AD, which is written in two places in capital letters and reproduced audibly will actually provide the credit. If he reads the message at the bottom and in small print, the user will actually create the correct impression that the funds are provided by the non-banking institution "UniCredit Bulbank Consumer Financing" EAD. However, the probability of this happening, given all the individualising signs of the bank, is small. And if this information is read, the confusion will increase even more, since it will not be clear to the user why the name of the bank is written in capital letters and played audibly, and not of the credit institution that he just read, will provide the credit. The SAC also considers that it is important for the consumer with whom he concludes the contract, as the information about the trader is "essential". There are significant differences between the companies "UniCredit Bulbank" AD and "UniCredit Consumer Financing" EAD. One is a bank, the other is a non-bank credit institution, one has a capital of BGN 2,800,000, and the other - BGN 285,776,674, one was registered in 1990, the other in 2006. One stands out with popularity among users in Bulgaria, the other is more unknown. For these reasons, it is not unimportant for the user whether he will conclude a contract with "UniCredit Bulbank" AD or with "UniCredit Consumer Financing" EAD. The argument that the lending company is fully owned by the bank does not change this conclusion, because this fact can change many times during the term of the credit agreement through the transfer of the shares owned by the bank. For these reasons, the SAC considers that if the consumer is clearly aware that it is UniCredit Bulbank AD that provides the loan, it is quite possible to make a decision on its conclusion. On the contrary - if he is provided with information in an indisputable and unambiguous manner that the contract will be concluded with "UniCredit Consumer Financing" EAD, he may not form such a decision, due to the differences established in favour of the bank between the two companies.

The SAC does not share the defence thesis of "UniCredit Bulbank" JSC that the user forms his decision to enter into a loan agreement only after he has received information from the Internet

site indicated in the advertisement, resp. after the terms of the loan have been explained to him in the office where the contract will be concluded. In this regard, the SAC points out that not every user has access to the Internet and knowledge of how to use it, and even those who have and can objectively obtain the information contained on the site would not necessarily do so and in any case after perception of television advertising. Next, the average consumer will proceed to look for more detailed information about the terms of the loans, including visiting an office where they are provided, only after he has already made a commercial decision to take advantage of the offered service.

VII. CONCLUSIONS AND RECOMMENDATIONS

The studies and analyzes presented above lead us to the following conclusions, from which some recommendations follow:

1. The Bulgarian Supreme Administrative Court is generally well acquainted with Directive 2005/29 and with the applicable practice of the CJEU.
2. Where it deems necessary, the SAC is fully capable of clarifying the relevant qualities of the "average consumer" and applying the test to determine the "average consumer" as required by Directive 2005/29.
3. For some reason, in the vast majority of cases, the SAC does not make an effort to define the group of consumers affected by the commercial practice and to derive the qualities of its average member on the basis of which to assess the impact of the practice and apply the law. Instead, it is content to examine the objective elements of the factual composition of commercial practice and replaces the need to analyse them from the perspective of the "average consumer" by the court's own discretion. In some decisions this is stated directly. The replacement of the criterion "average user" with the personal judgment of the court does not meet the requirements of Directive 2005/29 and the mandatory practice of the CJEU. In this way, the court brings a strong subjectivity to the application of the law. This jeopardises the interests of both traders and consumers and is a source of legal uncertainty. It distances the Bulgarian legal system from the harmonized application of the requirements of EU law.
4. As far as we know the practice of the courts of other EU member states on the application of Directive 2005/29, we are inclined to express the opinion that the problems presented in this article in the understanding and application of the "average consumer" criterion by the Bulgarian court are not specifically Bulgarian and probably affect to a greater or lesser extent the competent authorities in other member states as well. Of interest is the answer to the question whether this is so.
5. The laconic and general definition of the qualities of the "average consumer" in Directive 2005/29 and in EU practice and the broad rights that Article 18 of the preamble of Directive 2005/29 gives to national authorities creates a risk of forming different practices in individual countries -members, and this will hinder the development of the common market, as it creates uncertainty for traders and mistrust among consumers.

6. It is necessary for the European Commission and the CJEU to give much more detailed instructions to the competent authorities in the Member States on how to understand the concept of "average user". It would be very helpful if these guidelines were based on objective and scientifically sound studies in the following two directions:

A/ What is consumer receptivity and vulnerability to common commercial practices, as well as practices that carry certain risks.

B/ How the competent authorities in the Member States understand the guidelines contained in point 18 of the preamble of Directive 2005/29 and how they determine the receptiveness, information needs and susceptibility to commercial practices of the "average consumer" when making decisions.

7. If it is found that the "average consumer" criterion adopted by Directive 2005/29 and by the practice of the CJEU not only does not correspond to the real mechanism by which the vast majority of consumers make their decisions, but is also not perceived by law enforcement bodies which, although formally using this term when justifying their decisions, de facto hide behind it their personal assessment of the case, the need arises to hold an expert discussion at EU level whether the concept of the "average consumer" should be abandoned and to look for another approach to analyze the impact of commercial practices that is closer to real market relations and to the understanding of morality in commercial relations by law enforcement agencies and society at large.

[1] The annual reports on the activity of CCP for 2019, 2020 and 2021 can be found at <https://kzp.bg/godishni-dokladi>, visited on 01. 06. 2022.

[2] Decision No. 9617 of 19.07.2017 under Adm. e. No. 5191/2016

[3] The comparison of this decision of the Bulgarian court with the decision of the Supreme Court (Oberster Gerichtshof) of Austria in case Ob 228/10y is very interesting. The Austrian court held that a photo and the words "forest berries" (Waldbeeren) on the packaging of a nutrition bar cannot mislead the average consumer, as he does not expect the bar to be made from whole or predominantly fruit. The expectation of the average consumer in this case is that the product contains real berries, not just flavors and that the bar tastes like berries. The Austrian and Bulgarian courts demonstrate a radically different understanding of the receptiveness of the average consumer. According to the Austrian court, the average consumer accepts the suggestion of the trade name rather as an expected taste rather than as an expected composition, which the consumer can learn unambiguously and in detail from the label. On the other hand, the Bulgarian court accepted that the trade name "Petit Beurre", which, among other things, is in French, is not only familiar to the average Bulgarian consumer, but it creates in him a specific idea about one of the ingredients, namely the cow's butter and the percentage its content in the final product. In our opinion, the analysis of the receptiveness of the average consumer made by the Austrian court is more convincing. The Bulgarian court seems to be strongly influenced by the evidence collected in the case, which contains a significant amount of technical information about the production and content of the biscuits, which the average consumer has no way of having.

[4] Judge Naydenova does not explain why she believes that the average user has all this knowledge and the ability to interpret them.

IRISH CONSUMER LAW: EVOLUTION AND EUROPEANISATION

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Summary

In this article we consider the evolution of Irish consumer law and the impact of EU law with reference to four (of the five) aspects of the 2022 Bill: sale of goods; digital content and digital services; unfair terms; and service contracts. In doing so, it will describe the current legal framework in each of these four areas and critically evaluate the proposed reforming legislation, highlighting the different factors which have contributed to the proposals for reform and providing an insight into the possible future relationship between Irish and EU consumer law.

Keywords

Consumer rights, sale of goods, digital market, unfair terms, Ireland.

I. INTRODUCTION

On 22 April 2022, the Consumer Rights Bill 2022 was published and presented to the Irish Parliament (the Oireachtas), where it is currently making its way through the legislative process and is expected to be enacted later this year.[1] Arguably, the Consumer Rights Bill 2022 represents the most far-reaching reform of Irish consumer law in over 40 years, since the enactment of the Sale of Goods and Supply of Services Act 1980. The 2022 Bill seeks to consolidate major aspects of consumer contract law, transpose a number of more recent European measures [2], and more generally reform the law to meet the needs of consumer society, with an eye on the digital market and a more sustainable and circular economy. The Bill deals with sale of goods in Part 2; digital content and services in Part 3; services in Part 4; consumer information and cancellation rights in Part 5; and unfair contract terms in Part 6.

Without question, the 2002 Bill represents a further Europeanisation of Irish consumer law, and a distinct turn away from more traditional influences, such as developments in the UK and other common law jurisdictions. That said, the role and impact of the common law is not totally lost; nor is the turn towards an EU framework and EU concepts complete. In different aspects of the Consumer Rights Bill 2022 the impact of European Union consumer law can be felt in different, and sometimes unexpected, ways at a national level. Thus, the Consumer Rights Bill 2022 offers an interesting insight into the varied and complicated interaction between EU law and the national legal order. This varied and complicated interaction is a result of a number of factors, including the different approaches to harmonisation at EU level (from full targeted harmonisation; to minimum harmonisation; to no harmonisation) and the national response thereto; the nature of pre-existing national regulation (depending on whether it is more or less developed); and the wider economic, policy and constitutional context.

In this article we consider the evolution of Irish consumer law and the impact of EU law with reference to four (of the five) aspects of the 2022 Bill: sale of goods; digital content and digital services; unfair terms; and service contracts.[3] In doing so, it will describe the current legal framework in each of these four areas and critically evaluate the proposed reforming legislation, highlighting the different factors which have contributed to the proposals for reform and providing an insight into the possible future relationship between Irish and EU consumer law.

1. Sale of Goods

Part 2 of the Consumer Rights Bill 2022 seeks to regulate sale of goods contracts by transposing Directive 2019/771 on consumer sales into Irish law, and in doing so by disapplying or revoking the pre-existing, and in some respects long-standing, legal framework. The impact of this reform on the evolution of the law is significant in two main ways: first, in terms of the legal framework: its structure and coherence; and second, in terms of the substantive rules themselves.

Legislative Framework

Taking the structure and coherence of the law first, it is notable that at the time of writing, Irish consumer sales law is regulated by three distinct sources of law, making the law incoherent and inaccessible for the average consumer. The principal statute is the Sale of Goods Act 1893, a nineteenth century commercial law statute passed at Westminster, London, which applied throughout the United Kingdom of Great Britain and Ireland, at that time, and was subsequently carried-over into Irish law with the foundation of the Irish Free State (and later the Republic of Ireland[4]) in 1922.[5] Not surprisingly, this statute did not expressly mention consumers, although it applied to commercial and consumer buyers alike.[6] It sought to protect buyers through a series of statutory implied terms (on title; correspondence with description; merchantable quality; fitness for particular purpose; and sale by sample) and by affording buyers the right to reject goods and terminate the contract where there was a breach of any of the statutory implied conditions, as well as a right to claim damages for any resulting loss. This legislation was modernised and given a consumer-twist by Part 2 of the Sale of Goods and Supply of Services Act 1980 which amended aspects of the 1893 Act (together known as the Sale of Goods Acts, 1893 and 1980[7]). Importantly, the statutory implied terms were re-cast[8], a definition of merchantable quality was introduced[9], and the statutory implied terms were made mandatory for buyers dealing as consumers.[10] Additional provisions were also introduced including a consumer right to request cure[11]; a warranty on spare-parts and servicing[12] and rules on commercial guarantees.[13]

On top of this Sale of Goods Acts framework, a third layer of rules on consumer sales was introduced by the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003^[14], which transposed Directive 1999/44 on consumer sales into Irish law.[15] Rather than integrate the new EC rules with pre-existing sales legislation, the decision was taken to adopt free-standing Regulations. Using a ‘copy and paste’ approach to transposition, the Regulations faithfully gave effect to the seller’s obligation to deliver goods in conformity with the contract, with reference to the various presumptions of conformity in relation to the description given by the seller; the consumer’s particular purpose; the normal purpose; and the normal quality and performance of the goods.[16] Where goods are not in conformity the trader is liable, and a hierarchy of remedies is provided with a first tier of remedies comprising a right to repair or replacement, and a second tier of remedies comprising price reduction or rescission.[17] The Regulations included a 6-month reverse burden of proof and rules on commercial guarantees but did not transpose any notification requirement on the consumer.

The 2003 Regulations expressly addressed their relationship with other consumer protection enactments in a series of complicated and inter-related provisions. First, the Regulations stated that they are in addition to, and not in substitution for, any other enactment relating to the sale of goods (such as the Sale of Goods Acts, 1893 and 1980).^[18] Further, the Regulations provide that consumers are entitled to invoke either provisions of the Regulations or, the provisions of the Sale of Goods Acts 1893 and 1980, whichever will afford them the greater protection.^[19] This sort of “pick and mix” approach sought to give consumers the best of both worlds, but in

practice can be criticised for being overly complex. Consumers were left in the unenviable position of having to choose, typically without legal advice. While it was generally accepted that the implied quality terms in the Sale of Goods Acts, 1893 and 1980, and the conformity requirements in the 2003 Regulations were largely in sync, the same could not be said for other aspects of the rules. In particular, the Sale of Goods Acts prioritise the right to reject (and terminate the contract) as a primary remedy, whereas Directive 1999/44 and the 2003 Regulations relegated the right to rescind or terminate the contract to a remedy of last resort. Again, whereas the burden of proof rests with the consumer under the Sale of Goods Acts, a reverse burden of proof for 6-months operated under Directive 1999/44 and the 2003 Regulations. These and other aspects of the rules on sale resulted in an incoherence in the law.[20] For example, in their *Final Report on the Legislation Governing Sale of Goods and Supply of Services*, the Sales Law Review Group noted with reference to Directive 1999/44:

Though the Directive overlapped substantially with the consumer sales provisions of the 1893 and 1980 Acts, it was transposed into Irish law as a stand-alone statutory instrument, resulting in a confusing and, in some respects, contradictory legislative framework. While several examples of the discrepancies between the domestic and EU enactments can be cited, the sharpest difference between the two regimes lies in the remedies available to the consumer for goods not in conformity, with the contract.[21]

This criticism led the Sales Law Review Group to recommend that:

“There is a need also to integrate the provisions of domestic and EU legislation in a more coherent and accessible way than has been done to date”[22]

Following the publication of the Final Report of the Sale Law Review Group, a consultation process was launched, and a Scheme (legislative outline) for a Consumer Rights Bill implementing the recommendation of the Group was published in 2015.[23] However, within a short number of months the EU Commission published its proposals for the two new directives: one on contracts for the supply of digital content, and a second concerning online sales and distant sales.[24] In light of these developments at EU level, it was decided to pause the domestic reform agenda until the EU legislative process was completed.

The Digital Content Directive (DCD)[25] and Sale of Goods Directive (SGD)[26] were finally adopted in 2019 and in 2021, and the Irish Government published a second Scheme for a Consumer Rights Bill, which sought to transpose the SGD in Part 2, and the DCD in Part 3. A Consultation on the Scheme for a Consumer Rights Bill, was commenced at the same time,[27] which ultimately led to the publication of the Consumer Rights Bill 2022 which, as noted above, is currently making its way through the Parliamentary process. The adoption of the DCD and the SGD in 2019 clearly delayed completion of the domestic reform agenda; but at the same time, the pursuit of an ambitious consolidation and reform process of consumer contractual rights has also delayed the transposition of the DCD and the SGD into Irish law. Thus, following a significant waiting period, Part 2 of the Consumer Rights Bill 2022 seeks to deliver on the Sales Law Review Group recommendation to integrate the provisions on sale of goods into a more coherent and accessible form.

Substantive Rules

Turning to the evolution of the substantive rules on sale, it is notable that the SGD is a maximum harmonisation directive [28], although in numerous ways it leaves certain matters to the discretion of member states, including via options and by identifying other aspects as being outside the scope of the Directive. While extending its scope to ‘goods with digital elements’ or ‘smart goods’, the SGD remains faithful to the requirement that the goods delivered must be in conformity with the contract, and the seller is liable for any lack of conformity.[29] Presumptions of conformity are replaced with quite detailed subjective and objective conformity requirements[30]; and a more detail remedial scheme is provided for, with the familiar preference for repair and replacement, before turning to price reduction and termination.[31] The reverse burden of proof is extended to one year post delivery [32], and commercial guarantees are again regulated.[33]

Part 2 of the Consumer Rights Act 2022 transposes the SGD and in doing so evidences a clear shift away from the former legal position and toward EU norms and concepts. For example, the definition of ‘goods’ from the Sale of Goods Act 1893 refers to ‘goods’ as including

all chattels personal other than things in action and money... The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

The language clearly reflects its nineteenth century origins. The Consumer Rights Act 2022 adopts the more modern and digital market friendly SGD definition, such that ‘goods’ means any tangible moveable items (other than money and any item sold by way of execution or otherwise by authority of law) and includes (a) any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions, and (b) water, gas and electricity where they are supplied in a limited volume or set quantity;

but in keeping with the pre-existing legal position, the option was not taken to exclude second hand goods sold at public auction or living animals. In a similar vein, the Consumer Right Bill does not carry forward the definition of ‘dealing as a consumer’ from the Sale of Goods and Supply of Services Act 1980 according to which:

a party to a contract is said to deal as consumer in relation to another party if—
(a) he neither makes the contract in the course of a business nor holds himself out as doing so, and
(b) the other party does make the contract in the course of a business, and
(c) the goods or services supplied under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.[34]

This definition is not expressly limited to natural persons, and had been interpreted in the UK to encompass an SME in the form of a husband and wife company.[35] Instead the Consumer Rights Bill 2022 adopts the EU concept of consumer as:

‘any individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.[36]

Most notable perhaps in terms of evidence of a turn away from traditional concepts towards EU norms, is the evolution of the rules on quality / conformity. The Sale of Goods Acts 1893 and 1980 use the device of implied contract terms, either conditions (important terms of the contract, breach of which give rise to a right to terminate the contract, reject the goods, and sue for damages) or warranties (a term collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated[37]) to ensure the quality of goods supplied. Earlier recommendations for reform from the Sales Law Review Group, and attempts at reform in the form of the Consumer Rights Bill 2015, sought to transpose EU law via the existing implied terms framework from the Sale of Goods Acts. However, Part 2 of the Consumer Rights Bill faithfully transposes the subjective and objective conformity requirements as stand-alone legal obligations and has jettisoned the device of implied terms which have dominated Irish sale law for 150 years.[38] In favour of maintain the use of implied term, it can be argued that the concepts and terminology are familiar and reasonably well understood; similar concepts and terminology are used throughout the common law world, providing non-binding precedent or guidance on interpretation and applicable; and maintaining the use of implied terms in consumer contract would help maintain a coherence with commercial sales law. However, against this is the argument that what is important is the substance of the rules and not their form or how quality / conformity is delivered; consumer and commercial sales law is based on very different policy approaches and so there is no real advantage in seeking to maintain artificial coherence between them. Perhaps more significant recently, and following Brexit, is a realisation at a policy level that Ireland's future consumer protection policy owes more to a European approach, than a common law approach, with guidance on the interpretation and application of law coming from the Court of Justice of the EU rather than the High Court in London.

Although the transposition of the SGD in Part 2 of the Consumer Rights Bill 2022 can be described as faithful throughout, reflecting the maximum harmonising nature of the Directive, there remains a number of areas where member states were allowed discretion and in these areas more traditional features of Irish law and the broader common law tradition can still be seen. Examples include provisions in relation to the right to sell and title issues; additions to the subjective and objective conformity requirements; third party rights; a short-term right to reject; a right to withhold payment and other remedies, and the limitation period, ensuring that Irish consumers do not suffer a reduction in rights and remedies, following the transposition of the SGD.[39]

Accordingly, Recital 18 provides that the SGD should not affect matters not regulated by the Directive and Recital 35 notes that conformity should cover materials defects as well as legal defects. Accordingly, as a preliminary to the subjective and objective requirements of conformity in sections 17-18 of the Consumer Rights Bill 2022, section 14 provides that a consumer has a right to terminate the contract where the trader / seller does not have the right to sell. In addition, Part 2 on sales contracts also includes a requirement that the goods are free from any charge or other encumbrance not disclosed to the consumer and that the consumer will enjoy quiet possession of the goods.[40] There is also provision for the sale of a limited

title to the goods.[41] These provisions are reminiscent of section 12 of the Sale of Goods Act 1893.

Additional subjective conformity requirements are provided for in section 17 of the 2022 Bill including in relation to spare parts and after-sales services.[42] Section 17(4) provides that spare parts and an adequate after-sales service must be made available by the trader—

- (a) in such circumstances as are stated in an offer, description or advertisement by the trader on behalf of the producer or on the trader's own behalf, and
- (b) for such a period as is so stated or, if no period is so stated, for a reasonable period.

A similar provision exists in section 12 of the Sale of Goods and Supply of Services Act 1980.

In relation to the objective conformity requirements, a potentially significant amendment, by way of the insertion of an additional word, was made in relation to para(a) whereby goods must “be fit for *all* the purposes for which goods of the same type would be normally used...”. This refinement derives from Irish legal doctrine of the definition of ‘merchantable quality’ under the Sale of Goods Act 1893 and clarifies that where goods have more than one normal purpose, they must be fit for all their normal purposes.[43]

Two further provisions extend the rights and remedies of consumers to third parties in certain circumstances. First, inspired by a provision from the Australian Competition and Consumer Act 2010[44], section 46 provides that where a consumer who is a party to a sales contract gives goods acquired under the contract to another consumer as a gift, that other consumer shall be entitled to exercise all rights and remedies under Part 2 on the same terms as the consumer who is a party to the sales contract. Second, inspired by section 13 of the Sale of Goods and Supply of Services Act 1980 on the sale of motor vehicles, section 47 provides that where a consumer purchases a motor vehicle under a sales contract, and the motor vehicle is not in conformity with the sales contract, and the lack of conformity would render the motor vehicle a danger to the public (including any person travelling in the motor vehicle) any person who uses the motor vehicle with the consent of the consumer and suffers loss as a result of that lack of conformity may maintain an action for damages in respect of that lack of conformity against the trader who sold the motor vehicle as if he or she were the consumer.

Perhaps most striking are the remedial provisions in Part 2 of the Consumer Rights Bill 2022 which go above and beyond that provided for by the SGD. In particular, in line with Recital 19, sections 23-24 provided that as well as a right to repair or replacement, a consumer has a short-term right to terminate the contract (normally 30 days after delivery) where there is a lack of conformity, similar to pre-existing Irish law and the current UK position pursuant to their Consumer Rights Act 2015. Section 32 provides for a right to withhold payment, and section 34 recognises the consumer's right to pursue additional remedies, including claiming damages; relying on failure of the trader to be compliant against a claim by the trader for payment of the price; seeking to recover money paid for goods that are non-compliant with Part 2; recovery of costs from the trader for having the non-conforming goods remedied elsewhere and an order for specific performance under the Sale of Goods Act 1893). Lastly, Part 2 does not transpose a liability period, and instead the traditional 6-year limitation period is maintained.[45]

1. Digital Content and Services

Part 3 of the Consumer Rights Bill 2022 transposes the DCD and in many ways it is in Part 3 that EU law is most impactful. This is largely because there is no pre-existing legislative regulation of digital content and services. When such a void is met with a maximum harmonisation directive, the outcome is more predictable.

Prior to the Consumer Rights Bill 2022, there is no legislative provision for the supply of goods with digital elements, digital content contracts and digital service contracts in Ireland. At common law, there is no direct legal authority on these types of contracts but based on legal doctrine from other common law jurisdictions with a similar legal framework (namely, the UK and Australia) it seemed highly likely that:

- contracts for the supply of goods with digital elements (such as a smart TV) would come within the statutory definition of a sale of goods contract pursuant to the Sale of Goods Acts 1893 and 1980;
- contracts for the supply of digital content on a carrier (such software saved on a CD or a memory stick) would also come within the statutory definition of a sale of goods contract pursuant to the Sale of Goods Acts 1893 and 1980; and
- contracts for the supply of digital content/services alone (e.g. downloaded or otherwise copied) would not come within the definition of a sale of goods contract pursuant to the Sale of Goods Act 1893 and 1980, but could be classified as a contract of services or sui generis.[46]

This lack of tailored regulation led to the unsatisfactory position that the legal rights and remedies enjoyed by consumers of digital content and services would vary considerably depending on the manner in which the digital content or service is supplied.[47]

The impact of the transposition of the DCD (alongside the SGD) is that:

- contracts for the supply of goods with digital elements are classified the same under existing and the proposed consumer protection legislation, as sale of goods contracts;
- contracts for the supply of digital content on a carrier are treated differently, and will no longer be classified as sale of goods contracts, but instead will be regulated by the DCD and Part 3 of the Consumer Rights Bill 2022;[48]
- contracts for the supply for digital content alone will be regulated by the DCD and Part 3 of the Consumer Rights Bill 2022;
- contracts for the supply of digital services are excluded from the scope of Part 4 on service contracts, and instead will be regulated by the DCD and Part 3 of the Consumer Rights Act 2022. [49]

While this involves some re-classification of certain contracts, the transposition of the SGD and the DCD brings clarity in terms of the classification of transactions and the application of

the different rules, as well as enhancing consumer protection by filling a legislative gap in relation to digital contracts which will be regulated in a consistent and tailored fashion.

This legislative gap is not surprising as digital content and digital services contracts are relatively new in the consumer context. The regulation of contracts for digital content and digital services has been on the domestic agenda in recent years, although little progress had been achieved. The Sales Law Review Group in its final Report in 2011 noted that ‘considerable uncertainty surrounds the law on the classification of contracts for the supply of software and digital content’.[50] It recommended altering the definition of ‘goods’ to include computer software. And instead recommended a comprehensive consultative process on the issues of whether strict liability standards are suitable for software contracts and on whether there is a need for a specialised instrument dealing with software transactions should be undertaken in advance of any further consideration of legislative regulation in this area.[51]

The policy agenda had moved on by the time the Scheme of a proposed Consumer Rights Bill 2015 was published.[52] Part 3 of the 2015 Bill sought to regulate contract for the supply of digital content (but not services) but only where a price was paid, using statutory implied terms derived from sales of goods legislation with further provision for modification, and a remedial framework providing for repair or replacement, followed by price reduction or termination, and with a right to compensation for damage to a device or other digital content, closely modelled on the UK Consumer Rights Act 2015. However, as noted above, progress on this draft legislation was paused with the publication of the European Commission’s proposal for a directive on contracts for the supply of digital content.[53]

The DCD and Part 3 of the Consumer Rights Bill 2022, broaden the proposed regulatory framework further by applying to digital content contracts (including digital content on a carrier) and digital service contracts, whether paid for by a price or personal data as counter-performance.[54] Without a pre-existing legislative framework to consider, Part 3 of the Consumer Rights Bill faithfully transposes the DCD, which itself closely mirrors the subjective and objective conformity obligations, as well as the remedial framework from the SGD, bringing a consistency to the law on sale of goods, digital content and digital services and promoting the ‘Europeanisation’ of the law. The DCD and Part 3 of the Consumer Rights Bill 2022 contain further rules on modification of digital content and digital services.

Part 3 of the Consumer Right Bill 3022 adds to this regulatory framework in a number of distinct ways.[55] For example, the vast majority of the definitions relevant to digital contracts (e.g. digital content, digital service, goods with digital elements, integration, updates, price, digital environment, compatibility, functionality, and interoperability) are novel to Irish consumer legislation. Given this novelty, the definitions of ‘digital content’ and ‘digital service’ have been expanded to include non-exhaustive illustrative examples from Recital 19 DCD, giving national legal effect to Recital 19, such that:

“digital content” means data which are produced and supplied in digital form, *including in particular computer programs, applications, video files, audio files, music files, digital games, e-books and other e-publication*; [authors’ italics]

“digital service” means-

- (a) a service that allows a consumer to create, process, store or access data in digital forms, or
- (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other user of that service,
and includes in particular video and audio sharing and other file hosting, social media, and word processing and games offered in the cloud computing environment; [authors’ italics]

As with Part 2 on sale of goods, Part 3 also contains rules on the trader’s right to supply and the consumer’s right to terminate where the trader does not have the right to supply.[56] Equally, Part 3 does not transpose a two-year liability period, but instead opts for the traditional 6-year limitation period.[57] And provision is made for a general right to withhold payment[58], and other remedies, such as damages, are expressly provided for, so long as a consumer cannot recover twice for the same loss.[59] Lastly, in relation to bundle or mixed contracts, the effects of the termination of the digital content element of such a contract on the other elements of the contract are regulated such that:

- (a) the consumer is entitled to terminate the contract if it were a digital content contract or a digital service contract only, and
- (b) the value of the goods or service to the consumer would be materially reduced in the absence of the digital content or digital service.[60]

2. Service Contracts

The third area of consumer contract law which is undergoing significant evolution with the enactment of the Consumer Rights Bill 2022, in due course, are contracts for the supply of services. Despite an early interest at European level to harmonise aspects of service contracts, in the form of a Proposal for a Council Directive on the liability of suppliers of services submitted by the Commission in 1990[61], this proposal was subsequently withdrawn [62], and so to this day, EU law remains silent on the general issue of liability of suppliers of services. Thus, without an EU Directive to transpose, you might expect that any new Irish rules on service contracts would follow a more traditional common law approach however, the new rules on service contracts evidence a clear EU influence, mixed with more traditional common law influences, evidencing both an evolution of the law and what might be described as *voluntary Europeanisation*. Before analysing this new legal framework for service contracts, it is useful to outline the current position pursuant to Part IV of the Sale of Goods and Supply of Services Act 1980, by way of contrast.

The Current Position (1980-2022)

Up to 1980, contracts for the supply of services were regulated by the common law only. Legislative intervention came in the form of Part IV of the Sale of Goods and Supply of Services Act 1980 (hereinafter the 1980 Act), which deals with contracts for the supply of services. This new legislation was intended to codify the existing common law regarding the quality of services supplied [63] and to bolster the protection of recipients of services by

regulating the use of exclusion clauses. Unlike the Sale of Goods Acts 1893 and 1980 which provided a reasonably comprehensive code of sale of goods law [64], Part IV of the 1980 can be described as modest in comparison, containing only four sections.

Thus, section 39 of the 1980 Act implies four terms into every contract for the supply of services where the supplier is acting in the course of a business. These are:

- (a) that the supplier has the necessary skill to render the service
- (b) that he will supply the service with due skill, care and diligence
- (c) that, where materials are used, they will be sound and reasonably fit for the purpose for which they are required; and
- (d) that, where goods are supplied they will be of merchantable quality.

In addition, section 40 states that any term implied by section 39 can be excluded (expressly, or by course of dealings, or by usage) except where the recipient of the service deals as a consumer, as defined,[65] in which case the express term limiting or excluding liability must be fair and reasonable, as defined,[66] and must be specifically brought to the attention of the buyer to be effective. However, the legislation does not provide a remedies regime for the recipient of services, and any remedies, such as termination of the contract and damages or specific performance remain regulated at common law.[67]

It is also notable that the 1980 Act does not include a comprehensive statutory definition of ‘services’,[68] or ‘contracts for the supply of services’ and although many such contracts are readily identifiable, this lack of definition has caused some difficulty. In *Carroll v An Post National Lottery*,[69] a Lotto agent, authorised by the defendant to sell national lottery tickets, incorrectly entered the numbers selected by the plaintiff, a player in one of the National Lottery games. As a result, the plaintiff failed to win approximately a quarter of a million pounds. The plaintiff argued, inter alia, that the supply of the lottery ticket by the defendant was a contract for the supply of a service, and that the defendant failed to supply the service with due skill, care and diligence, and hence there was a breach of section 39 of the 1980 Act. The High Court held that the contract between the plaintiff and the defendant was a contract to sell a lottery ticket which confers rights and obligations on the parties, but was not a contract for the supply of a service. Accordingly, the provisions of the 1980 Act had no application. This decision has been criticised for its narrow interpretation of a service contract.[70] This lack of definition and detail more generally are both addressed in the new rules on service contracts, which have also been given a distinct European twist.

Service Contracts Reformed – Part 4 of the Consumer Rights Bill 2022

Pursuant to Part 4 on Service Contracts of the Consumer Rights Bill 2022 (namely section 2 and sections 74-95), the new service contracts regime fills a number of gaps in the existing framework by introducing definitions for ‘services’ and ‘contract for the supply of services’ thereby bringing clarity to the scope and application of the legislation. The new rules also

provide a remedies regime and replace the existing implied terms with subjective and objective conformity requirements, both inspired by the DCD and the SGD, thereby extending the European influence into service contracts and bringing a coherence across the different consumer contracts within the scope of the Consumer Rights Bill 2022. Such coherence is to be welcomed for consumers who have to adjust to this new legal framework and for businesses, especially those who trade in a combination of goods, digital content/services, and other services.

First, as a preliminary issue in relation to definitions and scope of the new legislation, ‘service’ is defined broadly as any service or facility (other than digital content, a digital service and a service provided under a contract of employment or apprenticeship) and includes in particular

- (a) a service or facility for
 - (i) financial or other professional services,
 - (ii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,
 - (iii) accommodation,
 - (iv) communication, including electronic communication,
 - (v) transport, travel, parking or storage,
 - (vi) the care and maintenance of persons, animals or things, or
 - (vii) the construction, maintenance or repair of buildings
- (b) the supply of
 - (i) water, gas or electricity where it is not supplied in a limited volume or set quantity, or
 - (ii) district heating, and
- (c) any rights, benefits, privileges, obligations or facilities that are, or are to be, provided, granted or conferred in the course of a service.[71]

In addition, a ‘service contract’ means a contract (other than a sales contract and a contract for the sale of land) under which (a) a trader supplies or undertakes to supply a service to a consumer, and (b) the consumer pays or undertakes to pay the price of the service.[72] Based on these definition, Part 4 is stated to apply to any ‘service contract’ between a trader and a consumer, as well as the service element of a single contract which combines services with goods, digital content, or digital services.[73] Moreover, the relevant Government Minister is given power to exclude certain types of service contracts where the Minister is satisfied, after consultation, that such exclusion would be in the interests of consumer protection and fair competition.[74] And, inspired by the DCD, the relevant Government Minister is also given power to extend the scope of Part 4 to cover service contracts where the consumer does not pay or undertake to pay a price, and instead provides or undertakes to provide personal data to the trader, where the Minister is satisfied, after consultation, that service contracts for data are being concluded on a significant scale, and the regulation of such contracts would be in the interests of consumer protection and fair competition.[75]

In relation to consumer rights and service contracts, Part 4 provides first that the trader must supply the service in accordance with the contract, and at the agreed time or where no time or

period is specified or agreed, the trader shall supply the service within a reasonable time following the conclusion of the service contract.[76] Further rules on the supply of the service cover circumstances where there is a continuous supply of a service[77]; where the service is supplied on more than one occasion[78]; and if there is a short-term interruption of the supply of the service that is more than negligible.[79] Second, and again inspired by the DCD and the SGD, Part 4 provides that where a service contract is concluded, the trader is required to supply a service that is in conformity with the service contract[80] and a service is in conformity with the service contract if it complies with the subjective requirements in section 80 and the objective requirements in section 81.[81] Accordingly, the subjective requirements demand that the service supplied must:

- (a) comply with the terms of the service contract agreed between the trader and the consumer,
- (b) comply with any oral or written statement to the consumer by or on behalf of the trader in relation to the service or the trader on which the consumer relied when
 - (i) deciding to enter into the service contract, or
 - (ii) making any decision in relation to the service after entering into the service contract[82],
- (c) be reasonably fit for any purpose
 - (i) that the consumer made known to the trader at the time of, or before, the conclusion of the service contract, and
 - (ii) that the trader has accepted[83],
- (d) be of a nature and quality that can reasonably be expected to achieve any result
 - (i) that the consumer made known to the trader at the time of, or before, the conclusion of the service contract, and
 - (ii) that the trader has accepted[84], and
- (e) where the service contract is a distance contract or an off-premises contract, comply with any additional information requirements.[85]

In term of objective conformity, the following requirements apply:

- (a) the trader shall have the necessary skill to supply the service,
- (b) the trader shall supply the service with reasonable care and skill,
- (c) the trader shall supply the service in accordance with any applicable laws,
- (d) any materials used in the supply of the service shall be sound, reasonably fit for the purpose for which they are supplied, and correspond to any description provided by the trader, and
- (e) the service shall comply with any public statement in relation to the service made by, or on behalf of, the trader or any other person constituting a previous link in the chain of transactions relating to the service contract, particularly in advertising, unless the trader shows that
 - (i) the trader was not, and could not reasonably have been, aware of the public statement in question,

- (ii) at the time of conclusion of the service contract, the public statement had been corrected in the same way as it had been made (or in a comparable way), or
- (iii) the decision of the consumer to purchase the service could not have been influenced by the public statement.[86]

In relation to remedies, as with the conformity requirements, the influence of EU law is evident. But first, where there is a failure of supply, the consumer has an immediate right to terminate the contract where the trader will not supply the service, or where the service is essential, or where the consumer informed the trader at the time of, or before, the conclusion of the service contract that the supply of the service on or by a specified date was essential for the consumer and the trader fails to supply the service on or by that date. Otherwise, the consumer has the right to terminate a service contract where the trader fails to supply the service and then fails to comply with a request to do so within an additional period.[87] Second, where a service is not in conformity with the service contract, the consumer has the right to have the service *brought into conformity* with the service contract in the first instance.[88] This remedy operates along the same lines of repair and replacement in relation to goods, in that the trader must bring the goods into conformity free of charge; within a reasonable time after being informed by the consumer of the lack of conformity with the service contract, and without significant inconvenience to the consumer.[89] Moreover, this remedy does apply where it would be impossible to bring the service into conformity.[90]

In certain specified circumstances where the trader cannot or will not bring a service into conformity with a service contract the consumer has the right to a proportionate reduction in the price or to terminate the contract.[91] The consumer may be required to accept further attempts to bring goods into conformity by the trader in specific circumstances.[92] It will be objectively determined whether the lack of conformity is sufficiently serious to justify an immediate proportionate price reduction or termination of the contract having regard to the specific aspects of the nature and severity of the lack of conformity.[93] The right to terminate the contract will not apply where the lack of conformity is minor, and the burden of proof is on the trader in case of dispute. [94] As with Parts 2 and 3 on goods, and on digital content and digital services there are further provisions on the remedies of price reduction[95], on consumer and trader obligations on termination[96], including the trader's duty to provide a proportionate reimbursement of any price.[97] In addition, the consumer may have the right to withhold any outstanding part of the payment, until the trader fulfils the obligation[98], while other remedies (such as claiming damages; relying on failure of the trader to be compliant against a claim by the trader for payment of the price; seeking to recover money paid for a non-compliant service; recovery of costs from the trader for having the non-conforming service remedied elsewhere) can be pursued where the service is not in conformity with a service contract provided that there is no duplication of claims.[99] The subjective and objective conformity requirements are implied into every service contract and shall have effect as if they were terms of such a contract to facilitate such claims.[100]

Lastly, there are a number of miscellaneous provisions included in Part 4. For example, where a price has not been paid and the contract does not set a price or other consideration, a reasonable price is payable.[101] And the legislation provides that the trader's liability and the consumer's rights and remedies under Part 4 cannot be excluded or restricted.[102]

3. Unfair Contract Terms

The last significant area of evolution of consumer rights relates to unfair contract terms and Part 6 of the Consumer Rights Bill 2022. The contrast between the initial transposition of Directive 93/13 on unfair contract terms (the UCTD) in Ireland in 1995, and the current proposals for the transposition of the UCTD and the amendment of the rules on unfair terms in the Consumer Rights Bill 2022 illustrates a significant difference of approach, with the initial transposition best described as minimalist, and the latter proposed transposition as engaged and protectionist.

The UCTD is a rare creature these days: a minimum harmonisation directive at a time when maximum harmonisation dominates.[103] When Ireland first transposed Directive 93/13, in the form of the EC (Unfair Terms in Consumer Contracts) Regulations 1995[104], it was one of a minority of states that did not add to or enhance the minimum protection of the Directive: instead it took a minimalist approach.[105] The 1995 Regulations adopted a 'copy and paste' approach from Directive 93/13 to transposition. This reflected the relative novelty of unfair terms provisions and good faith obligations in Irish law. At that time, there were no pre-existing rules in Irish law on unfair terms, and so the 1995 Regulations were welcome because they were seen to fill a gap, although in due course they came to be viewed as a missed opportunity also.[106] The minimalist nature of the transposition also reflected the constitutional position in Irish law. The Directive was transposed by secondary legislation, in the form of regulations, made under the European Communities Act 1972, rather than being transposed by primary legislation in the form of an Act of Parliament.[107] Accordingly, section 3 of the European Communities Act 1972 empowers the relevant Government Minister to adopt regulations for the purpose of giving effect to European law, but transposing regulations cannot be used to go beyond what is necessitated by European law. In contrast, the prospect of a consolidating Act of Parliament, in the form of the Consumer Rights Bill 2022, affords Ireland the opportunity to re-engage more actively with the minimum harmonising nature of the UCTD and enhance consumer protection.[108]

The Consumer Rights Bill 2022 will revoke the 1995 Regulations and regulate unfair terms in consumer contracts in Part 6. Part 6 retains the core features of the UCTD – namely, the general unfairness test[109] and the core terms exemption[110] - but in doing so it makes a number of important amendments to the existing rules relating to the application of the rules, it seeks to clarify aspects of the core terms exemption and transparency requirements with a view to enhancing consumer protection, while also revising the former grey list and introducing a black list, and lastly, it puts the own motion obligation, a novel feature in Irish law, on a statutory basis.

Scope of Application

First, while Directive 1993/13 and the 1995 Regulations were limited in application to non-individually negotiated, that is, preformulated standard form contracts or terms, the Consumer Rights Bill 2022 extends the scope of Part 6 to apply to consumer contracts or to a term of a consumer contract which has been individually negotiated[111], and thus Part 6 will apply both to negotiated and non-negotiated contracts and contract terms. It has been noted that this is a significant change in principle, though its practical effect is likely to be less marked.[112] Accordingly, it is argued that the vast majority of consumer contracts are standard in form and this change will affect a very small portion of consumer contracts. It is also argued that contract terms agreed between a trader and a consumer are more likely to be fair than standard terms. Against these arguments however is the fact that some consumer contracts are negotiated and there is no guarantee that they will be fair given the asymmetry of information and bargaining power characteristic of consumer contracts. Thus, applying Part 6 to both negotiated and non-negotiated terms will simplify the law by bringing a consistency in the treatment of negotiated and non-negotiated terms. It will also prevent disputes about whether or not terms have been negotiated and will simplify the application of Part 6 to contracts that are partly negotiated and partly non-negotiated.

Second, Part 6 of the Consumer Rights Bill 2022 also brings clarity to the law in relation to the counter-performance or *consideration* provided for contracts. Directive 93/13 and the 1995 Regulations do not define ‘contract’; nor do they expressly provide that only contracts where the consumer provides monetary consideration come within their scope. Case Law from the Court of Justice of the European Union (CJEU) [113], and Commission Guidance [114] make clear that monetary consideration is not a prerequisite to the application of Directive 93/13. Thus, the Consumer Rights Bill 2022 provides that a consumer contract is not excluded from the application of Part 6 by reason only that the consumer does not pay a price under the contract. Given the growth in contracts for the supply of digital content and digital services, such as social media services where typically data is supplied as counter-performance or consideration, this clarification in the legislative framework is timely and welcome.

Clarification around core exemption and transparency requirements

As noted above, Part 6 retains the core features of the UCTD, including the core terms exemption [115] but in doing so it seeks to incorporate CJEU case law on the point and ensure that the core terms exemption is not interpreted or applied too broadly. Accordingly, a term shall not be assessed for fairness to the extent that it

- (a) specifies the main subject matter of the contract *and lays down the essential obligations under it* [authors’ italics][116]; or
- (b) relates to the adequacy of the price or remuneration payable.[117]

Moreover, section 131(3) provides that the reference to ‘the price or remuneration payable’ does not include

- (a) a payment that is incidental or ancillary to the price or remuneration payable under the contract for the goods, digital content, digital service, service or other subject matter of the contract supplied in exchange for such price or remuneration, or
- (b) a payment that is contingent on whether a particular event occurs or not.

This provision is a direct response to the broad interpretation of the core terms exemption taken by the UK Supreme Court in *Office of Fair Trading v Abbey National*.^[118] In 2007, the Office of Fair Trading (OFT) commenced an investigation under the UK Regulations that implemented the UCTD into the fairness of the contract terms relating to charges for unauthorised overdrafts in personal current accounts. With the agreement of seven banks and one building society, the OFT brought a test case on the question of whether the charges for unauthorised overdrafts were assessable for fairness under the Regulations. Both the High Court and the Court of Appeal found in favour of the OFT. However, and without making a preliminary reference to the CJEU seeking guidance on the interpretation of the core terms exemption, the Supreme Court overturned the Court of Appeal judgment. It held that the charges for unauthorised overdrafts were not assessable for fairness on the ground that ‘any monetary price or remuneration payable under the contract would naturally fall within the language’ of the core terms exemption. The Supreme Court judgment is widely viewed as an excessively broad interpretation of the core term exemption ^[119] and one that does not accord with subsequent jurisprudence of the CJEU. Thus section 131(3) seeks to bring clarity to the interpretation of the core terms exemption by promoting a narrower interpretation, designed to align with CJEU jurisprudence.^[120]

The Consumer Rights Bill 2022 takes a similar approach to the issue of transparency: it seeks to bring clarity to the interpretation of the concept of transparency by expanding on its meaning in a manner in line with CJEU jurisprudence which provides that the requirement of transparency ‘cannot be reduced’ to a requirement that contract terms be ‘formally and grammatically intelligible’ but ‘must be understood in a broader sense’.^[121] Accordingly, having re-stated the requirements that terms in consumer contract should be transparent^[122], section 134(2) provides that a term of a consumer contract is transparent if

- (a) the term is expressed in plain and intelligible language,
- (b) in the case of a term that is in writing, the term is legible and presented clearly,
- (c) the term is made available to the consumer in a manner that gives the consumer a reasonable opportunity to become acquainted with it before the conclusion of the contract, irrespective of whether or not such an opportunity is availed of,
- (d) in the case of a term that is novel or onerous, the term has specifically been brought to the consumer’s attention in such a way that the average consumer would be aware of the term,
- (e) any costs or other financial consequences deriving from the term would be comprehensible to the average consumer, and
- (f) the term complies with such other requirements as may be prescribed.

This expanded list of transparency requirements derives from EU and national jurisprudence. For example, the provision at paragraph (c) was inspired by the transparency requirement at

Article 31(2) of the European Commission's 2008 proposal for a Directive on Consumer Rights which was not included in the Directive as finally adopted. Paragraph (c) also ties-in neatly with Recital 20 of UCTD which states: 'Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms.' The provision at paragraph (d) derives from a well-established principle in Irish contract law that a party seeking to enforce an onerous or unusual contract term must show that it has been brought to the attention of the other party.[123] Paragraph (e) is inspired by CJEU jurisprudence including *Kasler*. [124]

In assessing transparency, the matters to be taken into account also have been expanded beyond those listed in UCTD to include the means by which the contract is communicated and presented to the consumer, and compliance with information obligations, as per the Commission Guidance on the UCTD which states that the 'fact of whether a seller or supplier has complied with sector-specific requirements is an important element when assessing compliance with the transparency requirements under the UCTD'. [125]

In addition, in the case of dispute, it is for the trader to show that a term in a consumer contract is transparent. [126]

Black List; Grey List; and Presumptions

The UCDT and the 1995 Regulations were notable for including an indicative and non-exhaustive grey list of 17 terms which *may* have been unfair. The Consumer Rights Bill 2022 moves away from this position to utilise a black-list of nine terms which are always unfair [127]; and an indicative and non-exhaustive grey list of 24 terms which *are presumed* to be unfair. [128] As a result, there is greater clarity in the law in relation to both lists, and higher levels of consumer protection.

Subject to certain exceptions, the following terms are always unfair if their object or effect is:

- (a) to exclude or limit the liability of a trader for the death of or personal injury to a consumer arising from an act or omission of the trader,
- (b) to require a consumer to pay for goods that have not been delivered or digital content, a digital service or a service that has not been supplied,
- (c) to impose on a consumer a burden of proof that, according to the applicable law, would otherwise be on a trader,
- (d) to exclude or hinder a consumer's right to take legal action or exercise a legal remedy, including by requiring the consumer to take a dispute to an arbitration procedure that is not governed by law,
- (e) to require a consumer to bear his or her own costs in respect of any arbitration,
- (f) to give a trader the exclusive right to determine whether goods are, or digital content, a digital service or a service is, in conformity with the contract,
- (g) to give a trader the exclusive right to interpret any term of the contract,
- (h) to grant the trader a shorter notice period to terminate the contract than the notice period required of the consumer, or

- (i) to confer exclusive jurisdiction for disputes arising under the contract in a court in the place where a trader is domiciled unless the consumer is also domiciled in that place.

Some of these terms derive from the UCTD grey list [129]; some derive from Article 84 of the European Commission proposal for a Regulation on a Common European Sales Law,[130] with para (i) also reflecting CJEU case law.[131] All these terms were identified as “both sufficiently serious and clear” to be accorded black-list status.[132]

The grey list of terms found in Part 1 of Schedule 5 increases the level of consumer protection over and above that in the 1995 Regulation in two different ways. First, while the grey list in the UCTD and the 1995 Regulations were identified as terms ‘that may be regarded as unfair’, section 133 identifies the grey list terms as terms which are ‘presumed to be unfair’, although clearly the presumption of unfairness is rebuttable. Second, the grey list in Part 1 of Schedule 5 includes a number of additions to the list of terms, namely at paras 4, 8, 13, and 18-24.

Own Motion Obligations

Lastly, although the own motion obligation has been recognised in Irish case law[133], the Consumer Rights Bill 2022 puts this obligation on a statutory footing in section 136 which states that in proceedings before a court relating to a term of a consumer contract, the court shall determine whether the term is unfair irrespective of whether a party to the proceedings has raised that question or indicated an intention to raise it. In line with CJEU case law, this obligation does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to determine whether the term is unfair.

This obligation is limited to ‘the court’ to determine the fairness of a contract term. In drafting this provision, a question was raised as to whether the obligation should apply also to officers of the court who exercise limited functions of a judicial nature, such as county registrars. This question was addressed in *Pepper Finance (Ireland) DAC v Cannon* [134], where the Supreme Court noted that it could raise ‘difficult constitutional issues’ if a county registrar were to make a determination on the enforceability of a contract term. This is because the Irish Constitution (Bunreacht na hÉireann, 1937) with an implied separation of powers, requires that the judicial function of the state can only be exercised by a court of law.[135] In these circumstances, the appropriate course is for the county registrar to consider the contract ‘by reference to the relevant EU jurisprudence’ to see if there is a potential argument/defence to be made on this basis. If there is such an argument/defence, the case must be sent forward to the relevant court for determination.

II. CONCLUDING REMARKS

The Sales Law Review Group in its Final Report in 2011 recommended that a separate Consumer Contract Rights Act should be enacted that would incorporate the main statutory provisions applicable to consumer contracts.[136] The enactment of the Consumer Rights Bill 2022 later this year will deliver on that recommendation, after a long gestation period, marking a significant evolution in Irish consumer law. A large part of that evolution has clearly

been driven by recent developments in EU law, namely the DCD and the SGD, but even in relation to these two maximum harmonisation directives, their impact on the national legal order has been different. The rules on Part 3 of the Consumer Rights Bill on digital content and digital services are very EU dominated; whereas the rules in Part 2 on sale of goods take a more hybrid approach, marrying the various EU concepts and norms with more traditional common law rules, to maximise consumer protection. Nevertheless, much like the Sale of Goods Act 1893 was described as a ‘codification’ of the common law at that time, the Consumer Rights Bill 2022 represents a mini-codification of consumer contract law, where concepts and norms are shared across different Parts of the legislation, bringing a coherence to the law and making it more accessible to consumers and businesses alike. Given the novelty of much of the Consumer Rights Bill 2022, once enacted, the next major challenge will be in terms of informing and educating consumers, business and those who provide legal advice, of these new rights and responsibilities.

It is also important to note that this EU / national interaction is not a one-way system. In those areas which go beyond EU law, whether it be the longer limitation (or liability) periods as a means of achieving greater sustainability, or the regulation of service contracts using the concepts of subjective and objective conformity and the associated remedial scheme to fill a regulatory gap, inspiration can be drawn and lessons can be learned by other member states and the EU institutions from this evolution of Irish consumer law.

[1] For text of Bill, associated materials and progress through Parliament see <https://www.oireachtas.ie/en/bills/bill/2022/44/> (last accessed 15 July 2022).

[2] Namely, Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1; Directive 2019/771 on certain aspects concerning contracts for the sale of goods [2019] OJ L 136/28; and Directive 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7.

[3] The one aspect of the Bill which is not considered in this paper is Part 5 on consumer information and cancellation rights. Part 5 does not evidence any significant evolution in the law as it largely re-enacts Chapters I to III of Directive 2011/83/EU as transposed by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013), with amendments pursuant to Directive (EU) 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules, [2019] OJ L 328/7.

[4] See Republic of Ireland Act 1948.

[5] See Art. 72 of the 1922 Constitution in the First Schedule to the Constitution of the Irish Free State (Saorstát Éireann) Act 1922. See now Art. 50 of the Constitution, Bunreacht na hÉireann, 1937 which provides that ‘Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the coming into force of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by the Oireachtas.’

[6] *Wallis v Russell* [1902] 2 IR 585; see also *Priest v Last* [1903] 2 KB 148; *Grant v Australian Knitting Mills Ltd* [1936] AC 85.

[7] Sale of Goods and Supply of Services Act 1980, s.9.

[8] See now ss.12-15 of the 1893 Act, as substituted by s.10 of the 1980 Act.

[9] Sale of Goods Act 1893, s.14(3).

[10] Sale of Goods and Supply of Services Act 1980, s.3 and Sale of Goods Act 1893, s.55.

[11] Sale of Goods Act 1893, s.53(2).

[12] Sale of Goods and Supply of Services Act 1980, s.12.

[13] Sale of Goods and Supply of Services Act 1980, ss.15-19.

[14] S.I. No. 11 of 2003.

[15] Council Directive 99/44, [1999] OJ L171/12; see Recitals 1–5.

[16] S.I. No. 11 of 2003 reg.5.

[17] S.I. No. 11 of 2003 reg..

[18] S.I. No. 11 of 2003 reg.3(1).

[19] S.I. No. 11 of 2003 reg.3(2) – (4).

[20] See e.g. White, “The EC Directive on Certain Aspects of Sale of Consumer Goods and Associated Guarantees: a Step Forward and Two Steps Back?” (2000) 7 *Commercial Law Practitioner* 3.

[21] See Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services*, (Prn. A11/1576) 2011, p.10, available at <https://enterprise.gov.ie/en/What-We-Do/Consumer-Competition/Sales-Law-Review-Group/> (last accessed 15 July 2022).

[22] See Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services*, (Prn. A11/1576) 2011, p.10, available at <https://enterprise.gov.ie/en/What-We-Do/Consumer-Competition/Sales-Law-Review-Group/> (last accessed 15 July 2022).

[23] See <https://enterprise.gov.ie/en/Consultations/Consultation-on-the-Scheme-of-a-proposed-Consumer-Rights-Bill.html> (last accessed 15 July 2022).

[24] COM (2015) 634 final and COM (2015) 635 final. The former proposal was later extended to cover digital services and the latter proposal was subsequently generalised to cover all consumer sales.

[25] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, [2019] OJ L 136/1.

[26] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, [2019] OJ L136/28.

[27] See <https://enterprise.gov.ie/en/Consultations/Consultation-on-Scheme-of-Consumer-Rights-Bill-2021.html> (last accessed 15 July 2022).

[28] Art. 4.

[29] Arts 5 and 10.

[30] Arts 6-7.

[31] Arts 13-16.

[32] Art. 11.

[33] Art 17.

[34] Sale of Goods Act Supply of Services Act 1980, s.3.

[35] *R & B Customs Brokers Ltd v United Dominions Trust Co* [1988] 1 All E.R. 847.

[36] Consumer Rights Bill 2022, s.2. See SGD, Recital 22 & Art. 2.

[37] Sale of Goods Act, 1893 s.62.

[38] Section 20 provides that the subjective and objective conformity requirements and other trader / seller obligations shall have the effect as if they were terms of the contract. This provision is designed to facilitate an action for damages, as an additional remedy provided for in s. 34, following delivery of non-conforming goods.

[39] The Consumer Rights Bill, 2022, also expands on the rules in relation to commercial guarantees: ss.40-45.

[40] Consumer Rights Bill 2022, s.16(1).

[41] Consumer Rights Bill 2022, s.16(2).

[42] See Recital 33 SGD. Also s.17(2) provides that the information that a trader is required to provide in relation to distance and off-premises contracts forms part of the sales contract, and s.17(3) states that goods sold in these circumstances must comply with any terms of the contract which derive from these information requirements that are additional to the subjective requirements in s.17(1); see Recital 26.

[43] *James Elliot Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269, see further White, [2012] *Irish Jurist* 225; approved in [2014] IESC 74.

[44] Australian Competition and Consumer Act 2010, s.266 of Schedule 2.

[45] Statute of Limitations, 1957, s.11.

[46] See e.g. Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services* (July 2011) paras 2.5 – 2.29 (available at <https://enterprise.gov.ie/en/Publications/Report-on-the-Legislation-Governing-the-Sale-of-Goods-and-Supply-of-Services.html> last accessed 15 July 2022).

[47] See e.g. Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services* (July 2011) paras 2.24 (available at <https://enterprise.gov.ie/en/Publications/Report-on-the-Legislation-Governing-the-Sale-of-Goods-and-Supply-of-Services.html> last accessed 15 July 2022).

[48] Consumer Rights Bill 2022, s.12(5) and s.49(3).

[49] Consumer Rights Bill 2022, s.49(2).

[50] See Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services*, (Prn. A11/1576) 2011, para 2.6, available at <https://enterprise.gov.ie/en/What-We-Do/Consumer-Competition/Sales-Law-Review-Group/> (last accessed 15 July 2022).

[51] See Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services*, (Prn. A11/1576) 2011, para 2.29, available at <https://enterprise.gov.ie/en/What-We-Do/Consumer-Competition/Sales-Law-Review-Group/> (last accessed 15 July 2022).

[52] See <https://enterprise.gov.ie/en/Consultations/Consultation-on-the-Scheme-of-a-proposed-Consumer-Rights-Bill.html> (last accessed 15 July 2022).

[53] COM (2015) 634 final.

[54] Consumer Rights Bill 2022, s.2 and s.49.

[55] Although Part 3 did not exercise other options in relation to (i) the consequences for contract of withdrawal of consent to processing of personal data (Recitals 39-40); (ii) the application of Directive to metadata collected by trader and cases where access to digital content or digital services involves exposure to advertisements (Recital 25).

[56] Consumer Rights Bill 2022, s.50 and Recital 12.

[57] Consumer Rights Bill 2022, s.58(5) and (6).

[58] Consumer Rights Bill 2022, s.69.

[59] Consumer Rights Bill 2022, s.73.

[60] Consumer Rights Bill 2022, s.65.

[61] COM(90) 482 final, [1991] OJ C 12/8.

[62] COM(94) 260 final. The Economic and Social Committee's Opinion on this Proposal for a Council Directive on the Liability of Suppliers of Services goes so far in explaining the reasons for its withdrawal: 'When one examines this proposal it is clear that its implementation would put a brake on any research and innovation in the fields of activity of the liberal professions. It would lead to defensive medicine, defensive legal, commercial and fiscal consultation, and defensive advisory work by architects, engineers and building contractors. This was not the aim which consumers had in view.' [1991] OJ C 269/40, para 2.8.

[63] See, e.g. *Brown v. Norton* [1954] I.R. 34 at 56, where it was stated that when there is an agreement to purchase a dwellinghouse in the course of construction the work which remains to be done "will be carried-out in a good and workmanlike manner and with sound and suitable materials".

[64] The 1893 Act is expressed to be "[a]n Act for codifying the law relating to sale of goods", although it is not a *code* in the civil law sense of the word.

[65] 1980 Act s.3(1) provides that a party deals as a consumer in relation to another party if:

- (a) he neither makes the contract in the course of a business; and
- (b) the other party does make the contract in the course of a business; and
- (c) the goods or services supplied are those ordinarily supplied for private use or consumption.

See *In re Henry O'Callaghan v Hamilton Leasing (Ireland) Ltd and Access Refrigeration and Shop Fitting Ltd* [1984] I.L.R.M. 146 and *Cunningham v Woodchester Investments and Inter-call Ltd*, unreported, High Court, McWilliam, J., November 16, 1984.

[66] Schedule to 1980 Act. Section 2 of the Schedule lists five particular factors that may be relevant to the fair and reasonable test:

- (a) the relative bargaining strength of the parties, including alternative means by which the customer's requirements can be met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar transaction with other persons, but without having to accept a similar term;
- (c) whether the customer knew or ought reasonably have known of the existence and extent of the term;
- (d) where the term excludes or restricts liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with the condition would be practicable;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

[67] Of the remaining provisions in Part IV, s.41 provides that it is a criminal offence to display, publish, supply or otherwise furnish any statements purporting to restrict the rights of a recipient of a service; and s.42 addresses conflict of law issues.

[68] Although the legislation does exclude certain services from its scope, including meteorological or aviation services provided by the Minister for Transport, or anything done under a contract of service (1980 Act, s.2); contracts for the carriage of passengers or goods by land, sea, air or inland waterway from one place to another within the State (1980 Act, s.40(6)); and the provision of a universal postal service by a universal postal service provider (Communications Regulation (Postal Services) Act 2011, s. 26(3)).

[69] [1996] 1 I.R. 433.

[70] Clark, *Contract Law in Ireland*, 8th edn (Dublin: Thomson Round Hall, 2016), 8-46.

[71] Consumer Rights Bill 2022, s.2. This definition of “services” is based, with some additions and alterations, on the definition at section 2(1) of the Consumer Protection Act 2007.

[72] Consumer Rights Bill 2022, s.2.

[73] Consumer Rights Bill 2022, s. 75(1) and (2).

[74] Consumer Rights Bill 2022, s. 76(1) and (3).

[75] Consumer Rights Bill 2022, s. 76(2) and (4).

[76] Consumer Rights Bill 2022, s. 78. A similar ‘reasonable time’ obligation can be found in s.52(1) and (2) of the UK Consumer Rights Act 2015; s. 30 of the New Zealand Consumer Guarantees Act 1993; and s.62 of Schedule 2 of the Australian Competition and Consumer Act 2010.

[77] Consumer Rights Bill 2022, s. 78(4).

[78] Consumer Rights Bill 2022, s. 78(5).

[79] Consumer Rights Bill 2022, s. 78(7).

[80] Consumer Rights Bill 2022, s. 78(1).

[81] Consumer Rights Bill 2022, s. 78(2).

[82] This provision is new but is akin to the requirement requiring goods, digital content and digital services to comply with their description.

[83] Again this is a new provision in relation to services. Under Part IV of the Sale of Goods and Supply of Services Act 1980, the supplier of a service is not liable if the service fails to achieve a purpose or result indicated by the consumer provided that the supplier has exercised due skill, care and diligence. This fitness for particular purpose provision is akin to corresponding provisions applying to goods and to digital content and digital services. It is also in line with a recommendation of the Sales Law Review Group and is similar to a provision at s.29 of the New Zealand Consumer Guarantees Act 1993 and s.61(1) of Schedule 2 of the Australian Competition and Consumer Act 2010. Those enactments state that the provisions do not apply where the circumstances show that the consumer did not rely on the skill or judgment of the trader or that it was unreasonable for the consumer to so rely. This provision, like the fitness for particular purposes rules for goods, digital content and digital services in Parts 2 and 3, is subject to a stronger requirement that the trader accepts the purpose made known by the consumer. If the supplier of a service considers that he is not in a position to provide a service reasonably fit for the purpose made known by the consumer, he can decline to accept the proposed purpose.

[84] Again this is a new provision in relation to services. This subjective requirement is similar to s.29 of the New Zealand Consumer Guarantees Act 1993 and s.61(2) of Schedule 2 of the Australian Competition and Consumer Act 2010. As with the previous provision, it is subject to a requirement that the result to be achieved by the service be accepted by the trader. It is important to note that the provision does not require the service to achieve a particular result, but rather that it should be such that it can reasonably be expected to achieve the required result. If the trader considers that he is not in a position to provide a service reasonably fit for the purpose required or

one that can reasonably be expected to achieve the result made known by the consumer, he or she can decline to accept the result proposed by the consumer.

[85] Consumer Rights Bill 2022, s.80.

[86] Consumer Rights Bill 2022, s. 81.

[87] Consumer Rights Bill 2022, s. 84.

[88] Consumer Rights Bill 2022, s. 85(1).

[89] Consumer Rights Bill 2022, s. 85(3).

[90] Consumer Rights Bill 2022, s. 85(2).

[91] Consumer Rights Bill 2022, s. 86(1).

[92] Consumer Rights Bill 2022, s. 86(3).

[93] Consumer Rights Bill 2022, s. 86(4).

[94] Consumer Rights Bill 2022, s. 86(5) and (6).

[95] Consumer Rights Bill 2022, s. 87.

[96] Consumer Rights Bill 2022, ss. 88-89.

[97] Consumer Rights Bill 2022, s. 90.

[98] Consumer Rights Bill 2022, s. 91.

[99] Consumer Rights Bill 2022, s. 95.

[100] Consumer Rights Bill 2022, s. 82.

[101] Consumer Rights Bill 2022, s. 83. Similar provisions can be found at s.51 of the UK Consumer Rights Act 2015 and at s.31 of the New Zealand Consumer Guarantees Act 1993.

[102] Consumer Rights Bill 2022, s. 94.

[103] [1993] OJ L 95/29. Art. 8 of the Directive permits Member States to ‘adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.’

[104] S.I. No. 27 of 1995.

[105] Schulte-Nolke, H. et al (eds). *EU Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States*, (Sellier; 2007) pp. 376-403.

[106] Donnelly, M. ‘Unfair Terms in Consumer Contracts: Time for Legislative Recalibration?’ (2012) 19 *Commercial Law Practitioner* 114.

[107] This is a common and necessary method of transposition given the sheer volume of EU measures which must be implemented in member states: *Meagher v Minister for Agriculture* [1994] 1 IR 329. It also has the advantage of relative speed, when compared with the enactment of primary legislation through the Parliamentary process.

[108] Since its initial transposition, there has only been one addition to the substantive rule in the 1995 Regulations which provided that a term requiring the consumer party to an arbitration to bear his or her own costs would always be deemed to be unfair: Arbitration Act 2010, s.21(6).

[109] Consumer Rights Bill 2022, s.130.

[110] Consumer Rights Bill 2022, s.131(1).

[111] Consumer Rights Bill 2022, s.127(2)(a).

[112] *Scheme for a Consumer Rights Bill 2021*, p.225 available at <https://enterprise.gov.ie/en/Consultations/Consultation-on-Scheme-of-Consumer-Rights-Bill-2021.html> (last accessed 11 July 2022).

[113] Case C-74/15 *Dumitru Tarcau* and Case C-534/15 *Dumitras* where the CJEU ruled that a guarantee contract under which a private person provided a guarantee for a loan taken out by others came within the scope of the Directive even though the guarantee contract did not include any requirement for monetary consideration on the part of the guarantor.

[114] In particular, the European Commission states that ‘contracts between consumers and providers of social media services must be considered to be covered by the UCTD regardless of whether consumers have to pay certain amounts of money or whether the consideration for the services consists in consumer generated content and profiling’: European Commission, *Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts*, (2019) pp. 9-10.

[115] Consumer Rights Bill 2022, s.131(1).

[116] Case C-96/14, *Van Hove*, para. 33; Case C-26/13 *Kasler*, para. 49.

[117] UCTD Art. 4(2).

[118] [2009] UK SC 6.

[119] See Donnelly, “Loan Contracts and the Unfair Terms Regulations”, (2010) 17 *Commercial Law Practitioner* 107; Morgan, “Bank Charges and the Unfair Terms in *Consumer Contracts Regulations 1999: the end of the road for consumers*”, [2010] *Lloyd’s Maritime and Commercial Law Quarterly* 208; Davies, “Bank charges in the Supreme Court”, (2010) 69 *Cambridge Law Journal* 21.

[120] See generally e.g. Case C-34/13 *Kusionova*, para. 77; Case C-51/17 *Ilyes and Kiss*, para. 54; Case C-186/16 *Andricuic*, para. 31; re UCTD see Case 472/10 *Invitel*, para. 23; Case C-143/13 *Matei*, para. 54-56; Case C-26/13, *Kásler v OTP Jelzálogbank Zrt*; Case C-96-14, *Van Hove v CNP Assurances SA*.

[121] Case C-26/13 *Kasler*, paras 70-71; Case C-96/14 *Van Hove*, paras 40 and 50; Case C-186/16 *Andricuic*, paras 44-45.

[122] Consumer Rights Bill 2022, s.134(1).

[123] *Interfoto Picture Library v Stiletto Visual Programmes* [1988] 1 ALL ER 348; *Noreside Construction v Irish Asphalt* [2014] IESC 68.

[124] Case C-26/13 *Kasler*, para. 50; Case 143/13 *Matei and Matei*, para. 74; Case C-186/16 *Andricuic*, para. 47; and Case C-384/14 *Bucura*, para. 66.

[125] European Commission, *Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts*, (2019) p. 31.

[126] Consumer Rights Bill 2022, s.134(4).

[127] Consumer Rights Act 2022, s.132.

[128] Consumer Rights Act 2022, s.133.

[129] E.g. paras (a); (d) and (f).

[130] E.g. paras (b) and (h).

[131] Joined Cases C-240/98 to 244/98 *Oceano Grupo*.

[132] *Scheme for a Consumer Rights Bill 2021*, p.236 available at <https://enterprise.gov.ie/en/Consultations/Consultation-on-Scheme-of-Consumer-Rights-Bill-2021.html> (last accessed 11 July 2022).

[133] *Allied Irish Banks v Coughlin* [2016] IEHC 752; affirmed by the Supreme Court in *Pepper Finance (Ireland) DAC v Cannon* [2020] IESC 2.

[134] [2020] IESC 2.

[135] Bunreacht na hÉireann, 1937, Art. 6 and Arts 34-35.

[136] See Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services*, (Prn. A11/1576) 2011, p.422, available at <https://enterprise.gov.ie/en/What-We-Do/Consumer-Competition/Sales-Law-Review-Group/> (last accessed 15 July 2022).

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