

Contracts concluded away from business premises and contracts concluded through distance communication *in light of a proposal for a directive on consumer rights*

In this article, the author attempts to evaluate the necessity of approving the new directive on consumer rights, with an emphasis on passages, which focus on contracts concluded away from business premises and distance contracts. It also evaluates whether a high standard of consumer protection is maintained in the drafted directive, especially in terms of the newly implemented application of the principle of maximum harmonisation. In addition, the benefits of the directive for the EU market are considered along with a number of changes that the draft would introduce.

I. Introduction

At the beginning of October, last year, the Proposal for a directive of the European Parliament and of the Council on Consumer Rights began its journey through the legislative process. In light of the current world crisis, support for conducting business, which this draft clearly provides, is increasing to new dimensions. The new directive on consumer rights should replace existing directives on unfair terms in consumer contracts¹, on sales and associated guarantees², on distant sales³ and on sales conducted away from business premises⁴. The purpose of this ambitious reworking of the consumer Acquis is, in the words of Meglena

¹ Council Directive 93/13/EEC on unfair terms in consumer contracts.

² Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

³ Directive 97/7/EC on the protection of consumers in respect of distant contracts.

⁴ Directive 85/577/EEC on the protection of the consumer in respect of contracts negotiated away from business premises.

Kunev, EU Commissioner for consumer protection, *“to strengthen protection and fill in gaps in key areas, which weaken consumer trust. A unified market has the potential to provide consumers with much greater selection and opportunities. However, the European Union needs a safety net of rights, so that consumers will have the certainty that they can make purchases with peace of mind.”*

II. Increasing legal security for consumers and entrepreneurs

A pivotal change focuses on consumer contracts⁵ concluded away from business premises and contracts concluded through distance communication⁶ – primarily contracts concluded through the Internet. In contrast with the original directives on sales away from business premises⁷ and on distance sales⁸, which applied a principle of minimal harmonisation⁹ (Article 8 of Directive 93/13/EEC, Article 8, par. 2 of Directive 99/44/EC, Article 8 of Directive 85/577/EEC, Article 14 of Directive 97/7/EC), the new proposal maintains a principle of maximum harmonisation¹⁰. Thanks to this principle, consumer trust in cross-border business within the EU should increase and, at the same time, bureaucracy, limiting business carried out across member state borders and depriving consumers of better selection and competitive offers, should also be reduced. In effect, then, consumers shall be

⁵ Consumer contract shall be understood as any contract between a seller on one side and a purchasing consumer (not an enterprise or entrepreneur) on the other side.

⁶ Article 7, Proposal for a directive of the EP and the Council on Consumer Rights, COM 614/2008: *“means of distance communication” shall be understood as any means that can be utilised to conclude a contract between a business and a consumer, without requiring their simultaneous physical presence;*

⁷ Directive 85/577/EEC on the protection of the consumer in respect of contracts negotiated away from business premises.

⁸ Directive 97/7/EC on distance sales.

⁹ Minimal harmonisation consists of the ability of member states to accept or retain in force stricter rules regarding consumer protection.

¹⁰ Article 4, Proposal for a directive of the EC and of the Council on Consumer Rights, COM 614/2008: *“Member states, within the framework of their internal rule of law, may neither retain in force nor introduce measures anomalous to the measures of this Directive, including more or less strict measures for the purpose of ensuring a different level of consumer protection.”*

assured that if they purchase goods through distance sales or away from business premises in any EU state, they will, in accordance with the proposal, be able to enforce the right to withdraw from the purchase contract without giving a reason, within a period of 14 days¹¹ after receiving the goods (in the case of distance sales) or from the date the contract is signed (in the case of contracts concluded away from business premises)¹². At the current time, this is so in the Czech rule of law and consumers can freely enforce the right mentioned above.

Nonetheless, in other EU countries for instance a variety of periods, differing in length, have been designated for withdrawing from a contract concluded by means of distance communication without giving a reason. For example, Slovakia, Austria, France and Great Britain have set the period for withdrawing from a contract at seven days, which is the limit designated by existing directives as the shortest possible period. In Poland and Italy, consumers have the right to withdraw from a contract over a ten-day period, and in Germany and many other countries this “*cooling off period*” is set, similar to the Czech Republic, at 14 days. In Malta this period reaches 15 days¹³. Enterprises often list this discrepancy among the various legal regulations in the EU as one of the reasons they do not conduct business across international borders. While 19% of retailers in the EU sell or promote their business in at least one additional EU country, 48% of companies are prepared to conduct cross-border sales. As many as 55% of retailers, which are interested in cross-border business, consider the extraordinary expenses necessary to comply with a variety of internal legal regulations, governing consumer transactions, to be very important or rather important, and therefore limiting. 43% of all EU retailers think that harmonisation of

¹¹ Article 12 (1), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

¹² Article 12 (2), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

¹³ European Consumer Centre – list of periods. Accessed 31. 3. 2009 at <http://www.coi.cz/files/documents/lhuty-odstoupeni-od-smluv.pdf>

legal regulations concerning consumer protection should have a positive influence on their cross-border sales as well as on their budget for cross-border business.¹⁴

As the above information makes clear, these differences negatively impact the fundamental principles of the European Community's common market by increasing expenses for enterprises, which are interested in conducting cross-border business. Enterprises are forced to adjust the terms and conditions of their business, to adapt them to a variety of legal systems and to familiarise themselves with the adjustments necessary for each country, on a country-by-country basis. The resulting expenses are reflected in the final price, for which a product or service is sold, thereby decreasing the competitiveness of cross-border enterprises in comparison with local enterprises, which are not faced with any added expenses. Another barrier for cross-border business within the EU is, incontestably, the low level of legal security and the resulting fear among consumers to make purchases in different EU member states. Due to the lack of unity concerning consumer rights in the EU, consumers are afraid to make purchases in unknown foreign waters and, as a result, they are unable to benefit from the free internal market. This is further confirmed by the fact that 150 million EU citizens – a third of the population – make purchases through the Internet. However, only 30 million of these make online purchases across borders in the EU. On average, such a buyer spends 800 EUR abroad each year, meaning 24 billion EUR altogether, which demonstrates the huge potential of the internet market, if more people had the trust necessary to conduct business beyond the borders of their own member state.¹⁵

¹⁴ The Green Paper on the Review of the Consumer *Acquis*, in Brussels, 08.02.2007 COM (2006) 744 Final, p. 6.

¹⁵ Spotřebitelé: Komise navrhuje práva nakupujících platná v celé EU, dated 8.10.2008, available at: http://ec.europa.eu/ceskarepublika/press/press_releases/08081474_cs.htm, accessed 3.3.2009.

III. Determining basic definitions

The Proposal for a directive of the EC and of the Council on Consumer Rights also aims to resolve pivotal, substantive-legal problems, which primarily consist of a lack of uniformity regarding terms, which are crucial for the legal field in question. A consumer is defined as an actual person, who in contracts that are governed by this directive, acts in the interest of a purpose that cannot be considered his/her livelihood, business, trade or occupation¹⁶. A vendor, or a supplier, shall be understood as a person or a legal entity, which in contracts that are governed by this directive, acts in the interest of a purpose that can be considered to be his/her/its business or productive activities, trade or occupation, or anyone who is acting in the name of the vendor or as a representative of the vendor¹⁷. The implementation and thorough transposition of unified terms into the various legal regulations of member states will cause the removal of discrepancies, which persist even after resolving preliminary questions concerning the *Pinto*¹⁸ issue, in which the European Court of Justice decided that member states could extend the directive in such a way as to allow consumer protection to be applied even for legal entities or entrepreneurs. In contrast to this, according to European Court of Justice rulings in cases of the *Commission vs. France*¹⁹ and the *Commission vs. Greece*²⁰, stricter regulations in enforcing the directive in the countries in question was judged to be disruptive to the European Community's internal market²¹. Within Czech law, a consumer is very broadly defined as an individual that, when concluding or fulfilling a contract, does

¹⁶ Article 2 (1), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

¹⁷ Article 2 (2), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

¹⁸ C-361/89 P. Di Pinto

¹⁹ C-52/00

²⁰ C-154/00

²¹ Hulmák in Švestka, J., Jehlička, O., Škárková, M., Spáčil, J. et al.: *Občanský zákoník. Komentář*. 10th edition. Prague: C. H. Beck, 2006, p. 336

not conduct activities that would be included in his/her business or otherwise entrepreneurial activities.²² Implementation of the Proposal for a directive of the EC and of the Council on Consumer Rights should therefore lead to narrowing of the circle of individuals that could be considered consumers. After defining the terms consumer and vendor, or supplier, determining whether or not a contract is a consumer contract, which is understood as any type of contract concluded between a consumer and a supplier, or a vendor, is simple.

After this it is somewhat less problematic to address additional terms determining whether or not a contract is indeed a “contract concluded over distance”, which is understood to include any type of purchase contract or contract for the provision of services, when the vendor uses one or more means of distance communication exclusively to conclude said contract²³. Subsequently defining means of distance communication themselves, which should be understood as any means that can be used to conclude a contract between a vendor and a consumer without their simultaneous physical presence²⁴, is also relatively straightforward. Regarding contracts concluded away from standard business premises, business premises are newly, uniformly and clearly defined as all immovable and movable premises, including seasonal retail premises, where a vendor has carried out his/her/its business activities for an extended time, or booths at a market or trade fair, where a vendor, regularly or temporarily, carries out his/her/its business activities²⁵. Any contract concluded in the simultaneous physical presence of the vendor and the consumer away from business premises should be defined as a contract concluded away from business premises, for instance, at the consumer’s home or place of work.

²² Section 52 (3) of the Commercial Code

²³ Article 2 (6), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

²⁴ Article 2 (7), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

²⁵ Article 2 (9), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

The reason that contracts concluded away from business premises are afforded special attention is also remembered in the directive: away from business premises, consumers are subject to psychological pressure, wherein the question of whether or not consumers requested the vendor's visit is not a factor. In addition, a contract that is negotiated at a consumer's home, for example, but concluded in a sales office, should also be considered a contract concluded away from business premises in order to prevent circumvention of the rules, in the event that consumers are contacted away from business premises²⁶. The fact that whether or not a consumer arranges to have a visit in his/her home is not a factor makes it impossible to abuse this clause in standardised contracts, which very frequently contain such a measure, effectively precluding a consumer's ability to utilise his/her legal right to withdraw from a contract²⁷.

IV. Contracts concluded away from business premises and contracts concluded through distance communication

The crux of this new modification of consumer rights concerning contracts concluded away from business premises and contracts concluded through distance communication is found in chapter III of the Proposal for a directive of the EP and of the Council on Consumer Rights. The chapter's thirteen articles de facto contain the pivotal parts of the directive regarding sales away from business premises²⁸ and distance sales²⁹. The principle of maximum harmonisation, as mentioned earlier, is also applied here, in contrast to the original directives, the proposal even goes so far

²⁶ Pre 14, Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

²⁷ Section 57 (1) of the Commercial Code

²⁸ Directive 85/577/EEC on the protection of the consumer in respect of contracts negotiated away from business premises.

²⁹ Directive 97/7/EC on distance sales.

as to implement a uniform period of 14 days for withdrawing from a contract concluded by means of distance communication³⁰. The discrepancy among these periods, which were also applied earlier in Czech law, was, to say it lightly, inappropriate and confusing for the consumer. The penalising extension of this period, for cases when information is not provided to the consumer concerning his/her rights to withdraw from a contract within 14 days has been set at three months³¹, which also means the implementation of a uniform period to replace the existing, often inappropriately dissimilar periods. In the author's opinion, the shortening and unification of these periods is also very desirable, even if it means lowering the attained level of consumer rights. In Czech law, for example, a penalising extension of up to one year is enforced for contracts concluded away from business premises³². Another very desirable change, or rather a specification of the status quo, is the designation of a period for withdrawal as a time limit pursuant to procedural law, in which it is clearly stated that the time limit is observed, if the consumer sends a notice about exercising the right to withdraw from a contract, before the end of this time period³³. A withdrawal from the contract shall then be delivered to the vendor on a durable medium, either in the form of an affirmation written in the consumer's own words and sent to the vendor, or as a standardised form for withdrawing from a contract, which is included in part B of Annex I of the proposed directive³⁴. A durable medium is herein considered to be any instrument, which allows the consumer or vendor to store information designated to his/her person, in a manner appropriate for its future use, for a period consistent with its purpose and which enables reproduction of the stored information in an unaltered

³⁰ Article 12 (1), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

³¹ Article 13, Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

³² Section 57 (3) of the Commercial Code

³³ Article 12 (3), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

³⁴ Article 13 (1), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

state³⁵. In accordance with the Proposal for a directive of the EP and the Council on Consumer Rights, after a consumer withdraws from a contract, a vendor is now authorised to wait until it has received or repossessed the goods, or until the consumer is able to prove that the goods have been sent back, whichever occurs first, before returning payment³⁶. Present legislation imposed an obligation on the vendor to return payment to a withdrawing consumer within 30 days of communication concerning the withdrawal (which is also retained in the proposal). As such, it was possible to end up in a paradoxical situation, in which the consumer had not yet delivered the goods to the vendor and yet the vendor was already obliged to return payment to the consumer, because the 30-day period after withdrawal was ending. It is also set forth in the proposal that the consumer is only liable for potential loss in the value of goods, as a result of handling said goods in a manner different to any handling necessary to determine the nature and functionality of the goods. On the other hand, the consumer is not liable for damage to the goods, if information concerning the consumer's right to withdraw from the contract was not shared with the consumer³⁷. In reality this only confirms the request, often applied in practice, for covering losses caused by damaging the goods or a request for the release of unjust enrichment, which the consumer committed by not returning the goods completely. The termination of all accessory contracts *ex lege* without any expenses for the consumer has incontestable importance³⁸. Present legislation concerning consumer rights did not resolve the issue of bound contracts, which is, especially in the case of contracts for consumer loans, made by consumers for the express purpose of acquiring financial means for the conclusion of a purchase contract, very desirable.

³⁵ Article 2 (10), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

³⁶ Article 16 (2), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

³⁷ Article 17 (2), Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

³⁸ Article 18, Proposal for a directive of the EP and of the Council on Consumer Rights, COM 614/2008

The next question is likewise concerned with implementation into the various bodies of laws of the member states. To illustrate the imprecise implementation of a directive into Czech law, we can randomly cite, for instance, the poor transposition of Directive 97/7/EC, which has led to a proliferation of conditions precluding withdrawal from a contract from the delivery of goods altered according to a consumer's requirements, goods adapted to meet personal requirements or goods, *which by reason of their nature cannot be returned*, which are liable to deteriorate or which are past their expiration date³⁹ to include: "*goods, which by reason of their nature cannot be returned*". Special attention should be given to correct implementation of the directive into the various bodies of laws of the member states, in light of rulings from the European Court of Justice (Francovich⁴⁰, Factortame⁴¹) and the responsibility arising there from to member states for poor implementation of EU law. Nonetheless, even in light of the above-mentioned realities, use of a regulation was not given precedence. A directive is sufficient, in terms of welding together a fragmented regulatory framework and a regulation as such could lead to a lack of transparency in member states' various bodies of laws.

V. Conclusion

In conclusion, it is necessary to emphasise that expeditious adoption of the Directive of the EP and of the Council on Consumer Rights is without question very desirable. The two-year implementation period itself shall provide member states sufficient time to implement a directive of this size. Let us hope that utilisation of maximum harmonisation leaves minimal space for excessive legal creativity from the

³⁹ Article 6 (3), Directive 97/7/EC

⁴⁰ C-6 and 9/90

⁴¹ C-46 and 48/93

individual member states. Current efforts, especially from some of the old member states, to retain a higher standard of consumer rights protection (retention of minimal harmonisation) at the expense of increased legal security for the entire EU territory should be strictly refused. The so-called principle of “targeted minimal harmonisation”, which allows for minimal harmonisation to be applied only in “certain cases” should be approached in a similar manner. Likewise, the position of the European Consumers’ Organisation, referring to what it considers an insufficient level of consumer protection, should be dismissed⁴².

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⁴² THE FUTURE OF EUROPEAN CONSUMERS’ RIGHTS - BEUC’s reaction to the fundamental issues raised by the Proposal for a directive of the European Council and of the Council on consumers rights, COM(2008)614. Available at: <http://docshare.beuc.org/docs/2/AFHDKHHBPOPIBNOFLCABNKDCPDBG9DBY7Y9DW3571KM/BEUC/docs/DLS/2009-00291-01-E.pdf>, accessed 31. 3. 2009