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Foreword

Over the past few years, consumer protection in both the European Union and the Czech Republic has developed rather interestingly. A new civil code has become effective in the Czech Republic, which already contains transposition of the directive on the rights of consumers, and all EU Member States have also had to react to the need to incorporate the directive into their respective private law. Besides this, Czech society was shocked by the documentary film by director Silvia Dymáková called "Šmejdi", which in its nakedness pointed out the aggressive practices of false entrepreneurs preying upon the most vulnerable members of our society - senior citizens.

The submitted post-conference journal presents papers featured at the workshop "OFF-PREMISES CONTRACTS AND CONSUMER PROTECTION IN LAW AND PRAXIS", held at the Faculty of Law of Masaryk University in Brno, Czech Republic on November 19, 2014, and dedicated to finding a legal solution for protecting especially threatened groups of consumers in the CR. The aim of the workshop held within the framework of fulfilling the project "Socio-legal aspects of protecting especially threatened groups of consumers" was to compare the legislation and practice in the CR with those in neighboring EU Member States (Poland, Slovakia, Hungary, Austria and Germany), and to develop a professional legal discussion on protection of threatened groups of consumers, which could be implemented by both private law and public law.

The project researchers are pleased that the workshop met with great interest of the professional public, and that the discussion accompanying the entire social afternoon resulted in interesting ideas and proposals for possible further cooperation of individual participants. Relating cooperation of foreign participants and experts from practice (especially from the Czech Trade Inspection Authority) should culminate in elaboration of an integral monograph attempting to answer questions of a general sociological and humanistic basis of protection of especially threatened subjects of legal

relationships, and provide an analysis and legal teleological consideration over legislation ensuring consumer protection in EU Member States, and therefore also in the CR.

If the workshop contributed to increasing the legal protection of the consumer in the CR, or at least indicated possible legal means of resolution and generated discussions regarding such solutions, it has fulfilled its sense and purpose.

On behalf of the research team

Markéta Selucká

Off-premises Consumer Contracts – National Report for Austria Transposition of the Directive 2011/83/EU into Austrian Law

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Abstract

The article is going to be on particular questions which arose from the transformation of the Directive 2011/83/EU for the Austrian legislator. As the Directive is a total harmonized Directive, generally there is little scope left. So the focus of this article is about some questions that come along with an extended transposition of the Directive (concerning only the field of application). One special problem, that finally shall be discussed, is that the Austrian legislator has decided to keep its previous right of withdrawal that corresponds to the Doorstep Selling Directive 85/577/EEC. This right of withdrawal still remains applicable in cases which are not covered by the field of the Directive additionally to the new right of withdrawal. Concluding, the legal consequences if the trader fails to attend to one of his information duties are going to be mentioned.

Keywords

Austria; Total Harmonization; Extended Transposition; Term "Consumer"; "Austrian" Right of Withdrawal; Two Types of a Right of Withdrawal; Legal Consequences for Missing Information.

I Introduction

Following its proposal, the transposition of the Directive 2011/83/EU has received a lot of attention[1] in Austria already and even more after its publication in 2011. Hence, the focus of this article is not going to be on general questions which have already been discussed extensively in Austria in connection with the directive itself – for instance the criticism about the considerable obligations to inform the consumer or the questions about the right of withdrawal – but refers to the particular difficulties which arose from the transformation of the directive for the Austrian legislator.

The Directive 2011/83/EU was transposed into Austrian law through the "Verbraucherrecht-Richtlinien-Umsetzungsgesetz" (VRUG) [*Consumer-Rights-Directive-Transposition-Law*], BGBl I 2014/13 [*Federal Law Gazette*] from 26 May 2014. So the Austrian transformation was delayed five months[2] but came into force in time on 13 June 2014. With the transposition the legislator adopted the Allgemeines Bürgerliches Gesetzbuch (ABGB) [*General Civil Law Code*][3] and the Konsumentenschutzgesetz (KSchG) [*Consumer Protection Law*][4] and additionally created a new law, the Fern- und Auswärtsgeschäftegesetz (FAGG) [*Distance and Off-Premises Contracts Law*].

Until then the transposition of both the Doorstep Selling Directive 85/577/EEC and the Distance Selling Directive 97/7/EC had been included

1 See e.g. *Jud/Wendehorst* (Ed.), Neuordnung des Verbraucherrechts in Europa? Zum Vorschlag einer Richtlinie über die Rechte der Verbraucher (Vienna 2009); *Bydlinski/Lurger* (Ed.), Die Richtlinie über die Rechte der Verbraucher (Vienna 2011); *Stabentheiner/Cap*, Die neue Verbraucherrechte-Richtlinie. Werdegang, Geltungsbereich, „klassisches" Verbraucherschutzrecht", ÖJZ (Österreichische Juristen-Zeitung) 2011, p. 1045; *Lerm*, Die Verbraucherrechte-Richtlinie im Widerspruch zur Kompetenzordnung des europäischen Primärrechts, GPR (Zeitschrift für das Privatrecht der Europäischen Union) 2012, p. 166; *Feuchtinger*, Das neue Verbraucherrechte-Richtlinie-Umsetzungsgesetz, SWK (Steuer- und Wirtschaftskartei) 2014, p. 840; *Hechenblaickner/Skarics*, Regierungsvorlage zum Verbraucherrechte-Richtlinie-Umsetzungsgesetz-VRUG, ZFR (Zeitschrift für Finanzmarktrecht) 2014, p. 148; *Kolmasch*, Das Verbraucherrechte-Richtlinie-Usmetzungsgesetz, Zak (Zivilrecht aktuell) 2014, p. 126; *Schoditsch*, Neues im Konsumentschutzrecht – Die Umsetzung der RL über die Verbraucher in Österreich, RZ (Österreichische Richterzeitung) 2014, p. 214; *Pierer*, Umsetzung der Verbraucherrechte-Richtlinie, JAP (Juristische Ausbildung und Praxisvorbereitung) 2014/2015, p. 40.

2 Cf. Article 28 of the Directive.

3 JGS Nr. 948/1811 [*Justizgesetzsammlung Nummer - Collection of laws of the judiciary number*].

4 BGBl Nr. 140/1979 [*Bundesgesetzblatt Nummer – Official gazette of the federal law number*].

in the KSchG, however, this time the Austrian legislator chose another way. Some regulations like the general information requirements under Article 5 of the Directive 2011/83/EU and other general contract law rules were transposed into the KSchG whereas the new regime of distance selling and off-premises contracts was excluded from the general KSchG. The reason for this divided transposition was – as can be seen in the material of the legislative process – that it would not be appropriate to integrate the new regime of distance and off-premises contracts into the more compact KSchG, because due to a centralisation and standardisation of the two distribution types, the new rules are more extensive than the old ones (Directives 85/577/ECC and 97/7/EC). In comparison the newly created "Bundesgesetz über Fernabsatz- und außerhalb von Geschäftsräumen geschlossene Verträge (Fern- und Auswärtsgeschäfte-Gesetz – FAGG)" [*Federal Law of Distance Selling and Off-Premises Contracts*] offers enough space to transpose the new regime systematically.[5]

In my opinion, the fragmentation and complication of consumer protection in Austria, which go along with this divided transposition, are not desirable from the point of view of the consumer.[6] Whereas on the EU level, the legislative authority tries to consolidate at least some directives in the field of consumer protection, the legislator in Austria acts exactly contrarily and spreads consolidated rules to different laws. From my point of view, this makes it more difficult for the consumer (as well as for the trader) to find out about and understand his rights and obligations.

II Extended transposition - the field of application

In the definite transposition, Austria has decided to maintain its wider definition of the "consumer" as it is described in § 1 KSchG. The same approach has already been taken in transpositions of other directives. In so

5 ErläutRV 89 BlgNR 25.GP 4 et seq. [*Erläuterungen zur Regierungsvorlage, Beilage Nummer 89, 25. Gesetzgebungsperiode, Seite folgende – Government proposal, attachment no. 89, 25th period of legislature, pp. 4 et seq.*].

6 Cf. also *Kathrein*, Neues Konsumentenrecht. Verbraucherrechte-Richtlinie-Umsetzungsgesetz – VRUG, ZVR (Zeitschrift für Verkehrsrecht) 2014, p. 184 (185) and *Cap*, Umsetzung der Verbraucherrechte-Richtlinie. Das neue Fern- und Auswärtgeschäfte-Gesetz, ÖJZ (Österreichische Juristen-Zeitung) 2014, p. 707, who argue for a total reform oft he Austrian laws of consumer protection.

doing, Austria has used the permission of extension of the total harmonised Directive[7] as mentioned in Recital (13), which means that unlike suggested by the Directive, also contracts involved in business start-ups and, under specific conditions, contracts of associations and condominium owners' communities can be understood as consumer contracts.[8]

The legislator has moreover used the option of Article 3 (2) of the Directive and has decided no to apply the Directive to off-premises contracts for which the payment to be made by the consumer does not exceed EUR 50. This regulation is supposed to accommodate the small economic dimension of these contracts which do not need an extensive consumer protection.[9]

Furthermore, the optional rules in Article 7 (4) of the Directive about services for the purpose of carrying out repairs or maintenance which are immediately performed have been transposed into Austrian law. Actually, the Austrian legislator did not agree with the EU legislator who intended these specific rules to be a facilitation with regard to the information requirements or at least he considered the facilitation as very small but on demand of the Austrian Economic Chamber in the end the Article was transposed in § 6 FAGG into Austrian law.[10]

The other exceptions of Article 3 of the Directive that concern off-premises contracts were transposed into Austrian law without any content-related extension. An extended transposition would not have reached a consensus and moreover, for some fields there already exist specific rules in Austrian law which protect the consumer anyway. In the materials of the legislative process, for example the Bauträgervertragsgesetz [*Law for Contracts of building project organiser*] (respective to the exception of Article 3 [3] point [f] of the Directive 2011/83/EU respectively § 1 par. 2 point [7] FAGG) is mentioned.[11]

7 Article 4 of the Directive.
8 ErläutRV 89 BlgNR 25. GP 5; cf. to this question as well *Peintinger*, Der Verbraucherbegriff im Lichte der Richtlinie über die Rechte von Verbrauchern und des Vorschlages für ein Gemeinsames Europäisches Kaufrecht–Plädoyer für einen einheitlihen europäischen Verbraucherbegriff, GPR, 2013, p. 24.
9 § 1 (1) 1 FAGG. See also ErläutRV 89 BlgNR 25. GP 5.
10 ErläutRV 89 BlgNR 25. GP 6.
11 ErläutRV 89 BlgNR 25. GP 23.

The definitions of Article 2 of the Directive where subject to a different approach. For some definitions, there was no need for integration into Austrian law because the Austrian understanding of the respective terms was considered to correspond to the comprehension of the Directive (e.g. Article 2 [4] of the Directive "goods made to the consumer's specifications"). On the other hand some terms such as "sales contract" and "service contract" in Article 3 (5) and (6) of the Directive were not included into the list of § 3 FAGG by reason of fundamental distinctions from the classic understanding of these terms in Austrian law. In contrast to the Austrian understanding in the Directive a contract including sales-related as well as service-related elements is always a sales contract.[12] According to the Austrian perspective, it depends on which elements predominate. Only if the elements of the transfer of ownership of goods outweigh the service elements, a sales contract is concluded. Otherwise a contract with mixed elements can also be a service contract.[13] For systematic reasons, the Austrian legislator did not adopt the understanding of the Directive in the definitions of § 3 FAGG but respected the distinctions where there are different legal consequences on the one hand for sales contracts and contracts having as its objects both goods and services and on the other hand for service contracts. For example § 11 FAGG in the transposition of Article 9 of the Directive determines different dates for the commencement of the period to withdraw from a distance or off-premises contract for sales contracts in accordance with the Directive and for service contracts respectively.[14]

As mentioned above the term "consumer" is transposed in an extended way into Austrian law whereas the conventional Austrian understanding of the term "trader" (§ 1 par. 1 KSchG) is narrower than in the Directive: In Article 2 (2) of the Directive a trader is not only a "person […] who is acting […] for purposes relating to his trade, business, craft or profession" but also "any other person acting in his name or on his behalf". As it is the case for contracts including elements of both sales and service

12 See Article 3 (5) of the Directive: „including any contract having as its object both goods and services".

13 See e.g. *Welser*, Grundriss des bürgerlichen Rechts, volume 2, Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht, 13th edition (Vienna 2007) p. 255.

14 Cf. ErläutRV 89 BlgNR 25. GP 24, 33 f.

contracts, the Austrian legislator adopted the understanding of the Directive with regards to its broader definition of "trader", (reffering to his representatives as well), only in particular rules where the different understanding is decisive. So for example in the definition of "off-premises contracts" in § 3 par. 1 point (c) and (d) FAGG – which is in other respects almost identical with the definition in Article 3 (8) of the Directive – the rule refers to both traders and representatives. In my point of view, it is incomprehensible, however, why such a supplement is not admitted as well in § 3 (1) point (a) FAGG. According to point (a) of this rule, an "off-premises contract" is – just as in the equivalent Article 2 (8) point (a) of the Directive – any contract between the trader and the consumer "concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader" [*"der bei gleichzeitiger körperlicher Anwesenheit des Unternehmers und des Verbrauchers an einem Ort geschlossen wird, der kein Geschäftsraum des Unternehmers ist"*]. Both in point (a) and in point (c) of Article 2 (8) of the Directive, an off-premises-situation is described in which "in the simultaneous physical presence of the trader and the consumer" a contract is concluded, but whereas in point (a) this is done immediately, according to point (c) the contract is signed "on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed" [*"in den Geschäftsräumen des Unternehmer oder durch Fernkommunikationsmittel (…) unmittelbar nachdem der Verbraucher (…) persönlich und individuell angesprochen wurde"*]. While the Directive uses both times the identical expression "in the simultaneous physical presence of the trader and the consumer" [*"bei gleichzeitiger körperlicher Anwesenheit des Unternehmers und des Verbrauchers"*], the Austrian legislator makes a reference to the representative in § 3 par. 1 point (c) FAGG but not in point (a). In accordance with the Directive point (a) of § 3 (1) FAGG has to refer as well to both the trader and his representative and moreover has to include any contract that is not concluded by the trader himself but "trough any person acting in his name or on his behalf"[15].

15 Cf. Article 2 par. 2 of the Directive.

However, the fact that the representative is shown separately in the other point suggests a different understanding. In all remaining cases, the definitions of § 3 FAGG are congruent with those of the Directive.[16]

III Some specific question in the Austrian transposition

The information requirements according to Article 6 of the Directive were also transposed almost identically into § 4 FAGG. Only in some cases, terms of the Directive were adapted to the Austrian terminology for better understanding. So for example the information requirements about "identity" [*"Identität"*] and "trading name" [*"Handelsname"*] were transposed as "Name" [*"name"*] and "Firma" [*a specific Austrian expression for "trading name" which is expressed in the German Version of the Directive as "Handelsname"*]. At some other points the information requirements of the Directive were either combined[17] in one subitem or subdivided[18] into two or more.

Article 7 (1) and (2) of the Directive about the formal requirements of the information for off-premises contracts which the trader has to give to the consumer before he is bound by the contract (Article 6 of the Drictive) and the obligation of the trader "to give the information to the consumer on paper, or if the consumer agrees, on another durable medium" are transposed into § 5 FAGG.[19] The regulations of Article 7 (3) of the Directive about the requirement of an express request of the consumer if he "wants the performance of service or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating to begin during the withdrawal period" is transposed into § 10 FAGG together with the almost identical regulation for distance selling contracts (Article 8 [8] of the Directive). The Austrian legislator intended to emphasise this regulation by putting it ahead of the rules of the right of withdrawal (§ 11 et seqq. FAGG). Of course, the Directive' distinction between of off-premises contracts, where the "express request" has to be "on a durable medium", and distance selling contracts, in relation to which

16 Cf. ErläutRV 89 BlgNR 25.GP 24 ff.

17 E.g. § 4 par. 1 (3) FAGG that combines Article 6 par. 1 point (c) and (d) of the Diretive.

18 E.g. § 4 par. 1 (4) and (5) FAGG which transpose together Article 6 par. 1 point (e) of the Directive.

19 Cf. ErläutRV 89 BlgNR 25. GP 28.

the Directive does not mention anything about a durable medium is also transposed in § 10 FAGG. The legal consequences of such an express request as well as the legal consequences that occur when such an express is missing are transposed into § 16 par. 1 FAGG (Article 14 [3] and [4] point [a] subpoint [ii] of the Directive). In contrast to the Directive, the Austrian legislator did not see a requirement of a normative clarification of cases where the consumer shall bear no costs for the performance of services or the supply of some specific resources during the withdrawal period (as in Article 14 [4] of the Directive). Although § 16 par. 1 FAGG is almost identical with Article 14 (3) of the Directive which determines only under which circumstances the consumer shall pay to the trader an proportional amount when he exercises his right of withdrawal, in the opinion of the Austrian legislator, a normative clarification about in which cases the consumer shall bear no costs – as the Directive clarifies in Article 14 (4) – was not necessary. In the Austrian transposition, this results only from § 16 par. 4 FAGG which transposes Article 14 (5) of the Directive and determines that the consumer shall not incur any liability when he exercises his right of withdrawal except for cases of this Article.[20]

The rules of the right of withdrawal in Article 9 et seqq. of the Directive were transposed into § 11 et seqq. FAGG. At this point, the Austrian legislator had to make some systematic and conceptual changes to adapt the rules to Austrian law. However, these adaptations are not supposed to provide any change with regard to the content of these rules. An example is the use of the specific Austrian term "Rücktrittsrecht" instead of "Widerrufsrecht" ("right of withdrawal") as it is called in the Directive. However, the legislator notes in the material of the legislative process that a mistake in the terminology (e.g. in the case of information requirements about these rights given by the trader or in case of the consumer's decision to withdraw, if the consumer or the trader speaks of "Widerruf" instead of "Rücktritt") shall not have any effect. Another example is the regulation of the withdrawal period. In contrast to other Directives about consumer protection the Directive defines the withdrawal period only in terms of its ending. In comparison, the Austrian legislator determines the starting point and the duration

20 Cf. ErläutRV 89 BlgNR 25. GP 38.

of the period in accordance with the other Directives of consumer protection. At some other points, there was no need for a particular transposition, as for example for the effects of withdrawal according to Article 12 of the Directive. According to Austrian understanding, it is an immanent legal consequence of a withdrawal that the obligations of the parties to perform the contract terminates with the exercise of the right to withdraw.[21]

Article 13 and Article 14 (1), (2) and (5) of the Directive about the obligations of the trader and the consumer in the event of withdrawal were transposed almost identically into in § 15 FAGG. Par. 3 and 4 of Article 14 of the Directive were transposed separately into § 16 FAGG. These rules about the particularity of the right of withdrawal in case of contracts where the consumer requests a performance of service or the supply of some specific resources during the withdrawal period has already been discussed above with reference to Article 7 (3) of the Directive.

Another special regulation about the right of withdrawal refers to the particularity of a withdrawal in connection with the supply of digital content which is not supplied on a tangible medium. This special scheme is transposed into § 16 par. 3 FAGG. The Austrian legislator considered this regulation of the Directive as strongly incoherent and was confronted with great problems in the transposal legislation. The rules about digital content which is not supplied on a tangible medium are based[22] on the particular rules about the performance of service or of the supply of some specific resources during the withdrawal period, but at the same time there is a substantial discrepancy between the two regulations.[23] Therefore, the Directive is inconsistent in the opinion of the Austrian legislator because unlike in Article 7 (3) of the Directive[24] about the contracts of service and of the supply of some specific resources where it is stated that the consumer has to make an express request to start the performance during the withdrawal period, a similar rule for the contracts of the supply of digital content which is not

21 Cf. ErläutRV 89 BlgNR 25. GP 38.

22 Cf. the legislative process: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=de & DosId=197477#411747 and *Stabentheiner*, Das neue Fern- und Auswärtsgeschäfte-Gesetz, VbR (Zeitschrift für Verbraucherrecht) 2014, p. 117.

23 Cf. as well *Lurger*, Widerrufsrechte, in *Bydlinski*/*Lurger* (Ed.), Die Richtlinie über die Rechte der Verbraucher (Vienna 2012) pp. 53 (89 et seq.).

24 Or rather Article 8 par. 8 of the Directive for distance selling contracts.

supplied on a tangible medium does not exist. For this kind of digital content the requirement of an express consent arises only indirectly from Article 14 (4) point (b) and Article 16 point (m) of the Directive. However, the relation between Article 14 (4) point (b) and Article 16 point (m) of the Directive is unclear. Article 14 (4) point (b) determines under which conditions the consumer shall bear no costs for the supply of digital content which is not supplied on a tangible medium while article 16 point (m) defines in which cases the consumer does not have any right of withdrawal (in case of such a digital content). These two regulations show a significant discrepancy because according to Article 16 point (m) the compliance of two conditions only already accounts for a loss of the right of withdrawal: on the one hand, the prior express consent of the consumer and on the other hand, his acknowledgement that he thereby loses his right of withdrawal. In contrast, Article 14 (4) point (b) subpoint (iii) demands (alternatively) the fulfilment of a third condition for the case that the consumer shall not bear any costs. This third condition is that "the trader has failed to provide confirmation in accordance with Article 7 (2) and Article 8 (7)" of the Directive.

The Austrian legislator wondered – as it was stated as a question by some authors too[25] – if this third condition of Article 14 (4) point (b) subpoint (iii) has to be understood as well as third condition of Article 16 point (m). Otherwise the regulation of Article 14 (4) point b subpoint (iii) of the Directive would not have a field of application in the opinion of the Austrian legislator because this subpoint (iii) of Article 14 (4) point (b) would relieve the consumer of his duty of payment in a case in which the consumer would not at all have a right of withdrawal.[26]

The Austrian legislator decided not to leave this rule without any applicability and interpreted the Directive in such a way that the requirement of a confirmation of the consumer's prior express consent (Article 7 [2][27]) is a condition for the loss of the right of withdrawal as well. So in the Austrian transposition into § 18 par. 1 (11) FAGG the consumer loses his right of withdrawal in case of performance during the withdrawal period

25 See e.g. *Unger*, Die Richtlinie über die Rechte der Verbraucher. Eine systematische Einführung, ZEuP (Zeitschrift für Europäisches Privatrecht) 2012, pp. 270 (301 et seq.).

26 Cf. ErläutRV 89 BlgNR 25. GP 39 f.

27 Or rather Article 8 (7) for distance selling contracts.

only it the following three conditions are fulfilled: his express consent, his acknowledgement that thereby he loses his right of withdrawal and a provided confirmation within the meaning of § 5 par. 2 FAGG (which corresponds to Article 7 [2] of the Directive[28]). Is one of these conditions is not fulfilled, and does the consumer consequently still have the right of withdrawal during the withdrawal period, he is relieved of his duty of payment according to § 16 par. 3 FAGG. In § 16 par. 3 FAGG, the three conditions are not mentioned again because anyway, the consumer only has a right of withdrawal if one of the three conditions of § 18 par. 1 (1) FAGG is not fulfilled and each condition on its own can relieve the consumer of his duty of payment.[29]

In the end, of course, only the ECJ (European Court of Justice) can clarify the right understanding of the Directive rules. In my opinion, however, the Austrian interpretation of the Articles of the Directive is plausible. The regulations of the Directive about the performance of the supply of digital content which is not supplied on a tangible medium during the withdrawal period are badly formulated as a whole. From my point of view, particularly in Article 16 point (m) of the Directive and in point (a) about contracts of service it is not even clear that the regulations refer to a case in which the performance starts during the withdrawal period because it is not particularly mentioned, but obviously it has to be interpreted this way. And also in Article 14 (4) point (b) of the Directive it seems that the consumer is already relieved of his duty of payment if the trader has failed to provide a confirmation according to Article 7 (2)[30] of the Directive – irrespective of a performance during the withdrawal period or even irrespective of his withdrawal in general.[31] So it seems that there are many questions about these specific rules which have to be clarified by the ECJ.

28 Or rather Article 8 (7) for distance selling contracts.
29 Cf. ErläutRV 89 BlgNR 25. GP 39.
30 Or rather Article 8 (8) of the Directive for distance selling contracts.
31 Cf. the formulation in subpoint (ii) of Article 14 (4) point (b) „or“ and the totally different construction of point (a) of Article 14 (4) about contracts of service and of the supply of some specific resources where the aspect of a performance during the withdrawal period is not only mentioned in a subpoint (like in subpoint [i] of point [b]) but already in the introduction passage that refers to all subpoints.

Apart from the two already mentioned exceptions from the right of withdrawal; the Austrian legislator has also transposed the other exceptions of Article 16 of the Directive into § 18 FAGG without any difficulties. The regulations of the Directive were transposed almost identically into Austrian law. Only in § 18 par. 1 (1) FAGG there is another distinction between the Directive and the Austrian transposition that is worth to be mentioned. In this rule about the loss of the right of withdrawal in case of a service contract in which the service has been fully performed, the Directive uses the expression "express consent" [*"ausdrückliche(…) Zustimmung"*] in contrast to the other rules about this specific case[32] (Article 7 [3][33] and Article 14 [3] and [4] point [a] of the Directive) which call it an ("express") "request" [*("ausdrücklichee{n}") "Verlangen"*]. So unlike the other rules, Article 16 point (a) of the Directive incomprehensibly uses the same expression that is used for the case of digital content which is not supplied on a tangible medium. In contrast to the Directive, the Austrian legislator stays with the expression "request" [*"Verlangen"*] in § 18 par. 1 (1) FAGG as well. It has to be discussed if this transposition causes a substantive change or if Article 16 point (m) of the Directive has to be interpreted in terms of the other Articles anyway.

IV The "Austrian" right of withdrawal

Aside from the already discussed regime of a right of withdrawal for distance selling and off-premises contracts, the Austrian legislator has decided to additionally keep its previous right of withdrawal in § 3 KSchG that corresponds to the Doorstep Selling Directive 85/577/EEC. This "Austrian" right of withdrawal [*Rücktrittsrecht "österreichischer Prägung"*[34]] still remains applicable in cases which are not covered by the field of application of § 11 et seqq. FAGG (Articles 9 et seqq. of the Directive) because they fall under the exceptions of § 1 par. 2 FAGG (Article 3 [3] of the Directive). However, this old type of a right of withdrawal is adapted to the new withdrawal regime with regard to duration and starting point of the withdrawal period

32 These other rules refer in contrast to Article 16 point (a) of the Directive as well to contracts about the supply of water, gas, or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating.

33 Or rather Article 8 (8) of the Directive for distance selling contracts.

34 Cf. ErläutRV 89 BlgNR 25. GP 34.

and as well to formal requirements but it differs regarding the information that has to be provided by the trader and concerning the legal consequences in the event of a withdrawal (particularly in terms of the costs of returning or the liability for diminished value of the goods and performance during the withdrawal period).[35] The right of withdrawal according to § 3 KSchG is always applicable (if a case does not fall under the FAGG) except for the case in which the consumer initiated the conclusion of a contract. The Austrian legislator kept this right of withdrawal because otherwise he feared a pejoration of the consumer protection.[36]

These two different types of a right of withdrawal which are brought into accordance in some points but strongly differ in other points complicate the application for both the consumer and the trader. The situation of consumer protection is complex and hardly understandable already and two different types of the right of withdrawal make it still worse in my opinion. Maybe a further extension of the field of application of the FAGG would have been the better approach.

V Legal consequences for missing information

In addition, § 19 FAGG is worth mentioning. This rule prescribes administrative penalties applicable to infringements of the information and confirmation obligations of the trader. This rule is the only legal consequence that was introduced by the Austrian legislator in transposition of Article 24 (1) of the Directive. In the opinion of the legislator there was no need for other penalties because there are already other rules in Austrian Civil Law or in the transposition law of other Directives, which are considered as sufficient. In this regard the following legal consequences are possible according to the Austrian legal system[37]:

35 Cf. ErläutRV 89 BlgNR 25. GP 12 ff, 34, 38, cf. also *Stabentheiner*, Das neue Fern- und Auswärtsgeschäfte-Gesetz, VbR (Zeitschrift für Verbraucherrecht) 2014, p. 71.

36 ErläutRV 89 BlgNR 25. GP 13.

37 Cf. ErläutRV 89 BlgNR 25. GP 35; and as well *Dehn*, Allgemeine Informationspflichten nach Art 5 des Vorschlags für eine Richtlinie über Rechte der Verbraucher, in *Jud/Wendehorst* (Ed.), Neuordnung des Verbraucherprivatrechts in Europa? Zum Vorschlag einer Richtlinie über Rechte der Verbraucher (Vienna 2009) pp. 41 (63 et seq.); *Schwarzenegger*, Informationspflichten, in *Bydlinski/Lurger* (Ed.), Die Richtlinie über die Rechte der Verbraucher (Vienna 2012) pp. 25 (37 et seq.).

Is some information missing, especially an information about the prize of the goods or services or – under certain conditions – about the main characteristics of the goods or services, there might not be a consensus between the parties and consequently not even a contract.

Does the consumer furthermore have no idea at all or a misconception of the reality due to an infringement of the information duties by the trader, the consumer has the right to contest or adapt the contract in accordance with § 872 ABGB because in such a case, the trader has caused the consumer's error. An error about facts that have to be explained by the trader by rights, is always considered a contestable error according to § 871 par. 2 ABGB.

In addition, a pre-contractual liability (*culpa in contrahendo*) of the trader is possible. The result of restitution in kind can be the same as in case of an error. The contract can be adapted or contested.

Last but not least, competitors could bring an action against the trader who infringes his information duties according to competition law.

ConclusionIt remains to be seen if the new regime will prove its usefulness in praxis and if the consumer protection will improve through the new regulations. So far, the Austrian Economic Chamber has only pointed out that the pre-contractual information duties and the post-contractual obligations of documentation shall be summarised in one single procedure. Particularly for the case of an off-premises contract, the Economic Chamber recommends the use of one single document and provides an appropriate standard form for it.[38]

[38] Cf. *Stabentheiner*, Das neue Fern- und Auswärtsgeschäfte-Gesetz, VbR (Zeitschrift für Verbraucherrecht) 2014, pp. 108 (113).

Off-premises Consumer Contracts in Poland: Selected Issues

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Abstract

The purpose of this paper is to look at how the new Directive on consumer rights (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights) has been transposed into the Polish national law in the field of off-premises contracts. Given the maximum harmonization nature of the Directive, the paper is mainly concerned with these parts of the Directive in relation to which the Member States enjoy some regulatory freedom. Thus it presents how the regulatory options have been used by the national legislator. Moreover, it aims at analyzing whether the new national legislation giving effect to the Directive is likely to overcome practical problems and discrepancies in interpretation that happened to arise when applying its predecessor, i.e. the former regulation concerning off-premises contracts.

Keywords

Off–Premises Contract; Consumer; Trader; Full-Harmonization; Regulatory Options; Information; Withdrawal; Transposition; Costs.

I Introductory remarks

The main aim of this paper, prepared for the purpose of the workshop "Off-premises contracts and consumer protection in law and praxis", held on 19th November 2014 at Masaryk University in Brno, is to report on the current state of consumer protection law in the field of doorstep contracts in Poland. From the Polish perspective, the time of the workshop was a very

apt moment for a reflection on off-premises contracts. It fell exactly within the period when the Polish law was at the eve of a new consumer protection era that the Directive on consumer rights[1] (hereinafter referred to as the Directive) was meant to start. In contrast to the majority of Member States, that to my best knowledge have transposed the Directive by the time of the workshop, in Poland the transposition was still ahead. The national legislation transposing the Directive, although passed in Parliament, has not yet come into force[2]. As a result, at the time of the workshop it was impossible to tackle practical problems regarding the implementation of the new consumer Directive, which conceivably was the intention of the hosts of the workshop under the name "Off-premises Contracts and Consumer Protection in Law and Praxis". No information could be provided on how the new consumer law is applied in Poland. Therefore, this paper is aimed at giving an insight into how the Directive is actually transposed. Given the maximum harmonization nature of the Directive, the paper is mainly concerned with these parts of the Directive in relation to which the Member States enjoy some regulatory freedom. Thus it presents how the regulatory options have been used by the national legislator (Part I of the paper). To try and meet the expectations of the practical aspects of off-premises contracts phenomenon, a short review of problems that were likely to arise when applying the previous regulation is also offered. Furthermore, some speculations are made as to whether the national legislation giving effect to the Directive is likely to overcome these problems or, conversely, prone to give rise to new ones (Part II of the paper).

II Regulatory options

Technically the Directive is transposed into the Polish legal framework partially by a separate piece of legislation, namely the Consumer Rights Act[3] and partially by the Civil Code itself. However, provisions concerning

1 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 201 on consumer rights.

2 It was brought into effect on the 25th of December, which makes the Polish transposition delayed, as a new national legislation giving effect to the Directive was required to be in place by the 13th of July.

3 The Act on Consumer Rights of 30 May 2014 (Journal of Laws of 2014, item 827).

information for off-premises contracts, as well as provisions on the right of withdrawal from contracts of this kind, are exhaustively enumerated in the former act and therefore my focus will be entirely on this act. To give a complete picture of how the Directive is transposed, some remarks of the scope of the transposal are required. As mentioned before, the majority of provisions contained in the Directive are full-harmonization measures. Despite this, some deviations when transposing the Directive into national legislation are also possible. For instance, the Directive leaves Member States the option not to introduce corresponding national provisions to off-premises contracts for which the payment to be made by the consumer does not exceed 50 €. Also, it provides that Member States may define a lower value in their national legislation. In fact, the Polish Consumer Rights Act has used both these options by providing that its provisions shall not apply to off-premises contracts where the consumer is liable to pay an amount not exceeding 50 PLN.

Setting out detailed information that traders are to provide consumers with is undoubtedly the core aim of the Directive. Despite this, it gives Member States the option to introduce in their national legislation a simplified model of pre-contractual information duties in respect to given off-premises contracts. The option regards contracts where the consumer has explicitly requested the services of the trader for the purpose of carrying out repairs or maintenance for which the trader and the consumer immediately perform their contractual obligations and where the payment to be made by the consumer does not exceed 200 €. In respect to such contracts Member States are free to provide in national legislation simplified pre-contractual information requirements. Namely, Member States can limit information requirements to the information enumerated in points b and c of Article 6 paragraph 1 and some information named in Article 7 paragraph 4 itself, which entails that under limited duty to inform, the trader shall provide the consumer only with the information about:

- the identity of the trader, such as his trading name;
- the geographical address at which the trader is established and the trader's telephone; number, fax number and e-mail address;

- information about the price or the manner in which the price is to be calculated together with an estimate of the total price, on paper or, if the consumer agrees, on another durable medium

and additionally, information referred to in points a, h and k of Article 6 paragraph 1, that is information about:

- the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
- the conditions, time limit and procedures for exercising that right of withdrawal, as well as the model withdrawal form (if such a right exists in given circumstances);
- the information that the consumer will not benefit from a right of withdrawal (where a right of withdrawal is not provided for in accordance with Article 16) or the circumstances under which the consumer loses his right of withdrawal.

The trader may however choose not to provide information on paper or another durable medium if the consumer expressly agrees so.

The simplified information regime has been accepted and introduced into the Article 16 of the Polish Consumer Rights Act. However, it is not to be disregarded that the simplified model of information duties is applicable only when the payment to be made by the consumer does not exceed 600 PLN which equals about 150 €. As a consequence, the wording of Article 16 of the Consumer Rights Act leaves no doubt that the relaxed information regime applies to the off-premises contracts which meet collectively all the prerequisites set out in it, namely to the off-premises contracts that both are contracts for services mentioned before which the trader immediately performs getting in return an immediate fulfillment of consumer's contractual obligations and additionally give rise to the consumer's duty of payment which does not exceed 600 PLN.

As far as other aspects of regulatory freedom are concerned, the Article 6 section 7 of the Directive deserves mentioning. It says that Member States may maintain or introduce in their national law language requirements regarding the contractual information, so as to ensure that such information is easily understood by the consumer. In utilizing this option (Article 44 of Consumer Rights Act), the Polish legislator amended the Polish Civil Code provisions

on pre-contractual duties concerning the contract for sales. According to this amendment, if the purchaser is at the same time a consumer, the seller shall provide him or her with clear, understandable and unambiguous information in Polish which is sufficient to enable the purchased item to be used properly and in full. It is to be done before the contract is concluded. Along with Articles 7 and 7a of the Polish Language Act of 7 October 1999 the above-mentioned provision of the Civil Code spells out the national law language requirements regarding the contractual information.

III Practical problems

Meaning of the notion "off-premises contract" (scope of application of the consumer protection measures)

As to the meaning of off-premises contracts, the new legislation is far clearer than the previous one. Article 2 of the Consumer Rights Act defines off-premises contract as a contract between a trader and a consumer which is:

- concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
- a contract for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;
- concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer;
- concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to consumers.

Additionally, the above-mentioned article gives a comprehensible definition of how the term "business premises" is to be understood. Thus, it seems to eliminate some doubts which are likely to arise under previous regulation. For instance, in the Polish case law it was unclear whether a stall situated within the premises of a mall can be viewed as business premises of a trader

who leases this stall from the mall, having the main place of business elsewhere. In consequence, it was not clear either, whether a contract concluded between such a trader and a consumer at the stall constituted an off-premises contract to which consumer protection measures are applicable[4]. Article 2 of the Consumer Rights Act seems to cast away all such doubts, as it makes clear that "business premises" are any immovable retail premises where the trader carries out his activity on a permanent basis or any movable retail premises where the trader carries out his activity on usual or permanent basis. This is in line with the assumption expressed in the preamble of the Directive (recital 22), where it is highlighted that "business premises should include premises in whatever form (such as shops, stalls or lorries) which serve as a permanent or usual place of business for the trader. Market stalls and fair stands should be treated as business premises if they fulfil this condition."

However, during the public debate on the new consumer law, some doubts were also raised regarding the notion of off-premises contract and consequently the scope of application of the Consumer Rights Act. One of them concerns the usual practice of formation of contracts for cellular telephone services[5]. In the process of formation of such contracts an offer made by a trader is often delivered to a consumer by couriers and then accepted by the consumer in presence of the courier but without direct presence of the trader. In such circumstances, a question may arise, whether a contract made in such a manner is a contract that falls within the scope of the Consumer Rights Act. Similar doubts may arise as to cases in which an offer was made by the consumer away from the premises of the trader but the contract was entered into on premises. As said above, a contract may be understood as an off-premises contract where an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader, even if the conclusion of the contract took place on the business premises. Is it still an off-premises contract where the offer was accepted by a trader with

4 See: Sąd Okręgowy w Łodzi, 19. 03. 2007 r., III Ca 383/07.

5 See: http://okablowani.pl/umowy-zawierane-na-odleglosc-oraz-poza-lokalem-przedsiebiorstwa-w-nowej-ustawie-o-prawach-konsumenta/.

modifications (meaning that the contract was made as a result of the consumer's acceptance of the trader's counteroffer)? This cannot be answered when considering the mere wording of the Consumer Rights Act.

IV Right of withdrawal

One of the most important aims for the EU legislator was to grant consumers cooling off period. Consequently so it was for the Polish legislator enacting Consumer Rights Act. The main problem that the new regulation deals with are the differences in the starting point of the withdrawal period. Allegedly that is one of the main factors which made the application of the previous regulation troublesome. Under the Consumer Right Act there are no differences as to the starting point of the withdrawal period irrespective of whether a given contract is a distance contract or an off-premises one. The extended (14-days) period within which a consumer can change their mind and withdraw from the contract begins to run from the day of the conclusion of the contract. However, for the supply of goods it starts on the day on which the consumer receives the goods. Similarly to previous regulation, the Consumer Rights Act provides some exceptions to the right to withdraw. For instance, the withdrawal right does not apply when the goods subject to a contract are bespoke or personalised. Nonetheless, the exhaustive list of such exceptions (Article 38 of the Consumer Rights Act) seems more adequate than the one provided in the former legislation. Among cases to which the right to withdraw does not apply, the current list names contracts for the supply of goods which are liable to deteriorate or expire rapidly and contracts for the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery. In contrast to the former law, these exceptions to the withdrawal right are valid not only for distance contracts but also for off-premises ones. This is a modification that, beyond any question, calls for high praise. Under former law, traders operating in the off-premises context were put under high risk of incurring losses as a result of withdrawal from contracts for delivery of disposable products, in case of which no one could repurchase the product after the execution

of withdrawal right. The new law prevents all kind of traders from incurring such losses by removing unjustified inequality between traders entering into distance and off-premises contracts.

V Cost of returning goods

Many questions are solved by the transposal of the Article 14 of the Directive. When transposing it, Article 34 of Consumer Rights Act provides the time limit for the consumer to send back or hand the goods over to the trader in case of withdrawal. It also sets out a rule, according to which the consumer shall only bear the direct cost of returning the goods and only provided that they were properly informed by the trader about this burden. Both these issues were dubious under the former regulation. The new legislation seems to effectively cast aside doubts. As said above, it states that the consumer shall only bear the direct cost of returning the goods. Although the term "direct cost" is not clear from the outset, its interpretation proposed in legal writing seems to be shared without reservation and was supported by the Polish Office for Competition and Consumer Protection. According to this interpretation the term "direct cost" refers to the cost of delivery, that is for instance the amount paid by the consumer for shipping the goods to their designated shipping address (with the exception of the supplementary costs resulting from the consumer's choice of a non-standard delivery method). The cost of sending goods back to trader when executing the right to withdrawal does not constitute "direct cost" and therefore is to be borne by the consumer. In addition, the goods which, by their nature, cannot normally be returned by post and have been delivered to the consumer's home, shall be collected by the trader at their expense. It can be easily noticed at this point that the phrase "normally be returned by post" leaves the provision open for discrepancies in interpretation. Seemingly the mere impossibility to send goods in envelope is not enough to give rise to the trader's duty to collect goods at their expense.

VI Conclusions

In the light of what was said, one can reckon that the Consumer Rights Act provisions are capable of solving many problems that were likely to arise when applying the former regulation. The new off-premises law seems not only to cast aside some doubts concerning the interpretation of its predecessor, but also to be more adequate at some points. Unfortunately, the analysis offered in this paper shows that among the Consumer Rights Act provisions some remain vague. This constitutes a serious shortcoming of the new regulation, as it leaves the regulation open for discrepancies in interpretation and therefore may cause problems that the new law ought to eliminate instead of causing.

Off-premises Consumer Contracts in Slovakia[1]

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Abstract

Contracts concluded between consumer and trader are the most often used kind of contracts at all with regard to quantity. Therefore it is necessary to regulate legal relations established upon this kind of contracts. Under the present legal situation, consumer contracts are divided according more criterions. One of the criterions is the way (how) and place (where) the contract is concluded, a source of contracts coming into existence under this division are off-premises contracts.

Keywords

off-premises contracts, consumer, trader, legal regulation, information, control mechanism, transposition, protection, unfair commercial practices.

I Introduction

Legal regulation made by the European Union influences laws in their member states, the way of influence depends on the form of effect/applicability of particular legal act. In case of directive, both types of applicability can be taken into account – direct (in certain cases in order to protect the rights of individuals) and indirect (transposition into national laws by Member State). The 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

1 Príspevok bol vypracovaný v rámci grantového projektu VEGA č. 1/0505/14. *„Princípy nadnárodného civilného procesu, ich perspektívy a možnosti inšpirácie slovenskej právnej úpravy de lege ferenda."*

and Directive 97/7/EC of the European Parliament and of the Council (hereinafter as "Directive on Consumer Rights") was (indirectly) transposed into Slovak national law by Act no. 102/2014 Coll. on Consumer Protection related to selling or providing of services based on a distance contract, or a contract concluded outside operational premises of the seller; as subsequently amended (hereinafter as "Act no. 102/2014"). Not only Slovakia was obliged to transpose the Directive on Consumer Rights, but all the other Member States as well. Final current legal regulation on the national level results from the European legislation (as a common factor) and the real situation that is different in each of the Member State. Some legal instruments and provisions were added as a response to emerged situation.

II Transposition and national law

Slovakia fully transposed Directive on Consumer Rights in conformity with its Article 4. Fragmentation of consumer law on national level has been shown also within this transposition – 11 acts dealing with consumer rights were amended.

III Theme background

The most discussed situations coming under the scope of subject matter have been the excursions organised by the trader with the aim or effect of promoting and selling goods or services to the customer.

People (mostly (old age) pensioners or elderly people in general) are invited to excursions, where the products acquired are promoted and offered for sale. By "using" this opportunity and a lack of legal awareness, the trader applies unfair and aggressive commercial practices – especially:

- creating the impression that the consumer cannot leave the premises until a contract is formed,
- conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation,

- making unwanted and persistent solicitations mainly by telephone in circumstances and to the extent justified under national law to enforce a contractual obligation,
- falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice,
- claiming to be a signatory to a code of conduct when the trader is not;

or breaches consumer law in general by denying those rights that are given and guaranteed by law.

IV Praxis directing

Even though situation has got better since Act no. 102/2014 came into force (June 13, 2014), it is still not "problem-free".

Follow from the Annual report of the Slovakia Trade Inspection (according to the Act No. 128/2002 Coll. on State Control of Internal Market in the Consumer Protection Issues this institution is an authority of internal market surveillance; it is independent in its inspection and decision-making activities; is the authority of the state administration and a non-profit making organisation, funded by the state budget) for year 2014 (http://www.soi.sk/files/documents/kcinnost/vs%202014.pdf), an excursions organised by traders are perceived by consumers as a most negative topic within an acting of traders at all. Consumers consider goods being sold on excursions as low-grade and overpriced. It is also the field, which amount of complaints decreased rapidly in, when compared years 2013 and 2014. Deficiency in trader's acting was noticed in breaching of obligation to announce intended excursion according to the section 11 par. 3 and 4 Act no. 102/2014 properly and on time:

- announcement is not reported 20 days in advance to the Slovakia Trade Inspection,
- time schedule of excursion is missing,
- price of selling goods is missing,
- amount of participants is missing,
- letter of invitation is not attached to the announcement,

- orientation of excursion is missing,
- name of selling goods is missing,
- framework of telephone invitation is missing.

Despite the positive effect effect of change of law and social situation – broaden information, acting of traders has still not become legally suitable and these unfair commercial practices have been identified:

- deceiving of consumers – omitting and not stating all necessary information properly (e. g. "Invitation to non-binding meeting")
- aggressive marketing that significantly disrupts freedom of choice or behaviour of consumer; it includes exerting pressure, pestering (e. g. conducting personal visits, ignoring requests of consumer to leave or no to return, making persistent and unwanted solicitations by telephone),
- falsely claiming that a product can cure illness, dysfunction or disability/malformations,
- "allure and change" advertisement,
- falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice,
- creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either there is no prize or other equivalent benefit, or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost,
- promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

In 2014, the Slovakia Trade Inspection ascertained new ways of law's circumvent such as making excursions not as a public. Traders name an excursions as a "health lectures, days of health, healthy living style, advertising

campaign…" with no option to buy any goods so traders are not obliged to announce them, catalogue is delivered after the presentation to consumer's letterbox and he can order goods upon this invitatio ad offerendum.

When trader organizes an excursion, he is obliged to do so just in a place that is registered as his business premises/establishments. Traders usually mark a place of presentation but not every time it corresponds with their business premises/establishments according to the records in the Trade Register. The Slovak Trade Inspection closely cooperates with the Trade Licensing Office in this issue, so they common can draw consequence if marked place does not meet the requirements (space where trading is carried on – not just for one time) for business premises/establishments according to the section 17 Act no. 455/1991 Trade Licensing Act as subsequently amended. Traders let a special space to be written down into the Trade Register only a few days before an excursion is to be held and after that it is erased; traders usually moreover make their excursions in restaurants. This procedure is not considered to be legitimate, in 2014 5 subjects have had their trading license terminated because of violation as mentioned.

V Current situation

According to up-to-date situation in 2015, traders` acting gets better, despite that there are cases when traders (but not so much of them as in the past) violates law, specifically traders listed on web page http://www.soi.sk/sk/Predajne-a-prezentacne-akcie/Upozornujeme-spotrebitelov/Upozornenie-spotrebitelov-na-osobitne-zavazne-porusenia-povinnosti.soi?ind=: $1

- make excursions without prior announcement,
- sell goods for more than stated in letter of invitation,
- claim to pay the price right on the excursion,
- separate consumers from the others because of "drawing lots",
- deny the right of withdrawal by making its delivery impossible ("hiding" of trader).

VI Level of consumer protection

Decreasing number of ascertained violation of law in subject issue indicates that adopted measures meet their expectations. Not only act amendments, but also the betterment of awareness (e. g. contributions in media) play their roles in making situation better.

The level of consumer protection could be considered as sufficient. Legal base (unfair commercial practices, information duties, right to withdrawal, supervision) has established sufficient legal instruments that can help eliminate and remove illegitimate intervention.

Upon the author's point of view, the problematic issue is fragmentation of consumer law's legal adjustment. If consumer wants to make his claim, he has to use more than 3 acts (e. g. Act no 102/2014 to know that he can withdraw from contract; Act no. 250/2007 Coll. on Protection of Consumers and on changes and amendments to Act no. 372/1990 Coll. on offences as subsequently amended to claim the right to adequate financial compensation from the party, whose breach of a right or obligation stipulated in this act and in separate regulations is capable of inflicting damage to the consumer who successfully asserting a breach of right or obligation stipulated in this Act and in separate regulations; Act no. 40/1964 Coll. Civil Code as subsequently amended to know whether he is consumer or not…).

Another shortage can be seen in low knowledge of consumers, public education is necessary. Last, but not least deficiency can be seen in disunity of decision-making bodies, mainly courts.

All of mentioned represents reasons why enforcing of consumer rights is still on a low grade.

Off-premises Contracts in Germany

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Abstract

In transposing Directive 2011/83/EU into the German Civil Code, the German legislature has managed to avoid redundancies and adhered to the principles of abstraction and precision. As a result however, the law is not easily accessible for consumers and non-lawyers. This article investigates consumer protection in light of the obligations of information and the right to withdraw a declaration by comparing the new and former legal rules.

Keywords

Consumer Protection; Transposition of the Directive on Consumer Rights; Obligations to Inform; Right to Withdraw; Withdrawal; Accessible Law.

The transposition of the EU Directive on consumer rights has hardly been acknowledged in these parts. Its implementation passed almost unnoticed. This is somewhat surprising since the proposal for a Common European Sales Law, which was made at roughly the same time, has found a much more pronounced presence in the legal discussion. Although nobody knows yet whether this proposal will ever become binding law, a number of monographs, commentaries and articles have already been published. This has the ring of a topsy-turvy world to it. After all, due to the practical importance of distance contracts, the amendments provided by the Directive on consumer rights influence daily life and consequently daily legal practice. And even after the transposition of the provisions the Directive on consumer rights called for, the discussion has stayed comparatively quiet. Three legal education magazines published one, respectively two articles each on some isolated questions regarding the new legal provisions. And in another legal

education magazine, an article was published in the spring of 2014 which dealt with the then-current law, which was to expire on 12 June 2014. Only here and there could some short remarks be found regarding what was soon to enter into force. A standard commentary for students, academics and legal professionals which was released at the same time does not comment on the new provisions yet either.

The legislative implementation of the Directive on consumer rights, too, was quiet and speedy.[1] This is not a matter-of-course for the German legislature: Sometimes Brussels has to threaten to open treaty violation proceedings as it has happened at some previous occasions before the legislative proceedings to transpose a directive had begun. Conversely, the Directive on consumer rights was enacted within a mere nine months.

I Transposition of the Directive on consumer rights into the German Civil Code

The German legislature has remained true to the path taken in enacting the modernization of the law of obligations in 2001. Despite demands to the contrary,[2] the transposition of the Directive on consumer rights was not made in a separate codification dealing only with consumer contracts, but within the German Civil Code, the BGB.

With regard to off-premises contracts, the relevant provisions can be found in the general part of the BGB (definitions of consumer and trader, Sections 13 and 14 BGB), and in the general law of obligations, whereas the provisions in the latter are found in non-consecutive places, namely in Sections 312 et seq. and in Sections 355 et seq. The former deal with the factual preconditions that have to be met to apply the consumer protections rules. They also standardize the basic duties to inform and the right to withdraw. The latter provisions deal with the question of how the right to withdraw is exercised and what legal consequences follow from a withdrawal.

1 Cf. *Hilbig-Lugani* ZJS 2013, 441, 442.

2 *DAV* Stellungnahme Nr. 78/2012, p. 3; *Kaufhold* Zusammenfassung der Stellungnahmen des Deutschen Anwaltsvereins zum Entwurf eines Gesetzes zur Umsetzung der Verbraucherrechterichtlinie, zur Änderung des Verbrauchsgüterkaufrechts und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung, p. 3.

As a result, if somebody wants to withdraw a declaration made, they need to keep in mind three complexes of legal rules. What might be acceptable for a lawyer is difficult for a consumer who wants to know his rights but is not familiar with the law. This is also true for the Sections 312 et seq. One has to be aware of an intricate interaction of rule and exception. Unlike in the Directive on consumer rights, there are no separate rules concerning duties to inform for off-premises contracts and distance contracts, respectively, but the differentiation between both types of contracts has been made within each provision. This is based on the legislator's intention to avoid redundancy as much as possible and to maintain the high degree of abstraction and precision the BGB is so well-known for. However, this leads to a law that is praised by legal scholars but not understandable for entrepreneurs and consumers.[3]

This disadvantage is all the more serious, because a failure to provide correct information about the right of withdrawal, or else to omit this information, does not result in an unlimited right to withdraw the contract any longer, as had been the case pursuant the former legal provisions.[4] Even if the trader intentionally does not advise the other party on the right of withdrawal, the consumer can no longer withdraw the contract after a maximum period of twelve months and two weeks.[5] Therefore, it is the all the more important that the consumers know their rights and that the provisions dealing with these rights be easily accessible. This is a weak point of the German transposition.

II Definition of off-premises contracts

To meet the criteria of an off-premises contract, two requirements have to be fulfilled. Firstly, a presumed imbalance has to be given; secondly, further situation-specific requirements that call for the protection of the weaker party must be met.

3 See also *Hilbig-Lugani* ZJS 2013, 545, 550.
4 *Koch* JZ 2014, 758, 760; *Hilbig-Lugani* ZJS 2013, 545, 547.
5 Pursuant Section 356 (2) 3 this rule does not apply to off-premises contracts for financial services.

The parties to the contract must be a trader and a consumer. The underlying rationale is that in this situation, there is usually an imbalance between the trader and the consumer. This imbalance is to be reduced by rules which protect the consumer. Whether there has been an actual imbalance in a specific case, however, is of no relevance.[6] This may be criticized from a standpoint of legal policy, however, the consumer enjoys the protection of these legal provisions even if the specific case is different.

Consumer is defined by the redrafted Section 13 BGB as any natural person who enters into a legal transaction for purposes that are predominantly outside his trade, business or profession. The rule that the purpose need not predominantly be professional or commercial is meant to include those transactions that have purposes of both a professional and private nature. This codifies the former judicial decisions. More consideration should be given to the fact that only a person who pursues a self-employed commercial purpose is not a consumer. Consequently, employees are consumers under German law.[7] This goes beyond the scope of the Directive on consumer rights, but is generally considered to be in line with the principle of full harmonization.[8]

However, consumer protection is a one-way principle under German law: It must be the consumer who is obliged to owe the payment, and it must be the trader who is obliged to provide the contract-specific performance.[9] This has been widely criticized,[10] particularly since the Directive on consumer rights does not demand such a restriction. And in the case of other contracts – if, for example, the consumer is approached by a car salesman in parking lot and then sells the latter his car for cash – he is at least as worthy of protection as if the case were reversed. Here, however, he does not enjoy that protection.

Situationally, Section 312 b – transposing Art. 2 No. 8 and No. 9 Directive on consumer rights – calls for the consumer having given a binding

6 HK-BGB/*Schulte-Nölke* Sec. 312 para. 1.
7 Erman/*Saenger* Sec. 13 para. 1a, 15; cf. jurisPK/*Martinek* Sec. 13 para. 27 et seq.
8 HK-BGB/*Schulte-Nölke* Sec. 312 para. 2; *Bülow*/*Artz* Verbraucherprivatrecht para. 67.
9 *Bülow*/*Artz* Verbraucherprivatrecht art. 86; Palandt/*Grüneberg* Sec. 312 para. 2; dissenting opinion in HK-BGB/*Schulte-Nölke* Sec. 312 para. 4.
10 Cf. *Bülow*/*Artz* Verbraucherprivatrecht para. 86.

declaration outside the business premises of the contracting trader. The rules also apply if the contract is concluded on the premises of another trader – although in these cases, the consumer is normally not under psychological pressure and is normally not confronted with an element of surprise as would be the case in other situations. On the one hand, this extends consumer protection considerably. On the other hand, certain types of contract situations are now left out in which consumers had been protected pursuant the former law, specifically contracts that are entered into by an employee at their own workplace that are also the business premises of their employer.[11] Of course, the consumer is not in need of protection if the contract is related to the employment relationship. But this may not necessarily be the case, and then it would be rather difficult to explain why the OPC should apply to that contract.

Under the old legal provisions it was a prerequisite that the consumer be led to enter into a contract. This is not a requirement any longer. The new rules are rigid and less open to interpretation. I shall illustrate using two examples.

- In cases where the contract was concluded in a doorstep-selling situation, but the doorstep-selling situation was not the cause of the conclusion of the contract, for example because the consumer wanted to enter into the contract at any cost and had maybe even solicited the trader's visit,[12] the courts have refused to apply the consumer protection rules.[13] This should not be possible any longer pursuant to the new rules.[14]
- Conversely, in other situations the consumer is less protected than pursuant the former rules. If the consumer is led to enter into a contract in a doorstep-selling situation, but the contract is not concluded until several days later, the consumer will not be protected pursuant the new rules. This was different under the old rules.[15]

Only in the cases of Section 312 b (1) No. 3 can there be a discussion as to whether the consumer still entered immediately into the contract. These are

11 *Bülow/Artz* Verbraucherprivatrecht para. 238.
12 Pursuant to Section 312 (3) No. 1 in this situation, threre was no right to withdraw the declaration.
13 BGHZ 171, 364, 369.
14 HK-BGB/*Schulte-Nölke* Sec. 312 b para. 1.
15 BGH NJW-RR 2009, 1275, 1277 (three weeks); *Hilbig-Lugani* ZJS 2013, 441, 448.

the cases in which the consumer is approached in an off-premises situation, but the contract is concluded immediately after that on the business premises. But it looks to be only a question of time before the courts will have to decide whether a consumer was personally and individually approached.[16] Clever lawyers will be looking for a way to construe consumer approach in such a way that it would fall outside of the scope of the consumer protection rules. In addition, it is uncertain what the meaning of immediate conclusion after consumer approach is now. Are we looking at minutes or hours? Pursuant the former law, the German Federal Court of Appeal found that a doorstep-selling situation might still exist if the consumer entered into a contract two days after the trader's visit.[17]

Art. 3 (4) of the Directive on consumer rights allows the member states to decide not to apply this Directive or to introduce corresponding national provisions to off-premises contracts for which the payment to be made by the consumer does not exceed EUR 50 or to define a lower value in their national legislation. The German legislator drew the line at EUR 40, which does not mean that in these cases none of the provisions applies, but rather that only certain duties apply [see Section 312 (4) No. 12 BGB]. With regard to off-premises contracts, it is of relevance that no right of withdrawal exists and that the consumer is not obliged to pay a fee for the use of a certain means of payment by way of fulfilling his contractual obligations if the agreed-upon fee exceeds the cost borne by the entrepreneur for the use of such means of payment.

III Consumer protection through information

In addition to the general obligations to inform according to Section 312a BGB, which apply to every consumer contract, there are several other duties to inform the consumer that have to be specifically fulfilled in off-premises contracts. This goes beyond what was required pursuant the former law. According to the former law, the consumer had to be informed only about the right to withdraw the contract. What makes the law inaccessible

16 *Schärtl* JuS 2014, 577, 579.
17 Cf. BGH NJW 1996, 3416, 3417.

to the consumer yet again is the fact that the content of the duties to inform in off-premises contracts is regulated in yet another codification (the EGBGB) and not in the BGB.

The specific duties of information apply equally to off-premises contracts and to distance contracts. A differentiation is only made concerning the distinction whether the contract is a financial service contract or not. In addition, there are several duties of information that have to be fulfilled (shortly) after the conclusion of the contract. In the case of an off-premises contract, this information has to be given on paper, unless the consumer has agreed to get the information on a durable medium (Art. 246 § 4 (2) EGBGB). If the contract concerns financial services, the information has to be given on a durable medium in any case (Art. 246 b § 2 EGBGB). In this manner, the confrontation with an element of surprise can be relativized in a situation where the consumer needs to be informed very thoroughly: Whoever receives such a lot of information should always be alert! However, the amount of information that has to be delivered might also overburden the consumer. One may easily overlook within the sea of information the essential pieces needed to make informed decisions.

If the entrepreneur violates his duty to inform about the right to withdraw the contract, the maximum period of twelve months and two weeks applies (Section 346 (3) 2 BGB). In addition, the trader may be exposed to damages and claims based on unfair competition behaviour. Unlike in some other countries, there are no state authorities that supervise whether a businessman complies with his duties of information. Taking that into account it is doubtful whether this is in line with Art. 24 (1) of the Directive on consumer rights.

IV Consumer protection through withdrawal

In line with the Directive on consumer rights, Section 312 g (2) stipulates that there is no right of withdrawal in some specific contracts although they are off-premises contracts. One of those exceptions is stipulated in Section 312 g (2) No. 1: the right to withdraw a contract does not exist for contracts for the supply of goods that are not prefabricated and the production

of which is governed by the consumer's individual choice, or which are clearly tailored to the personal needs of the consumer. Of particular note in this regard are the so-called *build-to-order* contracts, i.e. contracts for goods that are manufactured – of course – following the consumer's individual choice, but by using standard parts that can easily be fractionized without loss of value. Although the underlying rationale, which is that the entrepreneur shall not be obliged to take back an item that he cannot sell to another customer – at least not without any loss –, is not fulfilled, the exception has to be applied nevertheless.[18] Consequently, it seems to be only a matter of time before clever entrepreneurs will seek to avoid the right of withdrawl by asking the consumer to make minor individual configurations to the item in question.

Compared to the former rules, it is now more difficult for the consumer to exercise his right to withdraw the contract. Pursuant the old rules, the right could by exercised by simply returning the goods. This is no longer possible. Although the law does not stipulate a form requirement, the mere returning of the goods cannot be interpreted as the necessary declaration (implied by facts).[19] This is because it can be seen from the legislative materials that the legislator has found it insufficient to merely send back the goods without any further declaration.[20] Taking into account that this is a major change compared to the former law, and that the consumers will probably be used to the former practice, one would wish that the legislature had made the change within the code and not only within the legislative materials. On the other hand it is commendable that the withdrawal period does not commence before the consumer has been informed about his right to withdraw the contract and before he has received the goods. However in some regards the level of protection is much lower than pursuant the former law. Firstly, if the trader fails to provide correct information on the right of withdrawal or if he omits this information, this does not result in an unlimited right to withdraw the contract any longer. The right to withdraw the contract generally ends after twelve months and two weeks. This might

18 *Schärtl* JuS 2014, 577, 579; *Hilbig-Lugani* ZJS 2013, 441, 451.

19 *Koch* JZ 2014, 758, 760; *Hohlweger/Ehmann* GWR 2014, 211, 213; *Foerster* JA 2014, 801; *Schärtl* JuS 2014, 577, 579; *Hilbig-Lugani* ZJS 2013, 545.

20 BT-Drucks. 17/12637, p. 60.

privilege entrepreneurs: Their risk of being obliged to take the goods back is limited to twelve months and two weeks and they might choose to bear this risk. As it is very difficult for the consumer to quantify his damage claim, the entrepreneur does not face a risk of being sentenced to pay damages. The risk of somebody claiming unfair competition behaviour is also relatively limited. Secondly, according to the former law, the consumer had to bear the costs for sending back the goods only in distance selling contracts if the parties agreed so and only if the value of the goods send back did not exceed the amount of EUR 40.[21] According to the new law, the consumer is now generally obliged to bear these costs.[22] Thirdly, according to Section 356 (4), in the case of a sale of consumer goods, the entrepreneur may refuse to make repayment until he has received the returned goods or the consumer has provided proof that he has dispatched the goods. Consequently, the consumer has to give up possession of the item and therefore has no security if the purchase price is not reimbursed.[23] This might prevent him from using his right to withdraw the contract.[24]

V Consumer protection in civil proceedings

There is also a form of consumer protection in court proceedings. If the entrepreneur files a claim against the consumer based on an off-premises contract, Section 29c ZPO applies. The court at the location where the consumer has had his place of residence at the time of initiating the proceedings has exclusive jurisdiction for all claims against the consumer. A choice-of-forum agreement – particularly if made after the emergence of the dispute – is thus also invalid. For claims of the consumer against the entrepreneur, Section 29c ZPO stipulates an additional jurisdiction for the court at the location where the consumer has had his place of residence at the time of initiating the proceedings. In this case, the choice is up to the consumer (Section 35 ZPO).

21 Cf. *Koch* JZ 2014, 758, 762.

22 *Koch* JZ 2014, 758, 762; *Hohlweger/Ehmann* GWR 2014, 211, 214; *Möller* BB 2014, 1411, 1417; HK-BGB/*Schulte-Nölke* Introduction to Sec. 312–312k para. 1.

23 *Hilbig-Lugani* ZJS 2013, 545, 548.

24 *Schärtl* JuS 2014, 577, 581.

VI Conclusion

From a systematic point of view, the Directive on consumer rights was transposed coherently into German law. However, the new provisions are not easily accessible for practitioners. This is particularly the case for foreign practitioners, who have little familiarity with German civil law and its principles. This might affect the proper functioning of the single market. The law is also not easily accessible for the consumer. A law that even legal professionals find hard to understand is overwhelming to the common consumer. After only six months, it is difficult to evaluate the new legal provisions. In certain aspects, the protection of the consumer has been extended – sometimes more than was necessary. In other respects, consumer protection has been curtailed – also more than was necessary. In part, this happened in line with the principle of full harmonization. But the legislature has not made full use of the possibilities which that principle still allows.

The new Civil Code and Protection of a Consumer Concluding an Off-premises Contract

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Abstract

In this paper, I focused on consumer protection concerning contracts negotiated away from business premises in the Czech private law and I also reviewed transposition of the directive on consumer rights into the new Czech Civil code. Aside from that, I tried to answer the question whether the specifically endangered consumers (usually senior citizens) are granted sufficient protection by the Czech private law, or whether the EU law (especially the Directive 2011/83/EU) provides sufficient substantive-law protection concerning the contracts negotiated away from business premises.

Keywords

Off-premises Contracts; Consumer; Total Harmonization; Right of Withdrawal; Transposition of Directive 2011/83/EU; New Czech Civil Code.

As of 1. 1. 2014, the new Civil Code became effective in the Czech Republic (Act No. 89/2012 Coll., Civil Code, hereinafter "CC"), which replaced the repeatedly amended Civil Code originating in 1964 (Act No. 40/1964 Coll., Civil Code, hereinafter "CC 1964"), though we may state that after the "Velvet Revolution", CC 1964 was substantially revised so that it would return to normal and standard institutions of private law, which we find all across Europe (especially amendment performed by Act No. 509/1991 Coll. effective 1. 1. 1992).

Czech lawmakers nevertheless felt the need to offer Czech society a new civil code (similarly to how all political representatives of other post-communist

countries are currently considering) because the previous code was considered and characterized as a code influenced by the ideals of communist legislation, even though the robust and relatively stabilized case law created since 1989 created a reasonably stable legal environment. Within the framework of Czech legislation, the new Civil Code, whose main drafter was prof. Karel Eliáš, was the third attempt, and only this third draft of the civil code became law de lege lata.

The basic point of view we want to challenge in the new Czech civil code is the manner in which it protects the consumer in case of off-premises contracts. The actual reason for the analysis of the legal regulation protecting the consumer in case of off-premises contracts is comprised of the fact that Czech society faces relatively strong pressure of groups that intentionally focus on the elderly part of the population. They misuse their trust and inability to digest quickly and flexibly the novelties of today's rapid development of society in an effort to quickly and unethically or downright immorally enrich themselves. As otherwise proven by the documentary film "Šmejdi" by director Silvia Dymáková[1], they use for these ends not only disinformation but outright lies, pressure and manipulation, but also degradation and aggressive behavior. The commentary for distribution of this film asks "What really happens on those popular excursions with a free lunch? Practices that chill to the bone. Lies and thought-out manipulation, whose only aim is to force helpless elderly persons purchase overpriced goods. Seniors pay horrendous sums from their meager pensions for often low-quality products." Law generally does not deal with what is, but determines what is to be. On the other hand, law as a normative system of each society is formed by real society, and must react to the real life of the given society, e.g. determine rules so that the state would be a legal and democratic state. Law (and its creators) must therefore react to social phenomena, e.g. it must take into account negative behavior in the given society and fulfill its basic aim, to allow in society only an acceptable level of injustice.

Before we offer opinions relating to law de lege lata, it is also necessary to understand the fact the consumer was also protected in case of off-premises contracts by CC 1964, e.g. even the "old" civil code contained consumer

1 Http://www.csfd.cz/film/322198-smejdi/.

protection in these specific cases. Czech lawmakers thus had to take into consideration specific expectations:

- Experience with implementing Directive 85/577/EC into the Czech legal system in CC 1964 including Czech case law.
- ECJ/EU case law relating to Directive 85/577/EC
- The fact that Directive 85/577/EC and Directive 97/7/EC were repealed and replaced by the Directive on the rights of consumers (Directive 2011/83/EU)
- Actual text of text Directive 2011/83/EU
- The principle of full harmonization of Directive 2011/83/EU with the possibility of a series of exceptions

One remarkable phenomenon of Czech society and the method of creating laws in the CR is the draft amendment of a new civil code, which the Ministry of Justice submitted for public discussion on 28. 08. 2014 at its Website[2] (e.g. not even eight months away from the effective date of the new code!). The draft amendment contained an entirely new legal regulation of contracts negotiated with the consumer, so before the consumer had a chance to even become familiar with the concept of consumer protection in the new civil code, lawmakers wanted to cancel the entire regulation and replace it with a completely new one, moreover founded upon transposition of directives on consumer protection conceived in minimalist fashion, because the draft generally contained only required a minimum directive standard that the CR must respect, so traditional (or already traditional) bonuses of consumer protection in Czech private law should be extracted and repealed.

We believe that in Czech society, we can generally understand the effort of certain groups to prey unethically and immorally on threatened groups of Czech society, their significant influence on social elites, and therefore also the creation of legal regulation, whether it concerns power groups affiliated with relatively monopolized provision of services (typically energy and telecommunication) or groups operating on the financial products market (typically non-bank loans, but also banking houses), as well as groups concentrating with full intention on the weaker individuals of our society.

2 Http://www.justice.cz.

We may therefore state in general that for a citizen of the CR, it is most beneficial that besides this he is also a citizen of the EU, which guarantees him a certain standard of protection from the powerful and power groups of Czech, but also European or global society.

I The term "off-premises contract"

It generally applies that under the term "off-premises contract", one may subsume any contract concluded upon the concurrent physical presence of the entrepreneur (business) and the consumer outside of the entrepreneur's workplace in the wording of Act No. 455/1991 Coll., on Trade Licensing (Trade Licensing Act), as amended. Besides this though, it will be necessary to start from the diction of Directive 2011/83/EU, e.g. business premises must be considered any property either movable or immovable, in which the entrepreneur permanently or normally operates his business (brick-and-mortar store, stand at a market, mobile shop, etc.). Also necessarily considered an off-premises contract however is such contract that was concluded within premises ordinarily used for business, if the entrepreneur addressed the consumer outside these premises, and then immediately concluded contract within the business premises. The cardinal question will be: how are we to understand the term "immediately". This will certainly be in the case when the consumer would, based on a personally handed over a leaflet on the street (public area) be "swindled" into the store to sign the contract. How will this be however in case that the consumer stops into the business premises the very next day? Will the condition "immediately[3]" still be fulfilled? The model solution offered to us by the CC thus seems to be a bit "incomplete", or left to the interpretation of the court, and in light of the non-existence of such case law evoking legal uncertainty for both consumers and entrepreneurs alike.

We will also consider as an off-premises contract also a contract concluded at so-called demonstration events (even though e.g. in this house of culture, the entrepreneur repeatedly runs his events, and the consumer arrives in his own vehicle), whether these events are held with transport

[3] Compare to this the legislation in Germany, where the term lasts two days. Paper published in the journal of Dr. Frank Spohnheimer.

arranged by the entrepreneur (or a third party) or the consumer arrives himself. Lawmakers state that the contract concluded outside the business premises is also a contract "negotiated during an excursion organized by the entrepreneur for the purpose of promotion and sale of goods or provision of services". Lawmakers apply a somewhat misleading term "excursion[4]", by which we would stricto senzu have to understand only excursion as a typed obligation (Sec 2521 et seq. of the CC), e.g. a set of services in tourism. In the context of the Directive on rights of consumers however, we must state that it concerns any "excursion event"[5] (e.g. it need not concern a set of services in tourism), which is implemented in order to promote and sell goods or services.

II Obligation to inform - basic method of consumer protection

It generally applies that just as CC 1964, CC respects the main principle of consumer protection in EU, entailing the ideal of a so-called informed consumer. In somewhat simpler terms, we could state that the consumer should decide whether it concludes a contract or not based on relevant information, which he will understand, e.g. "the consumer will know what it is about".

The obligation to inform generally can be categorized according to the moment when the consumer obtains information [6], e.g. in the period prior to signing the contract, at the moment of concluding the contract and during the course of paying the debt (implementation of obligation). The new civil code expands the general period prior to signing, and relatively strictly at that, because the entrepreneur is obliged to inform the consumer on a series of facts (Sec 1811(2) CC) regardless of the method by which the contract is concluded. Exceptions are defined only for specific subjects of performance, specifically everyday life matters (e.g. purchasing ordinary bread) and digital calculation (compare Sec 1811(3) CC). Whereas in case

4 Unfortunately, we find a similar term in the official translation of the Directive in Czech.

5 Compare Hulmák, Milan. In: Hulmák, Milan and coll. **Civil Code VI Binding Law. Special part (Sec 2055-3014).** Prague: C. H. Beck, 2014. Extensive commentary. S. 543.

6 For more information, see Selucká, Markéta. **Consumer protection in private law** 1st edition Prague: C.H.Beck, 2008. 134 pages Beckova edice právní instituty.

of contracts concluded e.g. within the framework of ordinary sales in brick-and-mortar stores, failure to uphold this obligation is prosecuted in principle only by the right to compensation for damage (injury), which arises in consequence of providing pre-contractual information, in case of contracts negotiated outside the business premises not sharing information on the price of the subject of fulfillment including taxes and fees, costs for supply and costs for returning goods in case of withdrawal from the contract, the consumer is afforded the right to not pay these costs to the entrepreneur (compare Sec 1821 CC and Art. 6(6) of Directive 2011/83/EU). We can state that from the legal regulation, no relief of the obligation to pay taxes and fees towards third parties (as a rules the state) arises, so it concerns incomplete performance of Directive on rights of consumers[7].

Within the framework of pre-contractual negotiations, the consumer should obtain information, which has certain characteristics. First he must be provided information clearly and understandably in the language in which the contract is concluded. We should understand understandability as that which the average consumer grasps and understands that which he is or will be bound to the contract. This does not only regard grammatical understandability and legibility (including letter size), but also fulfillment of the theory of the consumer, who "knows what he is getting into" (compare ESD C-26/13 Árpád Kásler, Hajnalka Káslerné Rábai versus OTP Jelzálogbank Zrt.). The form of provided information in case of contracts negotiated outside the business premises must be in writing (compare Sec 1828(1 CC), unless the consumer agrees that information will be provided to him in a different text form (e.g. in PDF on a CD).

However, in practice we generally encounter the fact that the consumer is usually, within the framework of the moment of surprise of crowded atmosphere, manipulated by information, which is not complete, is distorted or is an outright lie (typically a greeting on the street or an exhibition within the framework of demonstration events), and consequently obtains written pre-contractual (or by the contractual) information, which does not correspond to that which was told to him orally. The provisions

7 Consistantly Hulmák, Milan. In: Hulmák, Milan and coll. **Civil Code VI Binding Law. Special part (Sec 2055-3014).** Prague: C. H. Beck, 2014. Extensive commentary.

of Sec 1822(1) of the CC explicitly state that "The contract must also contain data shared with the consumer prior to its conclusion. This data can be changed if the parties explicitly agree thereto. The concluded contract must be in accordance with data shared with the consumer prior to conclusion of the contract. This data may change if the parties explicitly agree thereto, otherwise data as the content of the contract is usually more favorable." Thus, the consumer usually gets oral pre-contractual information within the framework of demonstrating a service or goods, then possible pre-contractual written information (Sec 1828(1) of the CC), and consequently concludes the contract, which contains arrangements, which should be in line with data provided prior to conclusion of the contract, whether such data was shared orally or in writing. If the consumer obtained different pre-contractual information, and so the content of the contract does not correspond to this, it does not mean the contract is invalid, because the contract includes rights and obligations, which arise from information provided to the consumer prior to concluding the contract. The situation will be in fact quite clear that the consumer has pre-contractual information in writing (or text) form. However, in case that the content of the contract does not correspond to the orally provided pre-contractual information, which is very typical for contract concluded outside the business premises, the consumer usually finds himself in a lack of proof, because he cannot prove that the entrepreneur shared with him completely different information.

It is a question of how to adopt an appropriate model solution in private law, which would sufficiently protect the consumer from dishonest entrepreneur, who tell the consumer incomplete information or outright lies for the purpose of compelling the consumer to conclude a contract that is disadvantageous to him. Of course the consumer can seek compensation for injury (damage), and the provisions prosecuting error in negotio (compare Sec 583 CC), but at the moment when the consumer does not bear the burden of proof, he will lose the dispute (if he even has the courage to attempt a long and expensive judicial process). In our opinion, such an institute does not exist (apart from the right to withdraw from the contract, but the contract has already been concluded). The only effective way to protect the consumer from dishonest behavior of the entrepreneur is effective public protection

comprised of public oversight of the area of this enterprising (in the CR as a rule Act No. 634/1992 Coll., on Consumer Protection, as amended, hereinafter the "CPA"). Besides imposing sanctions in the form of penalties (Sec 24 of the CPA), it would be in order to revoke the trade license, i.e. limit him in continuing sales not ad hoc and not for a limited period of time(Sec 23a of the CPA), but permanently.

III Withdrawal from the Contract

Withdrawal from the Contract is a general institute, whose implementation results in expiration of the obligation without fulfillment of the purpose of the contract occurring (effects ex tunc). In case of the general institution of legal withdrawal from the contract (not negotiated withdrawal from the contract), the theory applies that the contracting party may withdraw from the contract in case the obligation already exists, i.e. the contracting party can withdraw from the contract up until the moment until expiration occurs of the obligation by due fulfillment of the debt. The principle is partially broken by the provisions of Sec 2004(2), second sentence of the CC, since the contractual party may withdraw from the contract regarding the entire fulfillment in case of partial fulfillment of the debt, if partial fulfillment has no meaning for the creditor. Consumer protection also disrupts the principle of withdraw from the contract under conditions of existence of the obligation, because it provides the consumer protection by means of withdrawing from the contract within a certain term after expiration of the obligation to duly fulfill the debt. By its nature, withdrawal from the contract is not a sanction for breach of obligation (compare Sec 2002 CC and "fundamental breach of contract"), but a "bonus" or specific protection of the consumer.

The sense and purpose of such consumer protection are the fact that the consumer purchases goods or a service at the moment of surprise or in an atmosphere of certain pressure, because he may not compare the offered product with competitive offers, and in case of demonstration events, he faces marketing and even manipulative practices. The consumer

is therefore entitled to a 14-day term[8] "to think it over", during which he may withdraw from the contract in case that the obligation has expired by due fulfillment of the debt (goods were supplied and bore no defects). He may implement his right without any sanction (cancellation fee, etc.), with the stipulation that he only pays costs for return delivery of the goods.

The basic stipulation for implementing the right to withdraw from the contract is the fact that the consumer knows of his right, which should be guaranteed by the obligation to inform of the entrepreneur, by which the entrepreneur is burdened even prior to the actual conclusion of the contract. The consumer usually obtains such information in written form up until the moment of concluding the contract (at demonstration events this fact was not emphasized, or the consumer is directly instructed that he is not entitled to such right). If he did not receive instructions even within the framework of contractual or pre-contractual information, the fourteen-day term extends to one year and fourteen days with the stipulation that if the consumer is instructed during the course of the extended term, the running of the extended deadline is interrupted, and a standard fourteen-day term begins running. In case of a dispute, the entrepreneur bears the burden of proof of fulfilling his obligation to instruct (compare Sec 1839 CC), and if he cannot bear this, but still fulfilled the obligation, the consumer is entitled to withdraw from the contract in the extended term of one year and fourteen days. By ineffective lapse of the extended term, the consumer loses his right to withdraw, and oftentimes without the consumer even finding out that he was entitled to withdraw from the contract.

It is a question of whether the very extension of the term for withdrawal from the contract protects the consumer in a sufficient manner or not[9]. In our opinion, we can understand extension of the term for withdrawing from the contract in two levels - as a certain method of consumer protection, but also as a certain penalty for the entrepreneur (legal uncertainty) for his failing to act in a correct manner towards the consumer. It appears that the directive on consumer rights abandons the legal opinion

[8] Negotiated in the entire EU based on the principle of full harmonization of Directive 2011/83/EU.

[9] For more details see Selucká, Markéta. In: Eliáš, Karel et al. *Civil Code. Extensive academic commentary 1st volume Sec 1 - 487*. 1st edition Prague: Linde Praha, a. s., 2008. S. 391.

of the expression of the ECJ in relation to Directive 85/577/EEC in case C-481/1999 Georg Heininger and Helga Heininger versus Bayerische Hypo und Vereinsbank AG, that determination of a one-year preclusive term for the right to withdraw from the contract if the consumer was not instructed of his right to withdraw from the contract, is not in accordance with Directive 85/577/ECC. In our opinion, legal certainty of the entrepreneur is thereby strengthened (he knows that after a year the consumer cannot "just easily" withdraw from the contract, and if so, to the detriment of consumer protection. In Directive 2011/83/EU, thus the "pragmatic approach" has probably won in the sense when the consumer did not figure out himself the fact that he may withdraw from the contract without any sanction within a term of one year, it would be hard for him to realize his withdrawal later, moreover if an obligation expired by due fulfillment of the debt, the right may appear as "excessive" and needlessly unsettling of the legal position of the entrepreneur.

The obligation expired by due fulfillment of the debt, and both contracting parties become obliged after withdrawal from the contract to return provided fulfillment mutually. The consumer is obliged to send (hand over) to the entrepreneur goods without needless delay within a term of no later than 14 days, and the entrepreneur is obliged to return the provided money (price of goods and shipping price to the consumer) to the consumer without needless within a term of no later than 14 days. The entrepreneur does not become obliged to return the money in case that the consumer did not hand over goods to the entrepreneur, or did not prove to him that he sent the goods to the entrepreneur (compare Sec 1821 CC and Art. 6(6) of Directive 2011/83/EU). Paradoxically, it is rather the entrepreneur who is protected from the consumer, who is in default, meanwhile there is no specific protection of the consumer in case of default of the entrepreneur in returning money. In practice, we oftentimes meet with the situation that the consumer sends goods back in due fashion, but he does not receive the money within the term, or the amount is "shortened", with justification regarding opening and damage to sealed packaging, etc. It is as though European lawmakers forgot that the entrepreneur has a much stronger position in extracting his rights, who usually has a professional legal apparatus,

whereas the consumer, who did not receive a sum of money, is a lay person who often resigns protection of his rights and return of small sums (generalized costs for returning goods and damaged goods due to breach of the packaging). In our opinion, an entirely opposite design would be appropriate, i.e. the right of the consumer to withhold a thing (as a right in rem), until the entire amount is returned to him in standard fashion.

The sum of money that the entrepreneur is obliged to return is the price and shipping costs to the consumer, if the consumer did not choose a cheaper method of delivering goods. If he chooses more expensive and convenient supply of goods, he shall bear the difference himself (unless he was not duly instructed of his obligations within the framework of pre-contractual information). The very term "cheapest offered method of delivery" may be misleading, because the entrepreneur can offer delivery of goods by handover in a brick-and-mortar store or dispensary (e.g. for a symbolic sum of fifteen Crowns or even for free). However, it can be understood that this method cannot be characterized as the cheapest method of delivery. In our opinion, delivery can also be understood as such that enables delivery to the consumer's home and not to the business establishment of the entrepreneur. If the cheapest delivery would be in a brick-and-mortar store or dispensary, and the consumer would choose the cheapest courier service (e.g. Czech Post or PPL) in case that he exercises his right to withdraw from the contract, the entrepreneur, with reference to delivery at a contractual dispensary or brick-and-mortar store, could deduce that such delivery of goods is the cheapest, and in final consequence, the consumer would bear both costs for delivery to his home and back. That is because a general theory applies of balanced sharing of costs between both contractual partners, whereas the entrepreneur pays costs to the consumer, and the consumer pays costs to the consumer. The consumer should only pay extra for convenience, i.e. delivery at a certain time, bringing the consignment upstairs, etc.

The actual sense and purpose of the right to withdraw from the contract after the debt was fulfilled duly and on time is to give the consumer the chance to "try out the product", i.e. the consumer should return to the entrepreneur in principle only an opened and tested product back. However, if the consumer misuses his right in a manner where he "overuses" the goods beyond

standard familiarization with the subject of fulfillment, he should bear responsibility for decreasing the value of the goods, i.e. the entrepreneur becomes entitled to compensation for a decrease in value of the goods formed in consequence of excessive use, which cannot be characterized as familiarizing oneself with the goods. The Czech lawmaker created Art. 14, para. 2 of Directive 2011/83/EU in a somewhat expanding manner, when it determined that the right to compensation is extended to the entrepreneur in case that handled it differently "than it is necessary to handle it with regard to its nature and characteristics". So if the consumer vacuums the whole house twelve hours every day for ten days, he is certainly not using the product differently than as it is necessary to handle considering its nature and properties, i.e. he uses it in accordance with its normal purpose, etc. So according to Czech law, he should not be liable for possible decrease in the value of the product. Meanwhile, if he were to use the subject of fulfillment in a manner that contradicts its nature and properties, he should be liable for decreasing the value of the product (e.g. he uses his mobile phone to stir his tea in a glass).

IV Conclusion

Perhaps in conclusion, we could surmise that the consumer is entitled to a series of institutions of private law, which attempt to provide him with effective protection in the case of off-premises contracts. Whether it's the idea of "informed consumer", who is aware of his rights and obligations to which he undertakes, he concludes a contract or by such institute, there may be the specific right to withdraw from the contract without any reason or any sanction. Practice however teaches us of the fact that the situation in Czech society is much more complex and complicated, and that the practices of would-be entrepreneurs (in fact members of our society preying off of those most vulnerable) flexibly react to the effort of legislative power to determine clear and fair rules of play for behavior, which effectively protects the weaker from the stronger.

Generally, and especially in light of the enacted directives on consumer protection, we can state that the consumer is protected by a series of substantive institutes, but effective, quick and cheap method of protection of subjective

rights of the consumer in Czech society is still missing (but for exceptions e.g. institute of the financial arbitrator). The consumer does have the right in case withdrawing from the contract for the entrepreneur to return to him all financial performances that he provided the entrepreneur with, but in case the entrepreneur does not fulfill his obligation, or only partially, and kept part of the money for himself illegally, the consumer generally gives up on protecting his subjective rights, because he is discouraged from doing so by lengthy and costly litigation, which he does not wish to take on for petty amounts. The same can be said in case that the consumer does withdraw from the contract within his right, but the entrepreneur does not "recognize" his withdrawal, or feels it is ineffective or he tells the consumer directly that he had no right to withdraw from the contract or that he still has no right to do so. The consumer thus again forced to consider whether it is worth it to "undergo lengthy litigation", or just keep the product in which he is not interested. As a rule, he will choose the second option, i.e. he again resigns protection of his subjective rights.

Off-premises Consumer Contracts and Selected Questions of Public Consumer Protection

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Abstract

This paper focuses on public protection of consumers when concluding off-premises contracts. The main purpose behind this paper is to ascertain whether the selected public regulation of off-premises contracts in the Czech Republic ensures sufficient protection of the consumer. One may encounter the public issue of consumer off-premises contracts inter alias upon selling at markets and at wide-ranging sporting, cultural, social and recreational events and activities. Such a broad area would certainly deserve a separate analysis, but in regards to its diversity (and in many aspects its relative complexity), it cannot be explored further in this paper in all its dimensions. With regard to the ever-more-delicate problems of application practice, it will be necessary in the given context to focus attention on misleading and aggressive practices as unfair competitive practices. Especially observed will be the legal regulation of off-premises contracts under Act No. 476/2013 Coll., amending Act No. 634/1992 Coll., on Consumer Protection, the Consumer Protection Act, as amended (hereinafter "CPA"), especially with regard to protection of "especially vulnerable consumers".

Keywords

Public Protection of Consumers; Aggressive Practices as Unfair Competitive Practices; "Vulnerable Consumer"; Czech Trade Inspection Authority.

I Off-premises consumer contracts and unfair competition

Aspects of private and public protection of the consumer[1] run parallel in many directions and influence one another.[2] This appears inter alias in off-premises consumer contracts – especially in the unfair level of consumer protection. Rights of buyers, or the obligations of entrepreneurs towards them in production, import, distribution and sale of products, are regulated in an entire series of special legal regulations (e.g. in case of foods, this concerns Act No. 110/1997 Coll., on Foodstuffs and Tobacco Products, as amended, public health requirements on composition of products for children aged three and under or products designed for contact with food arise from Act No. 258/2000 Coll., on Public Health Protection, as amended, etc.). It is necessary to point out that as opposed to the private regulation of unfair competition, regulation of unfair commercial practices in the Act No. 634/1992 Coll., on Consumer Protection, the Consumer Protection Act, as amended (hereinafter "CPA"), does not relate to all commercial practices in the general level, but only in "business - consumer" relationships. In the wording of the provisions of Sec 2(1)(a) of the CPA, a consumer is considered an individual who is not acting in the course of business or in a separate profession. In relation to unfair competition, the viewpoint of the so-called average consumer will always hold substantial meaning. However, this term is not definitively defined either in Czech or European law, and its content is mainly influenced by secondary legal regulations of the European Union, the case law of the EU Court of Justice and the practice of national courts of individual EU Member States. Moreover, the meaning of this term differs in individual Member States, which may inter alias reflect the quality of protection of consumers as well, and especially those groups of consumers especially vulnerable to unfair commercial practices. **Protection of a so-called "vulnerable consumer"** is reflected in the CR in the provisions of Sec 4(2) of the CPA. In the wording of this provision, unfairness of commercial practices is assessed, if it is aimed

1 HULVA, Tomáš. *Ochrana spotřebitele (Consumer protection).* 1st Edition 1. Prague: ASPI, 2004, Právní rukověť. ISBN 8073570645, p. 44.

2 ONDREJOVÁ, Dana. *Nekalá soutěž v novém občanském zákoníku: komentář (Unfair competition in the new Civil Code: comment)* 1st edition Prague: C. H. Beck, 2014, ISBN 9788074005220, p. 115.

at consumers who, due to mental or physical weakness or to age, are especially vulnerable from the viewpoint of the average member of this group. This however does not affect ordinary exaggeration in advertising. Through regulation of the issue of unfair business practices (Sec 4-5a CPA including appendices no. 1 and 2), the CPA implements the Directive of European Parliament and the Council 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.[3] In keeping with the provisions of Sec 4(1) of the CPA (so-called general clause of unfair commercial practices), the merits of unfair commercial practice are defined. A commercial practice is considered unfair if the entrepreneur's conduct towards the consumer is contrary to the requirements of professional care, and is capable of significantly influencing that consumer's decision in such a way that the consumer may make a business decision that he would not otherwise have made. For a certain action to qualify as an unfair commercial practice, these conditions must be cumulatively fulfilled. Use of unfair commercial practices when offering or selling products, and when offering or providing services or rights, is exclusively prohibited (compare provisions of Sec 4 of the CPA). Especially misleading and aggressive commercial practices are labeled unfair. Then in appendices no. 1 and 2, the CPA exhaustively defines individual unfair commercial practices (appendix no. 1 defines misleading commercial practices and appendix no. 2 defines aggressive commercial practices).[4]

It is possible to summarize that each merit of misleading or aggressive commercial practice as listed in the appendix of the CPA is always simultaneously unfair competition. As opposed to breach of private regulations,

3 The directive understands "business-to-consumer commercial practices" to mean any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers. Unfair commercial practices are such practices that substantially disrupt or are capable of substantially disrupting the economic behavior of the average consumer, who is exposed to its effects or to whom it is designed, or the average member of a group, if the commercial practice focuses on a certain group of consumers, in relation to the given product.

4 Compare POKORNÁ J., VEČERKOVÁ E., DUDOVÁ J., LEVICKÁ T.: European initiatives in the Czech business environment and consumer protection. Paper presented at the international conference FKP (ECE) held on 5.–6. 3. 2015 at the Faculty of Business and Economics of Mendel University in Brno.

breach of public regulations is pursued by the relevant authority arising from its official capacity. The CPA considers misleading commercial practices inter alias e.g. incorrect informing by the entrepreneur on market conditions or on the possibility of obtaining a product or service, in order to compel the consumer to buy this product or offered service under less advantageous conditions than normal market conditions, or untruthful declaration that a product or provided service can cure an illness, health disorder or disability, etc.[5] Aggressive commercial practice is defined in the provisions of Sec 5a of the CPA. This concerns such practice during which, upon taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice. Upon judging whether a commercial practice is aggressive, mainly taken into account are the timing, place and duration of the commercial practice, the manner of acting, conscious exploitation of an adverse situation of the consumer, etc. An aggressive commercial practice is always a practice listed in appendix no. to this Act. This concerns inter alias a commercial practice during which the entrepreneur creates the impression that the consumer may not leave the place, where he is offered or sold the product or provided a service without conclusion of a contract. [6]

II Protection from misleading and aggressive commercial practices according to the CPA for off-premises consumer contracts

Consciousness of the growing need to protect "especially vulnerable" consumers (who are moreover threatened by misleading and aggressive commercial practices especially at demonstration events) has projected mainly in the gradual strengthening of public oversight. For off-premises consumer contracts, this enhanced protection is secured mainly by means of changes, which were introduced by Act No. 476/2013 Coll., amending the CPA,

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5 Compare the provisions of Sec 5 of the CPA in relation to appendix no. 1 of the CPA, letters (p) and (q).

6 Compare the provisions of Sec 5a of the CPA in relation to appendix no. 2 of the CPA, letter (a).

effective from 15 January 2014. In the wording of the provisions of Sec 20 of the CPA, as amended, now organizers of demonstration sales events are obliged to report to the Czech Trade Inspection Authority a series of data and details that concern the holding of so-called organized events. In the given context, it is first necessary to define what is understood by an organized event. According to the provisions of Sec 20(2) of the CPA, an organized event is considered an event designed for a limited number of consumers, who were directly or indirectly invited to it, and during such event there occur sales of products or provision of services or their promotion or offer, whereas it is not decisive whether or not the event also includes transportation of its participants.

A trader intending within the framework of an organized event to sell products or provide services (or promote or offer them)is obliged to announce this in advance to the Czech Trade Inspection Authority (hereinafter "CTIA") and provide legally required information. Meanwhile, the law in no way specifies the form of invitation to such an event (it is not decisive by what form the consumers were invited to the event). From this, one may deduce that an organized event may also be considered such an event to which an unlimited number of consumers can be indirectly invited (e.g. by invitation), whereas the actual event will then be performed only for a limited number of consumers. This will typically concern an event during which the seller demonstrates his commercial activity outside the area typically used for his trade. Reporting obligations do not apply to traveling, or door-to-door sales, or to direct sale with regard to the fact that it does not fulfill one of the criteria, which is the invitation. Also not considered an organized event in the wording of the CPA are events during which participants are trained and familiarized with products, who have the option here of purchasing products for resale. That is because such participants in this case do not act in the position of consumers.[7]

The CPA explicitly states that the legal regulation determining the obligation in relation to holding organized events does not relate to cases of holding auctions according to the law regulating public auction, since the legal

7 In: portal of the Czech Trade Inspection Authority [online]. 2015 [cit. 4/20/2015]. Available from: http://www.coi.cz/cz/pro-podnikatele/oznamovani-predvadecich-akci/.

regulation of auctions ensures a sufficient guarantee of protection of consumers. Furthermore, the scope of the legal regulation excludes events organized exclusively for the purpose of individual negotiation of an insurance policy, supplemental pension insurance, investment services or investment instrument trading, as well as events organized exclusively for the purpose of tasting, consumption and sale of tasted products, if a part of such event does not include promotion, offer or sale of other products or provision of other services.

Oversight on upholding obligations laid down by the CPA is quite fragmented in terms of organization. Meanwhile, certain powers of control authorities also overlap. In terms of protecting the consumer from unfair competition, the Czech Trade Inspection Authority holds so-called residual powers. In the section of agricultural, food and tobacco products, this concerns the Czech Agricultural and Food Inspection Authority[8]. Within the framework of their organizational arrangements, these oversight authorities work closely with public health protection authorities in terms of risks to human health, with the state veterinary administration and with trade, customs and other agencies. For the administrative offense of breaching the ban on use of unfair business practices, according to Sec 24(1)(a) of the CPA in affiliation with Sec 24(12)(d) of the CPA, a fine may be imposed up to an amount of CZK 5 million.

III Conclusion

With regards to these findings, one may conclude that by amendment of the CPA, strengthening undoubtedly occurred of public protection of the "vulnerable consumer" in relation to concluding off-premises consumer contracts. This fact is supported by the penalties that the relevant oversight authority (by CTIA) has imposed for breaching the valid

8 General principles and requirements of law governing food (inter alias in relation to protection from unfair commercial practices, especially in terms of labeling of foodstuffs and tobacco products, as well as further obligations to inform) are relatively integrally defined in the Regulation (EC) of European Parliament and of the Council no. 178/2002, and especially in the Regulation (EC) of European Parliament and of the Council no. 1169/2011 on the provision of food information to consumers.

regulation.[9] In the area of public regulation of the given issue, objective responsibility of entrepreneurs and the relatively fast path towards remedy upon exercising the relevant administrative and legal liability relations are an undeniable benefit. In keeping with the provisions of Sec 23 of the CPA, all government oversight bodies are authorized to issue binding instructions to remove ascertained deficiencies. In the case of immediate threat to life, health or property, they are mainly authorized to stop the sale of products or provision of services.[10]

Mainly the long-term, persistent, insufficient mutual cooperation amongst authorities having oversight over consumer protection can be labeled an existing problem of application practice. Also, consumer awareness should be improved (even with regard to the newly developing unfair practices by untrustworthy "entrepreneurs"). These facts relate to the overall effort to strengthen enforceability of the law, and to fulfillment of aims of the national consumer policy for the years 2015-2020. [11]

9 In: Message of CTIA on penalties to so-called "Scoundrels" for 2013 [online]. 2014 [cit. 4/20/2015]. Available from: http://www.coi.cz/pokuty-smejdum-pres-21 milionu-nc998/.

10 Compare the provisions of Sec 23a of the CPA.

11 Compare to this the portal of the Ministry of Industry and Trade: "Priority spotřebitelské politiky 2015–2020" [online]. 2015 [cit. 2015-05-05]. Available from: http://databaze-strategie.cz/cz/mpo/strategie/priority-spotrebitelske-politiky-2015-2020?typ=struktura.

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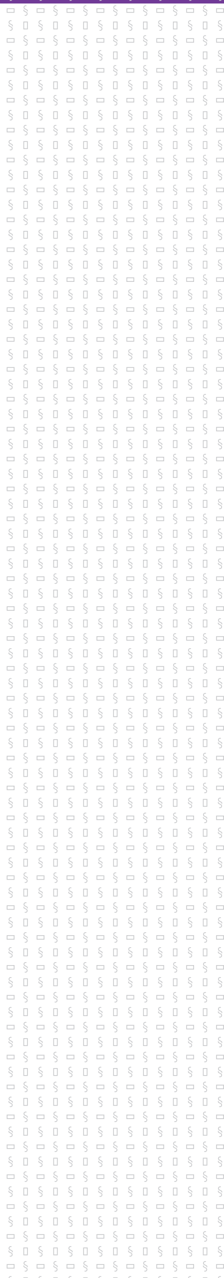
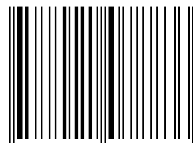

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