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DISTANCE SALES ON CONSUMER GOODS ACCORDING TO EUROPEAN DIRECTIVES AND NATIONAL LAW

I. INTRODUCTION

The knowledge of European Consumer Law is important, not only for companies (who, first of all, are required to perform their duties) but is a first thing knowledge for an average consumer. If a consumer knows what a law appertains to, they can effectively enforce it.

Consumer Law issues are regulated not only at the national level but, first of all, at the European level. In the area of consumer legislation, Member States are required to implement through acts of law objectives defined by the European legislation. The EU directives are of primary importance in this respect. The normative basis for issuing directives is found in art. 288 TFEU¹.

According to its wording, in order to exercise the Union's competences the institutions shall adopt regulations, directives, decisions, recommendations and opinions. The Directive requires each Member State to which it is addressed to achieve the specified results, but leaves the choice of form and methods to the national authorities. So far, national authorities have been free to decide how to do so. It is a characteristic feature of the directives that they are addressed to the Member States of the European Union. Member States shall adopt all measures of national law necessary to implement legally binding Union acts (article 291 TFEU). To facilitate the task for the Member States, the body of the consumer directives legislative is usually preceded by a lengthy introduction explaining the reasons of introducing the Directive and the direction that the interpretation of its provisions should head in².

An important element of the consumer law is distance sales of consumer goods. Recent advances in areas like telecommunications technology, compu-

¹ A. Brzozowski, *Konsumencka umowa o dzieło (w świetle art. 6271 Kodeksu cywilnego)*, Warszawa 2013, p. 1.

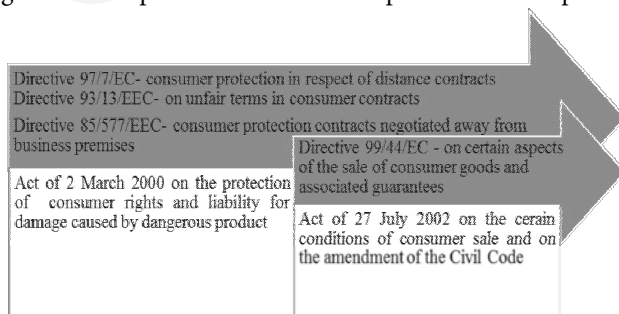
² J. Sozański, *Prawo Unii Europejskiej*, Poznań 2010, p. 45.

ter technology and software and information technology are constantly affecting and changing lives in the 21st century. Electronic commerce (EC or e-commerce) describes the process of buying, selling, transferring, or exchanging products, services, or information via computer networks, including the Internet and a legal framework that would regulate the buying and selling of goods at a distance has been created. Distance sales occur when you don't have direct contact with the seller, i.e. without face to face contact. For example shopping over the Internet, mail order, phone or television³.

According with article 2(7) the Consumer Rights Directive a term »**distance contract**« means "any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded". It should be emphasized that the Directive on Consumer Rights aims at achieving a real business-to-consumer (B2C) internal mark⁴.

Previously, the rules of distance sales were regulated in different acts, but the situation has changed. According to the legislative proposal of the European Commission dated 8th October 2008, which covered a preliminary draft of the Consumer Rights Directive, subjects regulated by this act would cover the issues in respect of contracts negotiated away from business premises, distance contracts, as well as consumer sales and related guarantees.

Diagram 1. European Directives and implementation in polish acts⁵.



³ E. Łętowska, *Ochrona konsumenta*, KPP 1996, nr 2, p. 733-734.

⁴ L. Johnston, *Electronic Commerce Management for Business Activities and Global Enterprises: Competitive Advantages*, In Lee (Western Illinois University), USA 2012, p.123.

⁵ H. Schulte- Nölke, Ch. Twigg- Flesner, M. Ebers, *EC Consumer Law Compendium, The Consumer Acquis And its transposition in the Member States*, European law publishers, Munich, 2007, p.58.

Hitherto (in force until now) rules distance sales were regulated in different acts, but situation has changed. According to the legislative proposal made by the European Commission on 8th October 2008, which covered a preliminary draft Consumer Rights Directive, subjects of Regulation by this act were to become the issues in respect of contracts negotiated away from business premises, distance contracts, as well as consumer sales and related guarantees. In principle, this act was thus related to Directives 85/577/EEC, 93/13/EEC, 97/7/EC and 99/44, replacing it entirely. However, the target has not been achieved, as part of the next meetings of the European Council and the European Parliament initial assumptions were limited. As a result, Directive on Consumer Rights (directive 2011/83) adopted on 25th October 2011 replaced two current directives only and amended another.

The new Directive amends:

- Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts
- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

Furthermore it repeals:

- Council Directive 85/577/EEC of 20th December 1985 to protect the consumer in respect of contracts negotiated away from business premises (*consumer protection contracts negotiated away from business premises*)
- Directive 97/7/EC of the European Parliament and of the Council of 20th May 1997 on the protection of consumers in respect of distance contracts (*consumer protection in respect of distance contracts*)⁶

The introduction of the Directive is apposite because it updated simplified the rules. It also eliminated unwanted gaps and removed inconsistencies. Directive of the European Parliament and of the Council 2011/83/EU was adopted in October 2011 and the rules finally entered into force on 13th June 2014. With regards to the businesses they will now be able to trade across the twenty seven EU Member States using the same terms and conditions through the EU. Internal market will be able to gain the necessary impetus to actually become the single market envisaged by the Union as the inconsistencies between cross border transactions will be eliminated. Full harmonization of the consumer law helps in achieving the Uniformity, Predictability and Certainty across the European Union and therefore, is beneficial for the purposes of Single Market. The Consumer Right Directive aims to achieve the full harmonisation. The principle is laid

⁶ J. Affre, M. Miszczuk, *Dyrektywa konsumencka – konsekwencje dla e-przedsiębiorców*, Polska Agencja Rozwoju Przedsiębiorczości (PARP), Warszawa 2013, p. 4.

down in article 4 of the Directive. It states that “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive”⁷.

The Member States were obliged to adopt the provisions until 13th December 2013. The implementation of the changes led to small ‘revolution’ in EU Members Sates including Poland.

II. THE IMPLEMENTATION OF THE CHANGES IN POLAND – THE SMALL “REVOLUTION”

According to the plans described in the draft guidelines, two major laws-governing the fundamental issues related to purchases at a distance or off-premises and connected with the claim of the goods by the consumer will be overruled. Mentioned two main changes are:

- the repeal of the Act of 2nd March 2000 on the protection of consumer rights and liability for damage caused by dangerous products (Journal of Laws of 2000 No. 22, item 271 as amended)
- the repeal of the Act of 27th July 2002 on the specific conditions of consumer sale and amending the Civil Code (Journal of Laws of 2002 No. 141 item 1176 as amended);

On the place of these laws a new legislation will be adopted – the Act on consumer rights and the provisions regarding the statutory complaint by consumer goods (current inconsistency of the contract) introduced to the Civil Code and integrated with provisions of codex relating to warranties and guarantees. After these amendments, we would probably have to deal with only two modes of complaint - on the basis of the warranty and of the guarantee, providing that in the event of a code, it would apply additional consumer information obligations or adequately expanded consumer rights⁸.

It also aims to amend article 58 paragraph 2 of the Law on consumer⁹ credit to remove its conflict with article 16a paragraph 3 of the Act on the Protection of

⁷ Article 4, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁸ *EU Consumer Rights Directive: getting it right*, 18th report of session 2008.

⁹ If a linked credit agreement was concluded at a distance or off-premises contract, the withdrawal from the Agreement, the provisions of the Act of 2 March 2000 on the protection of consumer rights and liability for damage caused by dangerous products.

Certain Rights Consumers¹⁰ (this provision relating to the financial services entered into on distance will be transmitted to the new legislation), and change provisions of the Act of 20 May 1971 Code offenses on sanctions penal necessary to ensure the implementation by the traders obligations arising from the new regulations.

III. REGULATORY OPTIONS IN DIRECTIVE 2011/83/EU

In respect of contracts negotiated away from business premises and the distance, Members States can, in some cases, make a decision in relation to the introduction of the change. However, in principle it is only an exception to the rule, since the Directive (as it has been already mentioned above) is based on a full harmonization.

Selected regulatory options and solutions in the Draft law on consumer rights in Poland.

- Member States may decide not to apply this Directive or not to maintain or introduce corresponding national provisions to off-premises contracts for which the payment to be made by the consumer does not exceed 50 EUR. Member States may define a lower value in their national legislation. Polish Draft law on consumer rights - It is proposed to remain at existing currently the exclusion provided of the Law on protection of consumer rights, i.e. the equivalent of 10 EUR. Provision should clearly indicate that it is not about the value of a single purchased things, but by the value of the whole contract (for example, 3 things the 9 EUR each).

- 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 (article 6 paragraph 7 Directive 2011/83/EU). In Poland is no need to introduce additional language requirements above these that currently exist under the Act of 07.10.1999 on the Polish language (Journal of Laws of 2011 No. 43, item. 224)¹¹.

IV. DIRECTIVE 2011/83/UE (NEW CONSUMER RIGHTS DIRECTIVE)

IN THE CONTEXT OF CHANGES IN DIRECTIVES 93/13/EEC, 1999/44/EC AND REPLACE DIRECTIVES 85/577/EEC, 97/7/EC

Directive 2011/83 presented in the first row amends the regulations covered by Directive 99/44 but also includes new regulations. It means that the provi-

¹⁰ The provisions of the Act do not apply to the withdrawal of consumer credit a distance or off-premises.

¹¹ The draft guidelines draft law on consumer rights and to change the Act - Civil Code and other acts, <http://Sejm.gov.pl>, 11.01.2013 r.

sions of the Directive introduce new concepts, which extend the concepts or adjust previously used. The Directive introduces a new concept of consumer (art.2 pkt. 1), supplementing them with crafts as a kind of business, in connection with that a person cannot act to be a consumer. Regarding the cases of so-called getting a dual purpose, “where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer”¹².

It should be indicated that as regards concept of consumer are different definitions:

- Directive 1999/44 article 1 paragraph 2a
- Consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;
- Directive 2011/83/eu article 2 paragraph 1
- Consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
- Dz.U.1964.16.93 - Act of 23 April 1964 of the Civil Code (article 22 ¹)
- Consumer is any natural person performing a legal act which is not directly related to his business or professional activity.

In Polish law, the consumer is a person who performs legal action (purchases the goods or services) not directly related to their own business or professional activity. In the light of Directive simple distinction between *John Kowalski* buyer through the Internet and computer (collecting files, uses the online database) on receipt, or *John Kowalski Services Garment* making the same activities, but requesting invoices, could be misleading. Directive suggests that the consumer must also understand the person who will carry out activities, partly related to his trade, and partly unrelated to her, if only commercial purpose is not dominant. If the objective of the company *John Doe Services Tailors* is to buy a computer that shall be used for both accounting and to play games by *John Smith*, *John Kowalski* would be entitled to rights under the Directive¹³.

Directive 2011/83 extends the scope of the goods to which it applies, of “digital content” (data that are created and delivered in digital form, such as computer programs, applications, games, music, videos or texts, regardless of whether are available by downloading them from the carrier fixed assets or other means),

¹² Ch. Twigg- Flesner, *The Europeanisation of Contract Law; Current controversies in law*, Routledge- Cavendish, London/New York 2008, p. 60.

¹³ *Prawo – Nowe prawo konsumenckie*, Warszawa 2013, p. 2.

which is and which is not stored on a durable medium (in this case, is a commodity within the meaning of the Directive) Agreement to provide digital content are within the scope of Directive 2011/83.

The biggest change in this area relates to a disclosure of entrepreneur obligations. The trader, must give to the consumer an information about the product no later than at the time of conclusion of the contract proposal that has been substantially increased.

Change of the rules concerning the right of withdrawal from a distance:

- period for withdrawal by the consumer will be extended;
- principles to bear the cost of returning the goods to the consumer will be clearly defined;
- will be introduced for entrepreneurs to deduct an amount corresponding to the reduced value of things, which was a result of use by the consumer¹⁴.

In addition, the unification is to be the deadline for termination of the contract concluded at a distance. Currently, European law provides for the seven days (Polish term is 10 days), and according to the new rules will be 14 days, valid throughout the Union.

In turn, it could be said that the main change in off-premises contracts is the obligation to provide information directory which must be given to the consumer by trader no later than at the time of submission of the proposal to conclude a contract. It has significantly increased.

In the context of changes in the Directives 93/13/EEC, 1999/44/EC, you must specify that the most important changes are:

- the obligation to obtain by the entrepreneur the express consent of the consumer to any extra payment in addition to the price, before concluding the contract. If the trader has not received the consumer's express consent but has inferred it by using default options that the consumer must reject in order to avoid the additional payment, the consumer is entitled to reimbursement of this payment;
- tightening the rules on delivery (maximum delivery period of 30 days, in case of delay - reimbursement within seven days, the risk of loss and harm during transport will be borne by the entrepreneur)

V. CONCLUSION

It should be stressed that the importance of the new Directive on the consumer rights (especially in its originally proposed form) is not limited to legis-

¹⁴ W. Somerski, *Nam sprzedać tak kazano – obowiązki informacyjne w konsumenckim handlu elektronicznym w świetle przepisów prawa polskiego i europejskiego*, EP 2013, nr 6, p. 4.

lative matters. The Directive could certainly be regarded as an expression of certain doctrinal trend-oriented integration of European consumer law, and at least the consumer contract law.

Integration process itself, by virtue of the political matter, has not been completed successfully, but the fact that its occurrence is determined, it is important from the point of view of science of law.

Focusing on the regulations contained in the Directive must again be noted that the undoubted advantage introduced by the Act is that all entrepreneurs and consumers in the EU will be subject to the same rules. These principles undoubtedly empower even more the position of the consumer in relation to the entrepreneur. And here the question arises – is it definitely the right direction?

In Poland, there are opinions that the expansion of the rights of consumers in a way that assumes the Directive is too far-reaching. This applies, in particular to the provisions implementing the extended deadline to withdraw from the contract and paying the cost of shipping by the vendor.

On the other hand, as emphasized by participants in the negotiations on the adoption of the Directive, the Directive represents a compromise between the increase protection of consumers in respect of distance contracts in the so-called. unusual circumstances, and the desire of entrepreneurs to harmonize rules for the conclusion of contracts.

Against this background, the question arises whether or not the regulations, that are undoubtedly necessary to ensure adequate protection for consumers, implement demand certainty of the entrepreneur-consumer relationship. While the consumer law requires consideration of consumer welfare, as a weaker participant in the market, so much marketing practice requires taking into account the interests of entrepreneurs who, while fully respecting the rights of consumers, they must pursue their economic goals. It seems that these two lines could be reconciled on the basis of the adopted Directive.

The rules proposed by the EU are assumed to achieve a positive effect and increase the interest in e-shopping, especially those cross-border. What is interesting, currently in different EU countries is growing distance selling of the goods within the country, while the sales of cross-border remains unchanged. Therefore the Directive explains that better consumer protection will help develop distance selling across borders (people cease to fear ordering products from foreign online stores). This is to ensure a high level of consumer protection throughout the European Union. However, in practice they can be deadly for many micro and small enterprises, which accounts for the majority of 10 thousand Polish e-shops.

SPRZEDAŻ WYSŁKOWA TOWARÓW KONSUMENCKICH W ŚWIETLE UNIJNYCH DYREKTYW ORAZ PRAWA KRAJOWEGO

Jednym z następstw wynikających z przystąpienia do Unii Europejskiej jest kreowanie przez organy państw Unii Europejskiej wspólnotowego prawa konsumenckiego. W tym obszarze istotnym zagadnieniem jest przyjęcie nowej dyrektywy o prawach konsumenckich 2011/83/UE. Obecnie bowiem w poszczególnych krajach członkowskich UE zauważalna jest tendencja wzrostu sprzedaży na odległość wewnątrz kraju przy jednoczesnym niezmiennym poziomie sprzedaży na poziomie transgranicznym. Akt prawny ma więc stanowić kompromis pomiędzy zwiększeniem poziomu ochrony konsumentów w UE, a dążeniem przedsiębiorców do ujednoczenia zasad zawierania umów. W poniższym artykule zostanie więc przedstawiona problematyka wpływu dyrektywy 2011/83/UE na ustawodawstwo krajowe dotyczące sprzedaży dóbr konsumenckich na odległość. W duchu harmonizacji zupełnej, dyrektywa dokonuje zmian w szczególności w zakresie terminu odstąpienia od umowy, ponoszenia kosztów przesyłki przez sprzedawcę, czy też zwiększenia obowiązków informacyjnych przedsiębiorcy.