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ADAPTATION OF CONSUMER LAW TO THE DIGITAL AGE: EU DIRECTIVE 2019/2161 ON MODERNISATION AND BETTER ENFORCEMENT OF CONSUMER LAW

This Paper examines the most important innovations in the recently adopted European Directive 2019/2161 on better enforcement and modernisation of Union consumer protection rules. First, by adding the innovative rules, such as the ones on the trustworthiness of online reviews, the Directive aims to adapt the European regulatory framework on consumer protection to the challenges and particularities of the digital age and the digital market. Second, through the sharp rise of the fines for breach of consumer law and through the introduction of a mandatory individual remedy to the consumers who has been a victim of unfair commercial practices, the Directive substantially contributes to strengthening of the general enforcement mechanism of EU consumer law and achievement of high level of consumer protection.

Key words: *Consumer protection. – Enforcement. – EU Law. – Harmonisation. – Digital market.*

1. INTRODUCTION

EU consumer law is the most advanced regional system of consumer protection. It has started developing four decades ago and today the consumer *acquis* consists of a dozen directives and regulations interpreted through the extremely fruitful and far-reaching case law of the Court of Justice of the European Union in Luxembourg.¹ In the European Union

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¹ For an overview of EU consumer law, see: Norbert Reich, Hans-Wolfgang Micklitz, Peter Rott, and Klaus Tonner, *European Consumer Law*, 2nd ed,

consumer protection is guaranteed and highlighted by the EU Charter of Fundamental Rights.² European consumer law has two principal goals: to ensure achievement of a high level of consumer protection and strengthening of the internal market through the abolishment of non-tariff barriers for cross-border trade between different EU Member States.³ In the era of the Fourth Industrial Revolution, new technological developments represent a particular challenge to the traditional European consumer law (Hatzopoulos 2018).

2. ADOPTION OF THE NEW DIRECTIVE

European consumer law is developing continuously. Year 2019 was a very successful year for European consumer law. First, in the spring, two new directives were passed, regulating two specific types of consumer contracts. These are Directive 2019/770 on certain aspects concerning contracts for the supply of digital content⁴ and Directive 2019/771 on certain aspects concerning contracts for the sale of goods.⁵ The new directive on the supply of digital content has brought an innovative common European legal framework for contracts on supply of digital content, whereas the new directive on sale of goods has modified and further developed the provisions of the existing Directive 1999/44/EC on the sale of consumer goods. Both of these directives have rather similar subject matter: they aim to ensure conformity, one of supplied digital content and the other one of acquired goods with the consumer contracts. The directives, accordingly, provide remedies that the consumer will have in the event of lack of conformity of supplied digital content or acquired goods as well as the conditions for exercising these remedies.

Eventually, in the last days of 2019, which were also the last days of Jean-Claude Juncker's presidency of the European Commission, the long-awaited Directive 2019/2161 on better enforcement and modernisation of Union consumer protection rules (Directive 2019/2161) was eventually

Intersentia 2014; Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmson, *Rethinking EU Consumer Law*, Routledge 2017.

² Article 38 of the Charter of Fundamental Rights of the European Union "Union policies shall ensure a high level of consumer protection".

³ See, e.g. Article 1 of Directive 2005/29/EC on Unfair Commercial Practices.

⁴ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *OJ L* 136, 22 May 2019, 1–27.

⁵ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, *OJ L* 136, 22 May 2019, 28–50.

adopted.⁶ The new directive modified and amended four important European directives: Directive 93/13/EEC on unfair contracts terms, Directive 2005/29/EC on Unfair Commercial Practices, Directive 98/6/EC on product pricing and Directive 2011/83/EU on consumer rights. The Directive 2019/2161 brought substantial change to the regulatory framework of consumer protection in the European Union (Duivenvoorde 2019). The piece of legislation most affected by the changes is Directive 2005/29/EC on Unfair Commercial Practices,⁷ which has been materially updated.⁸ The Directive also broadens the notion of product, essentially important for the application of the rules on unfair commercial practices, which will now include not only goods and services, but also digital service and digital content, spreading thus the scope of application of consumer law and adapting it to the particularities of the rising digital market.⁹

A two-fold purpose of the new directive on better enforcement and modernisation of consumer law can be identified. First, the Directive aims to strengthen and further develop the existing common European enforcement mechanism of consumer law, which had previously demonstrated a number of shortcomings. Second, the Directive adapts the existing legislative framework to adequately address the challenges to consumer law brought about by new technologies, such as the development of online platforms or trader's increasing engagement in new forms of unfair commercial practices, typical for the digital market.

The new directive is the outcome of the efforts of the European Commission to improve EU consumer law through its Regulatory Fitness and Performance Programme (REFIT), which checks the existing consumer legislation, initiated back in 2012.¹⁰ The REFIT was a detailed fitness check of the existing consumer and marketing law directives

⁶ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, *OJ L* 328, 18 December 2019, 7–28.

⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ L* 149, 11 June 2005, 22–39.

⁸ On Directive 2005/29/EC, see: M. Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Hart Publishing 2016).

⁹ Article 3(1)(a) of Directive 2019/2161.

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Regulatory Fitness, COM(2012) 746 final, available at https://ec.europa.eu/info/sites/info/files/eu-regulatory-fitness_dec2012_en_0.pdf (last visited 16 May 2020).

carried in all of the EU Member States during 2016 and 2017. The REFIT concluded that there is a need for improving of effectiveness of the Union's consumer legislation, eventually resulting in the development of the New Deal for Consumers.¹¹ The new directive represents part of the outcome of the New Deal for Consumers, whereas the second part of this project is a legislative draft on common European rules on collective redress, which has not yet been adopted and whose fate is still unclear (Kaprou 2020).

The new directive also, to some extent, limits a previously very strict maximum harmonisation principle adopted in Directive 2005/29/EC on Unfair Commercial Practices and Directive 2011/83/EU on consumer rights. Generally speaking, in the past twenty years, it is possible to observe a shift in European consumer policy from the minimum harmonisation towards the maximum harmonisation approach, so the new directive's approach, in that sense, seems to be slightly different.

The maximum harmonisation principle requires that the EU Member State to fully harmonise their national rules on consumer protection with EU law, prohibiting them from having any measures that provide not only lower, but also higher level of protection than the one envisaged by the Directive (Faure 2008). The aim of maximum harmonisation approach is to secure strengthening of the internal market (as it diminishes the differences among the legal systems of the EU Member States). For example, in case of unfair commercial practices, Member States are allowed to indicate only the thirty-one practices contained in the Directive as the practices that are always unfair, not a single one more or less, as all other commercial practices have to be assessed under more general tests of fairness.¹² This approach has been confirmed by the Court of Justice of the European Union (Stuyck 2016).

Now, the new directive stipulates that Member States are allowed to introduce stricter national measures in case of unsolicited visits to consumers' homes by a trader in order to offer or sell products or excursions organised by a trader with the aim or effect of promoting or selling products to consumers where such provisions are justified on grounds of consumer protection.¹³ The establishment of a higher level

¹¹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumer COM/2018/0183 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1573718927782&uri=CELEX%3A52018DC0183> (last visited 16 May 2020).

¹² Joined Cases C-261/07 and C-299/07 VTB-VAB NV v. Total Belgium NV and Galatea BVBA v. Sanoma Magazines Belgium NV [2009] ECLI:EU:C:2009:244, para 65; Case C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v. Plus Warenhandels-gesellschaft mbH [2010] ECLI:EU:C:2010:12, para 53; Case C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag v. Österreich-Zeitungsverlag GmbH [2010] ECLI:EU:C:2010:660, para 40.

¹³ Art 6a(8)(a) of Directive 2019/2161.

of consumer protection in this kind of practice is particularly important for certain types of especially vulnerable consumers, such as elderly consumers, who are, in some cases, greatly affected by the unsolicited traders' visits.¹⁴ The introduction of the minimum harmonisation approach in such types of practices is understandable as this is a kind of commercial practice that does not (typically) have a cross-border dimension, so the discrepancies between national laws in this area do not affect the internal market.

3. MODIFICATIONS OF THE EXISTING RULES AND ADAPTATION TO THE DIGITAL AGE

3.1. Online Market Place

In the contemporary world, the digital markets are rapidly becoming the principal consumer markets. This is especially apparent during the coronavirus outbreak when an incredible increase in online consumer transactions can be observed, since the digital market has become a lifeline for many consumers, but also for traders during the COVID-19 pandemic. However, the fast developments of digital markets represent a big challenge for consumer law that is expected to follow this evolution (Twigg-Flesner 2016). In its regulatory response to the digital age, the consumer protection regulatory framework needs, on the one side, to ensure that consumers remain sufficiently protected, but on the other side, it must not unreasonably inhibit innovation and further digitalisation of the market. All in all, from a policy perspective, such a balance is not easy to achieve. In that sense, the new European directive seems to represent a well-balanced piece of legislation.

The new directive establishes the foundation for the development of a new European consumer law which would be able to respond to the technological changes and provide adequate remedies and fines for breach of consumer law, being particularly focused on establishing rules that will ensure full transparency in the online marketplace. Accordingly, one of the main regulatory tools that the new directive relies on is further development of the duty of information. Together with the right of withdrawal, the duty of information has been used as one of the most powerful tools of the EU consumer policy (Wilhelmson, Twigg-Flesner 2006). According to the settled case law of the Court of Justice of the European Union, the consumer is always to be understood as the weaker party 'as regards both his bargaining power and his level of knowledge' in comparison to a trader.¹⁵

¹⁴ Recital 54 of Directive 2019/2161.

¹⁵ See, as one of the latest decision confirming this approach, *OPR-Finance s. r. o. v. GK*, ECLI:EU:C:2020:167, par 19.

However, the appropriateness of the pre-contractual information requirements to provide efficient protection to the consumer was exposed to the severe criticism (Ben-Shahar, Schneider 2014). Likewise, the Court of Justice of the European Union in its recent judgement in Amazon also adopted a more traders-friendly and reasonable approach towards fulfilment of information requirements.¹⁶ Nonetheless, the modifications made by the new directive continue to rely on the pre-contractual information paradigm and introduce additional information requirements aimed at protecting consumers while acting on the online marketplace. Accordingly, providers of online marketplaces are bound to always inform consumers about the statues of a third party offering goods, services, or digital content in the online marketplace.¹⁷

In particular, they have to inform the consumer whether the provider is a trader or a non-trader and that information is based on the declaration made to the providers by the third party. This is of essential importance practically as consumers should accordingly know whether or not they are protected by consumer law. Otherwise, in the situation when there is no business-to-consumer relation, different sets of rules will apply, which are of a less protective character as parties are considered to be more equal when it comes to bargaining power and knowledge.¹⁸ It is still to be seen how this new obligation will work in practice and whether it will be easy for consumers to understand the status of their counterparty.

3.2. Payment by Consumer's Data

The new directive has introduced another great innovation: consumer law will now apply to allegedly “free” services, in situations where consumers pay for the usage of the provided services with their data, and not with the money.¹⁹ This is the case, for instance in using Facebook or Instagram, which are offered allegedly free of charge, but where these companies collect and sell their users' data. In this sense, the world famous Facebook and Cambridge Analytica scandal in 2018 is very important as it raised awareness among consumers that many of the online platforms they are using are not free in reality, but paid for with their data (Isaak, Hanna 2018). Consequently, consumers have become more aware about the extent of data collection and storage and

¹⁶ Case C-649/17 Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v. Amazon EU Sàrl ECLI:EU:C:2019:576.

¹⁷ Article 6a(1)(a) of Directive 2019/2161.

¹⁸ E.g. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance) PE/56/2019/REV/1, *OJ L* 186, 11 July 2019, 57–79.

¹⁹ Article 4(2)(b) of Directive 2019/2161.

its potential to influence consumers in their decision-making process, but this area is still calling for better regulation, and, as it stands now, it is not sufficiently and adequately regulated.

In recent years, the amount and variety of consumer data that traders collect from consumers has significantly increased. On the European level, the data protection has been reinforced by the powerful Regulation 2016/679 on General Data Protection, which has substantially increased fines for the violation of data protection rules.²⁰ This has been followed by consumer law changes, brought about by the new directive, as providers of allegedly free digital services, who in exchange gather personal data from consumers, will for the first time have to fully comply with consumer law requirements. In practice, this means that such traders will have to respect all of the mandatory consumer law rules, such as pre-contractual information requirements or right of withdrawal. This is a huge step forward in the regulatory system of consumer protection and it demonstrates an increasingly tight connection between the rules on data protection and consumer law (Durovic, Lech 2020).

3.3. New Blacklisted Practices

Directive 2005/29/EC on Unfair Commercial Practices lists thirty-one concrete examples of banned commercial practices, the so-called blacklisted practices, that are always automatically considered unfair, without the need to apply the general fairness test or any of the three small general clauses.²¹ For all, but these thirty-one commercial practices, the Directive requires that the competent judicial or administrative authority of EU Member State always apply either the general fairness test or one of the three small general clauses (misleading actions, misleading omissions, or aggressive practices) to assess fairness of a commercial practice as confirmed already in the first CJEU cases dealing with unfair commercial practices.²²

However, the text of Directive 2005/29/EC was drafted almost two decades ago and, accordingly, it fails to address certain contemporary

²⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L* 119, 4 May 2016, 1.

²¹ Article 5(5) and Annex I of Directive 2005/29/EC on Unfair Commercial Practices.

²² Joined Cases C-261/07 and C-299/07 VTB-VAB NV v. Total Belgium NV and Galatea BVBA v. Sanoma Magazines Belgium NV [2009] ECR I-02949, para 65; Case C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v. Plus Warenhandels-gesellschaft mbH [2010] ECR I-00217, para 53; Case C-540/08 Mediaprint Zeitungs- und Zeitschriftenverlag v. Österreich-Zeitungsverlag GmbH [2010] ECR I-10909, para 40.

forms of unfair commercial practices that have emerged as a result of the development of new technologies. Although it was imagined to represent a safety net, it seems that the general fairness clause is not powerful enough to firmly sanction these kinds of practices.²³ This why the new Directive on modernisation and better enforcement brings four new forms of unfair commercial practices that are always to be considered as unfair.²⁴ These are the practices dealing with advertorials and ranking of the offers, ticket reselling and two practices related to the online reviews.

3.3.1. Advertorial and Rankings of the Offers

The first new form of unfair commercial practice that is always unfair is non-transparent advertorials and rankings of offers, which may negatively affect consumer capacity to make a well-informed decision while acting in the market.²⁵ Namely, using editorial content in the media, or providing information to a consumer's online search query, to promote a product where a trader has directly or indirectly paid for the promotion or prominent placement, bypassing the main body of search results without making that clear in a concise, easy and intelligible form, in the content or search results, or by images or sounds clearly identifiable by the consumer, will now be considered as unfair practice.

Likewise, the new directive also regulates for the first time the ranking of the offer (as well as personalised pricing),²⁶ an innovative trading tactic which evolved due to the application of new technologies, again with the aim of enhancing transparency in online transactions. The consumer needs to be informed about all of the parameters determining the ranking of a particular offer. These include general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking. The aim is that consumers get a clear picture when the price presented to them is personalised on the basis of automated decision-making, so that they can be fully aware and take into account the potential risks in their purchasing decision.

3.3.2. Ticket Reselling

The second new, always prohibited practice deals with ticket reselling.²⁷ Traders should be prohibited from reselling to consumers tickets to cultural and sports events that they have acquired by using

²³ Article 5(2) of Directive 2005/29/EC on Unfair Commercial Practices.

²⁴ Article 13(7) of Directive 2019/2161.

²⁵ Article 13(7)(a) of Directive 2019/2161.

²⁶ Article 4(4)(a)(ii) of Directive 2019/2161.

²⁷ Article 3(7)(b) of Directive 2019/2161.

software such as ‘bots’, enabling them to buy tickets in excess of the technical limits imposed by the primary ticket seller, or to bypass any other technical means put in place by the primary seller to ensure accessibility of tickets for all individuals.²⁸

The introduction of this practice explicitly regulates secondary ticketing, something that has become an extremely lucrative business, to a large extent due to new technologies enabling easier and faster re-selling of the tickets than in the past. This prohibition applies to all types of cultural and sports events, which is of a rather broad scope. Similarly to the case of online reviews, the idea here is to prohibit reselling of tickets that have been acquired through the application of special new software and which are in excess of the ticket limit imposed by the primary ticket seller.

3.3.3. *Online Reviews*

The third and fourth newly introduced practices that will be automatically considered as unfair deal with the online reviews, an essentially important element of contemporary digital markets. Online reviews include consumers’ written feedback or rating of goods, services, digital services or digital content. The new directive has introduced to EU consumer law, for the first time, direct consumer law regulation of online reviews, addressing the actual problem of fake online reviews and the increasing number of influencers and brands vying for them to promote a product.

In the case of digital markets, the trader’s reputation, expressed in the form of online reviews, represents one of the most important elements for consumers in making their economic decisions. The rise of the Internet has enabled consumers to share with an immense audience their experiences regarding goods they acquired, services they used or digital content they have downloaded. A very good example is the *Tripadvisor.com* website which enables consumers to review and also provides access to the reviews by other consumers of hotels, restaurants or travel experiences offered in most countries of the world. Similarly, the *booking.com* platform has become one of the most popular marketplaces for hotels booking, where ratings provided by previous customers are of essential importance for the customers intending to book a hotel themselves. Such online platforms are supposed to ensure that the reviews posted on them are true (Hatzopoulos 2018). Still, the lack of reliability of online reviews has remained one of the greatest challenges of consumer policy (Narciso 2019).

It is, therefore, essential, from the regulatory perspective, to ensure the trustworthiness of consumers’ reviews and also protect traders’

²⁸ Recital 50 of Directive 2019/2161.

reputations (Ranchordas 2018). This can be achieved, for example, by ensuring that bots are prohibited from submitting fake consumer reviews and endorsements, such as ‘likes’, on social media (e.g. Facebook, Instagram, etc.). In many cases the consumer does not know whether a review has been paid for or whether it represents an honest review. Modern technology enables easily manipulation of the digital fora that provide reviews of products and services or to retaliate against or monitor consumers who criticize them through online reviews. The issue is that misleading and fake reviews have negative effects on consumer confidence, while acting on the market and leading to the consumer detriment.

In order to address this problem straightforwardly, the new European directive has introduced that “stating or otherwise creating the impression that a review of a product is submitted by a consumer who has actually used the product without taking reasonable and proportionate steps to ensure that that review reflects real consumers’ experiences” will always be considered an unfair commercial practice.²⁹ This means that a new obligation has been imposed on traders to always verify, in line with their powers, the trustworthiness of the reviews. The recent technological developments facilitate this. For example, traders can use technological tools to check whether the consumer writing a review has actually used or purchased the product.³⁰ Generally speaking, new technologies can now be applied to help traders comply with all consumer law requirements (Micklitz, Palka, Panagis 2017).

Another online review related practice that will always be automatically considered as unfair, is “submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products”.³¹ Accordingly, these new rules will help avoid the manipulation of reviews, for instance, by hiring bots to write them or by erasing bad product reviews and keeping only positive ones.³²

Prior to the adoption of the new directive, the trustworthiness of the online reviews was safeguarded by less protective and more universal small general clauses on misleading practices (misleading practices and misleading omissions) in Directive 2005/29/EC on Unfair Commercial Practices.³³ However, by defining two new unfair commercial practices related to online reviews, the new directive emphasises the importance of

²⁹ Article 3(7)(b) of Directive 2019/2161.

³⁰ Recital 47 of Directive 2019/2161.

³¹ Article 3(7)(b) of Directive 2019/2161.

³² Recital 49 of Directive 2019/2161.

³³ Articles 6 and 7 of Directive 2005/29/EC on Unfair Commercial Practices,

trustworthiness of online reviews in the European regulatory framework for consumer protection, increasingly focused on the digital market.³⁴

4. STRENGTHENING ENFORCEMENT

4.1. Enforcement Challenges

As pointed out above, the EU consumer law has been identified as the most advanced regulatory system of consumer protection in the world. It provides a regulatory framework that is aimed at protecting a number of consumer rights, such as fairness of contract terms and fairness of commercial practices. However, when it comes to enforcement, common European rules have traditionally been very scarce, vague and fragmented (Cafaggi, Micklitz 2007). They have turned out to be insufficient and inappropriate to provide adequate protection to the consumers, especially in the situation of increasing number of cross-border breaches of consumer law.

The general concept of consumer redress may be defined as 'receiving satisfaction for injury sustained' (Ramsay 1981). In relation to consumer law, the issue of redress means that consumers have effective and efficient instruments to protect their rights when these have been infringed. For consumer law in order not to be seen merely as a 'paper tiger', procedural law must enable recourse to court for the enforcement of such laws (Miller *et al.* 1998). It is of key importance to remember that a right is only as effective as its enforcement mechanism. Enforcement of consumer rights is primarily associated with recourse to courts and consumers' access to justice (Ramsay 2015).

Accordingly, consumer's right to redress, when their consumer rights have been infringed, has been recognised globally as one of the major principles of consumer law (Benohr 2013). The United Nations Guidelines on Consumer Protection of 1985 (as revised in 1999 and 2016), as the most important international legal document in the area of consumer protection, have also emphasised the importance of the adequate consumer redress (Durovic 2020). This is why the United Nations Guidelines point out that the governments should ensure that consumers can obtain redress of their rights through procedures which are expeditious, fair, inexpensive and accessible³⁵. The required access to justice for consumers is a manifestation of the broader right to a fair trial, as expressed also in Article 6 of the European Convention on Protection of Human Rights (Durovic, Micklitz 2017).

³⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions – A Digital Single Market Strategy for Europe, COM(2015) 192 final.

³⁵ United Nations Guidelines on Consumer Protection of 1985 at 33.

However, one of the main problems faced in the enforcement of consumer law is the inequality between trader and consumer, which also results in the fact that it is very difficult for individual consumers to protect themselves against the economically stronger and more powerful traders (Issacharoff 1999). This has been present as an eternal phenomenon. The rise of large corporations in the early twentieth century created a culture of corporations engaging in small violations of the law, since individual consumers were not likely to pursue the case in court. Traditional methods of enforcement turned out to be unsuccessful when it comes to ensuring effective consumer redress.

With the further globalisation of the market and development of technology, the problem with the enforcement has become further complicated. In more recent times, the situation has turned into an even more complex one as consumer transactions are being conducted on an international level, and increasingly via the internet, where the problem of consumer redress has become more prominent. Accordingly, the question on how to design an adequate system of enforcement which will ensure efficient and effective consumer access to justice is the focus of consumer policy, notably of the EU consumer policy (Wrbka 2015).

The problem with the lack of a common European framework for enforcement became particularly apparent after the huge pan-European cross-border scandals involving Apple and Volkswagen which have affected thousands of consumers across Europe (Nemeth, Carvalho 2017). The Apple case dealt with the issue of Apple company being engaged in diverse forms misleading practices in a dozen of European countries, in relation to the mandatory rules on the legal and commercial guarantees for its products, whereas the recent Volkswagen case was related to the misleading claims regarding the pollution emissions of Volkswagen vehicles. Apple case was resolved, whereas Volkswagen case is still pending in a number of jurisdictions.

Therefore, the development of common European rules on enforcement seems to be the natural progression following the 2017 strengthening of the European framework for cooperation among the competent authorities of EU Member States in charge of enforcement of consumer law. This is because in 2017, the institutional framework for cooperation among Member States was strengthened by Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws (CPC Regulation) which repealed Regulation 2006/2004.³⁶

³⁶ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, *OJ L* 345, 27 December 2017, 1–26.

The new CPC Regulation focuses on enforcing compliance and enhancing the protection of consumers' economic interests. For that purpose, it sets up an electronic database to be used for all communications between the competent authorities of the EU Member States. The database is directly accessible to the competent authorities, single liaison offices and the European Commission.

4.2. Higher Fines for Breach of Consumer Law

The new directive has empowered the competent authorities of the Member States, in line with the Regulation 2017/2394, to impose a substantially increased fines in case of major cross-border infringements of consumer law where breaches of consumer law affect consumers in more than one EU Member State. The Member States' authorities (judicial or administrative authorities) will now have the power to impose effective, proportionate and dissuasive penalties in relation to widespread infringements, with a Union dimension, that are subject to coordinated investigation and enforcement measures.

Increasing fines for breach of consumer law certainly represents one of the most important innovations of the directive. Finally, for the first time in the history of EU consumer law, there is an exact amount of fines established by a Directive. Prior to the new Directive, the old European directives would just require from the penalties to be "effective, proportionate and dissuasive"³⁷ without providing any explanation of what this meant in practice.³⁸ Moreover, for the first time, the fines for breach of consumer law are comparable to those for breach of competition law and data protection law.

The competent authorities of Member States will be entitled to impose fines on traders in the amount of at least 4% of the trader's annual turnover in all Member States concerned by the coordinated enforcement action.³⁹ That is potentially a very high fine and represents a radical improvement in comparison to the previous approach. In situation when that information cannot be established, the fine must be no less than 2 million euros.⁴⁰ Importantly, these provisions of the Directive also allow Member States to adopt higher fines than the ones envisaged by the Directive and actually encourages them to adopt higher fines for cases of breach of consumer law, as well as in situations that do not fall under a

³⁷ Article 24(1) of Directive 2011/83/EU on consumer rights; Article 13 of Directive 2005/29/EC on Unfair Commercial Practices.

³⁸ See: Case C-565/12 L CL Le Crédit Lyonnais SA v. Fesih Kalhan [2014] ECLI:EU:C:2014:190 where the Court of Justice of the European Union discussed the meaning of these requirements.

³⁹ Article 13(3) of Directive 2019/2161.

⁴⁰ Article 13(4) of Directive 2019/2161.

category of a “widespread infringement or the widespread infringement with a Union dimension”.⁴¹

The purpose of these developments is to ensure that fines have a deterrent effect on the traders, since the previous system of fines has not been sufficiently successful in that respect.⁴² In certain situations, it might be economically more beneficial for the traders to breach consumer law and make profit than to comply with consumer law, as the produced benefit would be higher than the fine paid. That is something unacceptable and thus such an increase in fine was absolutely necessary. Now the challenge is to start imposing these fines in practice in order to really understand how effective they are, although the comparative experience from the areas of competition law and data protection law is certainly encouraging.

4.3. Individual Remedies for Consumers

The Directive on better enforcement and modernisation of EU consumer protection rules has also introduced an obligation for Member States to adopt individual remedies for consumers, victims of unfair commercial practices.⁴³ The existence of such a remedy is of great benefit for an individual consumer. This means that the Directive requires, for example, that a consumer that has bought a “medicament” that allegedly protects them from catching coronavirus, a common misleading practice these days during coronavirus pandemic, needs to have the possibility to annul the purchase contract of the “medicament” and receive a full refund of the payment for the “medicament”.

The introduction of individual remedy has happened fifteen years after the adoption of Directive 2005/29/EC on Unfair Commercial Practices. This Directive has set up a very progressive system of prohibition of unfair commercial practices in business-to-consumer relations, inhibiting a widest range of unfair commercial practices (Collins 2010). However, Directive 2005/29/EC on Unfair Commercial Practices has not provided any common European remedy for individual consumers, victims of unfair commercial practices (Durovic 2019). That was a big shortcoming of the Directive and individual consumers had to rely on existing contract law remedies (e.g. fraudulent misrepresentation or dol) that could not always provide efficient and adequate protection.⁴⁴ Some Member States have introduced diverse special contract law remedies exclusively for breach of unfair commercial practices, but only a few of them and a joint systemic and coherent European approach was missing.

⁴¹ Article 21(1) of the Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

⁴² Recital 10 of Directive 2019/2161.

⁴³ Article 11a(1) of Directive 2019/2161.

⁴⁴ Recital 9 of Directive 2005/29/EC on Unfair Commercial Practices.

The failure to introduce individual remedies is primarily the outcome of the fact that Directive 2005/29/EC has introduced strict separation between the law on unfair commercial practices and contract law, maintaining the autonomy of the national contract laws of the Member States.⁴⁵ Moreover, the Directive 2005/29/EC seems to be focused on the collective dimension of enforcement rather than on the individual one (Micklitz 2006). The survey that preceded the adoption of the new directive showed that 27% of consumers who had had problems with unfair practices did not take any action, 36% because they did not expect a satisfactory solution.⁴⁶ In practice, the existence of individual remedies is a necessary prerequisite needed to eliminate all the effects that an unfair commercial practice has on an individual consumer (Durovic 2016). In that sense, the introduction of a mandatory individual remedy for every consumer is a huge step forward.

The new Directive explicitly requires that Member States ensure that every consumer who has been affected by an unfair commercial practice has access to compensation for damage, a price reduction and/or contract termination.⁴⁷ It is left to the Member States to determine the conditions for application and the effects of these remedies, but the remedies have to be introduced in each national law. Some of the factors that are to be taken into consideration during assessment are the gravity and the nature of the unfair commercial practice and the damages that the consumer suffered as a result of the unfair practice.

Interestingly, despite introduction of the individual remedy, the new Directive still, formally speaking, keeps strict separation between the law on unfair commercial practices and contract law, by pointing out that the national contract laws of Member States are not to be affected by the Directive.⁴⁸ This is because the European Union is aware that the Member States are very reserved and cautious when it comes to any massive harmonisation of contract law on the European level (Twigg-Flesner 2013).

5. CONCLUSIVE REMARKS

This paper examined some of the most important innovations brought about by Directive 2019/2161 on better enforcement and

⁴⁵ Article 3(2) of Directive 2005/29/EC on Unfair Commercial Practices.

⁴⁶ European Commission, Consumer Conditions Scoreboard 2017, available at: https://ec.europa.eu/info/sites/info/files/consumer-conditions-scoreboard-2017-edition_en_0.pdf, (last visited 30 April 2020).

⁴⁷ Article 11a of Directive 2019/2161.

⁴⁸ Recital 57 of Directive 2019/2161.

modernisation of Union consumer protection. The EU Member States have been given 24 months to align their respective national laws with the new directive, which they will start applying by mid-2022. This means that it will still take time to understand what the effects of the Directive will be in practice. However, what can be concluded at this stage is that the Directive is substantially changing Europe's landscape of consumer protection and improving the level of protection given to consumers.

An especially important part of the Directive is the introduction of much higher fines for breach of consumer law, which are now comparable to those imposed in other related areas of law: competition law and data protection law. This increase in fines will, on the one side, ensure a higher level of compliance with consumer law, and, on the other side, it will lead to the rise of the importance of consumer law. Other major positive changes include the adaptation of the legal framework of consumer protection to the challenges brought by the new technologies and the digitalisation of the market through the introduction of new rules specifically aimed at tackling business-to-consumer commercial practices taking place at the digital market.

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