

European consumer law in the digital single market

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Abstract

In the context of current pandemic crisis due, social distancing and quarantine measures were imposed by states due to the high risk of infection by going out of the house for buying the goods and services that are required. Naturally, there has been an increase in online acquisitions, use of online entertainment and online tools for professional purposes. This has increased the level of demand alongside the consumption in the online sector which forces the suppliers to become more inventive in order to sell their products and services and make them more accessible, price wise, in better meet the expectations. Unfortunately, this being a highly abrupt shift with no precedence, forcing the traders and providers in the online sector to cut corners in order to keep up and, as a consequence, may affect the consumers. All these being said, although we speak about unprecedented context, the European Union, over the last two decades, has enacted more directives and regulations in order to keep up with this market's unique and high innovation rate with the goal to ensure the consumer's protection. This papers analysis the evolution of the European Consumer Law starting with the minimum harmonisation approach and getting to new acts which try to fully harmonise the area for the attainment of a functional internal market, a Single Market which is, nowadays, pressured by the digital revolution and social distancing to change perspective, as customers are interacting with the business in different ways they did once and the digital content is becoming the main product or service to be supplied.

Keywords: consumer protection, European contract law, digital single market, digital content, online sales, consumer remedies, maximum versus minimum harmonization.

JEL Classification: K12, K13, K22, K23, K33

1. Introduction

When we are discussing about contract law in Europe, we have to realise that all states have their own national contract law and all the issues are debated and solved in accordance with the respective jurisdiction, no matter the topic, whether a valid contract has been concluded, whether it can be avoided due to mistake, misrepresentation, or duress; or whether one of the parties can demand payment of damages because the other party has not performed the contract or has not performed the contract correctly.

Strictly speaking, there is no such thing as a European law of contract, but in its scope to create a functional internal market, the European Union has adopted a many directives and some regulations, with the result that some issues of contract law-particularly in the area of consumer law-are treated uniformly across all

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Member States. Moreover, over twenty-five years ago, the European Parliament had already requested that ‘a start be made on the necessary preparatory work on drawing up a European Code of Private Law’ because it would only be possible to achieve a single market (as it was then called) by ‘unifying major branches of private law’.

It is clear today that business and politics operate in a European dimension, as demonstrated by the existence and success of the European Union, so there are good and practical reasons for the law to follow the consequences and seek to identify ways to build a common European contract law.

The role of European Union in the field of contract law is related to the attainment of a functional internal market and for that it regards mainly the harmonisation of different aspects of domestic law. Still, this process of harmonisation in specific area has to take into consideration the limits provided by the Member States in the treaties.³

The most important competence of the EU is to act for the fulfilment of the goals provided for by the treaties. Article 4(1) and 5(2) of the Treaty on European Union lay out the limits of the competences conferred upon the Union by the Member States in order to reach the objectives set out therein.⁴ In other words, the European Union only has attributed powers, related to specific areas of application.⁵

Despite being stipulated in the treaty texts prior to the Lisbon Treaty, the delimitation of competence between the European Union and the Member States was not very accurately indicated⁶. As such, the Member States decided to clearly define the principle of conferral by including a catalogue of competences in the Lisbon Treaty, more specifically, in Articles 2 to 6 of the Treaty on the Functioning of the European Union.⁷

The European Union acts only within the powers conferred by the treaties, in exercising its legislative powers, being subject to three key constraints: the principles of conferral, proportionality and subsidiarity. The principle of conferral is repeated several times in the treaties, either to clarify its limitation⁸, to define how the members States are sharing the power with the Union⁹ or to outline the

³ Twigg-Flesner, Christian. (2013) *The Europeanisation of Contract Law: Current Controversies in Law*, second edition, Routledge, p. 26.

⁴ Art. 5(2) (3b in the modification) „Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States”.

⁵ Craig P. & de Burca G., *Eu Law. Text, Cases and Materials*, Fourth Edition, Oxford University Press, 2015, p. 74.

⁶ Bradley K.S.C., *Legislating in the European Union* in Barnard C. & Peers S (eds.), *European Union Law*, Oxford University Press, 2014, p. 105.

⁷ Piris J-C, *The Lisbon Treaty: A Legal and Political analysis*, Cambridge University Press, 2010, pp. 82-84.

⁸ Art. 5(1) TEU: „limits of the Union competences are governed by the principle of conferral”.

⁹ Art. 4(1) TEU: „In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.”

powers of the Institutions to act for the fulfilment of the objectives¹⁰. These provisions are not a novelty as some were present right from the ECSC Treaty.¹¹

For the clarification of the relation between the Member States and European Union, in time, were enacted the principles of subsidiarity and proportionality, which are playing an important role in the decision making process of the European Union, with the main purpose of balancing the powers between the European Union and the Member States and taking the appropriate measures for the fulfilment of the objectives provided.¹²

Where the EU has exclusive competence, its ability to act is wider than in areas of shared competence. Where competences are shared, the principle of subsidiarity should act as a limitation on the EU's power to adopt legislation, and thereby ensure that action is taken at the most appropriate level, be that the EU level or the Member States

There are two shared competences which relate to contract law: consumer protection¹³ and the internal market¹⁴. Thus, in either area, the principles of subsidiarity and proportionality¹⁵ require e EU may act only when the "objectives of the proposed action cannot be achieved at Member State level" and the those measures are appropriate for the fulfilment of the intended objective, but how this can be applied in the context of contract law, whether consumer contract law or contract law generally, is still debatable and from a certain point of view is in this paper analysed.

2. European consumer law

The European contract law can be divided them into consumer and non-consumer provisions, although the allocation of a certain act to either of them is likely to be somewhat arbitrary. We may consider, taking into account the legislative process, that the consumer Directives have been the main force in the Europeanisation of contract law, but the process wasn't concentrated on that, also existing projects on the harmonisation of other areas. Still, a complex analysis of the measures taken by the EU will show that most of the actions were in relation to consumer protection, even those which may be considered outside the field are generally concerned with protecting a party to a transaction which seems to be in a weaker position.¹⁶

We have to mention that, in the field of consumer law, the European Union

¹⁰ Art. 13(2) TEU: „Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.”

¹¹ Bradley St. C. K., *Legislating in the European Union*, in Barnard C. & Peers S (eds.), *European Union Law*, Oxford University Press, 2014, p. 105.

¹² Lefter C., *Fundamente ale dreptului comunitar institutional*, Economica Publishing House, Bucharest, 2003, p. 78.

¹³ Article 4(2)(f) TFEU.

¹⁴ Article 4(2)(a) TFEU.

¹⁵ Manko R (2015) *Contract law and the Digital Single Market: Towards a new EU online consumer sales law?* In-Depth Analysis, European Parliamentary Research Service, p. 4-5.

¹⁶ Twigg-Flesner, Christian. (2013) *The Europeanisation of Contract Law: Current Controversies in Law*, second edition, Routledge p. 53.

used for a time as legal basis the ones on "the establishment and functioning of the internal market"¹⁷ explaining that "... legislation differs from one Member State to another [and] any disparity between such legislation may directly affect the functioning of the common market"¹⁸ and was only after the Maastricht Treaty, which redefined the internal market and enacted a special provision on consumer policy¹⁹ when consumer protection and confidence started to be exercised as main justification for EU level measures.²⁰

The main legal provision on consumer protection in the TFUE is article 169 which provides a general objective in the field: „In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.” The stated provision is to be interpreted in correlation with art. 12 TFEU which indicates that in context of enacting EU policies, customer protection has to be taken into account.²¹ Moreover, using art. 169 as a legal basis has its limitation as it clearly indicates that the pursue of customer protection is in strict relation to internal market²² and, by that, relate back to the old field of competence.

There are two types of Directives in the field of consumer law: the ones dealing with particular marketing or selling methods and the ones focusing on specific types of contract. From the short overview, it can be seen that many of the Directives falling into the first category contain many exclusions from their scope, some of which even giving rise to litigations. These exclusions are not consistent across the Directives.²³

The early Directives adopted a minimum harmonisation approach, Member States being able to introduce or maintain provisions in the field covered by that act, which granted consumers an even higher level of protection, but more recent Directives have moved away from this approach towards full or maximum harmonisation²⁴, especially after the resetting of Single Market paradigm.²⁵

The new wave of the digital revolution has fundamentally changed the Single Market and the field of contract law, especially the provisions related to consumer protection, but before focusing on the substantive rules on consumer protection in relation to digital matters, we think it is useful to have an overview on

¹⁷ art. 114 TFEU (ex. art. 95) and art. 115 (ex. art. 94).

¹⁸ see recitals to Directive 85/577/EEC on doorstep selling.

¹⁹ art. 3(s) and 129(a), later by Amsterdam Treaty art. 3(1)(t) and 153 and now art. 4(2) and 169 TFEU.

²⁰ Stuyck J. (2000) *European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market*, Common Market Law Review, vol. 37, p. 367-400.

²¹ Twigg-Flesner, Christian. (2013) *The Europeanisation of Contract Law: Current Controversies in Law*, second edition, Routledge p. 36.

²² art. 169 (2) TFEU.

²³ Kötz, H. (2017) *European Contract Law*, second edition, Oxford University Press.

²⁴ Twigg-Flesner, Christian. (2013) *The Europeanisation of Contract Law: Current Controversies in Law*, second edition, Routledge p. 42-44.

²⁵ Snell J. (2014) *The Internal Market and the philosophies of market integration*, in Barnard C. & Peers S., *European Union Law*, Oxford University Press.

the main Directives which were enacted in the field of consumer contract law²⁶, in order to understand the evolution from minimum to maximum harmonisation and the definition of the main terms like consumer, trader, seller, right to withdraw or others.

The first acts in the field of consumer protection were the *Doorstep Selling Directive* (85/577/EEC) and the *Distance Selling Directive* (97/7/EC), both being abrogated by the still applicable Directive on Consumer Rights (2011/83/EU) and having a minimum harmonisation approach.

The Doorstep Selling Directive (85/577/EEC)²⁷ was among the first acts in consumer law and has enacted rules on contracts between consumers and traders or anyone acting in the name of the later²⁸, when the act was concluded away from the business premises²⁹

The Distance Selling Directive (Directive/97/7/EC)³⁰ contained provisions on contracts of goods and services concluded between a supplier and consumer at a distance. Although the directive did not explicitly aim at e-commerce, it contained provisions that applied to all types of techniques used when contracting at a distance. The Distance Selling Directive was applicable fundamentally on B2C E-commerce only due to the fact that electronic contracting represented a way of contracting at a distance. Even though at the time of the proposal electronic contracting was not very frequented and the technology was not developed, the legislators had the task to set-up provisions that could apply and be valid in the future context of the technological developments. Due to this fact, the Distance Selling Directive is viewed as a primordial legal instrument in regulating the E-commerce and electronic transactions, e- contracts being the foundation for legal acts to come. The directive at hand targeted to protect the consumer that has no direct physical contact with the provider and no possibility to check the products physically, in the case of goods. There were a lot of provisions ensuring that the customer had sufficient information in order to undertake a distance contract and also the customer is granted a period in which the withdrawal from the contract is possible.

This directive provided rights and obligations that were of a binding nature, meaning that the customer, European citizen, cannot relinquish its rights attributed by the domestic law of the Member State. The Member State has the obligation to take all actions necessary in terms of legislation in order to not interfere with the rights of distance contracting. As a consequence, this decision might

²⁶ More on the evolution of EU consumer law: Weatherhill S. (2006), *EU Consumer law and Policy*, second edition, Edward Elgar.

²⁷ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises OJ L 372, 31.12.1985, pp. 31-33.

²⁸ As the Court explained in *Crailsheimer Volksbank v. Consrads and others* (2005), C-229/04.

²⁹ More on the matter in Bamforth N. (1999), *The Limits of European Union Consumer Contract Law*, *European law review*, vol. 24, issue 4, pp. 410-418.

³⁰ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent OJ L 144, 4.6.1997, pp. 19-27.

affect the choice of the clauses, made by the companies, in the contracts with the purchaser, even if the law chosen is the one of a state that is not a Member State of the European Union. If the contract has a close connection with the European Union, the European citizen buyer, naturally, cannot lose the protection attributed by the directive.

With regard to the financial services contracted at a distance, they were not regulated by the Distance Selling Directive, instead EU has issued the *Distance Marketing of Financial Services* (2002/65/EC)³¹, which is still in force, in order to treat more broadly the specific aspects of these types of services.

The above mentioned Directive protects the consumer in a comparable way with the rules from the Distance Selling Directive and current provisions from Consumer Rights Directive.

This legal act was a full harmonisation one, covering financial services sold at a distance, although the definition of such services was unclear: „any service of a banking, credit, insurance, personal pension, investment or payment nature”³² and does not cover the contracts containing immovable goods because the cooperation with the notaries granting *ad validatem* is not offering sufficient protection.

The masterpiece of EU legislation in terms of consumer protection was the *Consumer Rights Directive* (2011/83/EU)³³, a maximum harmonisation directive that replaced the Distance Selling Directive alongside the Doorstep Selling Directive, governing online and offline transactions while introducing a new standardised set of pre-contractual information obligations, as well as a single set of rules on the right of withdrawal.

The Directive was implemented in Romania by means of the Emergency Ordinance no. 34/2014³⁴ after the implementation period, which expired on 13 December 2013 and just after the European Commission filed the infringement procedure against Romania on 14 January 2014 proposing as penalties around 1.8 million fix amount and 650/day for delay³⁵.

The Consumer Rights Directive applies to contracts concluded between a business and a consumer (B2C) irrespective of the method of settlement, online,

³¹ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, p. 16–24.

³² Art. 2 (b) *Distance Marketing of Financial Services* (2002/65/EC).

³³ 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 Text with EEA relevance, OJ L 304, 22.11.2011, pp. 64–88.

³⁴ Emergency Ordinance no. 34/2014 from July 4th 2014, published in the Official Journal of Romania, section 1, no. 427 from 11/06/2014.

³⁵ After the final Communication of the European Commission C (2013) 8101.

offline, face-to-face, etc. However, criticisms arouse,³⁶ regarding the fact that the directive was no applicable for all types of transactions or contract, specifically for financial services, package holidays, social services, construction, healthcare, etc. The type of contracts are regulated by other directives or are of a very specific nature that impedes applicability of non-specific legislation though the critics considered that replacing cornerstone directive is should have been broader and regulate all types of transactions.

In the present Directive, "consumer" is defined as "any natural person who is acting for purposes which are outside his trade, business, craft or profession"³⁷.

The European legislator, for clarifying the situation, already present in the case law³⁸, where a contract is concluded by a natural person for products which could be used both for personal and professional purposes stated that: „however, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer"³⁹.

A "trader" is "any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive"⁴⁰.

One novelty element brought by the legislation at hand is a standardised pre-contractual information obligation alongside the clear set of rules on the right of withdrawal that applies to any contract concluded by a trader and a consumer. All this without taking in account if it is for the case of supply of goods, services or even digital content, which will be detailed subsequent in the paper. Having stated that the Consumer Rights Directive is applicable to all contracts and consumers some of the main focuses like the right of withdrawal and the pre-contractual information are only applicable to distance contracts and so called off-premises contracts.

The distance contract is defined a contract concluded between a trader and a consumer making the specification of trader not simply business at a distance without a coinciding physical presence of the two parties. An off-premises contract is presented as a contract concluded with a coinciding physical presence of the parties at a place that is not the business premises of the trader⁴¹. The context that satisfies the spirit of the definition is clearly a website by being an advance form of a catalogue with the order completed by the buyer and sent by post, carrier, fax and, of course, e-mail.

On the right of withdrawal, the directive offers specifically rules designed

³⁶ Weatherill S. (2012), *The Consumer Rights Directive: How and Why a Quest for Coherence has (Largely) Failed*, Common Market Law Review, vol. 49, pp. 1279-1318.

³⁷ Art. 2 (1) *Consumer Rights Directive* (2011/83/EU).

³⁸ Case Johann Gruber v. BayWa AG (2005) C-464/01.

³⁹ Art. 2 (7) *Consumer Rights Directive* (2011/83/EU).

⁴⁰ Art. 2 (2) *Consumer Rights Directive* (2011/83/EU).

⁴¹ Art. 2 (9) *Consumer Rights Directive* (2011/83/EU).

for the digital market specifically for the digital content. In order to exemplify, if a consumer has used the digital content, for instance downloaded the digital content, software or others or even unpacked a CD, the consumer cannot withdraw from the contract. The only exemption is in the case of digital goods without a tangible medium, namely software, in the case the download happened without the consent of the consumer.

Arguably a more important provision than the right of withdrawal is the *termination at will* right which empowers the consumer to cancel the contract if 30 days have passed since the conclusion of the contract if not other agreements were made at the conclusion of the contract. More so, the trader is obliged to reimburse the integral amount without undue delay.

In addition, the directive also forbids the trader to charge a fee to the consumer, which exceeds the actual cost supported. Whenever the trader dispatches the good to the consumer, the risk of damage or loss of goods is transferred to the consumer or, more often in practice, to the carrier if the good is in transit.

The Consumer Rights Directive stipulates that the Member States have the obligation to ensure that the trader operates a telephone line, that can be contacted at a basic fee, due to the cross-border nature of online transactions within the Digital Single Market. A last relevant specific provision is with regard to additional payments, by which extra fees can be charged only with the express consent, where pre-ticked boxes are prohibited, if not the consumer is entitled to be reimbursed.

The *Consumer Sales Directive* (1999/44/EC)⁴² dates back to 1999 and it is based on a proposal submitted by the Commission in 1996, long before the development of digital consumer sales, having a minimum harmonisation, but arguably with the biggest impact on contract law until now.⁴³

The directive applies to all consumer sales transactions, regardless of how they are concluded, aiming to harmonise the provisions on consumer sales from the national jurisdictions by means of standard rules of sales law with a high level of consumer protection with the purpose of straightening the internal market.

The directive provided that consumer goods are presumed to be in conformity with the contract if they comply with a certain description, are compliant to the intended purpose and have a normal quality and performance.⁴⁴

The Directive provides that the „incorrect installation” is a case of lack of conformity if the installation is part of the contract, also applying to the incorrect installation by the buyer as a result of shortcomings of the installation instruction. However, the seller may be free of liability in the cases when the installation is not stipulated in the contract and the buyer asks the seller to install the good.

As regarding the consumer’s rights, the Directive provides he/she can require ”to have the goods brought into conformity free of charge by repair or

⁴² 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 OJ L 171, 7.7.1999, pp. 12-16.

⁴³ Staudenmeyer D. (2000) *The Directive on the Sale of Consumer Goods and Associated guarantees, a Milestone in the European Consumer and Private Law*, European Review of Private Law, vol. 4, pp. 547-564.

⁴⁴ Art. 2 Directive 1999/44/EC.

replacement”⁴⁵, provided that the remedy is proportionate. A remedy is not proportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable. Only if the first set of remedies is not available, the consumer has the right to the second set of remedies. In that case the consumer is allowed to rescind the contract or, at his/her choice, to require an appropriate reduction of the price. However, a consumer may not rescind from the contract if the lack of conformity is minor.

Another Directive dealing with a particular type of consumer contract is the *Package Travel and Linked Travel Arrangements (2015/2302/EU)*⁴⁶, which replaced the former minimum harmonisation measure, Package Travel Directive (90/314/EEC)⁴⁷, which aims to adapt the scope of travel customers’ protection by taking into account the recent developments of the tourism, to enhance transparency, and to increase legal certainty for travellers and traders.

The Directive was implemented in Romania by means of the Government Ordinance no. 2 from 2018, being another way of passing from minimum to maximum harmonisation, as the EU considered that this field needed a proper attention due to its development which implied a higher risk for a certain type of customers, or better said, of specific products, the packages offered for sale or sold by traders to travellers and to linked travel arrangements facilitated by traders for travellers.

The term of „consumer” defined as „traveller” for the purposes of this Directive is unusually broad, covering any person who is seeking to conclude a contract or is entitled to travel of an existing one.

The travel „package” was redefined by this new act as being „a combination of at least two different types of travel services for the purpose of the same trip or holiday”⁴⁸ and another element was added, the ‘linked travel arrangement’ which means „at least two different types of travel services purchased for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers”⁴⁹

As regarding the consumer’s rights, we may notice that the Directive, due the sensitiveness of the field, tries to enact a list of rights, offering an overprotection if we compare them with the ones from other Directives: right to pre-contractual information, content of the package travel contract and documents to be supplied before the start of the package, right to price reduction in case of cost reduction, price increasing only if the contract expressly reserves that possibility, impossibility for the organiser to unilaterally change package travel contract terms other than the price, right to receive assistance and, maybe the most

⁴⁵ Art. 3 Directive 1999/44/EC.

⁴⁶ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

⁴⁷ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours OJ L 158, 23.6.1990, pp. 59-64.

⁴⁸ Art. 3 (2) Package Travel and Linked Travel Arrangements (2015/2302/EU).

⁴⁹ Art. 3 (5) Package Travel and Linked Travel Arrangements (2015/2302/EU).

important, right of withdrawal before the start of the package.

Another Directive providing rights for customers in a field similar to tourism is the *Timeshare Directive* (2008/122/EC)⁵⁰ which was adopted in 2008, after a similar act dealing with timeshares was first introduced in 1994, but in view of the changing nature of the market and similar products there was developed a new one aiming to achieve legal certainty and functionality of the internal market for consumers and businesses with respect to timeshare contracts and related contracts by means of full harmonisation of the laws of the Member States.

The Directive regulated „timeshare contracts” defined as „a contract of a duration of more than one year under which a consumer, for consideration, acquires the right to use one or more overnight accommodation for more than one period of occupation”⁵¹ or other similar contracts like „long-term holiday product contracts”, „resale contracts” or „exchange contracts” providing a number of rules regarding the marketing and sale of such contracts, primarily through detailed information requirements and the availability of a right of withdrawal.

We cannot end the list of European consumer law *aquis* without indicating one of the pivotal acts defending the consumer, namely the *Directive on Unfair Commercial Practices* (2005/29/EC)⁵² which introduced a prohibition of all unfair commercial practices in consumer transactions, the ”commercial practice” being defined as „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”⁵³, covering the activities both before and after the conclusion of a contract, but next to the definition, providing a list of 30 unfair practices prohibited in relations with customers.⁵⁴

3. European Union’s digital single market and customer protection

Online is a recognisable term, due to its wide use and the times we are now living, but it wasn’t always like that. Now we are immersed in this world of online shopping, we get our news online, we communicate online, get discounts, negotiate, enjoy waiting or reading intellectual property online, lend or buy rights and many more. The general idea is that a great percentage of transaction are

⁵⁰ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Text with EEA relevance) OJ L 33, 3.2.2009, pp. 10-30.

⁵¹ Art. 2 (a) Timeshare Directive (2008/122/EC).

⁵² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (Text with EEA relevance) OJ L 149, 11.6.2005, pp. 22-39.

⁵³ Article 2(d) Directive on Unfair Commercial Practices (2005/29/EC).

⁵⁴ Annex 1 to Directive on Unfair Commercial Practices (2005/29/EC).

realised online or virtually, and for some we don't pay cash or virtual money, but with other digital content, such as personal information, account data, profile preferences and other databased info attributed to users. On this particular topic there were a lot of legal inquiries and confusion, respectively on databases breaches and user data not consented transaction or hacked data, the cases of Facebook's „breach” of data, Cambridge Analytica or Huawei' user's “surveillance” being the biggest scandals in 2018 up to this date.⁵⁵

Clearly, it is not easy to identify the point at which, in the online environment, allowing a consumer to place an order must be considered a ‘directed activity’, as the simple fact of accessing the website is not sufficient, but the mechanism by which distance contracts are concluded is a relevant factor. The CJEU in one of its decisions, *Pammer v Schlüter*⁵⁶, provided that by the very nature of the internet, online domain is accessible throughout the EU and beyond, but entering online does not mean that the business directs its activities beyond its jurisdictions, it has to express „its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile”.

Still, the business-to-consumer relations are the typology of direct transactions made between businesses and direct consumers and the distinction between B2B and B2C is made because these types of transactions are subjected to a different law. Business-to-consumer transactions are legislated with more powerful accents because the consumer is identified as a weak part and has particular bargaining power, other than collective influence, by actions, the demand and price range of a market. Due to this factors, in terms of *internet legislation*, the consumer is in need of protection from a legislative perspective and as a result, a wide range of consumer protection laws was enacted, which affects the businesses that participate in B2C transactions.

The European Commission reacted to the latest online development and came with a strategy on the Digital Single Market promising a digital transformation that will benefit everyone in Europe with the scope of achieving climate-neutrality by 2050. Following the 30 legislative proposals of Juncker Commission part of the 2014-2019 strategy on Digital Single Market, there were enacted common rules for online sales, revised *Payment Services Directive*, revised consumer protection rules, new rules on cross-border parcel delivery services that are already in force, removal of geo-blocking for streaming services, new VAT rules for online sales of goods and services, a new Regulation on the free flow of non-personal data but the strategy still needs to be followed by new proposals which may, in the end, lead to a unified digital Single Market.

The Digital Single Market was proposed to be built on three pillars: *Access*, representing the constant improvement towards facilitating *access* to consumers and businesses to transaction digital, non-digital goods, services and intellectual property or software across the European Union; *Environment*: standing for the

⁵⁵ Schaub M., 2004, *European legal Aspects of E-Commerce*, Europe Law Publishing.

⁵⁶ Joined Cases C-585/08 and 144/09 Peter Pammer v. Raderei Karl Schlüter GmbH & Co KG; Hotel Alpenhof GesmbH v. Oliver Heller (2010).

perpetual adaptation and creation of the right conditions and an even playing level for digital networks and new, innovative businesses and services to boom; *Economy and Society*: developing the perfect environment in order to boost the growth of the digital economy and wellbeing of the consumers, the Commission developing even a map⁵⁷ with 16 key actions.

4. The perspectives of European consumer protection

The evolution of the Single Market, especially taking into consideration the latest developments in digital matters forced the European legislator to prepare two special new Directives regulating mainly the the field of online transitions, now with a specific legislative area on transferring digital content, both acts being part of the legislative package on Digital Single Market launched by Juncker Commission⁵⁸.

The Consumer Sales Directive was replaced by Online Sales Directive (2019/771/EU)⁵⁹ brings new provisions and clarifications to the one it repealed, Consumer Sales Directive (1999/44/EC), which increase or keep the present level of customer protection, but not only in relation to online sales, but other distance sales of goods.

The new Directive pursues, in regarding the non-conformity issue, similar path to the previous one, using a combination of objective and subjective requirements⁶⁰ by providing that any distorted agreement affecting the consumer is valid if the condition of goods was acknowledged at the conclusion of the contract⁶¹. We may notice that the change brought by the new act, by placing the conditionality of the consumer to expressly accept the conclusion of the contract under those conditions, is more helpful in the online environment, as defects are herder to be identified.⁶²

The text⁶³ of the Directive lists different consumer's remedies for lack of conformity like, firstly repair or replacement of the products, a price reduction or termination of contract. In relation to remedies, we have to indicate that there is clarification brought by this new act, extending by that the protection of customers

⁵⁷ European Commission Communication COM(2015)0192.

⁵⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe COM_COM (2015)0192.

⁵⁹ 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 (Text with EEA relevance) PE/27/2019/REV/1, OJ L 136, 22.5.2019, pp. 28-50.

⁶⁰ Mila Rafel, R. (2016). „The Directive Proposals on Online Sales and Supply of Digital Content (Part II): conformity and remedies for lack of conformity”. *IDP. Revista de Internet, Derecho y Política*. No. 24, p. 53.

⁶¹ Article 4(3) Online Sales Directive (2019/771/EU).

⁶² Beale H (2016) *Scope of application and general approach of the new rules for contracts in the digital environment*, In-Depth Analysis. European Parliament - Policy Department for Citizen's Rights and Constitutional Affairs, p. 21.

⁶³ art. 9 Online Sales Directive (2019/771/EU).

by allowing them to “to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract”⁶⁴

On the other hand, the new amendments do not comprise the possibility or goods’ return and payment reimbursed, but allows the consumer to terminate the contract for minor breach where repair or replacement are not possible or have failed.⁶⁵

In relation to time limitations, the Online Sales Directive comes with important developments as provides two-year legal period during which the seller can be held liable for the lack of conformity⁶⁶ and extends the period of the presumption of non-conformity of the goods to another two years, provisions which by maximum harmonisation might increase or decrease consumer protection depending on the national existing provisions.

The burden of proof, in case of sales, should rest on the buyer, but the European provisions in order to increase of consumer protection, provide a ”reversal of burden of proof”, the consumer having simply to indicate that the good is defective.⁶⁷

The *Digital Content Directive* (2019/770/EU)⁶⁸ is a pioneering piece of legislation that sets the first legal rules, at EU level, regarding the contracts and transactions that include consumers that also supply digital content and digital services. The directive makes a strong emphasis on harmonisation, by prohibiting the Member States to enact more or less rigorous requirements. With this piece of legislation, the Union answers some of the questions that arise in the analysis of the previous relevant directives.

One of the reasoning of the European Union is that the issue is important to be addressed and regulated due to the considerable economic growth by this sector, that trades digital content. Besides the observable issues of lack of sufficient protection attributed to older legislation, Evelyne Gebhardt, who was an Internal Market and Consumer Protection rapporteur explained: „with the sinking cost of electronic gadgets and the growing market for Big Data and targeted marketing, companies have an increased incentive to distribute consumer electronics without charge. Some consumer electronics are sold at the manufacturing price or less. The main purpose of such "giveaways" is to monetise through collection of user-generated content. This provisional deal bolsters consumer rights and increases legal certainty. It addresses the most pressing issues that consumer contracts in the digital sphere face today, such as software updates and changes to digital

⁶⁴ Smits, J. (2016). *The new proposal for harmonised rules for the online sales of tangible goods: conformity, lack of conformity and remedies*. Workshop for the Juri Committee on Legal Affairs of the European Parliament, New rules for contracts in the digital environment, pp. 1-16.

⁶⁵ Mila Rafel, R., *op. cit.* (2016), p. 54.

⁶⁶ Art. 14 Online Sales Directive (2019/771/EU).

⁶⁷ Manko R (2015) *Contract law and the Digital Single Market: Towards a new EU online consumer sales law?* In-Depth Analysis, European Parliamentary Research Service, p. 17.

⁶⁸ 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 (Text with EEA relevance.) PE/26/2019/REV/1 OJ L 136, 22.5.2019, pp. 1-27.

content/service”.⁶⁹

The Digital Content Directive has been drafted to improve the functioning and the transactions made on the Single Market and as its legislative predecessors the focus falls on the intense protection of the consumer. In this directive the protection of the consumers is pursued on the requirements of the contracts made between consumer, which supply digital content and digital services, and traders.

The directive applies, especially, to any contract, in which the trader supplies digital content or services to a consumer that offers payment and to transactions where the consumer provides personal data, like in the case of *social media* platforms, and in which the respective data or service is developed in agreement with the consumer's will. In the Digital Content Directive are explicitly mentioned contracts on which the provisions of the directive do not apply: healthcare; gambling services, by electronic channels or other technology that eases the communication at the request of the consumer (e.g. betting transactions, poker and casino games, lottery, etc.).

Unfortunately, the directives do not live up to its highest potential because in terms of modification of the digital content and services, and the reimbursement. The let-down is that certain particularities are not taken into account, the digital content, being intangible, cannot be treated like a physical good, therefore even by definition, the procedure should contain useful provisions to protect the consumer. Being as such the digital domain and context is legislated, as common sense dictates, and not in the grey areas where usually the problems rise and are a lot of sources that could hurt the consumer.

The Digital Content Directive has focuses on four objectives in order to regulate the abstract domain of transfers of digital content, firstly to fit for the purpose, secondly to treat the lack of conformity, thirdly offer a legal guarantee and fourthly to provision the updates and various modifications.

In relation to conformity of digital content, the Digital Content Directive has approached differently the matter than the other, choosing first the subjective criteria, the quality, quantity, functionality and others must be as indicated in the contract⁷⁰ and by that the protection of the consumer being weakened⁷¹. The digital content and digital services must be fit for the purpose and to be considered and treated in a common sense way, to be recognised by specifying the quantity, functionality, specifications, compatibility and general features, the digital content must be supplied with all of its features, installation, instructions, customer assistance and other accessories.

As remedies for failure to supply or lack of conformity of the expected digital content⁷², the consumer can decide, unlike Online Sales directive, to immediately terminate the contract, to have the digital content brought into

⁶⁹ Evelyne Gebhardt Internal Market and Consumer Protection rapporteur in 2019.

⁷⁰ Art. 6(1) *Digital Content Directive* (2019/770/EU).

⁷¹ Beale H (2016) *Scope of application and general approach of the new rules for contracts in the digital environment*, In-Depth Analysis. European Parliament - Policy Department for Citizen's Rights and Constitutional Affairs.

⁷² Mila Rafel, R., *op. cit.*, (2016), p. 54.

conformity in a reasonably time or, subsequently receiving a discount or require the annulment of the contract and to be reimbursed, if the digital content is not in conformity with the standards.⁷³

In contracts to the Online Sales Directive, in case of digital content there is no limitation of time for bringing a claim of non-conformity. Moreover, the burden of proof of any possible defects at the delivery time of the digital content is reversed without a time limit.⁷⁴

Another provision regards the period of guarantee, which must not be shorter than two years and for the case of subscriptions or streaming services (i.e. continuous supply) the period must be throughout the duration of the contract.

When a contract is concluded between a trader and a consumer, the trader must offer updates and other modifications. The modifications made in the case of continuous supply should not be at a cost for the consumer or to offer the possibility to the consumer to maintain the initial version, from the moment of contracting or to void the contract free of charge.

On a final note, the Digital Content Directive, was long awaited and it is useful because this sector needed regulated and also the consumer protected. The legal act offers a lot of protection and clears the practice of these type of transactions, offering also provisions that serve the consumer, not charging additional amount of money in cases of changes in the transactions and return periods. There are more benefits that could be exemplified, however, unfortunately the directive does not give provisions on the transactions made with the consumers' digital content, private data and backlogs of its historical activity, which in this day of age is becoming an extremely important currency and asset.

5. Conclusions

In the year 2015, when the Digital Single Market Strategy has been adopted, a legislative initiative was announced and it had the objective to harmonise the online sale of goods and supply of digital content. This initiative came in a form of a twin legislation, namely a directive on supply of digital content and digital services and a directive concerning the online sale of goods. The twin legislative proposal targeted to augment the development of the online sector, protect the consumer and cementing the true Digital Single Market.

The first legislative act tried to adapt the existing rules on online sales to the present moment, especially by including new developments on the market, but also trying to increase the customer protection in these kind of transactions.

In the second directive, the focus is on the creating benefits for consumers and for businesses by means of eliminating cross-border barriers that hampers the contract law.⁷⁵

The EU's statement is that the objective of the package is to offer legal

⁷³ Art. 12 *Digital Content Directive* (2019/770/EU).

⁷⁴ Art. 9. *Digital Content Directive* (2019/770/EU).

⁷⁵ Manko R (2015) *Contract law and the Digital Single Market: Towards a new EU online consumer sales law?* In-Depth Analysis, European Parliamentary Research Service.

certainty and protection for the European consumers and to facilitate the transactions of digital content and goods, all specifically at a cross-border level, still our analysis to the acts indicate that there are still discrepancies in the field of customer protection, with an advantaged position of the customer of digital content.

The two Directives, part of the Digital Single Market package, brought a new phase in the process of harmonising the European contract law which started in the 1980's. However, the consumer *acquis* revealed that the Member States are not quite prepared to relinquish a large part of their sole competence on contract law. From a political point of view, the most sensible issues, that the Member States debate, are on topics that are purely technical ones.

In the European private law, the author Christian Twigg-Flesner reasoned that a beneficial direction is to limit the Common European Sales Law solely to cross-border transactions, defined as a consumer from a Member State and a trader from another concluding a sale contract. An exception was stated in the case of a consumer coming to the traders Member State in order to conclude a contract, due to the clear intent a cross-border transaction at origin.

The entire logic is that the Digital Single Market should be governed and legislated by a single European set of legislation. Obvious enough, limiting the rules that regulate the cross-border transactions would have the benefit of permitting national legislators to ease the national consumer's needs and also a uniform legal regime for cross-border transactions and 28 (or 27) different national ones on domestic sales would create disputes in coherence and will not harmonise the European Union Digital Single Market.⁷⁶

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⁷⁶ Twigg-Flesner, C., 2015. CESL, „Cross-border transactions and domestic law – why a dual approach could work (although CESL might not)”, *European Review of Private Law*, Volume 23, p. 13.

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