

IMPLEMENTATION OF EU LAW INTO THE POLISH CONSUMER PROTECTION LAW, WITH PARTICULAR EMPHASIS ON THE OMNIBUS DIRECTIVE

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Purpose: On 1 January 2023, provisions implementing the Omnibus Directive, along with the Digital Content and Sale of Goods Directives, came into force in Poland. The aim of the implementation is to adjust consumer protection in response to advancing digitisation and new business models. This article focuses on the changes introduced to consumer protection laws as a result of the amendment of 1 December 2022 implementing the Omnibus Directive into the Polish law.

Design/methodology/approach: The deliberations are based on the related subject literature and an analysis of the legal provisions applicable in the area under discussion.

Findings: With the implementation into the Polish legal order of the Directive 2019/2161, legislators introduced numerous changes in consumer law, including new obligations for the providers of online trading platforms, and rules for the provision of information about price reductions of goods and services. The main implication of the implementation of the Omnibus Directive is the change from physical and legal defects to compliance (or non-compliance) of the goods with the contracts, and the extension of the limitation period for consumer claims. Adjusting their business to the new legal requirements, entrepreneurs will need to implement far-reaching organisational changes, which paradoxically, from the consumer's point of view, could lower the traditionally perceived level of protection. With respect to the legal aspects of some of the implemented provisions selected in this article, it should be concluded that the transposition of most of the solutions of the Omnibus Directive was carried out correctly, although certain inconsistencies could not be avoided.

Practical implications: Adjusting their business to the new legal requirements, entrepreneurs will need to implement far-reaching organisational changes. For these reasons, the importance of knowledge about the consumer protection, has been increasing in value.

Originality/value: The article raises the issue of consumer law, which is important not only from the point of view of the customer but also from the entrepreneur's perspective.

Keywords: consumer law, implementation, digital market, entrepreneurs' obligations.

Category of the paper: viewpoint, literature review.

1. Introduction

Consumer protection is a priority matter within the EU. An adequate level of consumer protection can undoubtedly improve the living conditions of the Community's citizens, hence the developments in consumer policies that have been observed for many years (Kaczorowska, Kurzyńska-Lipniewicz, 2019).

Directive (EU) 2019/2161 (hereinafter the Omnibus Directive) 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, entered into force on 7 January 2020 (Directive, 2019, Item 136.28).

The main purpose of the directive, a legislation package called *New Deal for Consumers*, was to “strengthen the enforcement capacities of member states, enhance product safety and increase international cooperation and new possibilities for redress notably through representative actions by qualified entities” (Regulation, 2021, Item 153.1, Motif 48). Without a doubt, the directive was also aimed at the improvement of the damage compensation system in response to unfair commercial practices engaged in by entrepreneurs (Miś, Miś, 2021).

The said regulation was also aimed at strengthening consumer protection mechanisms related to online transactions (Sieradzka, 2019). A definition of online services was introduced; specific protection was given to providing consumer's personal data for unpaid delivery of digital services; and finally, new information obligations (e.g., on informing consumers about price reductions) were placed on online trading platform providers (Sobczyńska, 2022).

Almost concurrently with the Omnibus Directive, two subsequent directives were passed aimed at strengthening consumer legal protection. These are 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 (Directive, Item 136), called a Digital Content Directive; and 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, called a Sale of Goods Directive (Directive, 2019, Item.136.28).

The Digital Content Directive, for example, extends consumer protection to unpaid services for access to which consumers provide their personal data. If consumers opt out of the digital content or services offered, based on this directive, they have right to access the content or data created by them while using such content or services. The provider, in turn, has the right in such a situation to prevent further use of the service, in particular by removing the users' accounts. In this type of digital service, consumers can use them within a 14-day period during which withdrawing from the contract is possible, if they declare that they made an explicit request for such and that they understand that they lose the right to withdraw from the contract upon its full performance by the seller.

The adopted regulations will allow for the rules of consumer protection within the EU to be unified, as well as reducing the costs on the side of entrepreneurs involved in cross-border operations, as they will help in avoiding additional costs of adjusting contracts concluded with consumers to meet the requirements in individual member states.

In accordance with Article 7(1) of the Omnibus Directive, member states will be obliged to adopt and publish the provisions necessary to implement this directive by 28 November 2021. The above regulations should apply from 28 May 2022 (Directive, 2019, Item. 136.28). As of today, this is the case in nine member states. Aside from Poland, the provisions have still not been implemented by Italy, Ireland, Malta, Luxembourg, Slovenia, and Slovakia. It was only in July 2021 that the Government Legislation Centre published on its website the Act Amending the Act on Consumer Rights and Certain Other Acts (Projekt, 2021), which was to lead to the implementation of the Omnibus Directive. In July 2022, the bill was submitted to the Sejm.

As for the Sale of Goods and Digital Content Directives, adoption and publication by member states of provisions necessary to implement them was to take place by 1 July 2021, and the provisions should have been applied from 1 January 2022.

The implementation of the above legal acts into the Polish legal system was carried out by the passing of an act on 4 November 2022 on changes to the Consumer Rights Act, the Civil Code Act, and the International Private Law Act (The Act, 2022, Item 2337), and the Act of 1 December 2022 on Amending the Act on Consumer Rights and Certain Other Acts (The Act, 2022, Item 2640).

It was necessary to amend, in particular, the Act of 20 May 2014 on Consumer Rights (u.p.k.) (The Act, 2020, Item 287); the Act of 9 May 2014 on Information on Prices of Goods and Services (u.i.c.t.u.) (The Act, 2023, Item 168); the Act of 23 August 2007 on Combating Unfair Commercial Practices (u.p.n.p.r.) (The Act, 2017, Item 2070); and the Act of 23 April 1964 – Civil Code (The Act, 2022, Item 1360). The amendments came into force on 1 January 2023.

This article focuses on changes implemented in consumer protection law based on the amendment of 1 December 2022 implementing the Omnibus Directive into the Polish law.

2. Online platforms

Until the Omnibus Directive was implemented, the term *online platform* had not been legally defined. The attempts to create a legal definition of such a term met with numerous difficulties. It was especially troublesome to specify the criteria differentiating this term from others similar in nature (Wyrwińska, Wyrwiński, 2018).

On 4 November 2022, Item 8, including the definition of an online trading platform, was added to Article 2 of the Consumer Rights Act. According to this item, an online trading platform is “a service using software, including a website, part of the website or application, operated by or for the entrepreneur, within which it is possible a) for the consumers to remotely conclude contracts with other entrepreneurs, or b) for the natural persons, who are not entrepreneurs, to remotely conclude contracts with other natural persons, who are not entrepreneurs” (The Act 2020, Item 287).

The introduced definition was the result of numerous consultations, and the original wording included in the Act Amending the Act on Consumer Rights and Certain Other Acts was subject to harsh criticism. The Act defined an online platform as a “service using software, including a website, part of the website or application, operated by or for the entrepreneur, which enables consumers the remote conclusion of contracts with other entrepreneurs and consumers” (Projekt, 2021). This wording was contrary to the definition of a consumer in Art. 22¹ of the Civil Code, which defined a consumer as “any natural person performing a legal act with an entrepreneur which is not directly related to the business or professional activity of the consumer” (The Act 2022, Item 1360).

The provisions of the Consumer Rights Act do not define the concept of consumer separately (Osajda, Mikłaszewicz, 2022). “According to the literal wording of this definition of the consumer, the transaction concluded between two natural persons with no business activity precludes awarding them a consumer status. The phrase contained in the article: ‘it is possible for the consumers to remotely conclude contracts with other (...) consumers’ is contrary to the above-quoted definition” (Miś, Miś, 2021). In this wording, the provision would allow for the conclusion of contracts via an online platform between a consumer and an entrepreneur, and between consumers.

To avoid excluding from the scope of the online platform definition the situation in which a contract is concluded between natural persons without any business activity, it was necessary to introduce changes in the Act Amending the Consumer Rights Act. The wording “within the platform it is possible for the consumers to remotely conclude contracts with other consumers” was replaced with the clause “it is possible for the natural persons, who are not entrepreneurs, to remotely conclude contracts with other natural persons, who are not entrepreneurs”.

3. Obligation to inform about Price Reduction

The term of the secret of an entrepreneur is used in Article 5(2) of the Act of 6 September 2001 on the Access to Public Information (Act, item 902, 2022), which states that the right to public information is subject to limitation based in view of the privacy of a natural person or an entrepreneur’s secret. However, the Act does not introduce a legal definition of this term.

Until the Omnibus Directive was passed, the obligations of entrepreneurs related to communication of prices were based on the Directive 98/6/EC (1998, Item 080). The entrepreneur was obliged to provide a product selling price and price per unit (i.e., per kilogram, litre, etc.). The Omnibus Directive added to the Directive 98/6/EC a new Article 6(a) introducing an additional obligation to regulate the issue of price transparency in the event of price reduction and promotional offers (Directive, 1998, Item 080).

In accordance with Article 4 of u.i.c.t.u., the place of retail sale and service provision must provide the prices or unit price of a product or a service in an unequivocal manner that does not raise doubts and makes price comparison possible. Moreover, whenever information is given about a price reduction for a product or service, one should also provide information next to the reduced price information about the lowest price of such a product or service applicable for 30 days before the reduction (The Act, 2023, Item 168). The above provision raises some interpretative concerns. The Office of Competition and Consumer Protection takes the position that the benchmark price (usually with a strikeout) should be the lowest price from the previous 30 days (UOKiK, 2023). This interpretation is consistent with the regulation discussed herein, but it does not result from its wording (Keler, 2023).

If the given products or services are offered for sale for a period shorter than 30 days, the information about the lowest price should include the lowest price of the product or service that was applicable in the period between when such product or service was first offered for sale and when the reduction was applied (Article 4(3) of u.i.c.t.u.). For goods with a short expiration period or shelf life, adjacent to the reduced price, one should provide information about the price before the first reduction was applied. The above regulations also apply to advertisements for goods or services including prices.

The obligation to share the lowest price from before the price reduction should thus be carried out in any retail setting or place where services are provided (whether stationary or online). In this regard, the Polish legislator went further than the EU legislation, as the Omnibus Directive is only applicable to the price reduction for goods (Patryk, Patryk, 2014).

It is worth emphasising that the value of the offer or its duration does not affect the obligation to provide information. It is sufficient that the entrepreneur provides information about the reduction in any form. It could be a promotional slogan suggesting a price reduction (e.g., “Now for less”, “Up to 50% less”, “Up to 200 zł off!”) or expressions such as Sale, Clearance, etc. Then, next to the current price, the entrepreneur must show the lowest price applicable in the given sales channel for 30 days before the promotional offer. Such pricing information can be presented on a price tag, on an electronic screen, on a price list, in a catalogue, or on the cover, or it can be printed or handwritten on the product or its packaging.

Concurrently with the Act of 1 December 2022 on Amending the Act on Consumer Rights and Certain Other Acts, a new resolution of the Minister of Development and Technology of 19 December 2022 on making prices of goods and services visible came into force.

The resolution specifies the way in which prices should be presented, including information about price reductions. In view of § 3(1) of this resolution, the price, unit price, or information about price reduction for the product should be presented on the product directly above it or in its vicinity, in a place that is publicly accessible and well visible to consumers (The Act, 2022, Item 2776); and in the event of a price reduction for a service, information about the reduced price should be placed next to the price and the unit price of the service (The Act, 2022, Item 2776, §10(3)). The resolution does not include specific guidelines on indicating the lowest price, although it mentions it should be provided in a visible, clear, unambiguous, and customer-accessible manner (It cannot be written in smaller font than the reduced price, or using an illegible color or low contrast.)

The scope of the introduced changes is also problematic. The obligation of informing about the lowest price before the price reduction was added to the act on informing about prices of goods and services, which is also applicable in the entrepreneur–consumer (B2C) relationship, as well as between entrepreneurs (B2B). In accordance with Article 2 of u.i.c.t.u., the provisions of this act do not apply to prices in trade between natural persons who are not entrepreneurs (The Act 2023, Item 168). Furthermore, this obligation should be met at a retail sales point. Although there is no legal definition of the term *retail*, the assumption that it includes only sales addressed to consumers seems incorrect.

In light of the above, the view that in this respect also, the Polish legislator went one step further than the EU legislator, who limits this obligation only to trading with consumers, seems justified (Chomiczewski, 2022).

4. Contracts Requiring the Transfer of Goods to the Consumer

The Act of 4 November 2022 amending the Act of 30 May 2014 on Consumer Rights introduced Chapter 5a, including regulations on contracts requiring the transfer of ownership of goods to the consumer. Thus, with respect to this type of contract, the provisions of the Civil Code on the warranty connected with the sale for consumers (except for goods that are only a digital content media) are excluded (The Act 2020, Item 287, Article 43(a)(1)). Article 43(a) of u.p.k. specifies that such contracts are sales contracts, delivery contracts, and “task as a commodity” contracts. *Commodity* is defined as a movable property, but also includes water, gas and electricity in cases where they are offered for sale in a specific volume or amount (The Act 2020, Item 287, Article 2(4)).

Consequent to the above, the period for limitation of consumer claims has been extended from 2 years to 6 years as of 1 January 2023 (General rules of Art. 118 and n.k.c. apply here). Also extended to 2 years (calculated from the moment the product is delivered) was the period in which the burden of proof with respect to the compatibility of the product with the contract

is shifted onto the entrepreneur. In the previous legal state, this period was 1 year (Kukuryk, 2022).

The adopted implementation introduces the term of *compatibility of the product with the contract*, as defined in Article 43(b) of u.p.k. The product is compatible with the contract if the following elements, among others, are in accordance with the contract: product description, type, amount, quality, completeness, and functionality; and with respect to goods with digital elements, also their compatibility, interoperability, and update availability. The prerequisite for considering a product as compatible with the contract is also its fitness for a particular purpose for which the consumer needs it, about which the consumer informed the entrepreneur in the moment of concluding the sales contract at the latest, and which the entrepreneur accepted.

It could therefore be assumed that the assessment of product compatibility with contracts is based on objective criteria on the one hand, and on subjective criteria on the other (Habryn, 2021). This regulation is a shift from the notion of physical and legal defect to the notion of compatibility (or non-compatibility) of the product with the contract (Bezwińska, 2023).

The list of consumer rights has been modified for cases of product incompatibility with the contract (Czech, 2020). In accordance with Art. 43(d) of u.p.k., a consumer can initially request the product to be returned to compatibility with the contract by means of repair or replacement. The other rights (i.e., requesting a price reduction or withdrawal from the contract), can be exercised by the consumer subsequently if the entrepreneur, at the very least, refused to bring the product to compatibility, or if from entrepreneur's statement or circumstances it is clear that they will not bring the product back to compatibility with the contract within a reasonable time without excessive inconvenience for the consumer (The Act, 2020, Item 287). The entrepreneur is obliged to return to the consumer the amounts due as a result of exercising the right to withdraw from the contract or to reduce the price immediately, not later than 14 days from receipt of the statement from the consumer.

5. Conclusion

With respect to the legal aspects of some of the implemented provisions selected in this article, it should be concluded that the transposition of most of the solutions of the Omnibus Directive was carried out correctly, although certain inconsistencies could not be avoided.

From the consumer's perspective, the most important solution is covering by the regulation the Act of 30 May 2014 of the Act on Consumer Rights in the respect of the warranty. The new provisions will be applicable to contracts requiring the transfer of ownership of goods to the consumer, including in particular sales contracts, delivery contracts and "tasks as a commodity" contracts, as well as contracts requiring the transfer of ownership of goods and provision of services, and contracts requiring the transfer of ownership of goods with digital elements.

One problematic aspect is the fact that from 1 January 2023, the provisions on warranty in the Civil Code, as well as new provisions on warranty added to the Act of 30 May 2014 on Consumer Rights by the Act of 1 December 2022 on Amending the Act on Consumer Rights and Certain Other Acts are applicable concurrently. In the current legal state, it should be individually specified which of the above regulations should be applied. Considering the fact that other responsibility systems for sales contracts exist, this could make exercising consumer rights in practice significantly more difficult, or perhaps entirely impossible.

It should nevertheless be emphasised that extension of the warranty period in contracts requiring the transfer of ownership of goods to the consumer, and the period in which the burden of proof relating to the compatibility of the goods with the contract lies on the entrepreneur, is beneficial for the consumer.

However, the change in the hierarchy of means of legal protection to which the consumer is entitled (first replacement or repair, then price reduction or withdrawal) should be assessed negatively.

The new provisions are to counteract the practice of apparent price reductions for goods by entrepreneurs following previous significant increases in the price. The act imposes on the entrepreneur the obligation to disclose information about the lowest price of the given product or service that was applicable in the period of 30 days before the reduction (This applies to the price of the product or service as well as to information included in the advertisements). This should have a significant impact on the increase in consumer awareness with respect to modulating prices of given products. However, there is still the potential for abuse; e.g., by forcing price increases 31 days before price reductions.

Adjusting their business to the new legal requirements, entrepreneurs will need to implement far-reaching organisational changes, which paradoxically, from the consumer's point of view, could lower the traditionally perceived level of protection (Wiewiórska, 2023).

Due to the short period within which the discussed regulations are binding, it is difficult to assess their functioning in practice. Only time will tell whether and to what extent they require further amendments and improvement.

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