

## LEGAL ASPECT OF THE FUNCTIONING OF E-COMMERCE IN POLAND

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The development of electronic commerce over the past several years has progressed very rapidly. On 25 December 2014 the Consumer Rights Act, which applies, among others, to e-commerce, came into force. The act introduces new rules for consumer protection as a consequence of the implementation of the Directive 2011/83/EU into the Polish legal system. This implementation resulted in, among others, changes in the formulation of rules and regulations of electronic services, intensification of the information obligation and abolition of legal barriers to cross-border e-commerce. The need to adapt websites is often troublesome for entrepreneurs, however the increase in the catalogue of consumer rights should increase the number of electronic transactions.

Keywords: E-commerce, electronic commerce, consumer

### 1. Introduction

Traditionally, electronic commerce is divided into two types: business-to-consumer e-commerce including purchases made by natural persons, most often in online stores, and business-to-business e-commerce which consists in purchases of goods made by entrepreneurs for production or distribution purposes (bulk purchases) [4]. Usually, the consumer's position in the relationship with the seller is weaker, which is why the provisions formulating the principles of online trading and consumer protection in relationships with the entrepreneur are of particular

importance [5]. The article presents an overview of key mechanisms and law instruments underpinning the functioning of e-commerce in Poland.

On 30 May 2014 the Consumer Rights Act was passed [7]. The act came into force on 25 December 2014 and it significantly changed the legal regulations concerning the conclusion of contracts (including electronic contracts) with the consumers. The new act is the result of the implementation of the provisions of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights into the Polish legal system, and a further step in the process of harmonisation of the Polish law with the EU law [13]. The EU law is aimed at full harmonisation of internal regulations of Member States. Harmonisation has two functions: it ensures common consumer protection rules on the EU market and establishes the same protection standards and regulation mechanisms [1]. The unification of the regulations concerning online trading should result in the increase of the share of Polish companies on the Community e-commerce market. It is worth pointing out that in 2014 alone, the cross-border sales resulting from contracts concluded electronically increased by 45% [2].

By introducing the new consumer protection rules (which undoubtedly strengthen the consumer's position in the relationship with the entrepreneur), the act amended the Civil Code regulations on sales contracts concluded with consumers and repealed the Act of 2 March 2000 on the Protection of Certain Consumer Rights and on the Liability for Damage Caused by a Dangerous Product (Dz.U. of 2012, item 1225, consolidated text) and the Act of 27 July 2002 on Specific Terms and Conditions of Consumer Sale and Amendments to the Civil Code (Dz.U. of 2002, No. 141, item 1176, as amended).

The act is an attempt to present the primary directions of changes in electronic commerce and problems with their interpretation and implementation by entrepreneurs.

## **2. The new regulation**

### **2.1. The definition of a consumer**

The Consumer Rights Act amended Article 22<sup>1</sup> of the Civil Code formulating the definition of a consumer. In accordance with the content of this article “a consumer is a natural person who carries out with the entrepreneur a legal act not directly related with his/her business or professional activity” [10]. Previously this article stated that “a consumer is a natural person who carries out a legal act not directly related with his/her business or professional activity”.

The new definition was made more precise by the indication of the other party to the contract, which should be the entrepreneur. The extended definition in this regard should be viewed in a positive light as it helps to avoid many interpretation

problems. This change was dictated undoubtedly by the wish to extend the scope of application of the consumer rights provisions to natural persons who, although perform actions related to their business or professional activity, act for purposes not related with such activity [14]. This solution should lead to the elimination of the problem with appropriate qualification of dual nature contracts. The extension of the content of Article 22<sup>1</sup> of the Civil Code leaves the contracts the parties to which are natural persons who do not conduct business activity or the contracts concluded by natural persons with entities who are not entrepreneurs outside the scope of the consumer rights act.

It is worth pointing out that the act gives the consumer status only to a natural person. A legal person or organizational units who are not legal persons with legal capacity under the act, e.g. registered or limited partnerships, cannot be considered a consumer. The situation remains unchanged when such entities do not conduct business activity, as in case of e.g. associations or foundations.

The condition for considering a natural person a consumer is the performance of a legal act not “directly related with the business or professional activity” of the natural person. This is essential for qualification of the contract because the provisions of the consumer rights act can be also applied in case of legal relationships between a natural person conducting business activity and an entrepreneur. The definition of the term “consumer” does not specify whether it refers to a natural person conducting business or professional activity or not. It is necessary, however, for the legal act not to be related with his/her business or professional activity or be related with it only indirectly.

Often the assessment of whether the given action is related with the activity of a natural person is very problematic. The obligation to prove that the given action is not related with the business activity, in accordance with the general rule specified in Article 6 of the Civil Code, is incumbent upon the consumer [3]. According to the case-law of the Supreme Court the consumer contract should serve the own, personal needs of the person concluding it or his/her immediate family, but may be concluded in order to ensure the proper functioning of the household [15].

It is worth noting that although the legal act carried out by the consumer most often has the form of a contract against payment, it is not always the case. The act can also be unilateral, in the form of e.g. withdrawal from a contract.

## 2.2. Information obligations of entrepreneurs

The range of information obligations of entrepreneurs in consumer trading is broad. The catalogue of such obligations with regard to consumer distance contracts is specified in Articles 12-26 of the Consumer Rights Acts [7].

In the light of Article 12, paragraph 1 the entrepreneur shall inform the consumer in a clear and comprehensible manner in particular about the main features of the good or service, the way of communication with the consumer, his/her iden-

tification data, business address, email address, postal address to which the consumer can direct the complaints, total price or remuneration for the good or service including taxes, as well as transport, delivery, postal services fees and other costs, payment method and deadline, manner of and deadline for performance of the good or service by the entrepreneur and the procedure for handling complaints applied by the entrepreneur, manner of and deadline for execution of the right of withdrawal from the contract, and a template of the withdrawal form, and finally about the existence and content of the guarantee and after-sales services and the manner of their implementation [7].

The obligation to provide information about key elements of the concluded consumer contract in a clear and comprehensible manner introduced by the provisions of the act increases transparency and safety of transactions.

In accordance with Article 17, paragraph 1 of the act in case of distance contracts against payment, concluded with means of electronic communication, the entrepreneur must provide the consumer in a clear and legible manner, immediately before the order is placed by the consumer, with information concerning main features of the good or service, total price, including transport, delivery, postal services fees or other costs, term of contract or manner and conditions for contract termination or the minimum term of the consumer's obligations under the contract [7]. Particular emphasis was given to the obligation to inform the consumer about the payment-based nature of the good or service. In light of Article 17, paragraph 2 the consumer should confirm that he/she is aware of his/her obligation to pay resulting from the concluded contract, most often by selecting an appropriate button [7].

It is worth noting that in accordance with Article 12, paragraph 1, section 14 it is the seller who shall inform the consumer about the term and content of the guarantee, if it was additionally granted by the manufacturer or the distributor [7]. Information about products on the websites should contain this information and respective files should be placed directly on the product fiche or on the store's website created specifically for this purpose. A sole reference to the manufacturer's website with a link does not fulfill the above information obligation.

It can be concluded that the range of information obligations of the entrepreneur was considerably extended with the provisions of the Consumer Rights Act of 30 May 2014. However, particular significance has not the extension of the scope of information, as much as the form of their provision to the consumer and the deadline for fulfillment of such obligations by the entrepreneur. Under Article 18, paragraph 1 the entrepreneur must, not later than at the beginning of order placement, provide on the websites used for electronic commerce the explicit, clear and legible information about any limitations to delivery and accepted methods of payment [7].

Provision of necessary information to the consumer should be made not later than at the moment he/she expresses a wish to be bound by the distance contract. Therefore, the consumer should be informed about the data specified in Article 12, paragraph 1 not later than when he/she uses the “place the order” button or other button with an equivalently unambiguous expression [7].

The provisions of the act specify, in exceptional situations, a limitation to the catalog of information obligations of the entrepreneur. In case the technical characteristics of the applied mean of distance communication limit the size of the information to be provided or the time to provide it (e.g. a text message) Article 19 states that the entrepreneur shall provide the consumer, before the conclusion of the contract, with at least information concerning: 1) the main features of the good or service provided by the entrepreneur, 2) the designation of the entrepreneur, 3) the total price or remuneration, 4) the right to withdraw from the contract, 5) the term of the contract, and in case the contract was concluded for the indefinite period of time – the manner of and conditions for its termination [7].

The remaining information must be provided by the entrepreneur to the consumer in a clear and legible manner, in a way corresponding to the type of the applied mean of distance communication.

In accordance with Article 13 information concerning: 1) the manner of and deadline for the execution of the right to withdraw from the contract, as well as the template of withdrawal form, 2) the costs of the return of the product, in case of withdrawal from the contract, which are incurred by the consumer if due to the nature of the products they cannot be sent back with regular postal service, 3) the obligation of the consumer to pay reasonable costs incurred by the entrepreneur, in case the consumer withdrew from the contract after submitting a request to begin the provision of the service to the entrepreneur, the entrepreneur may give the consumer, with the use of the template, the instructions on withdrawal from the contract attached as Appendix No. 1 to the act [7]. This solution is a significant facilitation for the entrepreneur conducting business activity online, as provision of such template to the customer results in fulfillment of the information obligation in that regard.

The use of the instructions template concerning the right to withdraw in the trading sector will enable the entrepreneur to comply with the above-specified information obligations. Non-compliance with the statutory content and the mode of providing the consumer with the information results in negative legal consequences. Under Article 29 lack of information about the right to withdraw from the contract results in extension of the withdrawal period by 12 months, and in accordance with Article 23 lack of information about additional costs exempts the consumer from incurring these fees (it applies also to costs relating to the return of goods) [7].

A certain facilitation is formulated also in Article 21, paragraph 1 in accordance with which the entrepreneur shall provide the consumer with a confirmation of the conclusion of the distance contract on a durable medium within a reasonable period of time after the contract conclusion, not later than upon delivery of the good or before commencement of the service provision [7]. It will enable the entrepreneur to fully eliminate paper correspondence in contacts with the consumer in the area of e-commerce.

The burden of proving that all information obligations under the provisions of law were fulfilled shall rest upon the entrepreneur.

In the light of the provisions of the Consumer Rights Act of 30 May 2014 the principles of creating web service regulations have changed. Apart from the increase of the amount of information which the seller must include on the online store website (from 6 to 21), it is worth noting that it should include specific terms and conditions for contract conclusion and meet technical requirements specified in the act (e.g. the above-mentioned obligation to describe the order button with the phrase “the order with obligation to pay” or other equivalent unambiguous phrase). Moreover, the provisions concerning the purchasing procedure should be correctly formulated, i.e. cannot violate statutory consumer rights, but also cannot contain solutions considered to be impermissible statutory provisions entered into the register maintained by the President of the Office of Competition and Consumer Protection. Unfortunately, this problem is one of the most frequently recurring errors in the process of formulation of regulations for e-commerce stores.

### 2.3. The extension of the consumer rights

The manifestation of pro-consumer solutions of the act in question is the extension of the consumer’s right to withdraw from the contract. The act unified the period for withdrawal from the distance contract or the contract concluded outside the company’s place of business in all states within the European Union, which improves cross-boarder trade. As already mentioned above, the period to exercise this right was extended from 10 to 14 days. In case the entrepreneur does not perform his/her information obligations, the period is extended to 12 months, whereby such period is calculated from the day on which the initial 14-day period ends [7]. If the consumer is informed by the entrepreneur about the right to withdraw from the contract within the 12-month period specified above, such period for withdrawal from the contract ends 14 days after information about this right is provided to the consumer [7].

The consumer’s position has been, therefore, significantly strengthened, and granting him/her a new tool aiding in the fight to exercise his/her rights helps to ensure safety of e-commerce.

It is worth emphasizing that the notice of withdrawal from the contract may take any form, the act does not specify any formal requirements in this regard.

Such notice may be submitted with the use of a unified form. The template of such document constitutes an appendix to the Consumer Rights Act. Although the entrepreneur may enable the consumer the submission of such notice via electronic means of communication, under Article 30, paragraph 4 also in such case he/she must provide the consumer with a confirmation of receipt of the notice of withdrawal from the contract on a durable medium (e.g. via email or by submitting a notice via the entrepreneur's website) [7]. As emphasized above, the use of the form is on the one hand a facilitation for the entrepreneur, but on the other hand it may be beneficial to the consumer. This solution ensures the fulfillment of all requirements necessary to terminate the contract concluded between the consumer and the other party to the contract.

The act formulates a closed list of cases in which the consumer may withdraw from the contract. Such possibility was specified in 13 cases listed literally in Article 38 [7]. For example, the consumer has no such right in case of contracts for delivery of digital content not saved on a tangible medium. Under the previous act the withdrawal right was excluded only in case of sales of tangible data media [9]. The withdrawal right is also excluded for contracts the subject of which is a product which deteriorates quickly or has a short expiration date, or the subject of which is a product delivered in a sealed package that, after opening of the package, cannot be returned for health protection or hygienic reasons if the package was opened after delivery. What is important, we can conclude from the content of Article 28, paragraph 1 that in regard to service contracts, if the consumer agreed, the right of withdrawal from the contract after performance of the full service may be excluded. The entrepreneur should provide this information before he/she begins execution of the subject of the contract [7]. This solution is also more beneficial to the consumer. In the previous legislation, the loss of the withdrawal right could occur already as a result of commencement of performance of the contractual service.

The act introduces detailed solutions concerning settlements with consumers. In accordance with Article 31, paragraph 1 upon receipt of the notice of withdrawal from the contract the entrepreneur must immediately (not later than within 14 days) refund all payments made by the consumer, including delivery costs. Given the fact that the requirement to return the good is the consumer's responsibility, the entrepreneur who did not declare a good pick-up service, may refund the payment only after he/she receives the good or a confirmation of dispatch of the good [7].

The refund is made with the payment method used by the consumer. An exception is made in case the consumer agreed to a different method of refund that does not entail additional costs.

As a rule, the costs relating to the consumer's withdrawal from the distance contract are incurred by the entrepreneur. However, the consumer shall cover direct costs of return of the good, unless the entrepreneur agreed to cover such costs or

did not inform the consumer about the need to cover such costs. A similar exception applies to the cost of delivery of goods exceeding the cost of the cheapest, regular method of delivery of goods by the entrepreneur, if the more expensive delivery method was selected by the consumer e.g. courier delivery instead of a regular postal service. In case the information obligation under Article 12, paragraph 1, section 9 is not fulfilled by the entrepreneur, i.e. in case the consumer was not informed about the loss of his/her right to withdraw from the contract and consequences of its execution (about the period and method of execution of the right to withdraw from the agreement, and about the template of the withdrawal form), the seller is responsible for the reduction of the value of the good resulting from its use extending beyond the level required to establish the nature, features and functioning of the good [7]. Article 34, paragraph 3 states that in case of delivery made to the consumer's place of residence upon conclusion of the contract and if due to the nature of the good it cannot be returned with the regular postal service the cost of receipt is covered by the entrepreneur [7]. Moreover, the consumer does not incur the costs of delivery of digital content that is not saved on a tangible medium, if the consumer did not agree to delivery of such content before the end of the period for withdrawal from the contract or was not informed about the loss of the right to withdraw from the contract upon giving such consent or did not receive a confirmation of contract conclusion on a tangible medium.

The Consumer Rights Act of 30 May 2014 covers with its scope also the issue of the use of the purchased good by the consumer in case of withdrawal from the contract. It is worth reminding that the repealed by the new regulations Act of 2 March 2000 on the Protection of Certain Consumer Rights and on the Liability for Damage Caused by a Dangerous Product included an undefined statutorily term of "usual management" within which the consumer had the right to use the good in compliance with the intended use [11].

In accordance with Article 34, paragraph 4 the buyer is responsible for the reduction of value of the product which results from its use extending beyond the use necessary to establish the nature, features and functioning of the product, unless the entrepreneur did not inform the consumer about the right to withdraw from the contract in accordance with the requirements [7]. Therefore, this obligation is dependent on the prior notification of the buyer about his/her right to withdraw from the contract. The provision specifies the extent to which the person making the purchase can use the good in the period in which the withdrawal from the contract is allowed. The consumer is obligated to be in charge over the ordered good until it is returned. After the receipt of the product, its type, status, completeness can be checked and its functional characteristics can be verified. It should be assumed that the scope of such activities does not exceed the rights of the customer of the stationary shop [6]. A similar position was taken in the recital 47 to the Directive 2011/83/EU, the implementation of which is the Consumer Rights Act of 30 May



2014 [13]. It can be concluded then that the principles for using the good in the period before withdrawal are currently slightly less beneficial to the consumer.

Payment of the compensation for the reduction of value of the good that is the result of activities extending beyond the above-described activities necessary to familiarize oneself with the good is the consumer's responsibility. The amount of compensation due to the entrepreneur may include costs of cleaning and repair, or the need to lower the sales value in the next transaction, which is a consequence of the use of the good.

#### 2.4. The unification of the rules of liability for the quality of the sold good

Upon coming into force of the Consumer Rights Act on 25 December 2014, the new solutions concerning the liability for quality of the good sold to the consumer became binding. This regulation was transferred from a separate act (Act of 27 July 2003 on Specific Terms and Conditions of Consumer Sale and Amendments to the Civil Code) to the Civil Code [8].

The Civil Code introduces a unified liability regime for improper quality of the good, based on the warranty scheme. The provisions do not introduce differences between the contracts concluded with entrepreneurs or in consumer trading.

Among the new solutions, particular importance should be placed on the replacement of the previous phrase of "inconsistency of the good with the contract" with the term "defect". Article 556 of the Civil Code states that the seller is responsible to the buyer under warranty, if the sold good has a physical or legal defect [10]. Physical and legal defect were defined separately. With reference to the physical defect it is worth to point out that Article 556<sup>1</sup> of the Civil Code extends the scope of its definition. A physical defect occurs when the sold good is incompatible with the contract. The term "inconsistency with the contract" used in the legislature cannot be considered synonymous with the term included in the earlier entrepreneur's liability system in consumer trading. It only defines the physical defect and specifies when such defect occurs. The catalog of cases in which the inconsistency of the sold good with the contract is established, included in Article 556<sup>1</sup> of the Civil Code, is open and based on solutions adopted in the acts previously in force.

Particular significance for the entrepreneur as well as the consumer have the warranty terms which have been extended. The amendment definitely improved the situation of the latter. The period for establishing a physical defect specified in Article 568 of the Civil Code was extended to 2 years, counting from the moment the good was released to the buyer [10]. If the buyer is a consumer and the subject of sale is a used movable, the seller's liability may be limited to no less than a year from the day the good was released to the buyer. In case of defects in real estates, the 3-year-long term was replaced with a 5-year-long term.

Also the regulation on the consequences of expiry of the periods for meeting claims has been changed. Under Article 556<sup>2</sup> of the Civil Code, the period for pre-

sumption of a defect of the purchased good was extended from 6 to 12 months [10]. Filing a complaint by the buyer within 12 months from the day the good was released results in a presumption of defect at the moment the good was released to the consumer. Thus, during the first 12 months of the period, until the complaint is filed, the burden of proving that the defect results from improper behaviour of the customer lies on the entrepreneur. After that period it is the consumer who must prove that the defect existed upon the release of the good. Application of this solution often decreases the consumer's possibilities to exercise the rights resulting from the warranty.

In accordance with Article 568, paragraph 2 of the Civil Code, the one-year limitation period for submission of the request of removal of the defect or exchange of the sold product with a defect-free one is calculated from the day the defect is established by the buyer. In case a party to the contract is the consumer, the limitation period may end before the period specified in Article 568, paragraph 1 of the Civil Code i.e. 2 years [10]. Thus, it has been significantly extended.

The provisions of the act introduce a one-year final period for submission by the consumer of a statement of withdrawal from the contract or price reduction. In accordance with Article 568, paragraph 3 of the Civil Code if the buyer requested the exchange of the good with a defect-free one or removal of the defect, the period for submission of the statement of withdrawal from the contract or price reduction begins with the moment of ineffective expiry of the period for the good exchange or defect removal (final date) [10]. The consumer's request of e.g. removal of the defect, does not result in the loss of the right to submit a declaration of price reduction or statement of withdrawal in case of lack of reaction of the seller or nonperformance of an effective repair and ineffective expiry of the period.

It is worth emphasizing that the order in which the buyer can request the settlement of individual claims has also changed. Before 25 December 2014 the customer could request the repair or exchange of the good with a new one. Only when the repair or exchange entailed excessive difficulties, the consumer could withdraw from the contract and request a price refund or price reduction for a defective product. In the current legal system it is the buyer who decides about the manner of bringing the good to a satisfactory state. Article 560, paragraph 2 of the Civil Code states that if the buyer is a consumer he/she may, instead of the proposed by the seller way of defect removal, request the exchange of the product for a defect-free one or, instead of an exchange of the product, request the removal of the defect, unless bringing the good to conformity with the contract in the manner selected by the buyer is impossible or would require excessive costs in comparison with the manner proposed by the seller [10].

Equally important is the fact that the buyer retains all rights in case the court proceedings are initiated and these rights are not dependent on the elapsed period of time or the previously selected way of bringing the good to the state conformant

with the contract. Under Article 568, paragraph 4 of the Civil Code in case one of the rights under warranty is enforced in the proceedings before the court or the court of arbitration, the period for performance of other rights of the buyer under warranty is suspended until the final termination of the proceedings [10].

#### **4. Conclusion**

The paper focuses on the essentials of Polish regulations of the functioning of e-commerce. The Consumer Rights Act of 30 May 2014 introduced a range of changes in the scope of obligations of entrepreneurs conducting business activity in the e-commerce sector. These changes require adjustment of the online store regulations, order submission systems or rules on providing the consumer with all necessary information to the new requirements.

Violation of information obligations leads to the extension of the consumer's rights. One of the examples is the extension of the period for withdrawal from the contract in case the consumer was not informed about the right to withdraw from the contract.

Such action is also a criminal offence under the petty offences law. Under Article 139b of the Petty Offences Code a person who, within the scope of his/her business, concluding a contract does not meet requirements of providing information or issuing a document specified in the provisions of the Consumer Rights Act of 30 May 2014 (Dz. U. item 827) is liable to a fine [12].

On the other hand, the act strengthened the consumer's position in regard to the conclusion of online contracts. The obligation to inform about all costs resulting from the contract was introduced; the period for withdrawal from the contract was extended. The term of a "defect" was restored and the principles of liability for the goods with defects were unified, with the period to exercise warranty being simultaneously extended, which at the same time increased the freedom of the consumer in the choice of the right that he/she wishes to exercise in case the good is incompatible with the contract.

Application of the new solutions causes a range of problems, often technical in nature. Ambiguities concern in particular the time and manner of performance of certain information obligations. Such doubt arises in case of the obligation of the entrepreneur to inform the consumer about the content of the guarantee. Often the amount of information on websites does not allow for a clear and legible message.

Legislative solutions in the area of consumer provisions integrated the Polish and UE regulations in this extent, and the consumer protection mechanisms that were implemented on their basis, despite certain shortcomings, should be viewed as positive. However, less than a year after the act on consumer protection came into force, it is too early for drawing conclusions about its real influence on online commerce.

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