

CONSUMERS PROTECTION FROM THE PERSPECTIVE OF SANCTIONING DOUBLE QUALITY STANDARD OF PRODUCTS AND SERVICES IN THE EUROPEAN UNION

Raluca DINU, PhD*

Abstract

The "New Deal for Consumers", developed by the European Commission, is an important step forward in improving consumer rights and legal certainty for businesses in areas such as cross-border portability of content, roaming charges and geoblocks, being implemented through updated rules of consumer protection, adapted to the challenges of the constantly evolving markets. This proposal contributes to ensuring fairness and confidence building in the single market through collaboration with all Member States and stakeholders in a public debate to ensure that there are no second-class consumers in the European Union. To this end, the Commission will ensure the implementation of the rules aimed at equal treatment of consumers in the single market, in order to promote a new culture of compliance with Union law in this area.

Keywords: *consumer, double standard, digital markets, CPC Regulation, collective injury situations.*

The European policy of consumer protection aims to adopt measures regarding the sanction of the double quality standard of products and services for consumers, in order to inform the latter on the differentiation of goods due to objective factors.

Thus, it is argued that, according to studies presented by the European Parliament, namely the study of the *Committee on the Internal Market and Consumer Protection*, the problem of quality differences (double standard) between products depending on the Member State or the region or locality where they are marketed may be found in the following situations: the manufacturer places on the market products with a different flavour and composition; products / services of a different quality; products of a different weight, which have, however, a package with the same or similar appearance or with differences impossible to detect for consumers; a new product or a new service, using better quality ingredients, but after a period of time a recipe change occurs, without any obvious modification of the product packaging, except the composition of the product, which is indicated in small letters on the side on the back of the label.

* PhD in Law, Head of the Commercial Sector at the Legislative Council of Romania.

The need to modernize some of the consumer protection rules and to strengthen the degree of compliance was confirmed by a comprehensive evaluation, completed by the European Commission in 2017 ("*REFIT verification of adequacy*"¹), evaluation of the Consumer Rights Directive². The evaluation concluded that the Union's consumer protection rules contributed to the functioning of the single market and offered a high level of protection for them. Overall, they are appropriate for the purpose, but they must be well applied and respected. The evaluation also identified areas in which EU consumer protection legislation can be updated and improved.

The report on the *Commission Recommendation on termination and redress actions*, adopted in January 2018, supports the findings of the 2017 assessment. The report concluded that existing individual action mechanisms are not sufficient in "collective injury situations", which affect a large number of consumers in the Union.

We also point out that consumer protection is a *shared competence* between the European Union and the Member States. As provided for by Article 169 of the Treaty on the Functioning of the European Union (TFEU), the Union must contribute to the protection of consumers' economic interests and to the promotion of their right to information and education.

To this end, the European Commission adopted on June 14, 2018 *a new common methodology for comparing the quality of food products in the European Union*. The Joint Research Center (JRC) - the science and knowledge service within the European Commission - has developed *a common methodology that will allow national consumer protection authorities to conduct tests to compare the composition and characteristics of food sold in similar packaging in The European Union and will assist these authorities in determining whether food is marketed in accordance with European law*.

The methodology is based on key principles, such as: transparency, comparability, selection of similar samples and product testing. Thus, under the coordination of the Joint Research Center, laboratories from several Member States will apply this methodology in a pan-European testing campaign to collect data on the extent of the problem represented by the double standard of product quality.

This methodology complements the actions announced in the Commission Communication COM (2018) 183 final, entitled "*New Deal for Consumers*"³ and aims

¹ Working document of the European Commission services - Report on the verification of the adequacy of the legislation on consumer protection and marketing, SWD (2017) 209 of 23.05.2017, made by the Commission on an adequate and functional regulation (REFIT) of the Commission.

² Report from the European Commission to the European Parliament and the Council on the application of Directive 2011/83/EU on consumer rights, COM (2017) 259 of 23.05.2017. Working document of the Commission services on the evaluation of the Consumer Rights Directive, SWD (2017) 169 of 23.05.2017.

³ "*Communication of the Commission to the European Parliament, the Council, the European Social Economic Council. New Deal for Consumers*", adopted on April 11, 2018, is based on the existing policy in the field of consumer protection and proposes modern rules, appropriate to current

to: clarify and strengthen consumer rights, including prohibiting the practice of applying double standards in terms of quality, which are deceiving consumers; to enable qualified entities to launch representative actions on behalf of consumers; as well as introduce stronger sanctioning powers for the authorities in the Member States responsible for consumer protection.

In addition to this methodology, other measures have also been adopted, including a set of guidelines on the application of Union legislation in the field of food and consumer protection to products with a double standard of quality and a *proposal for a Directive amending certain directives*, the basis of the "New Deal for Consumers" proposal, which was adopted by the Commission on April 11, 2018, in order to ensure clarity regarding the evaluation of potential cases of double quality standards in the marketing of products and services for European consumers in the Member States.

Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/ EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, of Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council on the better application and modernization of European Union consumer protection rules (the Omnibus Directive) aims to amending four European Directives on the protection of the economic interests of consumers. Most of the amendments refer to the *Illegal Commercial Practices Directive 2005/29/EC* and the *Consumer Rights Directive 2011/83/EU*, and *Directive 93/13/EEC* and *Directive 98/6/EC* only amend the sanctions rules.

Thus, Article 1 of the *proposal for a Directive* amends *Directive 2005/29/EC* by introducing the right to individual compensation for consumers and reinforces the rules on sanctions. The proposal also clarifies the application of the rules in force regarding misleading and hidden advertising of "double quality" products.

As regards the "double quality" of products, the amendment introduced by Article 6 paragraph (2) of *Directive 2005/29/EC* expressly provides that: "a commercial practice involving the placing on the market of a product as being identical with the same product marketed in several Member States, if these products have significantly different composition or characteristics that cause or may cause the average consumer to make a commercial decision that they would not have made otherwise, is a deceptive commercial practice that the competent authorities should evaluate and sanction on a case-by-case basis, in accordance with the provisions of the Directive".

Article 2 of the *proposal for a directive* amends *Directive 2011/83/EU* and provides additional definitions of digital content and digital services, as well as contracts for the supply of these products. These definitions bring into the scope of *Directive*

markets and commercial practices, which are constantly changing, stronger public and private instruments, to ensure compliance with the law and the possibility of compensating consumers.

2011/83/EU contracts for the provision of digital services in which the consumer does not pay money, but provides personal data. The definitions "*digital content contract*" and "*digital services contract*" clarify that, in the absence of payment, the rights and obligations arising from Directive 2011/83/EU will not apply if the personal data that are provided by the consumer to the merchant, exclusively for the provision of digital content or service, complies with the legal requirements, and the merchant does not process this data for any other purpose.

Other amendments made by art.2 refer to *greater transparency for consumers on digital markets*⁴, which are subject to specific additional pre-contractual information requirements specified in a new Article 6a. The proposed new rules will require digital markets to clearly inform consumers about the identity of the party with whom the contract is concluded. The Commission proposes to clarify that all digital platforms must clearly differentiate the results displayed as a result of payments received from other merchants by the "natural" search results, and digital markets must specify which are the main parameters determining the display order of offers⁵.

Another consumer protection gap concerns "free" digital services for which consumers communicate personal data, rather than paying for money. These "free" services include *cloud* storage, accounts on social media platforms, and email accounts. Given the increasing economic value of personal data, these services cannot be considered "free". Therefore, consumers must have the same right to pre-contractual information and to a 14-day withdrawal period for the cancellation of the contract, whether they are paying the service in money or providing personal data.

It is acknowledged that EU consumer protection legislation entails low costs of ensuring compliance for businesses. However, in some areas, certain provisions have become obsolete with technological changes or impose unnecessary costs on companies. The document "*New Deal for Consumers*" has proposed to *eliminate disproportionate burdens for businesses*, for example in the field of consumer communication. Merchants need to have more flexibility in choosing the most appropriate means of communication with consumers, as it is a necessity to be able to use new online communication means, such as web forms or chat windows, instead of email, with provided that any consumer can keep track of communication with the merchant.

Regarding the *better possibilities of compensating the consumers*, we specify that they are achieved through the effective application of the legislation and through

⁴ A *digital marketplace* is a type of e-commerce site where several third parties provide information about products or services.

⁵ Based on the *Commission Guidelines on the implementation / application of Directive 2005/29/EC on illegal commercial practices*, SWD (2016) 163 final of 25.5.2016 (section 5.2.6), <http://eur-lex.europa.eu/legalcontent/RO/TXT/?uri=CELEX%3A52016SC0163>.

the increased cooperation between the public authorities in a fair and secure single market.

Thus, in *situations of collective injury*, consumers must have the opportunity to claim their rights not only individually, but also through collective actions. For example, in a case such as "*Dieseldgate*"⁶, remedial measures for victims of illegal commercial practices could be applied collectively through a representative action. Under the "*New Deal for Consumers*", the Commission recommends a modernized system of representative actions, starting with the Cessation Directive⁷. The system allows qualified non-profit entities, for example consumer organizations or independent public bodies, to defend the collective interests of consumers in cases of collective injury, whereby individual consumers are guaranteed the respect of rights, being especially useful for consumers who, for various reasons, are discouraged to bring individual actions in court. Some *guarantees* will be integrated in the system, such as limiting the possibility of bringing actions against entities that fulfil certain criteria and the obligation of transparency regarding the sources of financing. In this way, the necessary balance will be maintained between access to justice and the prevention of possible abuses, through a specific approach different from the typical dispute resolution model of the United States of America.

Strengthening existing tools for consumers - alternative dispute resolution and online dispute resolution. Due to alternative dispute resolution⁸ and online dispute resolution⁹, consumers have access to simple, fast and equitable procedures for resolving domestic and cross-border disputes with traders, without going to court.

⁶ The Volkswagen scandal began on September 18, 2015, when the United States Environmental Protection Agency (EPA) warned car manufacturer Volkswagen about fraudulent programming of TDI diesel engines produced between 2009-2015. They complied with the nitrogen oxide (NOx) pollution norms only in laboratory conditions, exceeding up to 35 times the legal limit under normal operating conditions. EPA considers this type of programming illegal, and VW has admitted the fraudulent nature of the practice. About 11 million cars are affected worldwide, including 500,000 in the United States. This scandal has drawn attention to the high pollution rates of diesel-powered vehicles sold by many car manufacturers, which, under normal operating conditions, tend to exceed the legal norms of nitrogen oxide pollution. A study conducted by ICCT (International Council on Clean Transportation) and ADAC (Allgemeiner Deutscher Automobilclub) identified the largest discrepancies in Volvo, Renault, Jeep, Hyundai, PSA (Citroen, Peugeot) and Fiat. Critics have suggested that manufacturers using computer-controlled engines are always prone to breaking the law, a proposed alternative being the release of these programs in the public area (https://ro.wikipedia.org/wiki/Scandalul_Volkswagen).

⁷ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on cessation actions regarding the protection of consumer interests, OJ L 110, 1.05.2009, p.30.

⁸ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on the alternative settlement of consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22 /EC (ADR Directive, OJ L 165, 18.06.2013, p. 63.

⁹ Regulation (EU) No.524/2013 of the European Parliament and of the Council of 21 May 2013 on the online settlement of consumer disputes and amending Regulation (EC) No.2006/2004 and Directive 2009/22/EC (Consumer SOL Regulation), OJ L 165, 18.6.2013, p.1.

Also, the alternative and online dispute resolution framework encourages merchants to develop efficient customer relations systems¹⁰.

Effective enforcement of legislation is an important position in the Digital Single Market Strategy, including an initiative to update how consumer protection rules apply so that they are appropriate to the digital age, namely the revision of the *Regulation on cooperation on consumer protection (CPC)*¹¹. Following the entry into force of the new CPC Regulation, a set of competences for national authorities will be provided, a new procedure for redressing the violations of consumer protection legislation at the level of the European Union, as well as a better surveillance system. The Commission will have a stronger coordinating role and will be able to initiate coordinated investigations to ensure compliance with violations occurring throughout the Union¹².

Thus, *in order to strengthen the enforcement of rules and cooperation between public authorities*, the Commission will take the following measures: more effective sanctions, support for Member States in the preparations for the new CPC Regulation, capacity building for the benefit of national authorities, coordinated enforcement of rules¹³.

Regarding the training, education and capacity building, in March 2018, the online project "*Consumer Law Ready*¹⁴" was launched, and from the third quarter of 2018, the new database on the legislation regarding the protection of consumers (*Consumer Law Database*) is available on the e-justice portal¹⁵. The database provides all persons, in particular lawyers and law enforcement authorities, access to national rules transposing the main Union directives on consumer protection. It will also provide access to the relevant case law of the Member States and the Court of Justice of the European Union, as well as to national administrative practice.

¹⁰ On November 11, 2017, the Commission organized in Berlin an event launching the network "TRAVEL-NET", consisting of 15 ADR entities, which deals with consumer disputes in the travel / passenger transport sector, from 11 Member States. Among the participants in the event, there were representatives of major passenger transport companies. On December 13, 2017, the Commission organized a roundtable with the main industrial leaders in the retail sector of clothing and footwear and launched a communication campaign on SAL / SOL for consumers.

¹¹ https://ec.europa.eu/info/review-consumer-protection-regulation_en.

¹² The new CPC Regulation also provides a framework for cooperation between the various national authorities responsible for ensuring compliance with the sectoral legislation covered by it.

¹³ This activity is carried out in the form of a coordinated verification of the websites ("sweeps" - https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/sweeps_en) or a coordinated action to address problems affecting a large number of consumers in the Union (https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/consumer-protection-Cooperation-framework_en).

¹⁴ <https://www.consumerlawready.eu/>. *Consumer Law Ready* is a pilot project carried out by the European Commission, at the request of the European Parliament.

¹⁵ <https://e-justice.europa.eu/home.do>.

At the same time, the European Commission supports an *initiative for the self-regulation* of European companies, which aims at the principles of better presentation of information to consumers, including standard terms and conditions, and contributes to the development of the *Guidelines* based on *Directive 93/13/EEC on illegal terms in contracts concluded with consumers*, which protects European consumers against abusive standard clauses in contracts used by traders.

Following the REFIT verification of the adequacy, it was found that the main approach used in the Directive on abusive contractual clauses maintains its effectiveness and contributes to a high level of consumer protection. Based on numerous judgments given by the Court of Justice of the European Union, the guidelines aim to clarify the problems arising from the application of the Directive, for example regarding the legal consequences of the non-binding nature of illegal contractual clauses and the obligation of national courts to evaluate, on their own initiative, to what extent is a contractual clause falling within the scope of Directive 93/13/EEC.

As markets continue to evolve and change rapidly, the legislation in this field must adapt and evolve in order not to lose its relevance and ability to handle the new types of challenges that consumers will face. These may take the form of new complex and non-transparent transactions.

To this end, the Commission aims to monitor consumer markets in order to identify emerging issues to support the development of its policies, by exploring the following areas: *artificial intelligence* - deepening understanding and promoting transparency of applications that operate on the basis of artificial intelligence, in order to strengthen consumer confidence; *Internet of Things* - it is estimated that by 2020, there will be over 6 billion Internet-connected products in the European Union and 25 billion worldwide¹⁶, with the Commission having the role of assessing the adequacy of the current legal framework for product safety by setting up a group of experts who will assess whether and to what extent existing accountability systems are adapted to new market realities, such as artificial intelligence, advanced robotics, the Internet of Things, and cyber security issues¹⁷; *mobile e-commerce* - the Commission has launched a behavioral study focusing on the consumer impact of online marketing and information practices, namely retail financial services, in particular how they are presented and marketed via mobile devices; *sustainable consumption* - consumers need to have the ability to make informed purchasing decisions and have free access to organic products, in order to raise awareness of the various Union-specific labeling tools¹⁸, such as the European Union eco-label, as well as to ensure their proper understanding.

¹⁶ *Gartner Report* (2013) entitled "*Predicts 2015: The Internet of Things*": <http://www.gartner.com/newsroom/id/2970017>, STAMFORD, Conn., December 12, 2013.

¹⁷ See also the *Cyber Security Initiative*, adopted by the Commission in September 2017, https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-477_en.

¹⁸ For example, the EU eco-label (for non-food products and services), the EU organic label (for food), the EU energy label (for household appliances), the EU Motor Vehicle Labeling Directive

In conclusion, we consider that compliance with and enforcement of Union product harmonization legislation is required, which aims to strengthen the market surveillance framework for products, both within the single market and at external borders, including through exchanges with partners, organizations within the cooperation process for the structural supervision of the market.

Thus, with regard to *international cooperation*, the Commission proposes to conclude *cooperation agreements in order to enhance coordination with partners outside the Union*, by developing bilateral or multilateral agreements on consumer protection between the Union and important jurisdictions, such as the US, Canada and, in the future, China. These agreements can establish: mechanisms for mutual assistance between authorities; a new "one-stop shop" procedure for the redress of large-scale consumer rights violations committed by businesses worldwide and a more efficient surveillance system.

Product safety is a *global challenge*, and for this reason, international cooperation is essential for maintaining consumer safety in the Union, with both the producing states and the countries on whose markets similar products are found. The Commission will continue to promote effective consumer protection in future bilateral and multilateral trade negotiations, by including specific trade safety rules in product agreements. They will allow the exchange of information on dangerous products, including the producing states, as appropriate.

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