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Editorial

The Premature Obsolescence of the New Deal for Consumers

After a period of relative slowness, we have, since 2019, witnessed a significant increase in the activity of the European institutions with regard to consumer law legislation. The European Union seems to want to legislate on more and more matters and in more and more detail. This raises some problems, which we will address in this text.

2021: A very Important Year for Consumer Law in all Member States

Before proceeding to this analysis, it should be noted that 2021 will be a very important year for consumer law in all Member States, given the need to transpose three structural directives.

Directives 2019/770¹ and 2019/771² will have to be transposed by 1 July 2021, while Directive 2019/2161³ will have to be transposed by 28 November 2021. There will be new rules in all Member States on the sale of consumer goods and the supply of digital content and digital services and far-reaching changes to the regimes on unfair terms, indication of prices, unfair commercial practices and distance and off-premises contracts.

This will probably be the year with the most changes ever in consumer laws in the EU. Additionally, these changes will happen in all countries simultaneously. It will also be a golden opportunity for each country to reflect on its consumer legislation and even the relationship between consumer and more general regulations.

The freedom of the Member States is not, however, total. Maximum harmonisation is now the standard in European legislation. It even seems to be moving towards a uniformization of legislation, given the paradigm shift towards the adoption of regulations instead of directives⁴.

1 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.

2 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.

3 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 as regards the better enforcement and modernisation of Union consumer protection rules. This directive is one of the main pillars of the New Deal for Consumers, adopted by the European Commission on 11 April 2018.

4 Referring only to legislative projects presented in the last nine months: Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937; Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology; Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act); Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

Maximum Harmonisation, Abundance of Legislation and the Elephant in the Room

This maximum harmonisation means, as we know, that the Member States cannot, in many areas, lay down more favourable provisions for consumers than those resulting from the directives. The transposition of Directive 2019/771 will even mean that, in many Member States, the level of consumer protection will be lowered. This is because the previous directive on the sale of consumer goods⁵ was of minimum harmonisation, and the Member States have taken advantage of this to provide additional consumer protection in many areas.

The desire to legislate a great deal, as the European Union is said to want to do at the moment in the field of consumer law, may be totally in line with the objective of maximum harmonisation. The more detailed the legislation and the less freedom each Member State has, the fewer differences there will be.

The elephant in the room is the slow EU legislative process. Indeed, we have a problem when we combine the intention to cover all matters and maximum harmonisation with a very slow EU legislative process. In many cases, the legislator has to intervene quickly for its intervention to be effective. We are no longer talking only of specific problems confined to one country or region, which are unlikely to be resolved in the context described, but of structural and global problems.

Structural and Global Problems of Recent Years

COVID-19 has somewhat shaken up this system, with Member States in several cases feeling the need to lay down rules different from those contained in the Directives in order to regulate the market provisionally. This was very visible with the legislation in the tourism sector. With regard to package travel, the European Commission even decided to start infringement proceedings in July 2021 against 10 Member States (Portugal, Czech Republic, Cyprus, Greece, France, Italy, Croatia, Lithuania, Poland and Slovakia) for violation of Article 12-4 of Directive 2015/2302⁶. Article 12-4 states that in case of termination of the contract in the event of unavoidable and extraordinary circumstances occurring at the place of destination the traveller is not obliged to pay a termination fee and that the organiser shall reimburse any payments made “without undue delay and in any event not later than 14 days after the package travel contract is terminated”. With minor variations, the Member States determined that reimbursement need not be immediate. It should be noted that we were dealing here with legislations that provided for a decrease in the level of consumer protection (essentially preventing the immediate reimbursement of the amount paid following the cancellation of a trip), but the logic would apply in the same way to legislation that increased the level of protection. And while it is true that the EU institutions have acted to ensure compliance with the directive, national rules have not failed to produce the desired effect: additional protection for the trader, in contrast to what is provided for in the directive, for a short period of time, giving the trader time to reorganise its business following the pandemic crisis. The European Union, however much it wanted to legislate in this sense, would not have the necessary instruments to do so as quickly as the Member States. This is a difficulty that we will have to solve in the coming years if the trend of passing too much legislation, in too much detail and giving too little room for manoeuvre to the Member States continues.

Even more impressive than the pandemic is the rapid and intense way in which the topic of sustainability has entered and become embedded in consumer law in the last year. After many years of disconnect, the topics of consumption and, in particular, consumer law and sustainability are now on a unique path, with the aim of orienting consumer law policies and regulations towards the promotion of more sustainable choices. In November 2020, the European Commission communi-

5 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.

6 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements.

cated the New Consumer Agenda, guided by the motto "strengthening consumer resilience for sustainable recovery". The Agenda covers five priority areas, the first of which is precisely the green transition.

However, less than two years ago, in 2019, the three aforementioned directives (Directive 2019/770, Directive 2019/771, and Directive 2019/2161) were published and, even before they are transposed by the Member States and therefore before their provisions are actually applied, there is already open talk of the need to amend them.

Sale of Consumer Goods and Sustainability

The European Commission itself, among the actions foreseen in the New Consumer Agenda, already anticipates an evaluation of the revision of Directive 2019/771, in order to "further promote repair and encourage more sustainable, «circular» products". The reference to "further promote" is particularly friendly to the 2019 legislator, as this aspect was barely addressed at that time. This was openly discussed already at The European Consumer Summit 2020.

Admittedly, the durability of the good (or continuity, in the case of digital content or digital services) is now provided for as a conformity requirement. The explicit reference is a novelty. However, the approach to the issue of early and planned obsolescence is very timid. Recital 32 of Directive 2019/771 states that "ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy". However, preference is given to "product-specific Union legislation". The legal regime for the sale of consumer goods is only complementary. The same recital states that "in order for goods to be in conformity, they should possess the durability which is normal for goods of the same type and which the consumer can reasonably expect given the nature of the specific goods, including the possible need for reasonable maintenance of the goods, such as the regular inspection or changing of filters in a car, and any public statement made by or on behalf of any person constituting a link in the chain of transactions". The fact is that for instance a car has a much longer useful life than the two years which the Directive lays down as the rule for liability of the seller; there are no rules to guarantee that the consumer will be able to use the car after those two years. This problem can be solved at Member State level, since it is not comprised in the maximum harmonisation provision. Firstly, Member States may provide for a longer period for the liability of the trader. Secondly, the trader may be obliged to provide after-sales assistance to the consumer, even if against payment, during the expected lifetime of the goods, for instance by making spare parts available.

Apart from this, nothing in the Directive favours repair to the detriment of other remedies, notably replacement. And this is covered by maximum harmonisation. Member States cannot privilege repair in their domestic legislation. Nor is it possible, at domestic level, to encourage the consumer to demand a price reduction. This remedy is statistically less used but has great potential in this context to make consumer choice more sustainable.

The EU legislative process will still take some time to respond to these increasingly urgent needs. It will be necessary, when the time comes, to look very carefully at the remedies. It will also be important to regulate time limits, extending those currently in force which are not in line with the average expected lifetime of goods. The time limit for the presumption that the good was already in non-conformity with the contract at the time of delivery is also very relevant. In many Member States, this presumption is the most relevant provision for the effective application of the Directive.

Information Requirements, Right of Withdrawal and Sustainability

Directive 2019/2161 is less than two years old and there is still one year to go before the entry into force of the provisions that will transpose it, yet we are already looking forward to the amendment of several of the legal acts in which it introduces changes, namely the Unfair Commercial Practices and the Consumer Rights Directives⁷.

We are talking, on the one hand, about the information duties linked to the sustainability of goods and services and, on the other hand, about the right of withdrawal.

Information is key to an informed decision by consumers and compulsory indication of the more or less sustainable nature of goods will be an inevitability in the coming years. It does not in itself solve the underlying problem, but it helps to mitigate its consequences. The lengthy EU legislative process will again be a significant hurdle here. Member States are currently in the legislative process to amend the laws transposing the Unfair Commercial Practices and the Consumer Rights Directives, but do not have the possibility to introduce as of now more stringent information duties related to the sustainability of goods. This is despite the fact that the EU institutions are already acknowledging the lack of standards in this area. Efficiency is lost. It is also a loss for more sustainable choices.

The concept of the right of withdrawal, *ex-libris* of consumer law, has recently been called into question in the name of sustainability, and the pandemic has also helped to conclude that some practices are unsustainable. The issue takes on particular relevance in the area of distance buying of clothes, often on impulse and associated with a low price, and the subsequent exercise of the right to withdraw. Fast fashion is grateful. The environment is not. The long legislative process prevents a quicker reaction, again with the aggravating factor that a profound legislative change is underway at national level, which includes the provisions transposing the Directive on Consumer Rights.

The Need for Swifter and Smarter Legislative Processes at EU Level

An increase in the production of EU legislation in the field of consumer law seems unavoidable. The move towards ever greater harmonisation without flexibility in solving any problems at Member State level is also clear. However, in order to accept these two trends we need a faster and more flexible EU legislative process that adjusts quickly to the ever more rapidly changing society. If we do not do this, the European Union risks becoming less competitive and further and further detached from the citizens and from their problems and needs.

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⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

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