



CONSUMER PROTECTION IN THE EUROPEAN UNION

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LL.M. HUMAN RIGHTS THESIS
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EXECUTIVE SUMMARY

The main purpose of the present master thesis is to evaluate the effectiveness of consumer protection in the sphere of distance selling and electronic commerce, to examine consumer protection problems, including those arising from improper implementation of the Distance Selling and E-Commerce Directives, and consumer right to receive information, as well as to suggest possible solutions of the problems.

Firstly, the thesis discovers the nature of consumer rights as human rights and discusses the historical development of the universal consumer protection instruments and the EU consumer protection legislation.

Secondly, it examines provisions of the Distance Selling and E-Commerce Directives and their amendments, concerning consumer protection, analyses the problems of their implementation in Lithuania and the UK and proposes possible responses to these problems.

Finally, the present thesis considers the problems of the administrative (governmental) implementation of consumer right to receive information when concluding contracts by the means of distance selling and e-commerce in Lithuania and presents possible solutions.

INTRODUCTION

The ordinary “off-line” consumer is always confronted with a certain risk when buying goods or services. However, consumers purchasing goods or services by the means of distance selling and electronic commerce, especially through the Internet, may face the risks that they would not meet while using conventional means of purchase. Because of the distance factor in distance selling and electronic commerce, less information is available about the goods or services and the seller or provider, however, the opposite situation is not uncommon either. Furthermore, no personal contact occurs with the seller; goods cannot be checked before purchase. In addition, consumers might not be aware of the fact that they conclude a contract with little effort simply by pressing a button or clicking on an icon. Due to easy and non-time consuming handling, the risk arises that they may not carefully review their order.

The main purpose of the present master thesis is to evaluate the effectiveness of consumer protection in the sphere of distance selling and electronic commerce (hereinafter referred to as e-commerce), to examine consumer protection problems, including those arising from improper implementation of the Distance Selling Directive¹ and the E-Commerce Directive,² and consumer right to receive information, as well as to suggest possible solutions of the problems.

The primary subject of this master thesis is relevant and urgent from the theoretical as well as from the practical point of view. Theoretically this subject should be examined because of

¹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, OJ 1997, L 144, 19 (hereinafter referred to as the Distance Selling Directive).

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ 2000, L 178 (hereinafter referred as the E-Commerce Directive).

the continuous adoption of the new legal instruments of the European Union (hereinafter referred to as the EU), which are affecting consumer protection legislation in the sphere of distance selling and e-commerce within the Member States and minimizing the differences in regulation between common law and continental law countries. Furthermore, this thesis is relevant because the analysis of the new tendencies in the national and supranational case-law is efficient while creating new consumer protection measures or modifying the present ones, drafting and adopting new effective consumer rights protection instruments in the field of the distance selling and e-commerce.

The present master thesis is ingenious because it discovers the peculiarity of implementation of the EU consumer protection legislation, concerning distance selling and e-commerce, and highlights the problems pertinent to implementation within two Member States with different legal systems – Lithuania and the United Kingdom. The thesis contains a comparative analysis of implementation of the Distance Selling and E-Commerce Directives in Lithuania and the United Kingdom (hereinafter referred to as the UK). There are few main reasons for the choice of the above mentioned Member States. Firstly, although Lithuania and the UK have different legal systems, they have to abide to the general requirements, regarding the implementation of the EU legislation, in this particular case – rules on the implementation of the EU Directives. Secondly, Lithuania is a new Member State having less experience in implementation of the EU law, especially consumer protection legislation, and having almost no practice of consumer protection in the area of distance selling and e-commerce, while the UK is a good example of the proper transposition of the EU legislation into the national legal system. Moreover, the UK has an extensive practice of the consumer protection for Lithuania to follow. Furthermore, the Lithuanian legislator might study the case-law of the European Court of Justice on the inaccurate implementation of the EU Directives in the UK in order not

to repeat the same mistakes. Lastly, referring to the implementation of the Distance Selling and E-Commerce Directives one might note that both Member States experienced the same problems, which could be fully demonstrated by comparing the situation in Lithuania and the UK.

The first chapter of this master thesis discovers the nature of consumer rights as human rights and analyses the historical development of the universal consumer protection instruments and the EU consumer protection legislation, including the conditions of adoption of the Distance Selling Directive and E-Commerce Directive. In addition, the role of the case-law of the European Court of Justice and the Court of First Instance is discussed. The second chapter examines provisions of the Distance Selling and E-Commerce Directives and their amendments, concerning consumer protection, discusses the problems of their implementation in Lithuania and the UK and proposes possible responses to these problems, including amending the recent legislation in order to make it compatible with these Directives. Finally, the third chapter of this thesis considers the problem of the administrative (governmental) implementation of the consumer right to receive information when concluding contracts through the means of distance selling and e-commerce in Lithuania and introduces possible solutions.

However, because of the size limitations of the master thesis, it will concern only substantial aspects of the consumer protection issues, i.e. it does not consider the competence and activities of the judicial and non-judicial national and supranational institutions protecting consumer rights. Also it does not discuss the matters of product liability and product safety, consumer protection in telecommunication, finance, insurance and travelling services. For the same reason this master thesis focuses only on the main EU consumer protection

legislation in the area of distance selling and e-commerce - Distance Selling and E-Commerce Directives - and will not examine other EU Directives (e.g., Directive on misleading advertising, Directive on unfair terms in consumer contracts, Directive on unfair business-to-consumer commercial practices, Directive on injunctions for the protection of consumers' interests³), which also contain some applicable provisions.

The basis of the thesis research methodology is comparative legal analysis, systemic and teleological methods of legal interpretation and reviewing of the case-law. The main method of this thesis research is systemic legal interpretation of the EU legislation in correlation with the case-law of the European Court of Justice (hereinafter referred to as the ECJ). This master thesis also examines the implementation, purposes and methods of the relevant directives and introduces the comparative analysis of the appropriate national legal acts of Lithuania and the United Kingdom.

In summary, the present master thesis is generally based on primary sources – international legal instruments, EU legislation, national law and case-law of the EU and national courts. In addition, the thesis contains references to the works of the most influential consumer law experts such as Sinai Deutch, Hans-Joachim Reinhard, Norbert Reich, Andreas P. Reindl, George T. Brady and Stephen Weatherill.

³ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ 1984, L 250; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 95; 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, OJ 2005, L 149; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998, L 166, as amended by Directive 2002/65/EC, OJ 2002, L 271.

CHAPTER 1. E-COMMERCE AND DISTANCE SELLING DIRECTIVES AND CONSUMER PROTECTION IN THE EU

The purpose of this chapter is to analyze the conditions and circumstances under which general consumer protection provisions, the Distance Selling and E-Commerce Directives were created and adopted and to discuss certain consumer rights protected by the above-mentioned legal instruments. However, firstly, the nature of consumer rights as human rights has to be revealed since their implementation is the main subject of the present thesis.

1.1. *Consumer Rights as Human Rights*

Concerning the arguments for the classification of consumer rights as human rights, the nature of the former must be analysed. Many distinguished consumer law experts recognize that consumer law has private law as well as public law elements.⁴ Where the law relates to the formation, content and performance of contracts between persons, or where it imposes obligations to compensate loss or damage suffered by another person as a result of an unlawful act, it is private law. When it involves the creation or workings of a governmental structure, the making of laws, the prosecution of crimes or offences or the imposition of penalties, such as imprisonment, fines or confiscation of property, it is public law.⁵ According to Sinai Deutch, consumer law is a mixture of contract, tort, criminal and administrative law. Therefore, identification of this consumer law area as human rights might have a direct effect on the public aspect of consumer rights.⁶ Thus, in order to avoid a long-drawn discussion on the debates about the status of consumer rights, i.e. being referred to as

⁴ For example, see positions of Thierry Bourgoignie and Norbert Reich regarding the notion of consumer law in Jules Stuyck, "European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the internal market," *Common Market Law Review* 37 (2000): 367-375.

⁵ See Mary Ann Glendon, Michael W. Gordon, Paolo G. Carozza, and Christopher Osakwe, *Comparative legal traditions in a Nutshell* (2nd edition, Minnesota: West Publishing Company, 1999), 106-120.

⁶ Sinai Deutch, "Are Consumer Rights Human Rights?" *Osgoode Hall Law Journal* 32 (1995): 542.

human rights or not, three features of consumer rights should be highlighted as confirming their human rights nature. According to Deutch, one may identify:

- 1) whether there is an accepted definition of human rights that will assist in establishing consumer rights as human rights;
- 2) whether consumer rights fulfil the substantive test of human rights;
- 3) whether there is a formal basis in international documents for acknowledging consumer rights as human rights [whether consumer rights fulfil the procedural test of human rights].⁷

There are two approaches regarding the response to the first question. The first approach suggests including as human rights only those declared as such by the institutions of the United Nations. The second approach suggests establishing guidelines to outline the characteristics of human rights. However, both approaches determine two main requirements for a right to be considered a human right – procedural and substantive.⁸

Furthermore, a substantive test for the recognition of consumer rights as human rights should consist of three elements: a) the whole community and not a specific group should dispose of human rights, i. e. human rights should be designated to individuals; b) human rights are primarily the characterization of the individual, stressing her/his prosperity, honour and development; c) human rights are rights of the individual against powerful governments.⁹ Firstly, since every citizen is a consumer, consumer rights are individual rights. Secondly, consumer rights are legally enforceable claims which might be alleged by individuals, and which emphasise individual's right to welfare. Thirdly, consumer rights can be enforced by individual against government because they could be derived from the particular provisions of the international instruments which are discussed below. Sinai Deutch also notes that consumer's right to be protected is an essential part of the right to the adequate standard of

⁷ *Ibid.*, 543.

⁸ *Ibid.*, 546, 550-551.

⁹ *Ibid.*, 551.

living recognized under Article 11 of the International Covenant on Economic, Social and Cultural Rights.¹⁰

Finally, the procedural test of integrating into formal international documents should consist not only of formal procedure of declaring a right as a human right. Thus, one should accept the argument that “although none of those documents explicitly identified consumer rights as [international human] economic rights, there is sufficient evidence in the documents to support the claim of indirect acknowledgement.”¹¹ For example, a number of international instruments, such as the Charter of the United Nations,¹² the Universal Declaration of Human Rights¹³ and the International Covenant on Civil and Political Rights¹⁴ recognize the right of people to self-determination,¹⁵ which is one of the essential consumers’ rights, and nevertheless consumer law apply different aspect of this right,¹⁶ its primary meaning is the same, i.e. it is the right of individual to exercise choice. Moreover, the United Nations Guidelines for Consumer Protection,¹⁷ approved in 1985 by the United Nations General Assembly, evidence a substantial development in the international recognition of the principles of consumer protection and indicate the beginning of the international recognition of consumer rights as human rights.¹⁸ Therefore, it may be concluded that there is a strong

¹⁰ 19 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3, 6. I.L.M. 360 (hereinafter referred to as ICESCR).

¹¹ *Supra* note 6, 558.

¹² 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.

¹³ 10 December, 1948, GA Res. 217A (III), UN Doc. A/180 (hereinafter referred to as Universal Declaration).

¹⁴ 16 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3, 6. I.L.M. 360 (hereinafter referred to as ICCPR).

¹⁵ According to the above mentioned international instrument, the right to self-determination is the right of people to freely determine their political, social, economic and cultural status.

¹⁶ Consumer right to self-determination is the right to freely choose particular goods or services, without any pressure or interference.

¹⁷ 16 April 1985, GA Res. 39/248, 39th Sess., Agenda Item 12, UN Doc. A/RES/39/248, New York: United Nations, 1986 (hereinafter referred to as UNGCP).

¹⁸ *Supra* note 6, 571.

tendency toward formal admission of consumer rights as human rights in international instruments.¹⁹

1.2. The Development of the Consumer Protection Provisions in the EU

Regarding the essence of the consumer rights at the EU level, firstly, one should explore the definition of the “consumer”. Under Article 13 of 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements²⁰ the “consumer” is defined as a person who concludes a contract for a purpose which can be regarded as being outside his trade or profession. A similar definition is established by Article 5 of 1980 Rome Convention on the Law Applicable to Contractual Obligations.²¹ According to Article 2(2) of the Distance Selling Directive, “consumer” means any natural person who in distance selling contracts is acting for purposes which are outside his trade, business or profession. One should notice that, in comparison with Article 13 of Brussels Convention and Article 5 of Rome Conventions, Article 2(2) of the Distance Selling Directive limits the definition of consumer to natural persons.²² In other words, the recent EU consumer protection legislation is ensuring rights and freedoms of individuals but not companies or other legal entities.

In the EU, consumer protection was originally seen as a subsidiary task of the common market programme. Under the Treaty of Rome one of the purposes of the European Economic Community (hereinafter referred to as EEC) has been, *inter alia*, the promotion of the “harmonious, balanced and sustainable development of economic activities, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic

¹⁹ *Supra* note 6, 578.

²⁰ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1972, L 299, 1 (hereinafter referred to as Brussels Convention).

²¹ Rome Convention on the Law Applicable to Contractual Obligations, OJ 1980, L 266 (hereinafter referred to as Rome Convention).

²² For more see Jules Stuyck, *supra* note 4, 371.

performance, the raising of the standard of living.”²³ However, actions concerning establishment of the specific measures of consumer protection started only in 1975 from the resolution of the Council of Ministers (hereinafter referred to as the Council), outlining its preliminary program for a consumer protection and information policy detailing the objectives and general principles of a consumer policy.²⁴ The Council acknowledged that the role of the consumer in the EEC had changed and the new conditions required ensuring that consumers were better informed of their rights and protected from abuses by traders and services providers. Consequently, the Preliminary Programme determined five basic consumer rights:

- (a) the right to protection of health and safety;
- (b) the right to protection of economic interests;
- (c) the right of redress;
- (d) the right to information and education; and
- (e) the right of representation (the right to be heard).²⁵

According to Hans-Joachim Reinhard, this definition of basic consumer rights made consumer protection a comprehensive social programme for consumer protection.²⁶

Furthermore, one should mention the considerable contribution of the ECJ to the development of EU consumer policy as a by-product of the free movement of goods, one of the fundamental principles of the EEC.²⁷ Article 28 (ex Article 30) of the Treaty on European Union²⁸ was aimed to achieve free movement of goods, providing that “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between

²³ Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11, 15 (hereinafter referred to as Treaty of Rome), Article 2; and Consolidated Version of the Treaty Establishing the European Community, OJ 2006, C 321E, Article 2.

²⁴ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, OJ 1975, C 92, 3, para. 6 (hereinafter referred to as Preliminary Programme).

²⁵ *Ibid.*

²⁶ Hans-Joachim Reinhard, “Consumer Protection through EU-Directives,” *The European Legal Forum* 2 (2004): 85.

²⁷ Consolidated Version of the Treaty Establishing the European Community, *supra note* 23, Article 3, Article 14, Articles 23-31.

²⁸ Treaty on European Union, OJ 1992, C 224, 1 (hereinafter referred to as Maastricht Treaty or EC Treaty).

Member States.” In one of the first cases on Article 28 (ex Article 30) the ECJ interpreted it more broadly prohibiting “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.”²⁹ Later in the landmark case known as *Cassis de Dijon* judgement³⁰ the ECJ established how Article 28 (ex Article 30) should be applied to national technical rules which had a hostile effect to market integration, although they did not discriminate according to nationality. In this case the ECJ recognized that German law imposing restrictions on the marketing of weak alcoholic drink, alleging consumer health protection and consumer protection from unfair practices, had infringed the principle of free movement of goods of Article 28 (ex Article 30) and, therefore, was unlawful State suppression of consumer choice.³¹ Hereafter, Member States must show strong and powerful reasons, such as the protection of public health, the fairness of commercial transactions, the defence of the consumer, to justify rules which subordinate consumer choice and free movement of goods to national mandatory requirements.³² The *Cassis de Dijon* judgement has been applied in many consequent cases in order to eliminate national rules which hinder the free movement of goods, resulting in wider consumer choice. For example, in *Walter Rau v De Smedt* case,³³ the ECJ declared the Belgian law requiring margarine to be marketed in cube-shaped blocks incompatible with Article 28 (ex Article 30). According to the ECJ:

It cannot be reasonably denied that in principle legislation designed to prevent butter and margarine from being confused in the mind of the consumer is justified. However, the application by one Member State to margarine lawfully manufactured and marketed in another Member State of legislation which prescribes for that product a specific kind of packaging such as the cubic form to the exclusion of any other form of packaging considerably exceeds the requirements of the object in view. Consumers may in fact be protected just as effectively by other measures, for example by rules of labelling, which hinder the free movement of goods less.³⁴

²⁹ Case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville* [1974] ECR 837, para 5.

³⁰ Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

³¹ *Ibid.*, paras 10-14.

³² *Ibid.*, para 8.

³³ Case 261/81, *Walter Rau Lebensmittelwerke v De Smedt PvbA* [1982] ECR 396.

³⁴ *Ibid.*, para 17.

Summarizing, one should conclude that the ECJ played and is still playing a significant role in the evolution of the EU consumer protection policies and legislation.

In 1981, considering the above mentioned case-law of the ECJ the Council adopted a second resolution, the purpose of which was “to enable the Community to continue and intensify its measures [with respect to consumer protection and information] and to help establish conditions for improved consultation between consumers on the one hand and manufacturers and retailers on the other.”³⁵ Reconfirming the consumer rights and principles created in the previous Preliminary Programme, it emphasized the need to have consumers participate in economic decision making and implementation, and suggested that agreements between and among interest groups would be an effective means to achieve consumer protection goals.³⁶

The Single European Act,³⁷ stating that the internal market must be formed by the end of 1992, was the first document in primary legislation to use the term “consumer” and also authorizing the Community to adopt legislation in furtherance of the creation of the internal market and provided an expanded basis for consumer-related legislation. One should mention the Three Year Action Plan of Consumer Policy in the EEC (1990-1992),³⁸ adopted in 1990, which aimed at improving product labelling, minimum safety requirements in production, and more security for consumers in the sphere of credits and concerning package tours.

However, consumer protection was not introduced as a separate policy until the EC Treaty, which laid the foundation for it in Article 153 (ex Article 129a) and declared it as a fully—formed Community policy. The EC Treaty elevated consumer protection to the status of

³⁵ Council Resolution of 19 May 1981 on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy, OJ 1981, C 133, 1.

³⁶ *Ibid.*

³⁷ OJ 1987, L 169.

³⁸ Communication from the Commission, COM (90) 98 final, of 3 May 1990.

Union policy, requiring the Union to contribute to the reaching of a high level of consumer protection through “specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.”³⁹ This language allows the EEC to adopt consumer protection measures, without requiring a direct connection with market integration.⁴⁰ Furthermore, the status of consumer protection as the a Community common policy was confirmed in the Maastricht Treaty by amending Article 3 which now states that “the activities of the Community shall include... a contribution to the strengthening of consumer protection.” In addition, Article 153(2) establishes a “horizontal” application of consumer protection requirements across the borders of the EC’s business.⁴¹

The European Union Charter of Fundamental Rights,⁴² proclaimed in December 2000, states in Article 38 (“Consumer protection”): “Union policies shall ensure a high level of consumer protection.” Although the Charter is not binding, it is of significant importance in respect of recognition of consumer rights as human rights, since the Advocates-General and the European Courts have already referred to the Charter more than in thirty cases⁴³ and therefore, confirmed the obligatory nature of the Charter. For example, the Charter was mentioned in the Opinion of the Advocate General Jacobs in *Z. v Parliament*,⁴⁴ Opinion of the Advocate General Mischo in *D. v Council*,⁴⁵ and Opinion of the Advocate General

³⁹ *Ibid.*, Art. 153(1)(b).

⁴⁰ Andreas P. Reindl, “Consumer Contracts and European Law,” *Washington University Law Quarterly* 75 (1997): 641.

⁴¹ For more see *Ibid.*, 641-643.

⁴² Charter of Fundamental Rights of the European Union, OJ 2000, C 364, 01 (hereinafter referred to as the Chapter), available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed 30 July 2007).

⁴³ Statistics available at http://www.jeanmonnetprogram.org/conference_lapietra/ecfr.html (accessed 10 October 2007).

⁴⁴ Case C-270/99 P, *Z v European Parliament* [2001] ECR I-09197, para 40, referring to Article 41(1) (Right to good administration) of the Chapter.

⁴⁵ Joint cases C-122/99 P and C-125/99 P, *D and Kingdom of Sweden v Council of the European Union* [2001] ECR I-04319, para 97, referring to Article 9 (Right to marry and right to found a family) of the Chapter.

Tizzano in *BECTU*.⁴⁶ However, the references to the Charter made by the Court of First Instance (hereinafter referred to as CFI) and the ECJ are of substantial importance. According to John Morijn, “the Charter seems to have entered the case-law of the Court of First Instance as unmentioned source of “confirmation” of the two sources of inspiration mentioned in Article 6(2) of the EC Treaty.”⁴⁷ The CFI made its first reference to the Charter (Articles 41(1) and 47) in the case *max.mobil Telekommunikation Service GmbH v Commission*,⁴⁸ confirming a right of individuals to have their affairs handled impartially, and to secure an effective remedy where rights are violated. In *Jégo-Quéré et Cie*⁴⁹ the CFI referred to Charter’s Right to an effective remedy and fair trial, stating “[i]n addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union [...]”

However, the ECJ in its case-law has not made any references to the Charter yet. Nevertheless, one might expect the Charter to be referred to by the ECJ in the near future and consumer rights and their protection, established in Article 38, to be confirmed by the European Courts as fundamental rights.

Furthermore, a number of the appropriate EU regulations and directives were adopted. The newly adopted legal provisions, which contain maximum harmonization, represent an essential change in direction of the regulation of consumer protection. The EU legislature regulated a specific area of consumer protection by adopting the Distance Selling Directive,

⁴⁶ Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Unijon (BECTU) v Secretary of State for Trade and Industry* [2001] ECR I-04881, paras 26-28, referring to Article 31(2) (Fair and just working conditions) of the Charter.

⁴⁷ John Morijn, “Judicial Reference to the EU Fundamental Rights Chapter. First experiences and possible prospects” (E.Ma Thesis, College of Europe in Bruges, 2002), 11, available at http://www.fd.uc.pt/hrc/working_papers/john_morijn.pdf (accessed 30 August 2007).

⁴⁸ Case T-54/99, *max.mobil Telekommunikation Service GmbH v Commission* [2001] ECR I-03105, paras 48, 57.

⁴⁹ Case T-177/01, *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-04267, para 42.

which has been implemented by the member states. Although the Distance Selling Directive does not apply to the important area of financial services, the currently adopted Financial Services Distance Marketing Directive⁵⁰ closes this gap.

Another EU legal instrument, the E-Commerce Directive, is not so much concerned with consumer protection. The main purpose of the E-Commerce Directive is to remove legal obstacles and uncertainties and to harmonize existing legislation in the Member States in order to ensure the free movement of information society services within the European Union; however, it also establishes the consumer protection provisions considering the specific nature of the online transactions.

1.2.1. History of Adoption of the E-Commerce Directive

Long before the adoption of the E-Commerce Directive there have been discussions within the EU about the necessity of adoption of the fundamental legal instrument regulating use of the Internet communication for doing business, i. e. the electronic commerce. Thus, the consumer protection was not the primary target area of the E-Commerce Directive. First and foremost the Directive laid down a general framework to ensure the free movement of information society services in the EU.

At the Lisbon European Council, held on 23-24 March 2000,⁵¹ the Heads of States approved the principles which should inform the steps to be taken by the European Union in order to gain most benefit in all socio-economic areas from the technologies of the so-called

⁵⁰ Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 2002, L 271 (hereinafter referred to as Financial Services Distance Marketing Directive).

⁵¹ Lisbon European Council, 23 and 24 March 2000: Presidency Conclusions, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm (accessed 20 November 2007).

information society. Furthermore, the Commission and the Council were asked to work on an Action Plan for that purpose. On 19-20 June 2000 the European Council endorsed the Action Plan,⁵² where the Commission had addressed the need to accelerate the consolidation of electronic commerce. The Single Market, besides the traditional forms of business, had to be adapted to work for electronic commerce. For that, up-to date legislation that would fully meet the needs of business and consumers was recognized being essential. Consequently, the E-Commerce Directive was adopted and came into force on 8 June 2000.

One should note that during the discussion on drafts of the Directive on Electronic Commerce, the one more general rule was proposed:

The consumer contracting electronically may not be deprived of the protection granted by EC directives, when the law governing the contract is that of a country that does not belong to the European Community, when the consumer is resident on the territory of a Member State of the European Community and when the contract has a close link with the Community.⁵³

However, the Community legislature did not follow this suggestion.

The Directive covers all information society services as well as services provided free of charge to the recipient. It addresses internal market aspects, in particular the free access of EU-based providers to e-commerce; provision of information, especially on the identity of the provider; conclusion of electronic contracts; commercial communications; liability of providers of information society services and providers of intermediary services; limitation of liability for mere “conduit,” “caching,” and “hosting;” and on-line dispute settlement, preferably by codes of conduct and out-of-court mechanisms. Since electronic commerce affects many fields of law, especially the consumer protection law, where legal adaptations are needed and a number of uncertainties must be removed to clarify the regulatory

⁵² *Ibid.*

⁵³ See Norbert Reich, and Axel Halfmeier, “Electronic Commerce: Consumer Protection in the Global Village: Recent Developments in German and European Union Law,” *Dickinson Law Review* (2001): 111.

framework, thus, the E-Commerce Directive is considered as a fundamental legal instrument aiming to harmonize national legislation within the EU. Speaking about significance of the Directive one should also note that there were vigorous disputes between Member States and the EU institutions on the particular provisions of the Directive, including consumer protection rules. For example, the content of Article 9 was a subject of debates because it obliged Member States to ensure that their legal systems did not deprive electronic contracts of legal validity on the sole ground of their having been concluded by electronic means. Before this provision Member States' civil laws recognized a great scope of action to the freedom of the parties to regulate their relations but there were situations where this freedom was limited in order to protect the specific parties of the specific contracts such as consumers and employees. Article 9 obliged Member States to remove such requirements or to reinterpret them so that their electronic equivalents were admitted. The disputes arose since this provision would have affected the consumer protection regulations making them less favourable to consumers. On the other hand one more subject of discussions - Article 10 imposed more stringent obligations applicable to the electronic contracts than those applicable to the rest of distance contracts on service providers, who in case of electronic contract must make all the contract terms and general conditions available in a way that the recipient could reproduce and store them. Finally, there were arguments on Article 11, which in final draft established an obligation on service providers to acknowledge the receipt of the recipient's order without undue delay and an order must be considered to be received when the parties were able to access them. In the primary Commission Proposal, Article 11 set as the moment the contract is concluded the moment when the recipient of the service has "confirmed receipt of the acknowledgement of the receipt".⁵⁴ However, in the legal orders of different Member States this final step is considered in different ways, i.e. it has different

⁵⁴ Commission proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM (98) 586 final of 18 November 1998, 27.

implications – it can establish the moment transmission of the risks take place or determine the moment certain time-periods starts to count (e.g. cooling-off period for distance consumer contracts), or the moment the right to revoke the offer expires.⁵⁵ Therefore, the uniform solution on the moment of conclusion of the contract suggested by the Commission was removed from the Directive in the Council stating that solutions in the different legal systems were very distant.

There were other debates on the content of the E-Commerce Directive; however, they will not be discussed because they are not the subject of this master thesis.

1.2.2. History of Adoption of the Distance Selling Directive

Besides E-Commerce Directive for many forms of electronic commerce the main legal instrument is the Distance Selling Directive, whereas contracting through the Internet or through e-mail falls under its scope.

Firstly, in the EU distance selling was addressed by adopting Commission Recommendation of 7 April 1992 suggesting to the businesses engaged in distance selling to adopt codes of practice in order to offer consumers some protection.⁵⁶ In the same year the Commission presented the first draft of a directive on distance selling. From this moment the discussions and debates on the draft were opened and lasted for five years. Then on 20 May 1997 the European Parliament and Council finally adopted the Distance Selling Directive. One should mention that there had been a sharp debate and much lobbying on its content, particularly whether it should be more extensive than its final draft, e.g. extending to financial services, and requiring prior consent from consumers before being contacted by telephone, email and

⁵⁵ David Oughton and John Lowry. *Consumer Law*. (Oxford: Oxford University Press, 2000), 97-119.

⁵⁶ Commission Recommendation 92/295/EEC, OJ 1992, L 156.

so on⁵⁷ by sellers identifying themselves and explaining the reason of their call. The cold calling is permitted under the Directive if there is no clear objection from the consumer.⁵⁸

The Distance Selling Directive contains consumer protection rules such as rules on the proper identification of the supplier. If prepayment by a credit card is demanded, the business address of the supplier must be presented. One of the most important and progressive provisions in the Directive is the cooling-off provision. It means that a consumer can choose to withdraw from the contract within seven working days, without penalty, and need not to give a reason. In the case of sales, the consumer has a right of withdrawal within seven working days after delivery. In the case of services, the consumer has a right of withdrawal within seven days after the conclusion of the contract and distribution of information about withdrawal rights. Importantly, this cooling-off period is a new institute of consumer protection legislation in many old Member States like the United Kingdom as well as in the new ones like Lithuania. The implementation of Distance Selling Directive into Member State law might increase the consumer's freedom of decision *vis-a-vis* electronic commerce, even though this freedom is weakened by numerous exceptions (regarding financial services, sale excursions, certain recreation services and contracts concluded at an auction).

1.2.3. Other EU Consumer Protection Instruments

The Financial Services Distance Marketing Directive supplements the Distance Selling Directive, but firstly its proposal differed with regard to information obligations and right of withdrawal. The challenge in this Directive was to simultaneously allow for certain specifics of the trade in financial services while guarding the consumer's freedom of decision. The

⁵⁷ *Ibid.*

⁵⁸ According to Article 10 of the Distance Selling Directive, cold calling by automatic calling machines and fax requires prior consent of the consumer.

final proposal of 23 July 1999⁵⁹ put the information and withdrawal rights of the consumer in distance contracts for financial services in line with Distance Selling Directive. However, in contrast to the Distance Selling Directive, the Financial Services Distance Marketing Directive guarantees the consumer the EU standard of protection, even in cases where the law of a third country is applicable, as long as the transaction has an adequate connection with the EU. Thus, it goes beyond Article 5 of the Rome Convention and similar clauses in other EC directives and the Directive created a sound basis for increasing and harmonizing the protection of the European consumer in cross-border electronic commerce.

Finally, one should observe the main purposes of the current consumer policy and the new Commission's strategy for the health and consumer policy 2007 - 2013, namely "Healthier, safer, more confident citizens: a health and consumer protection strategy",⁶⁰ replacing the Consumer Policy Strategy 2002-2006.⁶¹ This is to protect citizens from risks and threats which are beyond the control of individuals and that cannot be effectively tackled by individual Member States; increase the ability of citizens to take better decisions about their consumer interests; mainstream consumer policy objectives across all Community policies; ensure common high level of protection for all EU consumers, wherever they live, travel to or buy from in the EU, from risk and threats to their safety and economic interests; increase consumers' capacity to promote their own interests, i.e. helping consumers help themselves.

⁵⁹ OJ 1998, C 385, 10, amended by Commission Proposal of July 23, 1999, COM (99) 385 final, EC document No. 599PC0385.

⁶⁰ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on EU Consumer Policy Strategy 2007-2013, COM (2007) 99 final of 13 March 2007, available at http://ec.europa.eu/consumers/overview/index_en.htm (accessed 29 March 2007).

⁶¹ Council Resolution of 2 December 2002 on Community Consumer Policy Strategy 2002-2006, OJ 2003, C 11, 1. This Strategy established three main objectives: 1) a common level of consumer protection; 2) effective enforcement of rules concerning consumer protection; 3) adequate inclusion of consumer organizations in EU policy and the subsequent measures proposed therein.

Summarizing, it should be noticed that all legal instruments described in this chapter recognise and protect basic consumer rights, such as the right to safety, the right to self-determination, the right to information, the right to be heard, etc. For example, many consumer law directives contain specific and very detailed duties of sellers and suppliers regarding provision of information to consumers since a right to receive information is a fundamental consumer right (the Distance Selling Directive (Articles 4-5), the Financial Services Distance Marketing Directive (Articles 3-5), the E-Commerce Directive, etc.).

CHAPTER 2. PROBLEMS REGARDING METHODS OF IMPLEMENTATION OF EU CONSUMER PROTECTION LAW AT THE NATIONAL LEVEL

The subject of this chapter is analysis of the Distance Selling and E-Commerce Directives and their implementation in the EU Member States, in particular in Lithuania and the United Kingdom, and description of the situation prior to and after coming into force of these Directives.

Because of the new technologies and distance factor in distance selling and e-commerce consumers within the EU are often confronted with risks that they would not meet when using conventional means of purchase; therefore, they need special means of protection to be adopted at the EU level, as well as implemented by Member States at the domestic level. There are various EU directives regulating consumer protection in different spheres, including distance selling and e-commerce. Member States should have been implemented most of these directives.

However, one should notice that, nevertheless, generally, implementation of the EU consumer protection legislation within the Member States is not problematic. However, some Member States choose the “copy-paste” method to implement directives into their legal systems and, if necessary, translate directives literally into their language, for example, Greece, Lithuania, Poland⁶² adopted provisions transposing Distance Selling and E-

⁶² In Greece the E-Commerce Directive is “copy-pasted” to the Acte legislatif 131 FEK A No 116 du 16/05/2003, p. 1747 [Decree 131/2003]; in Lithuania both Distance Selling and E-Commerce Directives are almost literally translated to the Order of Minister of Economy of Republic of Lithuania of 17 August 2001 on approval of Rules on marketing of products and delivery of services when contracts are concluded by means of distance communication, Official Gazette, 2001, No. 83-7325, Law of the Republic of Lithuania on Information Society Services, Official Gazette, 2006, No. 65-2380 and related legal acts; the same can be said in regard of legislation of Poland, implementing these Directives, namely, Ustawa z 23 kwietnia 1964 Kodeks Cywilny and Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną.

Commerce Directives into national law which are identical to those of Directives'⁶³. Moreover, often Member States implement the EU directives by the sub statutory acts, thus, reducing their weight. The reason is the national law must guarantee that the national authorities will effectively apply the directive in full and that the legal position under national law should be sufficiently precise and clear, and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts. Therefore, it is questionable whether a sub statutory could fulfil these conditions implementing Directives.

The aim of the Distance Selling Directive is to provide a common set of rules that protect consumer rights and interests when buying at a distance. The Directive was adopted in view of the diverging regulation measures taken by Member States with respect to distance selling, and the negative effect that these measures produced in the internal market. According to Recital 1 of the Directive, it was adopted to serve the purpose of the Internal Market, which for the consumer mainly takes the form of cross-border / distance purchase.⁶⁴ The main provisions of the Directive focus on information requirements and the right of withdrawal with regard to distance contracts between consumers and suppliers.⁶⁵

Concerning the E-Commerce Directive, it has not been adopted first and foremost to protect consumers but merely to achieve the internal market in information society services and to

⁶³ See, for example, Order of Minister of Economy of the Republic of Lithuania of 17 August 2001 on approval of Rules on marketing of products and delivery of services when contracts are concluded by means of distance communication [Lietuvos Respublikos ūkio ministro 2001 m. rugpjūčio 17 d. įsakymas Nr. 258 “*Dėl Daiktų pardavimo ir paslaugų teikimo, kai sutartys sudaromos naudojant ryšio priemones, taisyklių patvirtinimo*”], Official Gazette, 2001, No. 7325-83;

⁶⁴ Recitals 1 and 3 of the Distance Selling Directive, *supra note* 1; see also Recital 4, which focuses on new technologies in the frame of distance selling.

⁶⁵ However, one must emphasise that the provisions of the Distance Selling Directive were not supposed to cover all possible distance contracts, and as it has been mentioned in previous chapter it should not apply to contracts on financial services, which are dealt with in the Services Distance Marketing Directive, and a number of other less important distance contracts.

free the movement of information society services throughout the European Union.⁶⁶ Nevertheless, as Recitals 7 and 10 in the preamble of the Directive show, one of the main aims of the Directive was also to protect consumers by providing them with sufficient and appropriate information and based on that to lead to higher consumer confidence in information society services and cross border purchases with the help of e-commerce. Certain provisions of the E-Commerce Directive were completely new for some of the Member States. For example, in Greece, new provisions were those establishing consumer protection in the area of e-commerce because before implementation of the E-Commerce Directive Greek law did not set any rules protecting consumers concluding contract by the means of distance selling and e-commerce.⁶⁷ Furthermore, after the implementation of the E-Commerce Directive, Greek law introduced new requirements for the information to be provided to the consumer by the seller or service provider (Article 4), in other words, the ability to exercise consumer's right to receive information does not depend anymore on whether or not a contract is concluded, i.e. the information has always to be available and must be provided independently of whether or not a contract was concluded in the area of e-commerce.⁶⁸ On the other hand, the E-Commerce Directive introduced the provisions, which have not been new in Greek law (as well as to the legal systems of some other Member States like Lithuania), for example, the rules complementing the already existing and very comprehensive rules on illegal advertising (Article 5 of the E-Commerce Directive).⁶⁹ However, Article 6 of the E-Commerce Directive transparency requirements on unsolicited advertising e-mails were irrelevant because existing Greek legislation in general did not allow the sending of e-mails containing promotion without expressed prior approval by the

⁶⁶ Recitals 1, 3, 5, 7, *supra* note 2.

⁶⁷ Makris, Spiros, "Implementation of the Directive on Electronic Commerce into Greek Law and Consumers Protection in the Area of Electronic Commerce: Comparison with German Law," *The European Legal Forum* 3 (2004): 161.

⁶⁸ *Ibid.*, 164.

⁶⁹ *Ibid.*, 166.

consumer.⁷⁰ Finally, the Greek legislation, implementing the E-Commerce Directive, contains administrative sanctions, which should apply when its provisions are infringed but these sanctions are of little relevance to the consumer, since they do not directly affect the rights of the consumer.⁷¹

Regarding the E-Commerce Directive, one should note that the Member States had to transpose it into their legislation by 17 of January 2002.⁷² However, not all of them observed the term. For example, the Electronic Commerce (EC Directive) Regulations 2002⁷³ incorporating the Directive into the law of the United Kingdom were adopted a few months after the expiration of the term. Moreover, implementation of the E-Commerce Directive in some Member States was improper and inappropriate. For example, in Greece, firstly, the E-Commerce Directive was implemented only on 16 of May 2003,⁷⁴ i.e. more than one year later than it had to be adopted; secondly, the E-Commerce Directive was transposed into Decree, which is only a sub statutory act and consequently can lead to intricate situations hereafter. The United Kingdom's chosen method of implementation of the E-Commerce Directive also can cause some future problems, which will be discussed below.

The present situation for consumers in the field of distance selling and e-commerce is unsatisfactory within the chosen EU Member States, especially in Lithuania (nevertheless, Lithuanian legislation have been improved during the past few years as new legal instruments were adopted in this field). The main problems are the following:

- There is lack of clarity because the distance selling provisions are regulated by different statutes.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 167.

⁷² Art. 22 of the E-Commerce Directive, *supra* note 2.

⁷³ S.I. 2002 No. 2013 (hereinafter referred to as the E-Commerce Regulations).

⁷⁴ *Supra* note 67, 161.

- In Lithuania, the Ministerial Order⁷⁵ implementing the Distance Selling Directive is of sub statutory character only. Moreover, Distance Selling and E-Commerce Directives are implemented by the few national instruments in parallel, which might lead to contradictions between different provisions.
- In the United Kingdom, both Directives are also implemented by secondary legislation, which does not precisely follow the provisions of the Directives.

An analysis of the consumer protection aspect within distance selling and e-commerce implementation at the national level is essential for various reasons. Firstly, both Directives - with a view to consumer protection - place the focus on information rights for consumers. Although distance selling has a longer history of regulation, Directives on the European level regulate both areas; these had to be implemented by national law. Notwithstanding the similarities and common features of both, it has already been mentioned above that while the Distance Selling Directive aims at consumer protection, the purpose of the E-Commerce Directive is primarily the development and harmonization of the internal market in information society services.⁷⁶ Therefore, the E-Commerce Directive is more to be seen as public law and as providing a framework for e-commerce in Europe. However, it also contains important provisions aimed at protecting the user of these services, including consumers.⁷⁷

In reviewing implementation of the Distance Selling and E-Commerce Directives in Lithuania, this thesis chapter will show that there are almost no similarities in the

⁷⁵ Lietuvos Respublikos ūkio ministro 2001 m. rugpjūčio 17 d. įsakymas Nr. 258 “*Dėl Daiktų pardavimo ir paslaugų teikimo, kai sutartys sudaromos naudojant ryšio priemones, taisyklių patvirtinimo*” [Order of Minister of Economy of the Republic of Lithuania of 17 August 2001 on approval of Rules on marketing of products and delivery of services when contracts are concluded by means of distance communication], Official Gazette, 2001, No. 7325-83 (hereinafter referred to as “the Ministerial Order No. 258”).

⁷⁶ Recital 1 of the E-Commerce Directive, *supra* note 2, para 1.

⁷⁷ See Recitals 5, 7, 8 and 10, 11, 29, 65 of the E-Commerce Directive, *supra* note 2.

transposition of both Directives. Regarding implementation of the Directives in the United Kingdom, this chapter will reveal a common problem of their proper transposition into national legislation.

2.1. Distance Selling and E-Commerce Directives' Implementation in Lithuania

Within Member States implementation of a directive into national law is usually done in several ways. Under Article 249 (3) of the EC Treaty, EC Member States are free to choose the form and means of implementation because a directive is binding upon Member States only as to the result it aims to achieve.

Lithuania chose to translate directives literally word-by-word into the Lithuanian language as a common way of implementing European law. A positive aspect for this implementation lies in the fact that all provisions through the “copy-paste” method are fully transposed into the national legal order. Nevertheless, several problems might appear due to non-harmonization with other Lithuanian provisions touching upon the same area as those of the implemented directive. In turn, failure to coordinate can lead to confusion in application and unclear situations when referring to those provisions.

One more phenomenon can be noticed in Lithuanian law regulating consumer protection issues. Lithuania chose to implement several European consumer protection rules in a parallel way into two national legal instruments. Therefore double regulation exists in the shape of several provisions on consumer protection in the Law on the Protection of Consumer Rights

⁷⁸ as well as in the Civil Code of the Republic of Lithuania.⁷⁹ In most cases, this double regulation is technical. However, as it was mentioned earlier, in certain instances, it leads to material contradictions between different provisions and generates inconsistency between relevant legal instruments. Many of these “double regulation” problems occur in Lithuanian rules on distance selling, which are discussed further.

2.1.1. Implementation in Distance Selling

In Lithuania, at first the Distance Selling Directive was transposed into the Civil Code as well as into the Law on the Protection of Consumer Rights of 2000 and the Ministerial Order No. 258. All three implementing measures set forth very similar, even identical provisions, which add little or nothing to the provisions of the Distance Selling Directive.

Analysis of the Lithuanian provisions that implement the Distance Selling Directive suggests that the provisions of the Directive were literally translated into Lithuanian legislation without any further development or interpretation. In addition, primarily the same provisions of the Directive were transposed into three legal instruments of different legal force (codified law, ordinary law, and ministerial order). Certainly, thus transposing the Directive into national legislation did not ensure efficient implementation of the Directive. The existence of the same provisions in three different legal instruments created uncertainty as to what rules should be applied, as well as undermining the legal nature of these instruments. It is clear that the law should provide the principal rules, whereas administrative provisions are supplementary and should aim at further development of rules provided in the law. Thus, the Ministerial Order No. 258 should have had as its object not to formulate rules on distance

⁷⁸ Law on the Protection of Consumer Rights of the Republic of Lithuania, Official Gazette, 2000, No. 85-2581 (hereinafter referred to as the Law on the Protection of Consumer Rights of 2000).

⁷⁹ See especially Art. 6.366 the Civil Code of the Republic of Lithuania, Official Gazette, 2000, No. 74-2262 (hereinafter referred to as the Civil Code).

selling but to develop the provisions on distance selling put forward by the Civil Code or the Law on the Protection of Consumer Rights of 2000. It was also clear that the provisions on distance selling stipulated in the Law on the Protection of Consumer Rights of 2000 were excessive because they literally repeated the relevant rules had been provided in the Civil Code and failed to set forth any new regulation.

The new edition of the Law on the Protection of Consumer Rights,⁸⁰ passed by the Parliament of the Republic of Lithuania on 12 January 2007, no longer contains provisions transposing the Distance Selling Directive into national law. The Law provides only for the rules implementing the Financial Services Distance Marketing Directive adopted in 2002.

However, removal of the distance selling provisions from the Law on the Protection of Consumer Rights did not at once solve all the problems related to the Lithuanian rules on distance selling because it was not only the mechanical transposition of the Distance Selling Directive that created a problem. A more important question lies within the inconsistencies that the provisions of the two Lithuanian implementing measures, which are left, generate. One should note that existing Lithuanian implementing measures were not applicable to contracts concluded via telecommunications operator⁸¹ until the adoption of the Law on Electronic Communications in 2004.⁸² Such an applicability exemption in the Lithuanian measures could only be explained by misinterpretation or by a shortening of the translation compared to the original provision of the Distance Selling Directive, which states that it is not

⁸⁰ Law on the Protection of Consumer Rights of the Republic of Lithuania, Official Gazette, 2007, No. 12-488.

⁸¹ See Art. 6.366 (3) of the Civil Code; Point 4.6 of the Ministerial Order. From 1 May 2004 area of social relations pertaining to electronic communications services, including telecommunication services, and networks, associated facilities and services, use of electronic communications resources as well as social relations pertaining to radio equipment, terminal equipment and electromagnetic compatibility is regulated by the Law on Electronic Communications of the Republic of Lithuania, Official Gazette, 15 April 2004, Nr. 69-2382.

⁸² Law on Electronic Communications of the Republic of Lithuania, Official Gazette, 2004, No. 69-2382 (hereinafter referred to as Electronic Communications Law).

applicable to contracts concluded with telecommunication operators through the use of public payphones.⁸³ It is absolutely evident from the Directive that this exemption referred to highly specific cases of distance contracts (use of public payphones) but not to all cases involving a telecommunications operator. Nevertheless, this problem was eliminated; it is a lesson to the Lithuanian legislator to be more precise and accurate when transposing EU law into national legislation in the future.

Moreover, both national implementing measures transpose the same provisions of the Distance Selling Directive but to a different extent. Some of the provisions of the Directive are only implemented in the Ministerial Order No. 258,⁸⁴ whereas the Civil Code does not mention them.

In view of the imperfection of the transposition of the Distance Selling Directive, traders and service providers might find it difficult to follow the Lithuanian distance selling rules because of their contradictions and lack of legal clarity. Therefore, the national provisions on distance selling should be made more efficient and less confusing. One way to improve national regulation in the area of distance selling (which in fact is being implemented by the Consumer Rights Protection Board) is reviewing and improving the provisions of the Ministerial Order No. 258 making them truly supplementary, consistent, and informative with regard to the Civil Code.

⁸³ Art. 3 (1) of Distance Selling Directive, *supra* note 1.

⁸⁴ See Art. 10 of Distance Selling Directive, *supra* note 1; Point 23 of the Ministerial Order, Art. 6.366 – 6.368 of the Civil Code.

2.1.2. Implementation in E-Commerce

One should emphasize that adoption of special legislation on e-commerce in Lithuania took a substantive period and the process itself was quite complicated. Firstly, in February 2001, the Lithuanian Government approved the conceptual framework for national Information Society development in Lithuania.⁸⁵ There appeared the statement that Lithuania lagged behind the European standard in the use of Information Technology.⁸⁶ It was mentioned that use of IT must be promoted and increased by supporting, inter alia, the development of E-Commerce and by developing and harmonizing laws and regulations in this field.⁸⁷ Secondly, in 2001, the Law on E-Commerce in Lithuania was drafted. Although the draft law contained many important provisions and was thought to be in conformity with the provisions of the E-Commerce Directive, it has never been adopted. Later on, in April 2002 the Minister of Economy adopted the Ministerial Order “Regulation on the Provision of Information Society Services, especially Electronic Commerce, in the Internal Market”.⁸⁸ This act had to be seen as the official Lithuanian implementation of the E-Commerce Directive, although, it was just partial implementation. Besides, such minor problematic issues as inclusion of “*Internal Market*” in the title raised one question from the outset: Did such a sub statutory administrative legal act suffice to implement the provisions of Directive 31/2000/EC on E-Commerce?⁸⁹ True, implementation of a directive does not necessarily demand adoption of laws or even legislative action. Indeed, the ECJ so stated in one of its judgments.⁹⁰ At the

⁸⁵ Resolution of the Government of the Republic of Lithuania of 11 October 2004 confirming the draft concept of the new Lithuanian Law on Information Society Services, Official Gazette, 2004, No. 151-5497.

⁸⁶ *Ibid.*, point 2.

⁸⁷ *Ibid.*, e.g., points 8.2, 9.5.

⁸⁸ Lietuvos Respublikos ūkio ministro 2002 m. balandžio 10 d. įsakymas Nr. 119 “*Dėl kai kurių informacinės visuomenės paslaugų, ypač elektroninės komercijos, teikimo vidaus rinkoje reglamento patvirtinimo*” [Order of Minister of Economy of the Republic of Lithuania of 10 April 2002 on approval of Regulation on the Provision of Information Society Services, especially Electronic Commerce, in the Internal Market], Official Gazette, 2002, No. 40-1517, was terminated on 20 September 2006.

⁸⁹ See M. Civilka, “Elektroninės komercijos teisė” [Electronic Commerce Law] in *Informacinių technologijų teisė* [Information Technologies Law], ed. by D. Sauliūnas (Vilnius: NVO Teisės Institutas, 2004): 285-286.

⁹⁰ Case C-144/99, *Commission v Kingdom of the Netherlands*, [2001] ECR I-3541, paras. 17-18; Case C-433/93, *Commission of the European Communities v Federal Republic of Germany*, [1995] ECR I-2308, para. 18.

same time, this decision as well as earlier ones emphasized that national law must guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear, and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts. It was questionable whether a Ministerial Order could fulfil these conditions implementing E-Commerce Directive. A ministerial order could be described in its character as a legal act that provided norms binding on everyone. Therefore, that form of transposition might satisfy the requirements for implementation set forth in several decisions of the ECJ, which state that the provisions have to be binding in the domestic legal order.⁹¹ However, provisions of a ministerial order could only be applied if their content did not contradict statutory provisions.⁹² Furthermore, qualitative differences exist between laws and sub statutory legal acts in the Lithuanian legal system, since the latter are usually based on grounds foreseen in law and have the function of either implementing statutory provisions or particularising rules of a general character established by statutory provisions.⁹³ Nevertheless, they do not contradict to statutory provisions, according the legislative rules,⁹⁴ sub statutory acts cannot establish rights and obligations, which are not foreseen in higher legal act (statute, code, the Constitution).

On several occasions, the Lithuanian Constitutional Court had an opportunity to rule on the character and effects of sub statutory legal acts within the Lithuanian legal order. In one of its rulings, it can be found that:

⁹¹ See, e.g., Case C-239/85, *Commission of the European Communities v Kingdom of Belgium*, [1986] ECR 3645, paras. 7, 14.

⁹² Andruškevičius, Arvydas, *Administracinės Teisės Principai ir Normų Ribos* [The Limits of Principles and Norms of Administrative Law] (Vilnius: Teisinės Informacijos Centras, 2004): 128-131.

⁹³ *Ibid.*

⁹⁴ For more see *Ibid.*, 130; and Vancevičius, Stasys, *Valstybės ir teisės teorija* [Theory of the State and the Law] (Vilnius: Justitia, 2000): 100-250.

The sub statutory legal act is a legal act adopted by a competent body on the basis of and according to the procedure prescribed by the law. The sub statutory act is usually an act of administration. Norms of the law are realized by it; however, such an act may not replace the law itself and create new legal rules of a general nature that in their power would compete with the norms of the law. It is an act of application of norms of law irrespective of the fact whether this act is of temporary (ad hoc) or permanent validity.⁹⁵

Another decision emphasizes that Government resolutions, which are also sub statutory legal acts, conflict with the Constitution if they contain different legal rules, and therefore compete with those set up by laws.⁹⁶ The Court argued that the hierarchy and harmony of the Lithuanian legal system is seen to be disturbed in cases when sub statutory legal acts broaden rights that are also contained in laws.⁹⁷

Taking into consideration the place of the ministerial order within the Lithuanian legal system and the decisions of the Lithuanian Constitutional Court on sub statutory legal acts, it is doubtful whether effective application of the E-Commerce Directive could be assured by its implementation into Lithuanian domestic law. The applicability of a ministerial order as such is open to question by clearly creating new rights for consumers and obligations towards undertakings neither established in laws such as the Civil Code or the Law on the Protection of Consumer Rights, nor in others. Following the above rulings of the Lithuanian Constitutional Court, the Ministerial Order implementing the Directive, therefore, was recognized as conflicting with other Lithuanian statutory acts. Furthermore, the unexpected

⁹⁵ Ruling of the Constitutional Court of the Republic of Lithuania of 19 January 1994, “*On the compliance of the resolution of the Seimas of the Republic of Lithuania “On the main directions of land reform” 17 June 1993, with the Constitution of the Republic of Lithuania*”, Official Gazette 1994, No.7-116; see on the character of sub statutory Lithuanian legal acts according to the jurisdiction of the Constitutional Court of the Republic of Lithuania: Jarašiūnas, Egidijus, *et. al.*, *Constitutional Justice in Lithuania*, The Constitutional Court of the Republic of Lithuania (Vilnius, 2003): 347-362.

⁹⁶ Ruling of the Constitutional Court of the Republic of Lithuania of 26 October 1995, “*On the compliance of the provision of Part 7, Article 10 of the Law of the Republic of Lithuania “On the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property”, as well as the provision of item 1.2, item 2.1 and its sub-items 1, 2 and 3 of the 26 January 1994 Resolution No 55 of the Government of the Republic of Lithuania “On Partial Amending of the Procedure for Enforcement of the Law “On the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property”, Confirmed by the 15 November 1991 Resolution No 470 of the Government of the Republic of Lithuania” with the Constitution of the Republic of Lithuania*”, Official Gazette, 1995, No. 89-2007.

⁹⁷ *Ibid.*

form of publication, i.e. a form of sub statutory act, appeared to be the second critical point for transparency.⁹⁸

Finally, on 11 October 2004 the Lithuanian Government confirmed the draft concept of the new Lithuanian Law on Information Society Services.⁹⁹ Within this draft concept, it was foreseen that the provisions of the Ministerial Order on E-Commerce and therefore the implementation of the E-Commerce Directive would be transferred to the Law on Information Society Services and other statutory provisions to provide them with an appropriate legal basis.¹⁰⁰

On 1 July 2006 the Law of the Republic of Lithuania on Information Society Services¹⁰¹ came into force. The Law aims at implementing the E-Commerce Directive. It was already mentioned that before the adoption of the Law the E-Commerce Directive was only partially implemented in Lithuanian legal order. With the adoption of the Law on Information Society Services and the subordinate secondary legislation, the Lithuanian national legal framework for the relations associated with information society services is created. In conformity with the E-Commerce Directive, the Law sets requirements for the provision of information, conclusion of agreements by electronic means, defines responsibility of providers of information society services and other related subjects, establishes dispute resolution mechanisms, and other matters.

⁹⁸ Case C-300/81, *Commission of the European Communities v Italian Republic*, [1983] ECR 449, para. 10, where the ECJ, although not in the area of consumer protection but in the field of credit institutions, stated that Member States should implement the directive in question fully satisfying the requirements of clarity and certainty.

⁹⁹ Lietuvos Respublikos Vyriausybės nutarimas “Dėl Lietuvos Respublikos informacinės visuomenės paslaugų įstatymo koncepcijos patvirtinimo” [Resolution of the Government of the Republic of Lithuania confirming the concept of the Law on Information Society Services of the Republic of Lithuania], Official Gazette, 2004, No. 151-5497.

¹⁰⁰ *Ibid.*

¹⁰¹ Lietuvos Respublikos informacinės visuomenės paslaugų įstatymas [Law of the Republic of Lithuania on Information Society Services], Official Gazette, 2006, No. 65-2380.

2.2. Distance Selling and E-Commerce Directives' Implementation in the United Kingdom

Prior to the adoption of the Consumer Protection (Distance Selling) Regulations 2000,¹⁰² which came into force on 31 of October 2000, there was in effect Unsolicited Goods and Services Act 1971, which imposed both civil and criminal sanctions. The 1971 Act was designed to meet problems caused by “inertia-selling”. Goods were sent to the potential customer without his or her prior knowledge or request and then various techniques, from sending of an invoice to demands for payment and threats, were used to extract the notional price of the goods from the customer.

Distance Selling Regulations, which implement the Distance Selling Directive, repealed the part of the Unsolicited Goods and Services Act 1971 relating to civil remedies for sending unsolicited goods and introduced new measures in Regulation 24, effective for goods and services supplied after 31 of October 2000. A consumer is able to treat unsolicited goods as an unconditional gift if sent without the recipient’s agreement or knowledge, by someone with no reasonable cause to believe the goods would be acquired for business purposes. The sender loses all rights to the goods (Reg. 24(1)-(3)). Moreover, in some cases one involved in mentioned activity can be charged with criminal offence.¹⁰³

The E-Commerce Directive has been implemented generally in the United Kingdom by the Electronic Commerce (EC Directive) Regulations 2002¹⁰⁴, which (with the exception of Regulation 16, which came into force on 23 of October 2002) came into force on 21 August 2002. The E-Commerce Regulations are stated not to apply to any act passed on or after the date the Regulations were made or in exercise of a power to legislate after that date. This

¹⁰² S.I. 2000/2334 (hereinafter referred to as the Distance Selling Regulations).

¹⁰³ David Oughton and John Lowry, *Consumer Law* (Oxford: Oxford University Press, 2000), 81-82.

¹⁰⁴ S.I. 2002/2013.

provision assumes that every item of relevant legislation enacted after 30 of July 2002 will conform to the internal market provisions of the E-Commerce Directive. However, if non-conforming legislation is enacted after that date, the Regulations cannot be used either to apply UK laws to outgoing services or to disapply UK laws to incoming services, where required by the Directive. Moreover, the reason for so limiting the E-Commerce Regulations is not obvious.¹⁰⁵ Following the enactment of the E-Commerce Regulations, the government adopted a series of extending regulations, applying the original regulations to selected new legislation and statutory instruments. These are the Electronic Commerce (EC Directive) (Extension) Regulations 2003,¹⁰⁶ which extended the original Regulations to the Copyright (Visually Impaired Persons) Act 2002 and to the Tobacco Advertising and Promotion Act 2002 and the Electronic Commerce (EC Directive) (Extension) (No 2) Regulations 2003,¹⁰⁷ which extended the original Regulations to the series of existing copyright statutes and instruments and to two new copyright instruments.

Speaking about the method of implementation of the EU directives, the UK has chosen to implement Distance Selling and E-Commerce Directives by administrative, i.e. secondary legislation. However, it is not by itself making this legislation invalid, i.e. the implementation of the Directives by secondary legislation does not make them null and void. The problem is that this legislation does not exactly follow the structure and wording of the Directives. Therefore, there same problems as discussed in Subchapter 2.1 can arise and there is a risk that this legislation might be challenged in the ECJ.

¹⁰⁵ Graham J.H. Smith, ed., *Internet Law and Regulation* (3rd edition, London: Sweet & Maxwell, 2002). See online updates to the Third Edition available at <http://www.sweetandmaxwell.co.uk/online/intreg/index.aspx> (accessed October 5, 2007).

¹⁰⁶ S.I. 2003/115.

¹⁰⁷ S.I. 2003/2500.

CHAPTER 3. IMPLEMENTATION OF THE CONSUMER RIGHT TO INFORMATION: THE IMPORTANCE OF ADMINISTRATIVE MEASURES

“...The Commission concluded that measures are needed to protect the consumer because, in order for the internal market to work properly, it is necessary for guarantees concerning products purchased by consumers in another country to be honored without discrimination in the consumers’ country of residence.”¹⁰⁸

Every citizen of the EU potentially is a consumer; therefore, the principal objective of the consumer policy is supporting education and informing the consuming public. One of the primary aims of the Distance Selling and E-Commerce Directives is to protect consumers by providing them with sufficient and appropriate information. It has been mentioned in Chapter 1 of this master thesis that information provisions were somewhat controversial during the drafting of the Distance Selling and E-Commerce Directives. Moreover, as discussed in Chapter 2 requirements concerning the information to be provided to the consumer by the seller or service provider were quite innovative for some Member States, and therefore, transposing the provisions of the Directives into national legislation was enough challenging to them. In addition, Member States had to ensure the enforcement of appropriate administrative measures.

Referring to the above mentioned problem, the consumer right to receive information when participating in distance selling and e-commerce and the problem of its administrative implementation will be considered below.

¹⁰⁸ George T. Brady, “Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises?” *North Carolina Journal of International Law & Commercial Regulation* 23 (1997): 155.

3.1. Consumer Right to Information

E-commerce and distance selling bring great benefits to consumers by providing greater choice, promoting competition among suppliers, and allowing businesses to develop new relationships with their customers to the advantage of both. However, they also create new risks for consumer protection, including those arising from the cross-border consumer transactions. For instance, Internet is a cheap and easy way for fraud, especially in respect of the most vulnerable group – the electronic consumers. For example, there are pseudo-entrepreneurs, who try to sell goods or services using anonymous e-mail addresses or a mail box number, thus making it difficult to find out their actual location; “get-rich-quick schemes” online; paid offers of revealing secret methods for the privileged, claiming to skyrocket consumer’s money, miracle health and beauty products, etc.¹⁰⁹ Moreover, online consumers face problems of understanding of the terms and conditions of the electronic contracts as the majority of the online sellers provide information about the goods and services on sale just in one language and only few sellers have bilingual or multilingual information available to the consumers. The same can be said about the possibility to participate in distance sales of people with disabilities as far as only few Internet sellers have special versions of their web pages adapted to the needs of the disabled people. Finally, information about the goods and services which are being sold through the Internet is often vague, definitions are not clear; the wording is very formal, confusing and complicated for the ordinary consumer to understand.

E-consumers must be aware of possible internet fraud. However, the relevant and effective means of protection of consumer rights should also be ensured. The Director General of Fair Trading of the United Kingdom described “vulnerable consumers” as “those who through

¹⁰⁹ For more see http://www.konsument.gov.pl/en/handel_elektroniczny/index.html (accessed March 29, 2007).

age, infirmity or another disadvantage have difficulty in obtaining and understanding the information they need.”¹¹⁰ Informational problems in sphere of distance selling and e-commerce are particularly great. Therefore, consumer policy, related to distance selling and e-commerce, as a part of the wider EU consumer policy should aim to improve consumer confidence in the internal market. Recent activity on the regulatory, enforcement and information aspects of consumer confidence will also help the development of distance selling and e-commerce in the EU. First, the regulation needs to be right to stimulate consumer confidence and enable business to conform to EU consumer demand easily. Therefore, online consumers generally have the same rights and protection as offline consumers. Second, regulation needs to be enforced. Third, consumers need information and advice to use cross-border opportunities. Furthermore, the rules on providing information to consumers should be even more relevant and clearer in this field.

Moreover, in recent years the EU policy designated a goal of creating a body of active consumers who would be aware of what they can require from suppliers and, thus, able to use their power of informed choice in order to induce the efficiency of the markets. To achieve this goal, in shops and through the media, consumers should be provided with accurate, thorough and comprehensive information. The notion that the consumer, duly informed and thereby protected, is able to participate fairly and effectively in the market, has obtained the status of a guiding principle of policy.¹¹¹

Summarizing, consumer information reduces the imbalance of knowledge between consumer and supplier; therefore, on the one hand, consumers are enabled to inform suppliers about

¹¹⁰ Bridgeman, James “A Speech to the Year Ahead Symposium” in *Consumer Protection in Financial Services*, ed. Peter Cartwright (London: Kluwer Law International, 2000), 11.

¹¹¹ See Weatherill, Stephen, “The Role of the Informed Consumer in European Community Law and Policy”, *Consumer Legal Journal* 2 (1994), 49.

their real preferences as well as make an informed choice and suppliers, on the other hand, are able to compete with each other more fairly and efficiently.

Thus, a right to receive information is a principal consumer right, therefore, many consumer law directives contain specific and very detailed suppliers' duties regarding providing of information to consumers. As has been already mentioned such directives include, *inter alia*, the Distance Selling Directive (Articles 4-5), the Financial Services Distance Marketing Directive (Articles 3-5), and the E-Commerce Directive.

One of the major goals of the Distance Selling Directive is the increase in information requirements. The latter could be divided into two types: pre-contractual disclosure and written disclosure at or just after signing of the contract. Pre-contractual information should be provided in sufficient time prior to the conclusion of the contract. "Before signing a distance contract, a consumer must receive clear and comprehensible information about the service itself, the supplier, the cost and the right of withdrawal. Contracts must be in writing or on another durable medium."¹¹² According to Article 4 of Distance Selling Directive supplier must provide consumer with following prior information:

- (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
- (b) the main characteristics of the goods or services;
- (c) the price of the goods or services including all taxes;
- (d) delivery costs, where appropriate;
- (e) the arrangements for payment, delivery or performance;
- (f) the existence of a right of withdrawal, except in the cases referred to in Article 6 (3);
- (g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
- (h) the period for which the offer or the price remains valid;
- (i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.¹¹³

¹¹² *Distance Selling*, http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sell/index_en.htm (accessed March 29, 2007).

¹¹³ *Supra* note 1.

Under the Distance Selling Directive the second “package” of information requirements should be fulfilled in good time during the performance of the contract, and at the time of delivery latest, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him. The confirmation or confirmation on another durable medium (electronic mail) must be given to the consumer at the time of performance of the contract and the following information must also be presented in writing:

- arrangements for exercising the right of withdrawal;
- the place to which the consumer may address complaints;
- information relating to after-sales service;
- conditions under which the contract may be rescinded.¹¹⁴

The ECJ considers that non-disclosure of information to consumers may itself infringe Article 28 of the EC Treaty. For example, in *GB-INNO-BM v CCL*,¹¹⁵ the ECJ held that a Luxembourg law controlling the provision by a trader of information about prices was capable of impeding trade in goods from States where no such control was imposed, therefore, it was incompatible with Article 28. The court declared that “under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements”.¹¹⁶

¹¹⁴ *Supra* note 103.

¹¹⁵ Case C-362/88 [1990] ECR I-667.

¹¹⁶ *Ibid*, para 18.

3.2. *Administrative implementation of the Consumer Right to Information*

Speaking about the administrative implementation of the Distance Selling and E-Commerce Directives on consumer right to information in the United Kingdom, one must note that there were no problems in this field. The UK has duly transposed information provisions to the national legislation; moreover, applied administrative measures are satisfactory, since in the UK several services are responsible for consumer information and exercise powers at national level as well as local level. Belgium, Denmark, Germany, Luxemburg have also successfully completed the administrative implementation of the consumer right to information. For example, Luxembourg Government is aware that effective protection and a genuine consumer policy are possible only if consumers are adequately informed about their rights and therefore, it subsidizes the Luxembourg Consumers' Union (ULC), which has the formal mission of informing consumers. The government has also established a legal information service at the courts, which provides information of a general nature to the public.¹¹⁷

As the contrast to the above mentioned states, Lithuania lacks administrative implementation of the Distance Selling and E-Commerce Directives on consumer right to information. Nevertheless, Lithuania has adopted national legislation implementing Distance Selling and E-Commerce Directives (which as mentioned in chapter 2 also is not completely clear and flawless). Thus, such activity can be considered as formal implementation. The problem of practical realization and day-to-day administrative implementation of the consumer right to information remains unsolved. The main reason is that Lithuania simply re-wrote the Distance Selling and E-Commerce Directives without any further analysis of possible legal or economic consequences of such copy-paste "legislation", ignoring problems, associated with the application of these legal acts. Consequently, the Lithuanian Government did not

¹¹⁷ Consumer Policy in Luxembourg: as Compared with the Other Member States of the European Union, European Commission Health and Consumer Protection Directorate-General, October, 1999, http://ec.europa.eu/consumers/reports/nat_folder/rapplu_en.pdf (accessed November 2, 2007).

introduce sufficient administrative measures. Furthermore, national consumer protection associations and organizations do not play an active role thus failing to support consumers in enforcing their right to information. Finally, the passiveness of consumers and internet users¹¹⁸ demonstrates that Lithuanian consumers are inclined to reconcile with the violation of their rights to information, committed online.

In conclusion, one should suggest several possible ways of resolution of problem of administrative implementation of the Distance Selling and E-Commerce Directives' consumer right to information in Lithuania.

Firstly, the means and possibilities have to exist to secure protection of consumer rights, especially to information.¹¹⁹ Although directives being not sufficiently implemented into national law might under specific circumstances have direct effect against a Member State and its authorities that fail to implement it properly,¹²⁰ such a direct effect of directives in conflicts between private individuals has been consistently rejected by the ECJ in its judgments.¹²¹ It has repeatedly held that based on Article 249 (3) EC Treaty directives cannot alone impose obligations on individuals.¹²² Thus, direct applicability of provisions of a directive can be affirmed only to a very limited extent. In the case of implemented provisions

¹¹⁸ There are only a few complaints regarding infringement of rights, including right to information, in the internet context, filed with the National Consumer Protection Agency, and there are no such claims before the courts of the law at all.

¹¹⁹ See Joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer (C-397/01)*, *Wilhelm Roith (C-398/01)*, *Albert Süß (C-399/01)*, *Michael Winter (C-400/01)*, *Klaus Nestvogel (C-401/01)*, *Roswitha Zeller (C-402/01)* and *Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.*, [2004] ECR I-8835, para. 111.

¹²⁰ See e.g. the famous landmark decision on direct vertical effect of Directives: *Van Duyn v Home Office*, *supra* note 118, para. 12; also Case C-51/76, *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, [1977] ECR 113, paras. 21-24.

¹²¹ E.g. Case *Marshall v Southampton*, *supra* note 118, para. 48; also in one of the recent judgments of the ECJ, Case C-144/04, *Werner Mangold v Rüdiger Helm*, [2005] ECR I-0, paras. 74-77, the Court did not explicitly give direct effect to the provisions of the directive but did refer to the principle of non-discrimination as general principle of Community law to base the obligation for a national court to set aside national rules not conforming with the directive and the general principle of Community law.

¹²² E.g. Case C-91/92, *Paola Faccini Dori v Recreb Srl*, [1994] ECR I-3325, paras. 20-21; Case C-201/02, *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, [2004] ECR I-723, para.56.

of the Distance Selling and E-Commerce Directives, ineffective implementation into the national legal order might prevent a consumer from enforcing rights towards undertakings selling their goods and services through the means of distance communication.

Especially for the protection of the right to information - direct effect could possibly be drawn from the rights enshrined in Article 153 EC Treaty in connection with directives. Since the right of information is already contained in Article 153 EC as primary law, directives only substantiate the provisions already established there. Therefore, in case of conflicts of a horizontal nature, consumers might directly refer to their rights of information established in European Community law. On the other hand, beside the duty to faithfully implement the provisions of a directive into national law, Member States, under Article 249 (3) in connection with Article 10 EC Treaty, are obliged to achieve the result envisaged by the directive and therefore have to take all appropriate measures to ensure the fulfillment of that obligation. The ECJ has in addition consistently decided that this obligation is binding not only on all authorities of a Member State but also on national courts.¹²³

To overcome the gap in the effectiveness of EC law in case of improper implementation of a directive, the national court has to interpret its national law in the light of the wording and purpose of the directive in question.¹²⁴ On numerous occasions, it was stated that the obligation to interpret national legislation in the light of the directive extends to all national law and not just to legal acts adopted to implement the directive itself. Furthermore, this may also not depend on whether national legal acts already existed at the time of transposition.¹²⁵

¹²³ *Supra* note 118 and 121-122; Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, [1990] ECR I-4135, para. 8.

¹²⁴ *Ibid.*

¹²⁵ *E.g.* Joined case C-397/01 to C-403/01, *supra* note 120, para. 115; Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98), [2000] ECR I-4941, paras. 31-32; Case C-54/96, *Dorsch Consult Ingenieuresellschaft mbH*

The interpretative extension to the whole national law is also expedient in respect to the idea of harmonization, since the goal of harmonization cannot be reached by simply transposing one or the other legal norm into the domestic legal system. Only if the latter is also interpreted in its entirety in accordance with the aim envisaged by the directives will a convincing result be achieved.

Following the essence of the decisions, a possibility might exist for the Lithuanian implementing provisions to gain full protective effect for consumers despite the shortcomings mentioned, if national courts follow the stated approach. Therefore, they should interpret not only the implementing national provisions in the light of the Directives but also all existing national law contradicting these provisions to provide them with full effect. This would include the Civil Code, the Law on Consumer Rights Protection, and possibly also national constitutional provisions and principles.

Regarding to the case-law of the ECJ, the above principle of interpretation in the light of the wording of the directives is not restricted to interpretation in its strict sense. Concerning the relation between the Lithuanian Distance Selling and E-Commerce provisions, the ECJ has shown in several of its decisions that it does not make any difference whether the provisions were implemented into national law or whether the matter is one of non-implementation.¹²⁶ It must rather be seen as both the interpretation of existing national law and the change of

v *Bundesbaugesellschaft Berlin mbH*, [1997] ECR I-4961, para. 43; Opinion of AG van Gerven delivered on 30 January 1990 in Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, [1990] ECR I-1889, para. 50: "It is difficult to justify a restriction of the requirement of interpretation in conformity with the directive to the implementing legislation itself (quite apart from the difficulty of determining whether or not a given national provision has been enacted for the purpose of transposing a directive into national law) since the directive has, as from the time of its adoption and *a fortiori* as from the expiry of the period prescribed for its transposition into national law, become part of Community law and as such takes precedence over all provisions of national law." and delivered on 12 July 1990 in Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, [1990] ECR I-4135, para. 9.

¹²⁶ See M. Lutter, 'Die Auslegung angeglichenen Rechts', 47 *Juristen Zeitung* (1992) p. 607; S. Lubitz, *supra* note 42, p. 187.

content of national law by integrating the aims of the Directive¹²⁷, although not thereby establishing the direct effect of the directives in question but realizing the direct application of national law interpreted in the light of European law.¹²⁸ This means that the method of directive-conforming interpretation should also be applied for the purposes of gap-filling in domestic law out of the obligation to ensure the full effectiveness of directives. Thus, consumers should also be protected by the distance sale provisions as far as the scope of Distance Selling Directive reaches in cases when they use means of e-commerce through the interpretation of the national provisions on exemptions in the limited scope of Article 3 of Distance Selling Directive.

Although interpretation in conformity with the directive is the prior interpretation method for national law,¹²⁹ this is unproblematic only as long as this interpretation follows the structure and the teleology of interpretation of national law. The ECJ as well as AG van Gerven have held that the possibility of interpretation is limited where national law does not provide for a national interpretation method of the respective provisions in such a way as to construe it in the light of the wording and the aim of the Directive.

Summarizing, as it was already mentioned, consumers may refer to the direct effect theory, stating that individuals have the right to invoke EC law to challenge national measures implementing EC law. The clear, precise and unconditional provisions of EC legal instruments confer rights directly to individuals.¹³⁰ Therefore, individuals can bring cases

¹²⁷ See M. Lutter, *supra* note 60, p. 597.

¹²⁸ E.g. Opinion of AG van Gerven delivered on 12 July 1990 in Case C-106/89, *supra* note 57, para. 7; M. Lutter, *supra* note 60, pp. 604-605.

¹²⁹ See e.g. Opinion of AG Van Gerven delivered on 30 January 1990 in Case C-262/88, *supra* note 59, para. 50.

¹³⁰ See Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1; Case 41/74, Van Duyn v. Home Office, [1974] ECR 1337; and Case 152/84, Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) [1986] ICR 335.

before the national (in this particular case – Lithuanian) courts challenging the administrative measures of implementation of Distance Selling and E-Commerce Directives’ right to information. Secondly, consumers might submit complaints to the Commission under Articles 226-228 of the EC Treaty in order to get Lithuania to comply with EC law, namely, Distance Selling and E-Commerce Directives (infringement procedure). The Commission, after evaluation of the State’s efforts to comply, has the discretion of deciding whether the case is to be brought before Community Courts. Therefore, through this procedure individuals could force Lithuanian Government to implement proper administrative measures ensuring consumer right to information under the Distance Selling and E-Commerce Directives.

As a matter of fact, since the expiration of the term of implementation of the Distance Selling and E-Commerce Directives, including implementation of the right to information, the Commission has not received any complaint against Lithuania concerning the implementation of these Directives. Moreover, the Commission is not requested and does not plan to initiate any infringement action against Lithuania regarding above mentioned Directives.¹³¹ Therefore, one might conclude that, firstly, individuals are not aware of the possible ways of protection of their rights and, secondly, in case they are aware, they lack enthusiasm, resources and support of governmental and non-governmental organizations.

Finally, the national consumer protection associations and organizations should become more active in encouraging the consumers to protect their right to information. Moreover, as a further precondition for effective consumer protection by interpretative means of national

¹³¹ Thibaut Cruysmans (representative of the Directorate General for Communication of the European Commission), e-mail message to author, November 12, 2007.

law, consumers and judges have to be aware of and have to know about the differing meaning of the provisions under national and European law.

CONCLUSION

The primary aim of this master thesis has been to analyse consumer protection in the field of distance selling and e-commerce, to examine consumer protection problems, including implementation of their right to information when purchasing on a distance and by means of e-commerce, as well as to suggest possible solutions of these problems. In order to achieve this aim, the present thesis has evaluated international consumer protection provisions, EU legal instruments, national legislation of the selected Member States, case-law of the EU judicial bodies, as well as of the national courts, and finally, the works of the prominent legal scientists.

The thesis has discussed the history of adoption of the Distance Selling and E-Commerce Directives in order to reveal the situation of consumer protection in this area prior and after these Directives came into force. Moreover, it has discovered that the roots of the inappropriate consumer protection in the sphere of distance selling and e-commerce mostly lie in the failure of the Member States to ensure a proper transposition of the Distance Selling and E-Commerce Directives into national legal system and to conduct due administrative implementation of the Directives.

A comparative analysis of the implementation of the Distance Selling and E-Commerce Directives in Lithuania and the United Kingdom has revealed the major mistakes made by Lithuanian Government while transposing Directives into national system. Therefore, the best solution might be the revision of the recent Lithuanian legislation which unduly implements both Directives.

Discussion of the lack of administrative (governmental) measures of implementation of the consumer right to information when concluding contracts by means of distance selling and e-commerce in Lithuania brought up the possible solutions such as submitting complaints to the Commission on the improper implementation of consumer right to information of Distance Selling and E-Commerce Directives in order to initiate the infringement procedure, promoting the activities of the governmental and non-governmental consumer rights organizations and encouraging individuals to protect their right to information.

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