



**SELECTED ISSUES OF ONLINE CONSUMER PROTECTION LAW IN
THE UNITED STATES, THE EUROPEAN UNION AND BOSNIA AND
HERZEGOVINA. A COMPARATIVE ANALYSIS**

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ABSTRACT

Although the main principle in the contract law is that contracts should be respected, under specific circumstances in consumer contracts, there is a possibility of deviation from the principle. Since consumer is a weaker party, in the online environment he is given three basic rights which are the right of withdrawal, the right of information and the protection against the unfair contract terms. The objective of the thesis is to compare their regulation in the European Union and the United States in order to see if results of the comparison can influence the improvement of Bosnian and Herzegovinian legislation. The method which is used is the functional method of comparative law. It will be shown that the solution of US system provided for clear communication of the information could be easily implemented in the Statute of Consumer Protection of B&H. The Statute is harmonized to certain extent with EU legislation, however some of the provisions were integrated in ambiguous manner. Moreover, some of them were not properly translated in the process of transposition. Therefore, it is highly recommended that the amendment of specific articles takes place.

Keywords: consumer protection, information duties, withdrawal, unfair contract terms, distance selling, e-commerce, online environment.

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ABBREVIATIONS

AAA	American Arbitration Commission
B&H	Bosnia and Herzegovina
B2C	Business to Consumer
ECJ	European Court of Justice
ERSCA	The Electronic Records and Signatures in Commerce Act
EU	European Union
FTC	Federal Trade Commission
MHSSA	Michigan Home Solicitation Sales Act
MMWA	Magnuson – Moss Warranty Act
MSN	MicroSoft Network
SARL	(French: Société à responsabilité limitée) - Limited liability company
UCC	United Commercial Code
UCTD	Unfair Contract Terms Directive
US	United States
USD	United States Dollar
v.	(Latin: versus) – against

1. INTRODUCTION

Internet has become an integral part of the consumer life. Online shopping consumes less time and avoids standing in long lines. Goods are usually delivered to home addresses in the time frame of couple of days. Need for searching a parking lot is avoided and time spent in traffic is saved. Moreover, goods sold on the internet are most of the time cheaper than in the offline environment, due to the high competition of resellers from all parts of the world. Contracting in the internet is also very convenient. After finding a perfect product, all the consumer has to do is to spend couple of minutes entering the required data. Some websites are making even this process faster. Sometimes even a click of a mouse is enough to place an order.¹

In the US, the consumer is defined as a person which is purchasing goods for personal use with no intention of reselling.² EU directives also provide for similar definition of consumer as a person acting for a purpose outside of his profession.³ Although online consumer contracting is more convenient, cheaper and time saving, the consumer can be faced with difficulties which are not present in the offline sale of goods. He does not have opportunity to check the goods in person before buying them. Due to the lack of information or even misrepresentation, the consumer can be easily dissatisfied with the ordered goods. In a contrast to offline contracts, online contracts are more often in the form “take it or leave it” and he is in no position to negotiate. Internet service providers as sellers, tend to misuse weaknesses of consumers, therefore in overcoming these barriers, laws on consumer protection have to be properly developed.

¹ Eg. One click service at Amazon.com.

² Black's Law Dictionary (9th ed. 2009).

³ Eg. Art.2 of Unfair Contract Terms Directive.

1.1. Consumer protection in the US, EU and B&H

Before 1960s US consumer protection barely existed. The area of modern consumer protection began with the Consumer Bill of rights of President Kennedy. In 1968, the Congress passed the Truth in Lending Act⁴, which regulated consumer financial services. This act signaled a start of a new phase of regulating consumer protection at federal level.⁵ Although consumer protection is even today a state concern, some federal laws have been passed that expressively or implicitly regulate this area of law.⁶ In regard to the online consumer protection, the United States do not have a different set of rules as it is in the EU. US consumer laws are not harmonized also at federal level and consumer protection differs between the states. Therefore, when making a reference to the particular state laws in the thesis, the reference will be made to the most developed state consumer protection laws.

While in the United States the role of case law enables fast developments in the protection of the consumer, in the EU the process is slower having in mind long directive enacting procedure. At the time of establishment of the European Community, none of the Treaties addressed the issue of consumer protection. It was presumed that the consumer will enjoy the benefits of a new market approach in elimination of the trade barriers.⁷ Except as a policy, the Treaty of Rome did not have any provision on the matter of consumer protection.⁸ The protection started developing in the 1970s with the start of the first consumer program.⁹ The first consumer directives were adopted in the middle of 1980s. In regard to the online consumer protection, changes happened in 1997 with the adoption of the Distance Selling

⁴ 15 U.S.C. §§1601- 1667f (1968).

⁵ Mark E. Budnitz, The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils, 26 GA. ST.U.L.REV. 1147 (2010), at 1149.

⁶ Eg. The Magnuson-Moss Act, 15 U.S.C. §§2301-2312 (1975).

⁷ STEPHEN WEATHERILL, EU CONSUMER LAW AND POLICY 4, (Edward Elgar Publishing, Northampton, 2005).

⁸ Anna Wilinska-Zelek, Consumer Rights – New Tendencies, Considerations about Directive 2011/83/UE at 2 (March 8, 2013) available at <http://polishreviewofsocialscience.cont.pl/wp-content/uploads/2012/05/wilinska-zelek-consumer-rights-new-tendencies-considerations-about-directive-2011-83-UE.pdf>.

⁹ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information policy, Official Journal of European Communities C 92/1 (1975) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1975:092:0001:0001:EN:PDF>.

Directive, following with the Directive on E-Commerce in 2000. Later, in 2011, the Directive on Consumer Rights has been enacted bringing significant changes in EU consumer protection law. Statutes and courts are not the only stakeholders having an important role in development of the consumer law. In the US, the most important agency providing for consumer protection is the Federal Trade Commission. This agency has a mission to prevent the practices which are deceptive or unfair, to educate consumers about their rights while avoiding, at the same time, burdening of the business process.¹⁰ In the European Union, important consumer institution is the European Consumer Centre, which advises EU residents, while participating in the cross-border transactions.

In Bosnia and Herzegovina, the first rules on consumer protection were adopted in 2002. The Statute on Consumer Protection was later amended dates in 2006.¹¹ The reason why there was a need to adopt the Statute is the request to follow the trends of the European Union in order to successfully accede as a member state.¹² Bosnia and Herzegovina has also an independent institution of the Ombudsman for Consumer Protection.

The essential rights an online consumer is given are rights of withdrawal and information and, protection from unfair contract terms. As legal traditions are different and some are more liberal than the other, states have taken divergent standings upon the issue of these consumer rights. The thesis will, therefore, compare more and less liberal approaches of the United States and the European Union, in order to improve consumer protection in Bosnia and Herzegovina. Digital goods represent an important segment of online sale, nevertheless the scope of the thesis is limited to the sale of tangible goods.

¹⁰ The Federal Trade Commission (Feb.19, 2013) available at <http://www.ftc.gov/ftc/about.shtm>.

¹¹ In the further text, it will be referred to the Statute of 2006.

¹² The Consumer Protection Statute of B&H had to be in compliance with European law as it was one of 16 conditions which had to be fulfilled in order for B&H to conclude The Stabilization and Association Agreement with the EU.

1.2. Research questions

The thesis has two research questions. The main research question is how can Bosnian and Herzegovinian consumer protection be optimized relying on the resources from the EU and the US? In order to answer, it is necessary to answer to a research question of peculiarities of consumer rights laws in the US and the EU.

1.3. Methodology

In the thesis, protection from unfair contract terms, right of information and withdrawal right will be described and analyzed in comparative perspective including certain case law reviews. Comparative method was of particular use in the countries of Central and Easter Europe after the fall of the socialist governments where “[t]he experience of the other European countries helps(ed) them to choose the solution which best suits their own legal traditions [...]”¹³ As Bosnia and Herzegovina is also one of the former socialist countries, successful solutions of developed systems should find its place in the future consumer protection movements.

According to Konrad Zweigert and Hein Koetz, a basic model of comparative law is the functionality model.¹⁴ The main objective of the thesis is to analyze the functionality of different rules applied to Bosnian model, therefore this method is the most appropriate. In order to apply functional method it is necessary for a scholar to find a functional equivalent of the same rule in the other compared systems.¹⁵ That is possible in the case at hand, since the same problem of consumer protection is faced in all of the three jurisdictions. However, there are many differences in the evaluation of the problem and the attempts to solve it.

¹³ KONRAD ZWIEGERT & HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 17 (Clarendon Press, 1998).

¹⁴ Id. at 34.

¹⁵ GUISEPPE PIER MONTANERI, METHODS OF COMPARATIVE LAW 117 (Edward Elgar Publishing Inc, Northampton 2012).

The final function of comparative law is to apply its findings in the international context. The aim is to decrease or to eliminate discrepancies in different regulations in order to harmonize national laws.¹⁶ This model is of particular importance to be applied in Bosnian consumer protection as a value model. Bosnian law is already highly influenced by the European due to the current political trends of enlargement of the European Union. Elimination of law divergences is an approach B&H has taken on its path towards the accession.

1.4. Structure of the thesis

The main body of the thesis contains of three chapters, starting with the second chapter which addresses the issue of unfair contract terms. Mass contracts are an everyday phenomenon and therefore to shorten contracting time, they are usually in the form of adhesion contracts. The consumer does not have any influence and sometimes does not have knowledge of existence of the contract itself. Different wrap contract methods have made it impossible for the consumer to buy the goods or services without agreeing to long, endless contracts.

The third chapter addresses the issue of information duties. It does not respond to the question of privacy and how revealed consumer information should be protected. This chapter, however, examines the extent of information disclosed by business person (not) required by law. The objective of the chapter is to point out to the problem of the lack and the excessive information.

The right of consumer to be informed and the right of withdrawal are essential tools in overcoming the lack of presence while purchasing. Withdrawal right is described in the fourth chapter. It is designed for internet contracting in order to avail a privilege to the consumer to

¹⁶ ZWEIGERT & KOETZ, *supra* note 13, at 24.

change his mind. He has an opportunity to give the goods back without stating a reason why. The only cost the consumer can be associated with is the cost of return. Right of withdrawal is present in the all three systems, however the period of time to exercise the right is very different.

2. UNFAIR CONTRACT TERMS

In the last three decades, the European Union has shown considerable interest in the development of the protection of consumer rights. One of the rights guaranteed is consumer relief from the unfair contract terms in the framework of the Directive of 1993 on Unfair Contract Terms.¹⁷ In contrast, the United States are more of a liberal approach towards consumer contracts¹⁸, therefore in American law an individual statute on unfair contract terms does not exist. In Bosnia and Herzegovina, influence of the EU has been very important in development of consumer protection. Therefore, in 2002 Bosnian legislation enacted the Statute on Consumer Protection which was amended in 2006¹⁹, modeling it on EU directives. Neither of the legal systems have a different set of rules regulating unfair contract terms in the online world.

This chapter provides an overview of unfair contract terms regulations. The differences are also explained on the example of two Amazon websites which are designed for the US and the UK market. The last subchapter is devoted to Bosnian model on consumer protection against unfair contract terms. The objective of the chapter is to give not only an overview of solutions in the US and the EU, however to give recommendations consisting of possible improvements of Bosnian Statute relying on US and EU resources.

¹⁷ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts L 95/29 (1993) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1993:095:0029:0034:EN:PDF>, hereinafter Unfair Contract Terms Directive, Directive on Unfair Contract Terms or UCTD.

¹⁸ Jane K. Winn & Mark Webber, The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants, 62 *The Business Lawyer* 209, 211 (2006) available at https://courses.washington.edu/sales09/Handouts/winn_webber_unfair.pdf.

¹⁹ Zakon o zaštiti potrošača u BiH, Službeni glasnik BiH br. 25/06 (2006) [Statute on Consumer Protection of Bosnia and Herzegovina, B&H Official Gazette 25/06 (2006)] available at http://www.uptz.ba/index.php?option=com_content&view=article&id=56:zakon-o-zastiti-potrosaca-u-bih&catid=34:zakon-o-zatiti-potroaa-u-bih&Itemid=61.

2.1. Peculiarities of online adhesion contracts

In the framework of business to consumer²⁰ agreements in the online environment, contracts are most of the time not individually negotiated since the value of the contract is often very small. Terms and conditions of the contract are usually incorporated in the website in a presence of a link which connects the “Home page” to the new website containing conditions of use or sale. Often these provisions are not included in one, rather they are scattered over several different pages, making it harder for the consumer to access the relevant information. Most common models used in the incorporation of the terms of use into an online contract are clickwrap and browsewrap agreements.²¹

A clickwrap agreement is a method of including terms and conditions of the website or software by clicking on the “I agree” button. Afterwards, terms and conditions become an online contract or its constituent part.²² The notion of the browsewrap agreement refers to a similar practice where consumer agrees to terms and conditions by conduct, normally in a form of a mere usage of the website or by a registration. Since terms and conditions contain a non-negotiable provision that obliges the user to respect the content of the Act, consumers may be bound without even having any knowledge about the existence of the contract.²³

In the EU, browsewrap and clickwrap agreements are enforceable as long as they comply with the content of directives that regulate the consumer protection. The situation in the US is different, since identical consumer protection statute does not exist at the level of all states regulating in a detail all aspects of consumer transactions. Therefore, the enforceability of contractual terms contained in the form of the browsewrap or the clickwrap agreement differs on a case to case basis.

²⁰ Hereinafter B2C.

²¹ CRISTINA COTEANU, CYBER CONSUMER LAW AND UNFAIR TRADING PRACTICES 45-47 (Ashgate Publishing Limited, England 2005).

²² ALAN DAVIDSON, THE LAW OF ELECTRONIC COMMERCE 68 (Cambridge University Press, 2009).

²³ COTEANU, supra note 21, at 55.

2.2. Unfair contract terms in EU and US

The Directive on Unfair Contract Terms is a very short directive of 11 articles. In order for the contractual term to be regarded as unfair, according to Art.3 of the Directive, contractual term should not be individually bargained, under the condition that it causes significant imbalance between parties to the consumer's detriment.²⁴ A non-individually bargained term represents a term drafted in advance, not allowing the consumer to influence its content.

In the US, the doctrine of unconscionability is applied in a case of a fundamentally unfair contract or a contractual term. The court, according to the doctrine, has the discretion to invalidate the contract in a situation of extreme unfairness between the contractual parties.²⁵ If contractual terms are unreasonably in favor of one of the parties under the conditions that the other party did not have a meaningful choice,²⁶ the court may refuse to enforce the contract. Rules for application of this doctrine are set in the provision 2-302 of the Uniform Commercial Code.²⁷ Courts may decide not to enforce the contract clause in question or the entire contract. Furthermore, the court has a right to balance the contract, therefore to limit the application of the unconscionable contract term(s) in order to avoid the unconscionable result.

Legal definition of unconscionability is not provided in the UCC, therefore the courts decide which term is unconscionable on a case by case basis. As a remedy, the court will usually provide for non-enforcement of the imbalanced term, however rarely satisfy party's claim for damages.²⁸ Unconscionability can be regarded as procedural or substantive.

²⁴ Art.3.1 UCTD.

²⁵ Black's Law Dictionary (9th ed. 2009).

²⁶ Philip Bridwell, The Philosophical Dimensions of the Doctrine of Unconscionability, 70 U. Chi. L. Rev. 1513, 1513 (2003).

²⁷ The Uniform Commercial Code (hereinafter UCC) is a model law drafted by leading experts of commercial law in the US. It has been implemented in all 50 states. In the further text a reference made to the UCC is the reference to the model law and not to the state implemented versions of it.

²⁸ JANE WINN & BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE §6.02[C] at 6-12 (Aspen Publishers, New York 4th ed. 2006).

Procedural unconscionability results from improprieties in the contract formation, whereas substantial unconscionability represents actual contract term that is commercially unreasonable.²⁹ Adhesion contracts or the contracts in the form „take it or leave it“ are usually considered as procedurally unconscionable.³⁰ However, that does not mean that the court will allow relief from the contract, unless it contains unreasonably harsh term.³¹

Both systems of consumer protection tend to safeguard the same values while not enforcing imbalanced clauses which are obviously only on the detriment of one contract party. The application of the doctrine of unconscionability and unfair contract terms, however, manifest differently.

2.2.1. Application of doctrine of unconscionability and unfair contract terms

Under the UCC 2-302, courts have right to police the contract in the case of one sided contractual terms without regard to the environment of contract, offline or online. Although the doctrine of unconscionability is usually to be applied in consumer transactions where the consumer is purchasing for his own benefit from a professional seller,³² the UCC 2-302 is to be applied also to contracts between two consumers or between businessmen. The Directive on Unfair Contract Terms is strictly limited to B2C contracts, with its limitation set in Art.3.³³ Moreover, the Directive is to be applied only to not-individually bargained terms of the contract, whereas the doctrine of unconscionability is applicable as long as the assent to the contractual term was not apparent or real. In order for the court to decide that clause (contract) is unconscionable, the particular term at stake has to be outside of the circle of the assent.³⁴ If

²⁹ Black's Law Dictionary (9th ed. 2009).

³⁰ Amy J. Schmitz, Embracing Unconscionability's Safety Net Function, 58 Ala. L.R. 73, 73 (2006) available at <http://www.law.ua.edu/pubs/lrarticles/Volume%2058/Issue%201/schmitz.pdf>.

³¹ Id.

³² Rober S. Snaidre, Unconscionability, Assent And Consumer Protection, 31 U. Pitt. L. Rev. 359, 359 (1969-1970).

³³ Art.3.1 UCTD: "A contract term [...] shall be regarded as unfair if [...] it causes significant imbalance to the parties' rights [...] to the detriment of the consumer".

³⁴ Snaidre, supra note 32, at 361.

the term was not disclosed to the buyer or the buyer could not have an understanding of the term, then the assent was not apparent. If the assent was apparent, the second step the court has to pursue is to determine if the given assent was real. The real assent mirrors in freedom of choice and pressure on the party to endorse the contractual content.³⁵

In online adhesion contracts, it is very easy to indicate the differences in protection of consumer right. Conduct such as clicking on the “Agree” button or simple use of the website is enough for the consumer to accept terms and conditions of the website, sometimes even while remaining ignorant. In contrast to the UCTD, the UCC or any other US statute do not contain non-exhaustive list of contract clauses that may be regarded as unfair. The Annex of the Directive³⁶ contains seventeen terms which form a non-exhaustive list called “gray list”. For example, if the contract contains a clause which limits or hinders “consumer’s right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration [...]”³⁷ court may rule the term as unfair. However, US courts would usually enforce entire contract presented in the form of adhesion contract unless under the standard of a reasonable person, the party could not understand the meaning of contractual term(s).³⁸

Similarly, in a case before the Court of Appeals of Illinois, a clickwrap agreement in a form of terms and conditions of sale between Dell and its customers contained an arbitration clause which was incorporated in the main contract via link.³⁹ An arbitration clause is a waiver of the right to proceed with the dispute in front of the courts. Hence, consent to such a clause should be voluntary and the parties should be given full information on consequences,

³⁵ In determination if the party could have understanding of contractual term, standard of reasonable man is used. See Snaidre supra note 32, at 361-62.

³⁶ Art.3.3 UCTD.

³⁷ Annex 1.q UCTD.

³⁸ WINN & WRIGHT, supra note 28, at 6-7.

³⁹ Hubbert v. Dell Corp., 359 Ill.App.3d 976, 835 N.E.2d 113 (III App.5.Dist., 2005).

which cannot be presumed in consumer pre-printed contracts.⁴⁰ However, the Court of Appeals held that a mere fact the contract represents a form of an adhesion contract is not enough to rule that the arbitration clause was unconscionable. In order to prove unconscionability, plaintiffs should have proven “that results of arbitration were inordinately favorable to manufacturer”.⁴¹

In contrast, in the case *Mostaza Claro v. Centro Movil*, in form of a preliminary ruling, ECJ⁴² decided on the question of validity of arbitration clause in the adhesion contract when the consumer did not even raise the action for annulment in arbitration proceedings. The court held that national courts “must determine whether the arbitration agreement is void, [...] even though consumer has not pleaded that invalidity [...]”.⁴³ In yet another case before the German District Court Krefeld and later before the English High Court upon the issue of recognition and enforceability of the judgment, both courts found the arbitration clause unfair in the consumer contract. The clause was deemed as unfair, as the clause written in a small print deprived the consumer of the access to his local courts.⁴⁴ Therefore, courts in the EU would probably find a clause limiting legal access to a court as unfair and disregarded its application.⁴⁵

The best possible way to understand the differences in consumer protection laws is to compare terms and conditions of sale on a real example of the company operating business in these two markets. In the next two sections (2.2.2. and 2.2.3), Conditions of Use and Sale of

⁴⁰ Julia Hoernle, Legal control on the use of arbitration clause in B2C E-commerce contracts, Masaryk Uni.J. of Law and Technology 23, 23 (Feb 01, 2013) available at http://mujlt.law.muni.cz/storage/1234798613_sb_03_hornle.pdf.

⁴¹ Holding no.7 in *Hubbert v. Dell Corp.*, supra note 38.

⁴² European Court of Justice, renamed to Court of Justice of European Union.

⁴³ *Mostaza Claro v. Centro Movil*, C-168/05 (ECJ, 2005), at §39.

⁴⁴ *Richard Zellner v. Phillip Alexander Futures Ltd., Securities and Futures Ltd.*, 6O189/95 (Landgerichts Krefeld, 1996) & ILPr730 (QB) (English High Court, 1997).

⁴⁵ According to the English law, arbitration clause as a question in the dispute under £5000 is considered automatically unfair and unenforceable, see Hoerle, supra note 40, at 28.

Amazon Inc. designed for European and American market will be compared, in order to demonstrate how consumer protection laws influence contracting in a different manner.

2.2.2. Case study I: Amazon.com

Amazon.com is a website of the company Amazon.com Inc., registered in Seattle, Washington and specialized in the sale of goods in the US. It has several affiliates' websites, which are operating in Brazil, Canada, China, Japan and the European Union. Conditions of Use of the website are linked to the main website in the down corner. By clicking on Conditions of Use, a consumer is redirected to the new website. According to the first paragraph of the document, consumer who is using Amazon.com or any of the services offered even by its affiliates is subject to the terms of the Conditions of Use. Therefore, this is a clear-cut case of a browsewrap agreement.⁴⁶ In analyzing Conditions of Use it is clear that consumer rights are diminished in the three provisions under the names of "Disclaimer of warranties and limitation of liability", "Disputes" and "Applicable Law".

2.2.2.1. Limitation of warranties

Warranties in the US are regulated under the UCC 2-312 – 2-318 and under the Magnuson–Moss Warranty Act on consumer products.⁴⁷ The MMWA applies to written warranties and provides a minimum standard for them at federal level. This Act does not oblige businesses to provide warranties, but if they do provide, then they should do it in compliance with the provisions set in the MMWA.⁴⁸ Under the UCC and the MMWA, warranties can be implied and express. An implied warranty according to the UCC 2-314 means that the goods should be merchantable,⁴⁹ unless the warranty is excluded under the

⁴⁶ Conditions of Use at §1 (Jan.28, 2013) available at

http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088.

⁴⁷ 15 U.S.C §§2301-2312 (1975), hereinafter MMWA.

⁴⁸ WINN & WRIGHT, *supra* note 28, at 6-14.

⁴⁹ Criteria of merchantability is described in the UCC 2-314.2 according to which in order to consider the goods as merchantable, goods have to pass in the trade without objection. If they are fungible they have to be of average quality, fit for ordinary purpose, adequately contained, packaged and labeled. The goods have to

UCC 2-316. An express warranty is a statement of the seller that goods are fit as represented in his promise, description, sample etc. Under the UCC 2-316, the seller may exclude all warranties by inserting the words “as is” or “all faults”.

In the provision of “Disclaimer of warranties and limitation of liability”, written in capital letters, Amazon.com notifies the consumer that it is providing the services on “as it is” and “as it is available” basis. It disclaims all warranties, express or implied and does not guarantee for damages arisen as a result of use of the Amazon services. According to Conditions of Use, a contract is formed after consumer sends his offer to Amazon in the form of an order, and the consumer receives an e-mail confirmation which represents the acceptance of the offer. A disclaimer of the warranties is not written in the confirmation of the offer or anywhere else, except in Conditions of Use. However, the consumer is bound by the disclaimer limitation, unless state laws forbid exclusion of the implied warranties or limitation of certain damages.

The UCC, the MMWA and state laws are different. Under some state laws it is prohibited to exclude warranties. Like in Amazon example, sellers however, usually attempt to exclude warranties and limit as much as liability as they can, acknowledging that some of the provisions contained in the disclaimer might not even be enforceable under some state laws.⁵⁰ This practice under the FTC regulations or the MMWA does not represent an unfair trading practice or term, although some consumer will not even know, that due to their state law regulations, disclaimer is not applicable to their transaction.⁵¹

Therefore, enforceability of limitation of warranties relies on the applicable state law. If the state law allows limitation on liability, implied warranties and damages, there is no

conform to a promise or affirmations of the fact written on the label. Each and every units separately and among all should be of quality and quantity in compliance with the UCC.

⁵⁰ See Ala. Code §§ 7-2-31.5, 7-2-719.4 (1984), Conn. Gen. Stat. Ann §42A-2-316 (West 1990), Md. Code Ann. Com. Law I § 2-316 (1992).

⁵¹ WINN & WRIGHT, *supra* note 28, at 6-15, ft. 63.

reason for the court not to enforce the provision at hand, unless if the unconscionability defense is applicable.

2.2.2.2. Dispute proceedings and conflicts of laws

Under the provision “Disputes” and “Applicable law”, Amazon.com Inc. regulates which institution is competent and which law is applicable in solving the dispute between the company and the consumer. Courts are not competent to solve the possible dispute at hand, rather an arbitration proceedings under the American Arbitration Association⁵² has to be conducted. Class action is excluded as a way of starting the proceedings, therefore they have to be carried on the individual basis.

Class filings are the most convenient way for consumers to sue, since the costs of the proceedings are divided. According to AAA rules in a case of the smallest claim up to USD 10,000, consumers would have to pay around USD 1,000 just to initiate the arbitration⁵³. Having that in mind, many consumers lose interest in conducting the arbitration process. Although consumers could be reimbursed by Amazon.com Inc. after the award is rendered, many of them will not have sufficient funds at their disposal even to start the proceedings. Hence, by excluding the class action in Conditions of Use consumer’s access to the legal remedy is aggravated. Conditions of Use determine applicable law to the contract as the Federal Arbitration Act for procedural part and law of the state Washington for merits without regard to the conflict of laws rules and the center of gravity.

In the case *Caspi et al. v. MSN*⁵⁴, plaintiffs filed a class action in New Jersey against MSN for increased charging them for changes in service plans without giving any notification to consumers. MSN sought to dismiss the case since the plaintiffs agreed online to the forum

⁵² Hereinafter AAA.

⁵³ Administrative Fee Schedules (Standard and Flexible Fee) of Commercial Arbitration rules of American Arbitration Association (2010) at 2 (Jan 29, 2013) available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004102.

⁵⁴ *Stephen J. Caspi et al. v. MSN*, 323 N.J. Super. 118, 732 A.2d 528 (N.J. App. Div., 1999).

selection clause. The clause provided that the applicable law to the contract is law of state of Washington and that the competent courts are courts in King County, Washington. The clause was a part of the agreement under the name “MSN membership agreement” to which consumer had to agree before becoming MSN member. Consumers had to scroll down until the end of the agreement and then click on the “I agree” button. The appellate court confirmed the holding of the Superior Court that there was neither a fraud nor that MSN used its “overweening” bargain power.

In yet another case, *Forrest v. Verizon*, the Court of Appeals of District of Columbia⁵⁵ held forum selection clause as enforceable in the form of a clickwrap agreement. Since courts of Fairfax County in Virginia were competent and class action remedy is not provided according to Virginia state law, the plaintiff argued that the defendant should have notified consumers about it, further alleging violation of Virginia consumer’s protection laws, misrepresentation and breach of contract. The court, however, held the forum selection clause as enforceable and dismissed the plaintiff’s motion.

Cited cases only confirm policy of US courts to enforce forum selection and choice of law clauses which are represented to the consumer in a form of the browsewrap or the clickwrap agreement. A mere fact that the consumer could not participate in the determination of the forum selected or the applicable law, does not annotate the clause as unenforceable. Existence of the term is not enough; it has to be unconscionable in order for the courts not to enforce it.⁵⁶

⁵⁵ *Forrest v. Verizon*, 805 A.2d 1007 (D.C. App., 2002).

⁵⁶ In *Bragg v. Linden Research*, 487 F. Supp. 2d 593 (E. D. Penn., 2007) the court found the clickwrap agreement’s forum selection clause which provided for arbitration as unconscionable due to very high arbitration costs. In *Comb v. Paypal*, 218 F.Supp.2d 1165 (N. D. Cal., 2002) customers had to commence the arbitration proceedings in the case of dispute before AAA. Since the costs of arbitration would be more than \$5,000 and the forum selection clause did not allow consolidation of the claims into one proceedings, the court held the clause as unconscionable.

2.2.3. Case study II: Amazon.co.uk

Amazon.co.uk is a website of the company Amazon EU SARL from Luxembourg operating the sale of goods in the United Kingdom. The company has a several other websites which are specialized in the markets of France, Germany, Italy and Spain. Amazon EU SARL is a 100% owned subsidiary of Amazon.com Inc.⁵⁷ Unlike US, UK Conditions of Sale do not contain a limited liability clause. Some European laws do not allow disclaimers of the implied warranties, thus an Austrian consumer group managed to stop internet provider in disclaiming the warranties implied in law, as it was against Austrian law. French consumer protection group, also, stopped the online vendor from disclaiming warranties for the late delivery on the ground of unfairness.⁵⁸

In the European Union, court competence in the case of the conflicts of laws in the civil and commercial matters is regulated by Brussels I Regulation.⁵⁹ According to the Brussels I, the consumer is a person who concludes a contract for the purpose outside of his profession or trade with the person who pursues professional or commercial activity. In compliance with Arts. 15-17, consumers may bring an action against the professional person in front of the courts of the state where the consumer or defendant are domiciled. However, a professional person may only commence an action against the consumer in the courts where the consumer is domiciled.⁶⁰ As to the applicable law, in the Art.6 of Rome I Regulation⁶¹, it is determined as the law of the country of consumer's habitual residence under the condition

⁵⁷ List of Significant Subsidiaries (Jan. 28, 2013),

http://www.wikininvest.com/stock/Amazon.com_%28AMZN%29/List_Significant_Subsidiaries.

⁵⁸ Winn & Webber, *supra* note 18, at 221.

⁵⁹ Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I), Official Journal of European Communities L 12/1 (2001) available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>,

hereinafter Brussels I. Brussels I Regulation is modified by Regulation 1215/2012, however the jurisdiction over consumer contracts is not amended and in Art.18 is regulated in the same manner.

⁶⁰ Art.18 Brussels I.

⁶¹ Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on Law Applicable to Contractual Obligations (Rome I), Official Journal of European Communities L 177/6 (2008) available at http://www.interact-eu.net/downloads/3774/Regulation_EC_No_593_2008.pdf, hereinafter Rome I.

that a professional person pursues any economic activity, or directs activities towards that country. Parties may contract a different applicable law to their agreement, however the choice of law clause should not deprive the consumer from the choices offered in the Art.6.

Contrary to US law, Brussels I prohibits the forum selection clauses in consumer's contract unless they favor the consumer. One of the listed possibly unfair clauses in the Directive on Unfair Contract Terms in the Annex (g) is limitation of the consumer's legal remedy as requiring the consumer to commence the arbitration proceedings instead of bringing the case in front of the courts. In the US, those clauses in consumer's contract would be upheld, unless they are found as unconscionable or unfair.⁶² Having a forum selection clause like in US Amazon website would be usually found contrary to EU law. Therefore, in Conditions of Sale of UK website, courts of Luxembourg are chosen as a selected forum, with a notice to the consumers that they can sue also in courts of the state of their residence. In the addition, law applicable to Conditions of Sale is the law of Luxembourg. According to the Rome I, however, law selection clause should not deprive consumers of the options offered by Art.6. Luxembourg law is probably a law that most of UK consumers are hardly acquainted with. Since the consumer is not offered UK law as choice of law this applicable law clause would not be enforceable in consumer contracts, as it deprived consumers from options set in Art.6.

Amazon.co.uk is a typical example of how differences in the EU and US jurisdictions influence contracting. That is obvious on examples of applicable law, court competence and disclaimer of warranties. Although Amazon.com and Amazon.co.uk are practically owned by the same company, Conditions of Use and Sale diversify in a line with the regulations of the market of interest.

⁶² Michael Cordera, E-Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet, 27 Rutgers Computer & Tech. L.J. 231, 244 (2001).

2.3. Unfair contract terms in Bosnia and Herzegovina

Bosnia and Herzegovina has adopted the Statute modeled after European Union law. Although it is a better solution than US solution, there are many reasons why it should be amended. The Statute on Consumer Protection of Bosnia and Herzegovina has 131 articles. Five articles of Chapter XI are devoted to unfair contract terms. The Statute is applicable to offline and online consumer contracts. According to the article 95, a contract term is unfair only if it is not individually bargained, represents strong imbalance between the parties, is not in the line with consumer's expectations, and the term is against the principle of good faith. The requirements are listed in four different points, without any connectors between them. Therefore, the provision at hand does not explain what the nature of conditions of unfairness is, are those conditions cumulative or alternative? A simple language interpretation of the provision does not reveal the answer to this question.

The Directive on Unfair Contract Terms similarly defines an unfair term as non-individually bargained term which causes significant imbalance between the parties contrary to the requirements of the bad faith on the detriment of the consumer.⁶³ In EU law such formulation is obviously cumulative. Having in mind that Bosnian provision of Art.95 is modeled after Art.3 it is logical to conclude that requirements of the Art.95 are also of a cumulative nature. Any different conclusion could create any term in consumer contracts as unfair, although it is for instance individually bargained. Unsettled issue as previous one, in the case of non-existing Statute Commentary could be differently interpreted, having in mind that rarely anyone would take look at the model law. Thus, the Statute should be more detailed in defining the core of the legal protection.

As to the warranties, a contract term which is excluding full or partially liability of the seller is regarded as unfair. In contrast to EU law and grey list of provision, which can be

⁶³ Art.3.1 UCTD.

under certain conditions regarded as null and void, Article 96 represents a list of provisions which are *de iure* null if they are part of a pre-printed contract. Therefore, if the parties determine the competent forum different than the Court of Bosnia and Herzegovina in cross-border transactions, the clause would be null and void. However, the problem of this clause is that it avails the protection to a native consumer, although it does not define him. It is not clear if that consumer has to have citizenship, domicile or habitual residence in the state.

It might seem strange that the competent court for consumer protection is at the state level. Usually, consumer protection claims are smaller and therefore it would be more efficient to have those cases litigated in the municipalities' courts. Due to the complex political system of Bosnia and Herzegovina, the explanation probably lies within the reasoning that best possible way to have consumer protection standardized and unified in the entire territory is to avail the jurisdiction to the only state court in non-constitutional matters. The Court of Bosnia and Herzegovina is very specific as it is structured separately from the entity courts to protect state competences,⁶⁴ however it is not the highest court.

Applicable law is not regulated in the Statute at all. Currently, the law applicable to the contracts of sale will be the law the parties have contracted or the law of place of the seller, unless other circumstances apply.⁶⁵ The law which is usually contracted in adhesion contracts is the law of the place of seller, what is contrary to EU law. It follows that most of the time, in the cross-border transactions, the Court of Bosnia and Herzegovina has to apply foreign law.

Since the Statute on Consumer Protection is modeled after EU law, there are many similarities. In transposition of the law, some provisions remained unclear and therefore should be language-wise modified. Bosnian law is guaranteeing more than a minimum

⁶⁴ Art.1 Zakon o sudu BiH, Sl. Gl. BiH 49/09 (2009) [Statute of Court of B&H, Official Gazette 49/09 (2009)].

⁶⁵ Art.19 Zakon o rješavanju sukoba zakona sa propisima drugih zemalja, Službeni list BiH 43/82, 72/82, 46/96 (1996) [Law on Solving Conflicts of Laws, Official Gazette BiH 43/82, 72/82, 46/96 (1996)].

protection provided in the Directive. Consumer protection transposition, however, has not been done entirely. The clear example is absence of regulation of applicable law in consumer contracts and translation difficulties.

Non-existence of unfair contract term regulation like in the US, in the current situation in B&H, would not be the best solution. Before 2002, the only protection that consumer could have was under the Statute of Law of Obligations and provisions on *laesio enormis*.⁶⁶ This system was obviously lacking consumer designed solutions. In terms of functionally the system as provided by the Directive is a better one, for the reason that Bosnia and Herzegovina is a civil law country and fast case law developments are not available legislative tool. Moreover, geographical position of the market makes it more reasonable to comply with EU provisions.

⁶⁶ Doctrine of excessive damages is regulated in Art.182 of Zakon o obligacionim odnosima FBiH/RS, Sl. list SFRJ, br. 29/78, 39/85, 45/89, 57/89 (1989), Sl. list RBiH br. 2/92, 13/93 i 13/94 (1994) [Statute on Law of Obligations FB&H/RS, Official Gazette SFRJ, no. 29/78, 39/85, 45/89, 57/89 (1989) and Official Gazette RB&H no. 2/92, 13/93 and 13/94 (1994)].

3. INFORMATION DUTIES

In order to enhance the consumer confidence to purchase online, the consumer should be educated and informed. Concerning disclosure of confidential information online, the consumer has to play a significant role in the online market place, feel safe and trust the seller that the ordered product is in the condition as advertised. Right to be informed is one of the basic consumer rights. Its rationale is not only to protect the consumer, it also increases online consumer transactions by building the consumer trust.⁶⁷

In 1962, former president of the US, John F. Kennedy, delivered a speech before the US Congress emphasizing the importance of the four basic consumer rights: right to be heard(1), right to choose(2), right to safety(3) and right to be informed(4). Right to be informed entitles consumers to be given the information about the product they are buying, the terms of sales, the guarantees and any risks which could pass to the consumer with the product.⁶⁸ The right further protects the consumer from “fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts he needs to make an informed choice”.⁶⁹

In the European Union, this right is regulated through the set of directives. Since the protection of this right is even more valuable on the internet, the Distance Selling⁷⁰, and the

⁶⁷ David Gefen et al., Trust and TAM in Online Shopping: An Integrated Model, 27 MIS Quarterly 51, 55 (2003): “Indeed some researchers have suggested that online customers generally stay away from e-vendors whom they do not trust.”

⁶⁸ The Consumer’s Bill of Rights (Feb 2, 2013) available at <http://www.curriculumlink.org/econ/materials/billofrights.html>.

⁶⁹ John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest from March 15, 1962, (Feb 2, 2013) available at <http://www.presidency.ucsb.edu/ws/?pid=9108>.

⁷⁰ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1996 on the Protection of Consumers in Respect of Distance Contracts, Official Journal of European Communities 144/19 (1997) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1997:144:0019:0027:EN:PDF>, hereinafter Directive on Distance Selling (Contracts) or Distance Selling Directive.

E-commerce⁷¹ Directives provide special rules for the internet consumer trade. Moreover, the Directive on Consumer Rights⁷², as the newest directive, enlarges the area of the consumer protection. In Bosnia and Herzegovina, consumer right on information is regulated in the chapter X of the Statute on Consumer Protection under the title “Distance Contracts of Sale”.

In order to understand the differences between the consumer protections laws it is necessary to give a short overview of current rules on consumer protection. Thus, the first part of the chapter will describe US approach of disclosure in order to circumvent the deceptive practices at federal level and in the states of California and Ohio. The second and the third part of the chapter are devoted to disclosure requirements in the EU and B&H which define it as an essential consumer right.

3.1. Peculiarities of US approach

In a contrast to the EU, US system applies the same statutes in the online and the offline environment.⁷³ Therefore, in consideration of seller’s information duties, there are no special provisions that would implement this right in regard to all consumer transactions in one particular place.

The Electronic Records and Signatures in Commerce Act⁷⁴ is an example where federal statute requires a service provider to certain information disclosures. The effect of the law is, however, limited to the area of electronic signatures. According to §7001.c ERSCA, an

⁷¹ 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), Official Journal of European Communities 178/1 (2000) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF>, hereinafter E-commerce Directive or Directive on E-commerce.

⁷² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal of the European Union 304/64 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>, hereinafter Consumer Rights Directive or Directive on the Consumer Rights.

⁷³ Michael Cordera, *supra* note 62, at 8.

⁷⁴ 15 USC §7001-6 (2000), hereinafter ERSCA.

electronic record will satisfy the requirement that certain information was given in writing only if the consumer consented to it affirmatively. Prior to consenting, the service provider has to disclose in a clear and a conspicuous way other options to have the record provided in non-electronical way. The consumer should also be aware of his right of withdrawal from the consent to have the record electronically. This includes the procedure how to use the right.

All fifty states and the District of Columbia have statutes that regulate unfair and deceptive acts and practices which provide essential protection for consumers.⁷⁵ Many of those statutes require sellers to provide consumers with the necessary information or the failure to provide it can be regarded as a deceptive practice.⁷⁶ According to Ohio Administrative Code, failure to provide clearly and conspicuously the information to a consumer in relation with reservations, limitations, modifications or conditions, constitutes a deceptive act.⁷⁷ In the addition, any exclusion should be written at the place close to the official offer. The Civil Code of California has a section on deceptive practices and methods of the unfair competition, describing 24 different practices as prohibited.⁷⁸ Some of them are misrepresentation of the goods as the goods of the other person or of the other source, sponsorship or approval, quality, standard, grade, style or model.

According to Californian Civil Code, the title “The Electronic Commerce Act of 1984”⁷⁹ describes all the information that should be given to a consumer in the e-commerce transactions. The provider of an electronic commercial service has a duty to provide the consumer with the name, the address and the telephone number. The consumer should be aware of all the charges to use the services. The service provider must inform the consumer

⁷⁵ CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES, A 50-STATE REPORT ON UDAP STATUTES 5 (National Consumer Law Center, 2009) available at http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

⁷⁶ ALPERIN J. HOWARD & CHASE F. ROLAND, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION ch. 4 §131, at 1 (West. Pub. Co., 1986).

⁷⁷ Ohio Administrative Code §§ 011-6121 (2013) §109:4-3-02.

⁷⁸ Cal. Civ. Code §1-9566 (1872) § 1770.

⁷⁹ Id. §1789-1789.9.

upon the procedure he should follow in a case of a dispute.⁸⁰ In a case the provider does not do so, he could be punished by a fine up to USD 5,000.⁸¹

The important disclosure requirement was developed in the FTC practice, according to which, if it is applicable in the concrete case, the seller has a duty to inform the buyer about his right of cancelation⁸² of the contract. The seller is bound to inform the buyer on the period of the time he can exercise the right simply to change his mind.⁸³ Nevertheless, this right is only limited to an in-house purchase above USD 25.

The concept of the right on information is explained differently in US academic writings as the seller's obligation to disclose certain data in order to avoid unfair trading practices, rather than the consumer right on information. Even if provisions do not impose an obligation on the disclosure of certain information, the courts might impose this burden in their judgments in order to enhance the consumer trust.⁸⁴ However, US system does not provide exact guidelines which information should be disclosed to a consumer on the internet. Deceptive practices in the European Union are regulated by the Directive on Unfair Commercial Practices⁸⁵ which is a separate topic from the right of information provided in the Directives on E-commerce, Distance Selling and Consumer Rights.

⁸⁰ Id. §1789.3: Information on the dispute procedure should include the telephone number and the address of the Complaint Assistance Unit of the Division of Consumer Services of the Department of Consumer Affairs.

⁸¹ Id. §1789.5.

⁸² In the EU also known as right of withdrawal.

⁸³ Protections for In-Home Purchases: The Cooling-Off Rule (Feb 13, 2013) available at <http://www.consumer.ftc.gov/articles/0176-protections-home-purchases-cooling-rule>.

⁸⁴ Id. (Feb 13, 2013).

⁸⁵ 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 and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), Official Journal L 149 (2005) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:HTML>.

3.2. From The Distance Selling to The Consumer Rights Directive

In the European Union, the right of information is regulated in several directives. Since it is of particular importance in the internet environment, EU law provides specific rules in online contracts. The main directives regulating the online information duties are Distance Selling, E-commerce and Consumer Rights Directives.

3.2.1. Distance Contracts

The Directive of 1997 on Distance Selling is applicable to online contracts. A distance contract is “any contract concerning goods or services between supplier and consumer [...] (where supplier) makes exclusive use of one or more means of the distance communication.”⁸⁶ Information duties are regulated as a two-step disclosure, including the information which should be given before contracting and the post-contract information in the written confirmation of the agreement.

Before contracting, the information given to the consumer has to consist of the identity of the supplier and the main characteristics of goods with the price including taxes. If the delivery costs should be paid by a consumer, this information should be provided together with the information on the right of withdrawal. An offer should state the period the price or the offer remain valid.⁸⁷ As in the States, the text of the contractual terms should be written in a clear and understandable way. If it is applicable, the seller should provide the costs of using the means of communication. At the same time of conclusion of the contract or shortly afterwards, the seller has a duty to provide the consumer with the written confirmation of the contract. The confirmation should include information on the right of withdrawal, geographical address of the seller, information on cancelation of the contract and after-sale

⁸⁶ Art.2.1 Distance Selling Directive, Art.2.4 Distance Selling Directive: “[M]eans of distance communication mean any means which without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties.”

⁸⁷ Id. Art.4.1.

services or guarantees.⁸⁸ In any case, when the information on the right of withdrawal was not provided, cancellation period will extend to the three months.⁸⁹

The Distance Selling Directive is a directive of a minimum harmonization, therefore member states had a right to include a stringent provision during the process of the Directive's implementation.⁹⁰ Although the rules on the distance selling in different states are in the compliance with the Directive, they do not have to be necessarily unified. Adoption of the Directive was very important for European law as it was the only one that addressed the online contract issues before the E-commerce Directive existed.

3.2.2. Directive on E-commerce

The E-commerce Directive was adopted in year 2000. As it is applicable to both consumer and business transactions, the notion recipient will be used in this subchapter as it is more suitable than consumer. According to the Directive on E-commerce, every online service provider should disclose his name and geographical address. In the addition, the Directive obliges service providers to make available their e-mail addresses in order to be communicated in a more convenient and faster way. They have a duty to reveal the place and the number of the registration and the tax number. In the addition to other information, price of the service has to be clearly and unambiguously stated, with the reference that price does (not) include taxes.⁹¹

The service provider should in a clear, comprehensible and unambiguous way, before placing an order, reveal which technical steps a recipient of the service should follow in order to conclude the contract. If the contract will be stored, the recipient should have knowledge of the existing record including information of the contract's accessibility. Moreover, methods of

⁸⁸ Id. Art.5.

⁸⁹ Id. Art.6.1.

⁹⁰ Id. Art.14.

⁹¹ Art.5.1 E-commerce Directive.

the correcting input errors should be introduced to the recipient before placing an order. The consumer should know if there is a possibility to conclude the contract in a different language.⁹²

The E-commerce is not a consumer directive. Directive is, however, of special importance in EU consumer law as it provides rules on the information disclosures which are designed for the internet contracting. It is also of minimum harmonization. Minimum harmonization praxis has created barriers to the cross-border transaction, which is one of the main arguments for the European Commission to introduce a full harmonization within the Consumer Rights Directive.⁹³

3.2.3. Consumer Rights Directive

The Consumer Rights Directive broadens the perspective of the right of information of the online consumer. It was adopted in 2011 and it will be applied to the contracts concluded after June 2014. The Directive amends information duties adding several disclosure requirements that have to be fulfilled in the distance or off-premises contracts.⁹⁴

The Directive is enhancing consumer trust by binding sellers to reveal information on the cost of return of the goods. It also eliminates the hidden charges on the internet.⁹⁵ The price transparency is increased. Therefore, before placing an order, the price of the goods should be given to the consumer, free of all secret fees. In all parts of the process, consumer

⁹² Id. Art.10

⁹³ The main arguments for abandoning minimum harmonization approach are high costs, limitations to cross-border transactions and non-integrated European market. See Michael Faure, Towards a Maximum Harmonization of Consumer Contract Law, 14 Maastricht Journal of European and Comparative Law 433 (2008) available at

http://www.maastrichtjournal.eu/pdf_file/intersentia/MJ_15_04_0433.pdf:

⁹⁴ While the Directive on Distance Selling is repealed, the Unfair Contract Terms Directive is amended.

⁹⁵ Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online (Feb 2, 2013) available at http://europa.eu/rapid/press-release_MEMO-11-450_en.htm.

should be aware that goods are to be paid, labeling the confirmation button (if applicable) on the website as “order with obligation to pay”.⁹⁶

As EU Justice Commissioner Viviane Reding commented in her speech, adoption of the Directive will “strengthen consumer rights by outlawing internet fraudsters who trick people into paying for horoscopes or recipes that appear to be offered for free. Shoppers will no longer be trapped into buying unwanted travel insurance or car rentals when purchasing a ticket online. And everyone will have 14 days if they wish to return goods bought at a distance, whether by internet, post or phone.”⁹⁷ The Consumer Rights Directive is called revolutionary as it is of full-harmonization.⁹⁸ At the same time, however, this is the main reason why it is criticized.⁹⁹

Consumer protection laws in the US and the EU in regard to right of information have taken even more different approach than in the case of unfair contract terms. In order to demonstrate the divergences the best possible method is to emphasize them in a real life example of Amazon websites.

3.3. Example of Amazon.com/co.uk

Amazon.co.uk clearly states in one of its provision of Conditions of Sale that the consumer is contracting with the company under the name Amazon EU SARL.¹⁰⁰ That relevant information is not available in the provisions of Conditions of Use of Amazon.com. Therefore, the consumer cannot be sure if he is contracting with Amazon.com Inc. or some of its subsidiaries. Amazon EU SARL provides in the contact details the name, address, share

⁹⁶ Art.8 Directive on the Consumer Rights.

⁹⁷ Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online (March 10, 2013), supra note 95.

⁹⁸ Wilinska-Zelek, supra note 8, at 5.

⁹⁹ See Jan Smits, Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights, 1 European Review of Private Law 5 (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358426.

¹⁰⁰ Art.1 Conditions of Sale (March 21, 2013) available at http://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=1040616.

capital, place and number of registration, business license number and tax registration number.¹⁰¹ At the same time, Amazon.com Inc. provides only the name and the address of the company.¹⁰² Moreover, European Amazon provides information on right of withdrawal and their returns guarantee,¹⁰³ while US Amazon only shares information on their own return policy.¹⁰⁴

There is also a difference in the communication of the information. Conditions of Use of Amazon.com have provisions which are in all capital letters and in the bolded font. Except the title and the statement that the consumer is bound by Conditions of Use and Sale which are bolded, all provisions of Amazon.co.uk are of normal, non-bolded font. This difference is a result of the US definition of conspicuous, what will be explained in the subchapter below.

It is not convenient for the consumer to access the terms and conditions of any of two websites. The consumer has to scroll to the end of the page and somewhere in the bottom find, written in very small letters, name of the link providing the terms and conditions of the sale. Even if the consumer finds the appropriate link, there is a possibility that he will not read the conditions, as they are 6 (Amazon.com) or 9 pages long (Amazon.co.uk).¹⁰⁵ Unfortunately, in the online world this is an example of shorter terms and conditions.

3.4. The other side of the mirror

Contracting parties have a duty to read the contract and they are presumed to have knowledge of the contractual content.¹⁰⁶ Due to the presumption, although real people do not

¹⁰¹ Art.18 Conditions of Use (March 21, 2013) available http://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=1040616.

¹⁰² Conditions of Use (under provision “Our Address”) (March 21, 2013) available at http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088.

¹⁰³ Art.2 Conditions of Sale (March 21, 2013), supra note 100.

¹⁰⁴ Conditions of Use (under provision “Returns, Refunds and Title”) (March 21, 2013), supra note 102.

¹⁰⁵ Put in the printer friendly format.

¹⁰⁶ Shmuel I. Becher, Asymmetric Information in Consumer Contracts: The Challenge That is Yet to Be Met, 45 American Business Law Journal, 723, 729 (2008).

read standard contracts¹⁰⁷, in front of the court, ignorance of provided contractual terms would not constitute a good defense. Another problem in regard to the information duties is presence of the asymmetric information.

The asymmetric information is a usual characteristic of the standard form contracts. The seller as a contract drafter has better access to the information while the consumer lacks familiarity with the contractual terms.¹⁰⁸ Actually, the consumer has no information about the content of the contract until the time he is provided with the copy to “sign”. On the other hand, the seller is the person who has all information and enough time to draft the contract precisely as it corresponds him. Therefore, stating that the consumer and the seller are slightly asymmetrically informed could be regarded as an understatement. In the addition, another anomaly is a tendency of the consumer not to read the contract at all. If consumers would read the contract, it would be possible to argue that this would reduce the asymmetry in information as long as they understand the content.¹⁰⁹ However, the standard form contracts are usually not material which will be read. As it is already written by Omri Ben- Shahr “[r]eading (of standard form contracts) is boring, incomprehensible, alienating, time consuming, but most of all pointless.”¹¹⁰ If a contract is written on more than twenty pages and consumer needs to buy flight ticket or goods of small value, rarely he will have will or time to read. And, even if he reads, there is a chance that the content of many terms will not be understandable.

In consumer protection law in the European Union, it seems that one of the ways of fighting the consumer information disadvantage is to oblige the seller or the supplier to

¹⁰⁷ Omri Ben- Shahr, The Myth of the ‘Opportunity to Read’ in Contract Law, 1 ERCL 1, 7 (2009) (Feb 14, 2013) available at http://home.uchicago.edu/omri/pdf/articles/The_Myth_Of_Opportunity_To_Read.pdf.

¹⁰⁸ Becher, *supra* note 106, at 733.

¹⁰⁹ *Id.* at 733.

¹¹⁰ Ben- Shahr, *supra* note 107, at 2.

provide certain information before the conclusion of the contract.¹¹¹ As mentioned, it is the principle of the Directive on Distance Selling and the Directive on E-Commerce while the Directive on Consumer Rights even extends it. Directives, however, except stating that the information should be given in a clear manner, do not access what actually clear is. Is a provision which is *per se* clear, also of the same characteristics in side of the twenty-page document?

Instead of dealing with the issue of the implementation of the right of information, it seems that the European Commission has taken a standing that more detailed information equals to a better consumer protection. Sellers are aware that consumers do not read the standard contracts. They can misuse their position and provide excessive information in order to discourage consumers to read the contracts.¹¹² Hence, one has to bear in mind that it is questionable if such a detailed consumer protection approach is actually helpful.

In the US, information provided should be in a conspicuous manner. The definition of the conspicuous term is given in the UCC 1-201(10) as a term which is in a larger font or in a contracting color, or printed in all capitals. In compliance with the UCC 2-316(2), disclaimers of all the implied warranties of merchantability have to be conspicuous, therefore most of the time, disclaimers are written in all capital letters. Although it is not a perfect solution, this is a way to draw consumer's attention to the important clauses of the online contracts.

The consumer is a weaker party and the sellers should be required to information disclosures. Excessive information requirements, however, can become a perfect tool for the sellers to conceal the consumer unfriendly clauses. Therefore, balancing between quality and quantity of the information in a defined comprehensive and clear way is important. It is a

¹¹¹ Id. at 7.

¹¹² Marco F. Campagna, Transparent Consumer Information in Directive 2011/83/EU, The Columbia Journal of European Law Online 36, 41 (2012) available at <http://www.cjel.net/wp-content/uploads/2013/01/m.campagna.pdf>.

solution in order to safeguard the rationale of information duties, warn consumer on the most important clauses and finally diminish the information asymmetries.

3.5. Bosnia and Herzegovina and right of consumer to be informed

According to the Bosnian law, sellers have information duties. Chapter X of the Statute on Consumer Protection is modeled after the Distance Selling Directive, thus it contains defined rules on the right of the information. Similarly as in the Distance Selling Directive, the seller has a duty to disclose information in the two-step process. Prior to contracting, information which should be given to consumer includes the name, the register number and the full address including the tax number, the phone number and the email.¹¹³ Although the Statute on Consumer Law does not have a separate chapter on the e-commerce, the E-commerce Directive's information requirements have been listed in the chapter.

The consumer should be aware of the name and the main characteristics of goods. He should be given the full purchase price with other costs including taxes. A notification of the existence of the legal guarantee should be communicated. The consumer should be given the information on the fulfillment of the condition to rescind the agreement together with the information on the withdrawal right. An offer or a price should state the period of their validity. The seller should, also, provide the information on the court competence and the applicable law. All information should be transferred in a simple, clear and comprehensive way. It is interesting that unsolicited e-mail is forbidden as a part of this Chapter.¹¹⁴ During negotiations or the latest before the delivery, the consumer is entitled to be given a confirmation in a written or in other permanent form¹¹⁵ Shortly after the shipment of the goods, the seller has a duty to inform the consumer about the time and the means of shipment. In contrast to the Consumer Rights Directive, the seller operating in Bosnia and Herzegovina

¹¹³ Art.44 Statute on Consumer Protection of B&H.

¹¹⁴ Id. Art.51.

¹¹⁵ Id. Art.45.

is not liable to provide the information that a consumer will bear the costs of the goods' return. Moreover, the seller does not have to notify the consumer on the out-of-court complaint mechanisms. The right of information also does not apply to contracts concluded at the public auctions.

Chapter X is not exclusively designed for the online contracts. Therefore, it does not have rules on how to place an order in the internet world while clicking on the button "order with obligation to pay". Moreover, it does not have rules on the future of the contract in the case information was not provided. Similar situation is in the Consumer Rights Directive except when the seller did not respect the formal requirements for the distance contracts set in the Art.8.¹¹⁶

It is possible to argue from the functional point of view, that regulation in the compliance with the EU directives is a better solution. The civil law tradition, geographical position and current political movements towards EU accession are main reasons why Bosnia and Herzegovina should continue following EU legal trends. Also, in the terms of simplicity, it is much easier to have information duties in consumer contracts in a one place, rather than scattered over in the different laws. The Consumer Rights Directive introduces new information requirements. An extension of the information duties can make information excessive, therefore, if Bosnian legislator determines the need to have new provisions on right of information, these provisions should be introduced in the clear and simple way. Moreover, clear and simple should be defined. Clear and simple should be conspicuous.

¹¹⁶ Art.8 of Consumer Rights Directive: "The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labeled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order."

4. RIGHT OF WITHDRAWAL

The right of withdrawal is known in EU, US and Bosnian law. Rationale behind is to protect the consumer, who did not have opportunity to check the goods in person, to return the goods in appropriate period determined by law. To exercise the right of withdrawal, the consumer does not have to argument it. Therefore, this method of cancellation of the contract has to be distinguished from the other possibilities as misrepresentation or mistake, since the consumer does not have to have an actual reason in order to avoid the contract.¹¹⁷ There are considerable differences in the development and the regulation of this consumer right in the United States on one side and on the other side in the European Union and Bosnia and Herzegovina.

In this chapter the right of withdrawal is described in a comparative perspective. The first part analyses the US approach in the light of the cooling off period in FTC praxis, Californian, Michigan and New York law. The second part is EU law based explanation of the right of withdrawal, with the emphasis on the newest solutions arriving with the Directive on Consumer Protection. Finally, the last part of the chapter is a review of the Bosnian system in regard to the cancelation rights highlighting necessary changes.

4.1. Right of withdrawal in a comparative perspective - US

In contrast to the EU, where right of withdrawal is one of essential rights given to the consumer, in the US jurisdiction there are no statutory federal provisions requiring the implementation of this right in consumer transactions. Right of withdrawal in the US is called as right to cancel the contract or cooling off period. The FTC has played a crucial role in the development of this right together with certain state laws.

¹¹⁷ The Right of Withdrawal in the DCFR – Overview (Feb 12, 2013) at 1 available at <http://www.jura.uni-muenster.de/index.cfm?objectid=13B7CD3C-A5AB-CA84-317B5ED46D162E8E&did=11688>.

Many websites, also, include their own return policy as a part of the conditions of business. One of many examples is Amazon.com which, according to its Conditions of Use, offers its consumers to withdraw from the contract in a very simple way. If the consumer does not need the item or simply does not want it, he can cancel the contract reacting very promptly. He has a possibility to cancel the order before it is shipped by deleting the item in his Amazon account. If the item has been already shipped, it can be returned under online return policy of Amazon.com. Under this policy, items which have not been opened can be shipped back in the period of 30 days in order to refund the consumer completely. Shipping costs will be borne by the consumer, unless the reason for return was Amazon's error.¹¹⁸ The time requested to proceed the refund is three to five business days, after the item was received.¹¹⁹

Under Californian law, the consumer only needs to send the written notification to the seller in order to cancel the contract without any penalties.¹²⁰ Except from a general rule of three days of cancelation period for door to door contracts, there are no other special provisions designed for the online environment in Californian law.¹²¹ Five days cancellation period is anticipated for the home equity sales during foreclosure¹²² and three business day for the home solicitation sales.¹²³ Under Michigan Home Solicitation Sales Act¹²⁴, the buyer is protected if an offer was initiated by the seller through written, personal or telephone contact. The offer has to be received in the buyer's home, where the buyer should consent to it. In

¹¹⁸ Returns and refunds (March 19, 2013) available at http://www.amazon.com/gp/help/customer/display.html/ref=hp_sn_ret?nodeId=901888.

¹¹⁹ Usually amounts to two weeks.

¹²⁰ Consumer Transactions With Statutory Contract Cancellation Rights (Feb 13, 2013) available at http://www.dca.ca.gov/publications/legal_guides/k-6.pdf.

¹²¹ C. Civ. Code, supra note 78, at § 1689.6(a).

¹²² Id. § 1695.4(a)

¹²³ Id. § 1689.6.

¹²⁴ MCL § 445.111-7 (1971), hereinafter MHSSA.

order to apply this rule, value of the goods has to be above USD 25.¹²⁵ New York law gives consumers right to give the goods back in the period of thirty days unless the store has defined a different rule in a very clear manner.¹²⁶

The Federal Trade Commission has a similar rule on three day cooling period as the state of Michigan.¹²⁷ In a difference to the MHSSA, the buyer does not have to purchase the order at home premises. In order to satisfy the rule of the FTC, it is enough if the item was purchased outside of seller's premises as buyer's workplace, motel, hotel and even a restaurant. The information on the cancellation right has to be given in detail, according to which the seller has a duty not only to inform the buyer on the right of cancellation, but also has to provide him with two copies of the cancellation form at the time of sale. The seller has to disclose its address, name and give notification on how to use the cooling off period. The cooling off rule will not cover the sale under USD 25.¹²⁸ The FTC rule only applies to consumer transactions. In order to cancel the contract, the consumer should mail the cancellation form to the seller or in the case he was not provided with the form, send a cancellation letter. In ten days, the seller should reimburse the consumer and in the twenty-day period pick up the items from the consumer. The consumer has to make goods available to the seller or failing that he will remain under contractual obligation. In a case of any problem, the consumer can file a complaint with the FTC.¹²⁹

American law is very strict in consumer transactions. Courts have, however, recognized deviations of the consumer right to withdraw in their decisions. In a case concerning digital

¹²⁵ Contract Cancellation (Feb 13, 2013) available at http://www.michigan.gov/ag/0,4534,7-164-17337_20942-44718--,00.html.

¹²⁶ Omri Ben-Shahar & Eric A. Posner, The Right to Withdraw in Contract Law, 40 The Journal of Legal Studies, 115, 115 (January 2011) available at <http://www.jstor.org/stable/10.1086/658403..>

¹²⁷ 16 CFR §429.0-3 (1995).

¹²⁸ Jan M. Smits, The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law, Maastricht Faculty of Law European Private Law Institute (M-EPLI) Working Paper No. 2011/01 (Feb 14, 2013) at 4, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719104&download=yes.

¹²⁹ Protections for In-Home Purchase (Feb 14, 2013), *supra* note 83.

goods, *ProCD v. Zeidenberg*¹³⁰, US Court of Appeals held that a shrinkwrap license was enforceable under the licensing contract, although in order to use the content, defendant did not have any other option unless to agree. Therefore, the court decided that due to the lack of choice, defendant had an option to return the goods to the seller. Similar conclusion has been reached in the case *Hill v. Gateway 2000*.¹³¹ Although US law has certain regulation on the withdrawal right the real counterpart to one developed in Europe, does not exist. Apart from the FTC or state cooling off rules, American law does not provide cancelation rights. If the consumer changes his opinion he will not find any other remedy, unless if the return clause was included in the contract.¹³²

4.2. Right of withdrawal in a comparative perspective – EU

In contrast to US, EU right of withdrawal in the internet environment is regulated through the Distance Selling and the Consumer Rights Directives. *Pacta sunt servanda* is a main principle in the contract law in European law traditions according to which each contractual party should be bound by the contract.¹³³ The only deviations from this principle are possible in exceptional circumstances. There are several reasons in internet purchases why it is justified to allow the consumer simply to change his mind. Function of the right of withdrawal is to remedy “a lack of psychological or informational strength on the part of the consumer.”¹³⁴ The consumer in distance contracts does not have a possibility to examine the goods prior to their delivery in order to check the quality. He does not know if goods will

¹³⁰ *ProCD, Inc. v. Matthew Zeidenberg and Silken Mountain Web Services Inc.*, 86 F.3d 1447(7th Cir. 1996).

¹³¹ *Hill v. Gateway 2000 Inc.*, 105 F.3d 1147 (7th Cir. 1996).

¹³² Ben-Shahar & Posner, *supra* note 126, at 148.

¹³³ Irene Kull, About Grounds for Exemption from Performance under the Draft Estonian Law of Obligations Act, 6 *Juridica International* 44, 44 (2001) available at http://www.juridicainternational.eu/public/pdf/ji_2001_1_44.pdf:

“The sacred principle of the classical law of obligations was the idea of *pacta sunt servanda* (sanctity of contracts), which means that contracts are binding on any conditions. [...] Disputing of contracts was allowable if the contract had been concluded by fraud, mistake or duress. In the absence of those circumstances, the parties were bound to their contract. Unilateral denunciation of a contract was, therefore, in general, excluded.”

¹³⁴ Smits, *supra* note 128, at 8.

correspond to his expectations. Very often reasons of pressure, unusual circumstances or surprise can influence consumer's decision to enter the contract.¹³⁵

The right of withdrawal is limited to distance contracts. According to the Distance Selling Directive, in the time frame of at least seven business days, consumer has an opportunity to withdraw from the contract.¹³⁶ This Directive is of minimum harmonization, therefore member states had right to prolong this period in the Directive's transposition. Germany, Cyprus and Denmark provide 14 days as a withdrawal period, whereas Italy provides 10 business days and Austria and Belgium 7 business days.¹³⁷ The consumer does not have to state any reason while canceling the contract nor he has to bear any penalty for his behavior. The only cost consumer can be charged with is the cost of the return of goods.¹³⁸

The period of withdrawal begins in a case of the sale of goods from the moment the consumer receives goods. In a case of services, the period starts at the moment of conclusion of the contract. When the consumer exercises his right of withdrawal, the seller has a duty to reimburse him as soon as possible and in any case not longer than thirty days.¹³⁹ The right of withdrawal does not apply, unless seller agrees, to performance of services as gaming and lottery services or the ones which performance has started. The right of withdrawal does not apply also to goods which price is dependent on market fluctuations out of the scope of seller's influence. Moreover, the supply of video, audio recordings, software, newspapers and magazines is exempted from the application of the withdrawal. As the consumer cannot waive

¹³⁵ Horst Eidenmueller, *Why Withdrawal Rights?* (Feb 14, 2013) at 12 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660535.

¹³⁶ Art.6 Distance Selling Directive.

¹³⁷ Annex IV of Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of consumers in respect of Distance Contracts, (Feb 14, 2013) at 19 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0514:FIN:EN:PDF>.

¹³⁸ Very similar at US Amazon, according to which buyer shall be charged for return of the goods if the reason for return is not a result of Amazon's mistake.

¹³⁹ Art.6 Distance Selling Directive.

from any of the rights provided in the Directive, therefore it cannot waive from the right of withdrawal.¹⁴⁰

This cancelation right is considered to be without a penalty although consumer will be charged with shipping cost. Even though the consumer is not held liable for exercising the right of withdrawal, many times he will be deprived from using this right if shipping costs are higher than the cost of goods. European law does not set the minimum value of the contract to exercise the right at USD 25 as American law. If the value of the goods is to smaller than the shipping cost, in that particular case however, it is not reasonable to expect that the consumer will be in the opportunity to use the right.

The Distance Selling Directive sets a standard of withdrawal for the consumer contract. Nonetheless, due to its characteristic of minimum harmonization, significant differences in the European law have been generated during the transposition of the Directive. Companies operating in online sale of goods usually operate cross-border, therefore they have to apply different withdrawal periods depending on the place of residence of the costumer. Fragmentation of the law is a burden for consumers and companies¹⁴¹ and therefore has been recognized as unnecessary in the Directive of 2011 on Consumer Protection.

The Consumer Protection is, in contrast to the Distance Selling Directive, a directive of full harmonization. Therefore, the time period for the right of withdrawal is set to 14 days in all member states.¹⁴² Another difference in the regulation of the right of withdrawal is the extension of the time period in a case the seller omits informing the consumer on the withdrawal. If the consumer was not given this information, he has one year to cancel the

¹⁴⁰ Art.12 Distance Selling Directive/ Siegfried Fina, The Consumer's Right of Withdrawal and Distance Selling in Europe (Feb 15, 2013) at 34, available at http://unternehmensrecht.univie.ac.at/fileadmin/user_upload/privat_fina/Fina_Beitrag_FS_Zehetner.pdf.

¹⁴¹ Id. at 49.

¹⁴² Art.9 Consumer Rights Directive.

contract starting with the end of the initial withdrawal period.¹⁴³ The seller can remedy his position in any time by providing the information. From that moment, 14-days period withdrawal starts again. The Distance Selling Directive extended this period only up to three months.¹⁴⁴ In order to cancel the contract, the consumer has to make an unequivocal statement of withdrawal. The seller has a duty to reimburse the consumer in 14 days which is a much shorter period than 30 days under the Distance Selling Directive. Moreover, the seller has to inform the consumer who will bear the costs of return. If he fails to do so, the seller will bear them.¹⁴⁵ Amazon.com provides cooling off period in its online contracts, only if the goods have not been opened yet. On the other hand, European consumer will be liable for diminishing value of the goods only in a case goods have been handled out of scope what was “necessary to establish the nature, characteristics and functioning of the goods”.¹⁴⁶

The Consumer Rights Directive regulates the right of withdrawal in a much more detail than the Distance Selling Directive. It is transparent, more consumer oriented and eliminates some of previous deficiencies. While in the US system of cooling off period has been developed mostly through the private regulation, the EU has developed a state law approach explained on a step by step basis. In the meantime, the influence of EU has played a major role in emergence of the right of withdrawal in Bosnian and Herzegovinian law.

4.3. Right of withdrawal in a comparative perspective – B&H

The Statute of Consumer Protection defines the distance selling contract as a contract of sale of goods or services which is organized by a seller using one of the methods of the distance communication. Distance selling contracts are strictly limited to consumer

¹⁴³ Art.10 Consumer Rights Directive.

¹⁴⁴ Art.6 Distance Selling Directive.

¹⁴⁵ Art.14 Consumer Rights Directive.

¹⁴⁶ Id. Art.14.2.

transactions.¹⁴⁷ Similarly as in European Union law, Bosnian consumer has a right to withdraw from the contract. Using similar wording, legislator allows the consumer to cancel the distance contract without any associated costs or reasons in a period of 15 days. The Statute differentiates the effect of the withdrawal period in the case of the sale of goods from the service contracts. Therefore, in the contracts of sale of goods, the withdrawal period begins from the time of receipt of the goods by consumer, whereas in the service contracts it starts from the moment of conclusion of the contract.¹⁴⁸

If the seller did not disclose any information to the consumer defined in the Art.44 including information on right of withdrawal, the cancellation period will be extended to three months. In any case seller can remedy its position by informing consumer in the three-month period.¹⁴⁹ In contrast to the Consumer Rights Directive, the Statute does not describe any of consumer's duties. Therefore, question if the seller is responsible to take over the goods or the consumer is should ship them back, remains unanswered. In compliance with EU approach, the consumer will bear the costs of shipping, although the seller does not have to particularly to inform the consumer on this issue.

US law does not define reimbursement time. Usually, this time frame is privately regulated as the period starting from the date the shipment is received by the seller. Therefore, the position of the consumer in the US in regard to the right of withdrawal is not the most favorable. In B&H, seller has a duty to reimburse the consumer immediately or not longer than 15 days from the date the seller received the notice of cancelation of the contract. The Distance Selling Directive defines this period as thirty-day period. The Consumer Rights

¹⁴⁷ Art.42.1 Statute of Consumer Protection of B&H.

¹⁴⁸ Id. Art.42.2-3.

¹⁴⁹ If the seller informs the consumer in compliance with Art.44, fifteen-day right of withdrawal begins from the moment of disclosure.

Directive has shortened the period to 14 days starting from the notice of cancelation of the contract.

Articles regulating the distance selling contracts in Bosnia and Herzegovina are obviously modeled after European law. Having in mind the influence of EU on Bosnian market and Bosnian attempts to become one of the member states, modeling the law after EU developments is a positive phenomenon. It is a better law approach in functional comparative perspective. However, legislator has to be very careful in the transposition of foreign law especially, when it is the first of a kind as in Bosnian example.

The most evident example of a problematic transposition is set in Art.48 of Statute on Consumer Protection. Exactly as Distance Selling and Consumer Rights Directives do, Art.48 should provide the exemptions from the right of withdrawal. Instead of regulating injunction to exercise the right of withdrawal, according to this article, Bosnian consumer cannot withdraw from withdrawal, unless otherwise agreed. Therefore, in Bosnian law, unless otherwise agreed, consumer cannot give up his right of withdrawal in the service contract where the performance has started, in the lottery games, in the case of sale of goods with the fluctuating price, or when the goods cannot be possibly returned. The consumer cannot give up his right of withdrawal also in the sale of video and software content, or in the case of magazine delivery, when he has already used the goods..

Having in mind the content of this article in Directives,¹⁵⁰ this is an obvious translation mistake. Art.48 should represent the exemptions from right of withdrawal and therefore wording of the article “unless otherwise agreed, the consumer must not give up from his right to cancel the contract [...]”¹⁵¹ is not logical. The right of withdrawal is regulated in Bosnian law and that is a positive cognition. Moreover, it is regulated in a manner that provides

¹⁵⁰ Art.6.3 Distance Selling Directive, Art.15 Consumer Rights Directive.

¹⁵¹ Art.48 Statute on Consumer Protection of B&H.

consumers with the necessary information and remedies the lack of it. However, The Consumer Protection Statute is in need for more detailed approach in regard to the duties of consumer. Finally, the main critique is directed to translation errors as they do not leave good impact on a reader. Hence, the amendment of the Art.48 should take place as soon as possible.

5. CONCLUSION

Consumer protection is a very important area of the law. Regulations of consumer protection, however, differ manifestly mainly due to the fact that systems are more or less of a liberal approach. Following the EU model in Bosnia and Herzegovina is a better approach for the reason it functions better. Before 2002 situation was similar as in the US, without unified consumer law, where the consumer had to seek protection under relevant provisions of the Statute on Law of Obligation. As case law developments are not available, lack of consumer protection provisions was recognized and the Statute was enacted. Therefore in the conclusion, it will be given more attention to the issue of (in)adequate transposition in the certain areas of consumer law in B&H in comparison to EU system, highlighting US solution which could be adapted to Bosnian situation.

I - In the area of unfair contract terms, US system applies the doctrine of unconscionability. This doctrine is different than EU regulation of unfair contract terms in the Directive, providing at the same time gray list of clauses which can be considered as unfair by the courts. Bosnia and Herzegovina follows the same path as the European Union with small divergences. The only significant similarity between three systems is absence of separate regulation of unfair contract terms in the internet environment. Therefore, offline regulations are the only source that avails protection to the consumer in the battle with the unfair contract terms.

The Statute on Consumer Protection has a shorter version of the Directive applied as one of the chapters. The main difference is the list defining clauses which can be regarded as null by the courts. In B&H that list represent the clauses which are automatically void, whereas the Directive on Unfair Contract Terms defines these provisions as the gray list. The Directive does not set the standard of the applicable law for the consumer transaction in a case

of unfair contract terms. The Statute does the same. However, in the EU this gap has been regulated through regulation Rome I, addressing the issues of both applicable law and competent court. The Statute defines the competence of the Court of Bosnia and Herzegovina, however, failing to address the issue of the applicable law. Other statutes are not addressing this issue either, thus the closest contact approach shall be applied in all cases. That is usually law of the place of the seller. Ambiguity of the certain clauses is yet another problem which should be addressed.

II - Right to be informed in a comparative view has been absolutely differently regarded and regulated. While there are several directives in the EU defining this field, in the US there are no provisions existing on right to be informed as such. Information duties in the US are defined as disclosure duties in order not to perform deceptive practice. The right of consumer to be informed is regulated in Bosnia and Herzegovina as a chapter of the Statute. It is very short and follows the rationale of the directives. The Statute requires less information disclosures than the Consumer Rights Directive.

In defining the right of consumer on information it is very important to find the balance between the necessary information and the length of the one provided. If the information is not specific and too long it is not good enough. It is even better for the consumer not to be given any information rather to be given one that will occupy too much of his time. Information duties have their limitation. If the seller goes beyond the limitation, he can easily misuse tendency of the consumers not to read standard form contracts. The most important clauses of standard form contracts should be clear and comprehensive and the law should provide the guideline on what is clear and comprehensive. US system has already developed the definition of conspicuous and this is solution which could be applied in B&H in order to draw attention of the consumer to the most important clauses.

III – The gist of the right of withdrawal is to remedy the consumer for lack of presence while purchasing goods online. Therefore, the consumer has a possibility to return goods and cancel the contract without being held liable. The costs he would have to take care of are most of the time only return costs. US system also recognizes the right of withdrawal under the cooling-off period, developed in the practice of the Federal Trade Commission and certain state laws. In contrast, EU approach is regulated by directives availing consumer longer period of time in order to ship the goods back to seller. B&H also recognizes the need for right of withdrawal, defining it as 15-day period. There would not be major differences in regulation of the right of consumer in EU and B&H, if the exemptions from the right to cancel the contract have been regulated correctly. The only logical way to interpret the Art.48 is to interpret it as a flagrant mistake in translation. Therefore, amendment of the mentioned article should take place as soon as possible.

Bosnia and Herzegovina has shown an interest in following the newest legal improvements of developed legal systems, more accurately the European Union. The Consumer Protection Statute of Bosnia and Herzegovina which has been enacted under the magnifying-glass of the EU, is at the level of the state. That is a major success in the specific system of two entities. Having consumer protection regulated at this level and the Court of Bosnia and Herzegovina competent, the consumer is protected identically in the entire territory not allowing different court practice, standards and forum shopping. Nonetheless, in order to make the consumer protection better, ambiguous clauses, transposition and translation mistakes should be corrected as the consumer protection has to be conspicuous, simple and clear.

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