

SPECIFIC QUESTIONS OF CONSUMER PROTECTION CONNECTED WITH INFORMATION DUTY IN CZECH LAW

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Abstract: *The text is focused primarily on the concept of informed consumers in the Czech law. We do not aim to cover exhaustively the whole field. The main target of the article is to introduce specific questions which are connected to such a topic. In the beginning we primarily introduce general characteristics of the informed consumer, then we analyse pre-contractual information obligation and the demands focused on the transparency. As the position of the consumer is weaker than the position of the entrepreneur, misleading commercial practices and unfair contract terms are examined as well. The text is then focused on sector specific rules, such as in the area of financial services and on the aspects of the digital consumer. Throughout the text, some problematic aspects of Czech regulation or inappropriate implementation of European legislation are mentioned as well. The aim of the article is to introduce national specifics within abovementioned areas and to analyse relevant questions of consumer protection connected with information duty of the entrepreneurs.*

Keywords: *Consumer, information, disinformation, digital consumer, financial consumer, information services, electronic contracting, cookies, commercial practices*

1. INTRODUCTION

Czech private law is based on the idea of a reasonable, informed consumer who is able to assess the consequences of his/her actions,¹ i.e. the basic presumption on which the concept of “consumer” is based being that the consumer is a person who has enough information to be able to make a responsible decision on whether or not to conclude the contract (the consumer knows “what is going on”).² However, special protection is given to so-called “particularly vulnerable consumers”, in accordance with Article 5 (3) of the UCPD Directive. The special protection has been implemented in Czech law in the Act no. 634/1992 Sb., Consumer Protection Act, as amended (further referred to as the “Consumer Protection Act”) (see Section 4 (2) of the Consumer Protection Act).³ Besides the concept

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¹ Such concept was incorporated in Czech law on the basis of the 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, further referred to as the “UCPD Directive”.

² The interpretation of the concept of “consumer” is consistent with the settled case-law of the Court of Justice of the European Union (CJEU) [Cape Snc v Idealservice Srl (C-541/99) and Idealservice MN RE Sas v OMAI Srl (C-542/99); Johann Gruber v. Bay Wa AG (C-464/01); Patrice Di Pinto (C-361/89)].

³ A business practice that can substantially impair the economic behaviour of a certain clearly identifiable group of consumers who, due to their mental or physical weakness, age or credulity, are particularly vulnerable by such practice or product or service, in a way that the entrepreneur may reasonably expect, is considered from the viewpoint of the average member of that group; this does not affect the normal and legitimate advertising practices of exaggerated statements or such statements that are not meant literally.

of “average consumer”, it also deals with the protection of the so-called vulnerable consumers, i.e. persons who are, due to their age, mental or physical weakness or credulity, more easily influenced by business practices aimed at them.⁴

The main aim of this article is to assess chosen issues connected with informed consumer and to analyse Czech legislation and its impacts. Next parts of this article will focus firstly on pre-contractual information requirements, then on misleading commercial practices which adversely affect consumers’ decisions and on unfair contract terms in connection of imbalanced position between consumer and entrepreneur. We conclude this section with reasonable consumer expectations. There are however also specific regulations in some sectors. In this area, we have chosen the specifics in the financial area and then in the online area connected with electronic commerce. The last chapter is focused on the problems with disinformation in connection with consumer protection. The main aim of the article is to introduce and analyse national specifics of consumer protection and information duty of the entrepreneurs.

2. PRE-CONTRACTUAL INFORMATION REQUIREMENTS

2.1 General information obligation

The general pre-contractual information obligation follows, in particular, Article 5 of the Consumer Rights Directive⁵ which was transformed into the Act no. 89/2012 Sb., Civil Code, as amended (further referred to as the “Civil Code”).⁶ The consumer must receive information well in advance, i.e. so that he/she could make an informed decision, and even if the information required by law is not known from the negotiation process. The information he/she must receive concerns, for example, the identity of the entrepreneur, the goods, the price, the delivery costs, the information on the rights from defective performance, the guarantee, the duration of the obligation, and the terms of termination. However, the rule of law appears to be imperfect since it does not contain any explicit sanction (unlike the breach of pre-contractual information obligation in the case of contracts concluded out of the premises and distance contracts). Nevertheless, it generally applies in Czech private law that if a breach of a legal obligation results in a damage (both the material and non-material one) then the person who breached the obligation (wrongdoer) is liable for the breach.

Czech private law also knows the institute of *culpa in contrahendo* (Section 1728–1729 of the Civil Code), but it is primarily a general institute applied generally to pre-contractual

⁴ This was also stressed out by The Supreme Administrative Court of the Czech Republic, in its judgment of 17 January 2014, file no. 4 As 98/2013-94.

⁵ Directive 2011/83/EU of the European Parliament and of the Council on consumer rights which amends the Council Directive 93/13/EEC and the Directive 1999/44/EEC of the European Parliament and of the Council and which repeals the Council Directive 85/577/EEC and the Directive 97/7/EEC of the European Parliament and the Council.

⁶ If the conduct of the parties aims at concluding the contract and these facts are not apparent from the context, the entrepreneur shall inform the consumer in good time before the contract is concluded or before the consumer makes a binding offer.

negotiations between potential contractors. Nevertheless, one of the Supreme Court resolutions established that *“the defendants had a legitimate reason to refuse to conclude the contract because the contractual terms offered by the plaintiff contradicted their initial wording; the Court also inferred that there was no causal link between the actions of the defendants and the damage incurred by taking into consideration the actions of the appellant and the defendants during the entire contractual process.”* (the resolution of the Supreme Court of the Czech Republic of 28 March 2013, file no. 25 Cdo 2863/2012).

The provision concerning the general pre-contractual information obligation in B2C relationships appears to be specific to the general institute of *culpa in contrahendo*, or it could make the appearance of the constituent elements of this institute stricter and more specific, but we take the view that priority will be given to liability for damage caused by breach of the legal obligation defined in Section 1811 of the Civil Code prior to the application of the general institute of *culpa in contrahendo*.

2.2 Transparency requirements

Czech private law includes an obligation for the entrepreneurs to provide consumers with information of a certain quality, in order to fulfil the meaning and purpose, i.e. so the decision should be made by an informed consumer “knowing what is going on”. Section 1811 (1) of the Civil Code explicitly states that *“all communications to the consumer must be made clearly and comprehensibly by the entrepreneur in the language in which the contract is concluded.”* For example, the Constitutional Court of the Czech Republic explicitly states that *“the content of the contract is to be legible to the average consumer, clearly and logically arranged. For example, contractual arrangements must be of sufficient font size, they may not be in a significantly smaller size than the surrounding text, and they may not be placed in sections that give the impression of an insignificant character.”*⁷ The High Court in Prague also ruled that the language of the contract must be understandable to the ordinary consumer: *“the Court of Appeal notices - which is immediately apparent from an analysis of the contract - that the contract is, due to the legal constructions of the individual covenants (for consumer contracts totally inappropriate), completely incomprehensible to a person without a legal education and a certain economic overview. Surely, it is not the consequence of clumsiness in the drafting of the text of the contract (i.e. the model text); the opposite is true. Obviously, the text of the contract is deliberately designed so that by its complex constructions it prevents a person who does not have legal education and a certain economic overview from understanding the true meaning of the contract covenant”* (the decision of the High Court in Prague of 7 September 2011, file no. 76 Cm 876/2010).

Czech case law also corresponds to the CJEU’s case law when the obligation of an entrepreneur to provide information in a clear and understandable language is not construed formalistically but teleologically (the consumer has received information and, therefore, “he knows what is going on”), which is fully in compliance with the effective consumer protection in the EU. For example, CJEU states in its decision of 30 April 2014, *Kásler Árpád, Káslerné Rábai Hajnalka v OTP Jelzálogbank Zrt.* (C-26/13) that: *“Article 4*

⁷ The decision of the Constitutional Court of the Czech Republic of 11 November 2013, file no. I. ÚS 3512/11.

(2) of Directive 93/13/EEC must be interpreted in the sense that if the clause at issue is such a clause as in the original proceedings, the requirement that the clause be drafted in a clear and comprehensible language must be understood in such a way that it establishes that the clause in question should be comprehensible to the consumer from a grammatical point of view, but also that the contract should transparently mention the specific functioning of the foreign exchange mechanism to which the clause in question refers to as well as the relationship between that mechanism and the mechanism laid down by other credit clauses, so that the consumer should be able, on the basis of clear and comprehensible criteria, to assess the economic implications resulting for him/her.”

The basic sanction provided by Czech private law in the case of information being communicated contrary to the requirement of clarity and comprehensibility is that such covenants are not taken into account, i.e. that it is a seemingly legal act (cf. Section 1812 (2) of the Civil Code).

The Civil Code anchored special private sanction (Section 1821 of the Civil Code) regarding the distance contracts and contracts negotiated away from the business premises.

“If an entrepreneur has not provided the consumer with the information on other taxes and fees borne by the consumer under Section 1811(2)(c) or the costs under Section 1811(2)(e) or Section 1820(1)(g), the consumer is not obliged to pay these taxes, fees or costs to the entrepreneur.”

The entrepreneur bears the burden of proof that he provided the abovementioned information.

3. MISLEADING COMMERCIAL PRACTICES

The legal regulation of Unfair Commercial Practices (the UCPD Directive) is not a part of the Civil Code but it was transposed to the Consumer Protection Act by amending Act no. 36/2008 Sb.

The European Commission sent the Czech Republic formal notice and criticised the transposition of several provisions of the UCPD Directive.⁸ In order to make a proper transposition of the UCPD Directive, the legislator adopted the Act no. 378/2015 Sb.⁹ *De lege lata* the Consumer Protection Act comply with the UCPD Directive since then.

The enforcement of the UCPD Directive is carried out by public bodies: Czech Trade Inspection Authority, Czech National Bank, Czech Energy Authority etc. These public bodies can initiate administrative proceedings on the basis of the consumer's requirement or from their own initiative under the condition that they have enough relevant information.

Section 5 and Section 5a of the Consumer Protection Act explicitly distinguishes between misleading actions and misleading omissions. The assessment of the misleading character of a commercial practice is influenced by the way in which pre-contractual information was provided to the consumers. The consumer is protected against aggressive

⁸ European Commission formal notice (2013/2204) of 23 January 2014 regarding Article 2, 3, 4, 5, 6, 7, 8 Annex I.

⁹ Amendment to Consumer Protection Act. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. 31. 3. 2015 [2017-05-29]. Available at: <<http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=445&CT1=0>>.

business practices and misleading business practices/misleading omissions which are unfair business practices. The consumer is protected against entrepreneurs' practices which can materially distort the economic behaviour of the consumers; more precisely the practise of the entrepreneur can significantly impair or is likely to significantly impair consumer's freedom of choice. It is prohibited to use a commercial practice to appreciably impair consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he/she would not have made otherwise. Competent court or ADR body must evaluate if the entrepreneur did not use in pre-contractual phase unfair business practices, which is one element among others on which the competent court/ADR body may base its assessment of the unfairness of contractual terms under Article 4(1) of the Directive 93/13/EEC on unfair terms in consumer contracts (further referred to as the "Directive on unfair terms").

The black list, which is Annex 1 (Misleading Business Practices) and Annex 2 (Aggressive Business Practices) of the Consumer Protection Act serves as a benchmark for assessing the misleading character of commercial practices. If the term is on the black list, it is not necessary to determine whether such practice fulfils requirements of general clause in the meaning of Section 4 of the Consumer Protection Act.¹⁰ It is considered a great tool for controlling public bodies. According to the information from Czech Trade Inspection Authority, most of the main trade chains stopped using the practice, which is on this black list.¹¹

The average consumer (not even vulnerable consumer) is a relevant reference point in the Consumer Protection Act, but this Act recognizes the average member of the group as a reference point when the commercial practice is directed to a particular group (Section 4). The commercial practice has to be assessed from the perspective of the average member of that group, who is vulnerable because of age, physical or mental infirmity or credulity. The term average consumer is used as a benchmark for assessing commercial practice in regard to advertising in the case law of the Supreme Administrative Court. This court declared that an average consumer is a person who is reasonably well informed and reasonably observant and circumspect.¹² The Supreme Court also used Euro-conforming interpretation of the term "*consumer*" and assessed commercial practice in connection to "*average consumer*". The Supreme Court declared that an average consumer is a person who is reasonably well informed and reasonably observant and circumspect taking into account social, cultural and linguistic factors. Reasonably observant and circumspect consumer in the case law of the Supreme Court means that the consumer is not inattentive or careless.¹³

¹⁰ The decision of the Supreme Administrative Court of the Czech Republic of 23 October 2014, file no. 7 As 110/2014-52. The decision of the Court of Justice of the European Union of 17 September 2013, CHS Tour Services (C-435/11).

¹¹ Study for the Fitness Check of EU consumer and marketing law Final report. Part 3 – Country reporting. In: *European Commission* [online] May 2017 [2018-05-02]. Available at: <ec.europa.eu/newsroom/document.cfm?doc_id=44842>, p. 242.

¹² The decision of the Supreme Court of the Czech Republic of 31 August 2011, file no. 8 As 83/2010.

¹³ The decision of the Supreme Court of the Czech Republic of 1 August 2008, file no. 32 Cdo 3895/2007, the decision of the Supreme Court of the Czech Republic of 23 October 2008, file no. 32 Cdo 4661/2007, or the decision of the Supreme Court of the Czech Republic of 28 October 2011, file no. 23 Cdo 4384/2008.

We are not aware of a specific rule for providing the information to the consumers through specific media, e.g. websites.

4. IMBALANCED POSITION BETWEEN CONSUMER AND ENTREPRENEUR

The Directive on Unfair Terms was transposed into the Civil Code and entered into force on 1 January 2014. The general clause has been transposed into the Section 1813 of the Civil Code. The Czech Republic employed so-called derogation clause set forth in the Directive on Unfair Terms and provided consumers with a higher degree of protection (Article 8).

Section 1813 of the Civil Code:

“Stipulations which establish, contrary to the requirement of proportionality, a significant imbalance in the rights or duties of the parties to the detriment of the consumer are presumed to be prohibited. This does not apply to stipulations on a subject of performance or price if they are provided to the consumer clearly and understandably.”

Interpreting the linguistic meaning of Section 1813 of the Civil Code, we may come to a conclusion that the protection from all unfair contract terms, regardless of how they were negotiated, is granted to the consumers. Nevertheless, the explanatory report to the Civil Code stated that the consumers shall not be given protection based on these provisions if a particular term was negotiated individually.¹⁴ If the legislator intended to provide the consumers with protection only against such contract terms that were not individually negotiated, he should have expressed it clearly in the particular legal norm so that it would be clear and obvious.¹⁵ The commentary to the Civil Code argues that the entrepreneur could not avoid the application of the unfairness test stating that the term was individually negotiated. Derogation clause (Section 1813 of the Civil Code) applies to all contract terms regardless of how the term was negotiated.¹⁶

De lege lata unfair terms shall not be taken into account unless they are challenged by the consumer (Section 1815 of the Civil Code). In the terminology of the Civil Code, it is understood as an ‘*apparent legal act*’ under Section 551 et seq. of the Civil Code, which shall not be taken into account and shall be considered as meaningless. We consider anchoring of this legal consequence to be compliant with the Directive on Unfair Terms.

The Civil Code includes general protection of weaker party, party with lesser bargaining power in Section 1753 of the Civil Code. It protects weaker party (consumer, tenant...) against the provisions of the standard commercial terms which the weaker party could not have reasonably expected. This term is ineffective unless expressly accepted by that party.

The asymmetry in the bargaining power of the consumers was also declared in the case law of the Constitutional Court.¹⁷ The court stipulated the importance of consumer pro-

¹⁴ For more, see the Explanatory report to the Civil Code, p. 449.

¹⁵ Please compare with the Decision of the European Court of Justice of 10 May 2001, the Commission vs the Netherlands (C-144/99).

¹⁶ For more, see the commentary to the Civil Code: HULMÁK, M. et al. *Občanský zákoník: komentář. V. Závazkové právo: obecná část (§1721-2054)* [Civil Code: Commentary. V. Contractual Obligations Law: General Part (Section 1721 to 2054)]. Prague: C. H. Beck, 2014, pp. 503–504.

¹⁷ The decision of the Constitutional Court of the Czech Republic of 10 April 2014, file no. III. ÚS 3725/13.

tection, which justifies the intervening in the party's autonomy in order to get a balance between the consumer and the entrepreneur, primarily in pre-contractual phase.

Lower bargaining power of the consumers is specifically reflected in the Article 6 of the Directive on Unfair Terms, which was transposed by Section 1813 and Section 1815 of the Civil Code. The provision in Section 1813 of the Civil Code sets forth a rebuttable presumption that all terms which, contrary to the principle of proportionality, establish an excessive disharmony between the rights and obligations of the parties to the consumer's disadvantage, are forbidden. It seems that Section 1813 of the Civil Code allows to prove the contrary. Pelikánová argues that theoretically, it is possible that a contract term which shows all the features of disproportionality is not banned, but she concludes that such interpretation would contradict the purpose and goal of the concept of the consumer protection as it is understood by EU law; such conclusions would also be in contradiction to the decisions of the CJEU.¹⁸

Article 4 (2) of the Directive on Unfair Terms has been transposed into Section 1813 para. 2 of the Civil Code. This provision does not comply with EU law, as the Directive does not mention “*subject matter*”, but rather “*main subject matter of the contract*”; it also does not refer only to “*price*”, but rather to “*price and remuneration*”.

In connection with this legal construct, it seems to be problematic to use the vague notions of clarity and intelligibility. There are not any guidelines on how to interpret the meaning of this transparency principle. As for the interpretation, the use of the concept of “*subject matter of the contract*” or “*main subject matter of the contract*” is disputable, which happened in the Czech Republic for example in connection with the case concerning bank fees for loan contracts.¹⁹ In this matter, the Supreme Court declared that this requirement (the duty to fulfil the transparency principle) arises from the general clause which stipulates the necessity of legal action.²⁰ The Supreme Court ruled, without applying the transparency test, that competent court is not allowed to assess an unfair character of banking fee, because it is a part of the price. We can see that the legal term “*core contract terms*” is interpreted widely in the Czech Republic (as it was shown by previously mentioned decision of the Supreme Court), which does not match with the CJEU case law.²¹ We can also say that in practice “*core contract terms*” in the meaning of Section 1814 of

¹⁸ PELIKÁNOVÁ, I. Odpovědnost za škodu – trendy a otázky, malý náhled do nového občanského zákoníku [Liability for Damage - Trends and Issues, Little Insight into the New Civil Code]. *Bulletin advokacie*. 2011, No. 3, pp. 15–23.

¹⁹ For more, see HRUDA, O. Poplatky za vedení úvěrového účtu - mají mít i české banky důvod k obavám? [Fees for a Loan Account – Should the Czech Banks Start Worrying?]. *Právní rádce*. 2012, No. 2, pp. 57–62; the decision of the Constitutional Court of the Czech Republic of 10 April 2014, file no. III. ÚS 3725/13; the decision of the financial arbitrator of 13 December 2013, file no. 10425/2013, litigation no. 181/SU/2013. In: *Kancelář finančního arbitra* [online]. [2018-05-02]. Available at: <http://www.finarbitr.cz/galerie/tinymce/rozhodnuti/181_SU_2013_nalez.pdf>.

²⁰ Section 37 of the Act no. 40/1964 Sb., Civil Code. The same requirement is in the Civil Code. “*The legal action must be done in a free way, seriously, definitely and intelligibly; otherwise, it shall be invalid.*” See also the decision of the Supreme Court of the Czech Republic of 23 April 2014, file no. Cpjn 203/2013.

²¹ The decision of Court of Justice of the European Union of 26 February 2015, Bogdan Matei and Iona Ofelia Matei v. SC Volksbank România SA (C-143/13). The decision of Court of Justice of the European Union of 6 June 2014, Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt (C-26/13).

the Civil Code are excluded from the unfairness test even without consistent application of the transparency test.

4.1 Reasonable consumer expectations

*“A provision of the standard commercial terms which the other party could not have reasonably expected is ineffective unless expressly accepted by that party; any stipulation to the contrary is disregarded. Whether or not a provision is of such a nature is assessed with regard to its content as well as to the manner in which it is expressed.”*²² The explanatory note to the Civil Code then explains that such provision was inspired by Article 2.1.20 of the UNIDROIT Principles of International Commercial Contracts.

We can thus consider as surprising arrangements (the arrangements which are contrary to those reasonably expected) such business terms that the other party could not reasonably expect (there is a surprising factor). The surprising arrangements may therefore only be those arrangements where there is a clear difference between the expectations of the other party (not necessarily only the consumer) and the content of the commercial terms (strangeness). Examining whether an arrangement is surprising therefore requires, firstly, determining whether the content of the commercial terms is unusual (objective criterion) and secondly, whether the content is unusual and surprising in a specific case (subjective criterion). The surprise factor will be assessed with regards to the usual content of a certain type of contract, to the scheme of the contract, but also to the way of expression (e.g. almost unreadable text, chaotic text, etc.).

The subject of discussion may be to what extent it is relevant when a surprising arrangement differs from usual legal rules. It is obvious that the apparent inadequacy, severe and unwarranted deflection from the usual arrangement in similar cases is considered surprising (e.g. significant restrictions on the rights from defects or rights to compensation, unlimited discretion, etc.). The legislation, however, does not offer strict limits and allows the courts *ad hoc* interpretations. The Supreme Court decided that it cannot be considered a mistake if the acting person had the opportunity to avoid such a mistake due to his/her own care while recognising decisive factors for the realization of a legal act. It cannot be accepted that the person would have the option to achieve the invalidity of the mistake in a situation when he/she has neglected the objectively existing possibility to ascertain the true state of legal conditions and without any reason, such a person was mistakenly affected in the judgment by some untrue impressions or indications.²³ The Supreme Court also ruled that the person (educated and experienced) could and should have assessed the terms (which she signed on the same side of the contract), and besides the text itself was not found to be extremely surprising and contrary to law.²⁴ The Constitutional Court then decided about the situation where the terms were written using smaller (but still readable) letters and found it as confusing and not clearly presented to

²² Section 1753. Civil Code.

²³ The decision of the Supreme Court of the Czech Republic of 26 February 2009, file no. 33 Odo 1560/2006.

²⁴ The decision of the Supreme Court of the Czech Republic of 29 June 2010, file no. 23 Cdo 1201/2009.

the consumer.²⁵ Similar argumentation can be applied also to the advertisement and the information presented to the consumer.²⁶ Although such decisions were issued on the basis of the previous (older) Civil Code the conclusions are fully applicable to the current legal regulations.

Most legal orders require that the storing of information, or the gaining of access to information already stored in the equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his/her consent, having been provided with clear and comprehensive information about the purposes of the processing.

5. SECTOR SPECIFIC RULES

5.1 Specifics Regarding Credit Agreement

Regarding credit agreement, the legislator adopted strict private sanction for breaching information duty. The entrepreneur can require only repo rate (0,05%) instead of the borrowing rate contracted in consumer credit agreement and the consumer does not have to bear any cost in case if one of following option is fulfilled:

- (i) consumer credit agreement contains an incorrect statement of the annual percentage rate of charge,
- (ii) consumer credit agreement does not conclude information about the borrowing rate,
- (iii) consumer credit agreement does not conclude information about the total amount which has to be paid by consumer,
- (iv) one of the abovementioned information was not provided in written form,
- (v) consumer did not receive a copy of the consumer credit agreement, which contains all abovementioned information, in written form or on another durable medium.

The consumer does not have withdrawal right regarding credit agreements relating to the residential immovable property; instead of this right the legislator transposed into the national law the reflection period (Section 111 of the Consumer Credit Act) in length of 14 days. The consumer may accept the offer (proposal of the contract) at any time during the reflection period.²⁷ The practice shows us that this rule does not help much. *A contrario*

²⁵ As it was already mentioned the Constitutional Court was dealing with the font size as well and it stated that “*The content of the contract is to be legible to the average consumer, clearly and logically arranged. For example, contractual arrangements must be of sufficient font size, they may not be in a significantly smaller size than the surrounding text, and they may not be placed in sections that give the impression of an insignificant character.*” The decision of the Constitutional Court of the Czech Republic of 11 November 2013, file no. I. ÚS 3512/11.

²⁶ It is however always necessary to analyse the source of the information. For example, it is stricter when the information was presented to the consumer using television broadcasting (the consumer has less time to read and absorb the information) – the text has to be presented for sufficient time in readable size, colours (etc.). When the information is presented to the consumer using e.g. leaflet, then some information presented to the consumer can be smaller and e.g. in the footnote. The situation is thus decided on the *ad hoc* basis. The decision of the of the Supreme Administrative Court of 25 August 2011, file no. 7 As 12/2011 – 65, the decision of the Municipal Court in Prague of 25 June 2012, file no. 7 Ca 42/2009 – 51.

²⁷ Recital 23, Article 14 (6), the Directive 2014/17/EU on Credit Agreements for Consumers.

to this rule the consumer can accept the proposal of the contract just immediately the proposal was done. The legislator did not transpose the provision that the consumer cannot accept the offer (proposal of the contract) for a period not exceeding the first 10 days of the reflection period (Article 14 (6) of the Directive 2014/17). We are convinced that this provision could protect the consumers more effectively.

The consumer has a period of 14 days in which it is possible to withdraw from the credit agreement without giving any reason (Section 118 of the Consumer Credit Act).

The consumer can withdraw from a life insurance contract or a supplementary pension insurance contract, if this contract was concluded solely through the means of distance communication (Section 1841 of the Civil Code), within 30 days from the date on which he was informed by the entrepreneur that a distance contract had been concluded. If the entrepreneur provides a consumer with deceptive information, the consumer has the right to withdraw from the financial contract, which was concluded solely through the means of distance communication, within 3 months from the date on which the consumer became aware or should and could have become aware thereof.

The consumer may exercise the right of withdrawal within 14 days from the conclusion of the financial service contract which was concluded solely through the means of distance communication. The entrepreneur is entitled to the payment of the price for the service, the price may not be disproportionate to the scope of the service provided. *“However, the entrepreneur shall not become entitled to the payment of the price if he began to perform before the end of the time limit for withdrawal under Section 1846 without the consumer’s consent...”*²⁸ This provision does not comply fully with the EU law (the Directive 2002/65/EC concerning the distance marketing of consumer financial services). The Directive 2002/65/EU in Article 7 (2) does not use the term *“consent”* but the term *“consumer’s prior request”*.²⁹ We must distinguish between the terms *“consumer’s consent”* and *“consumer’s prior request”*. If we speak about consumer’s prior request the initiator of the action is the consumer but in the situation that the consumer is giving consent, the entrepreneur is the initiator of the action. We do not have relevant data how this provision is interpreted by the courts.

Some scholars criticised extensive disclosure of the information.³⁰ Kotásek points out that the consumer is in such case inundated with the information and he is unable to concentrate on the provided information.³¹ Domurath discusses the topic – dangerous of in-

²⁸ Section 1849. Civil Code.

²⁹ Please compare the transposition. Recital 50, Article 7 (3), Article 8 (3), 2011/83/EU Directive which regulates distance contracts and obligations arising from contracts negotiated away from business into the Section 1834. Civil Code. *“If a consumer withdraws from a contract for the provision of services and the entrepreneur, at an express request of the consumer, began to perform before the end of the time limit for withdrawal from contract, the consumer shall pay to the entrepreneur a part of the agreed price proportional to the performance provided until the time of withdrawal from contract.”*

³⁰ ONDŘEJ, J., SELUCKÁ, M. In: J. Ondřej. *Spotřebitelské smlouvy a ochrana spotřebitele: ekonomické, právní a sociální aspekty* [Consumer Contracts and Consumer Protection: Economical, Legal and Social Aspects]. 1st edition. Prague: C.H. Beck, 2013, p. 32. DOMURATH, I. In: H. W. Micklitz – I. Benöhr. *EU Consumer Law and Human Rights*. Oxford: Intersentia Ltd., 2013, 272 p.

³¹ KOTÁSEK, J. *Reklama na spotřebitelské úvěry v novém zákoně o spotřebitelských úvěrech. Větší (dez) orientace spotřebitele?* [Consumer Credit Advertising in the New Consumer Credit Act. Larger (Dis)Orientation of the Consumer?]. Prague: Wolters Kluwer, 2010, no. 7, p. 31–34.

formation overload – in the context of (in)ability to understand the meaning of provided information.³² The extensive disclosure of the information leads to the situation that the consumer is overloaded and he/she is not able to make an informed decision, but we are not aware of such discussion in the Czech Republic amongst legislators. The Consumer Credit Act strictly regulates the specific information that must be provided to the consumer. This Act regulates what information must be provided to the consumer in the pre-contractual phase regarding the credit agreement and credit agreements for consumers relating to residential immovable property. As a positive element, we can assess the duty of the entrepreneur to provide required pre-contractual Standard European Consumer Credit Information on a form set out in Annex 2 of this Act. In regard to the credit agreements relating to residential immovable property, the entrepreneur has a duty to provide pre-contractual information on an ESIP form, which is Annex 4 of this Act.

Former Act no. 145/2010 Sb., Consumer Credit Act, was not so strict, providing pre-contractual information on a form was an option, not a duty, which was to the detriment of the consumers. Providing pre-contractual information on a form is more visible, transparent and readable to the consumer. Above described legislation improved consumer protection in the Czech Republic.³³

5.2 Requirements for online-selling contracts

The legal regulation of distant sales to the consumers is incorporated in the Civil Code (particularly in Sections 1820–1840) as the part of Czech private law. These provisions are placed right after the general regulation of the provisions on the obligations of contracts with the consumers (Sections 1810–1819 of the Civil Code) and they draw on the previous general provisions establishing specific requirements for distant sales.

The provisions on distant sales do not focus only on online sales (concluding the contract by electronic means), but they generally cover the obligations on distant contracting including telephone calls or contracting outside the business premises of an entrepreneur, and they also specify the content of such obligations. The definition of electronic means is not incorporated in the Civil Code, but it is possible to be inspired by the Act on Certain Information Society Services;³⁴ particularly Section 2 (c) which establishes that the electronic means include an electronic communications network or electronic mail and automated calling and communication systems.

The main basis for the provisions on distant sales was Directive 2011/83/EU on Consumer Rights; however, some of the areas were also implemented in the Consumer Protection Act as the public law regulation. The further described provisions are cogent; however, it is possible to incorporate into the contract the terms that are more favourable for the consumer.³⁵

In contrast to the offline transactions, there is a different set of obligations for the entrepreneur to inform the consumer of the specifics of distant sales if the entrepreneur is

³² MIKLITZ, H. W., DOMURATH, I. *Consumer debt and Social Exclusion in Europe*. London: Routledge, 2015, 264 p.

³³ We are dealing with the question of extensive disclosure of the information to the consumer also further in this text.

³⁴ Act no. 480/2004 Sb., Certain Information Society Services, as amended.

³⁵ Section 1812. Civil Code.

using any means of distant communication.³⁶ Such information obligation has to be fulfilled in advance before the conclusion of the contract or before the consumer makes a binding offer; the main purpose is to offer the consumer decent information about the whole contract (such information is specified under Section 1811 (1) and 1820 (2)).³⁷ The information provided to the consumer can be divided into 4 main categories: payment information, information on how the contract is binding (such as the minimum time for which the consumer is bound by the contract – the minimum consumption), information on withdrawal from the contract (options of withdrawal, terms of withdrawal, how the consumer should proceed – the entrepreneur has to provide the form³⁸ on withdrawal from the contract) and dispute resolution and assistance (supervision).³⁹ The Civil Code, however, does not establish the form of such information (it does not have to be only in written form), but the entrepreneur has to prove that he has fulfilled such information obligations.

Breach of information obligations can have different consequences. The entrepreneur could have the obligation to cover the damage if the arrangement with the consumer is excessive (it has no binding effect on them). If an entrepreneur does not provide the consumer with the information on other taxes and extra fees (including delivery or return of the good), the consumer is not obliged to pay these taxes, fees or costs to the entrepreneur (Section 1821), or the consumer is obliged to pay only a proportional part of such costs if the obligations from the contract have already been partly fulfilled (Section 1820 (1) (h)). It is, however, necessary to remind the general information obligation (applicable also on online sales) – the entrepreneur has to provide contact details, labelling, price and delivery costs well in advance before concluding the contract (Section 1811). All the information provided by the entrepreneur to the consumer has to be given clearly and understandably in the language in which the contract is concluded (Section 1811 (1)).

The pre-contractual information provided by the entrepreneur is binding and the contractual parties can change it only after a mutual agreement and in favour of the consumer.⁴⁰ The information must be clear and understandable to an average consumer and it has to be really provided to the consumer (it is not enough if it is provided through the hyperlink leading to another web page). Such information in the case of online transactions specifies (except the previously mentioned) the accessibility of the contract to the consumer, the languages in which the contract can be concluded, the individual technical steps leading to the conclusion of the contract, the possibility to correct mistakes made

³⁶ Section 1820. Civil Code.

³⁷ *"If the means of distance communication does not allow the consumer to be provided with all the information, he shall receive at least the information under Section 1811(2), (a), (b), (c) and (g) and the information under Section 1820(1)(b), (c) and (h). The entrepreneur shall provide the consumer with the other information in textual form no later than by the time of the performance."* Section 1824 (2). Civil Code.

³⁸ Requirements of that form are set forth in the Government Regulation no. 364/2013, Sb.

³⁹ For more, see the commentary to the Civil Code: HULMÁK, M. et al. *Občanský zákoník: komentář. V. Závazkové právo: obecná část (§1721-2054)* [Civil Code: Commentary. V. Contractual Obligations Law: General Part (Section 1721 to 2054)]. Prague: C. H. Beck, 2014, pp. 503–504.

⁴⁰ Section 1822. Civil Code.

during the data entering, and the codes of conduct that are binding on the entrepreneur.⁴¹ The contract itself (after it is concluded) also has to contain such information and the change is possible again only after a mutual agreement. If the entrepreneur wants to change the contract (different from the pre-contractual information) such a change, which must be within the legal limits, must be communicated to the consumer in advance (and the changes must be explicitly highlighted or expressed).

In the case of distant contracts, the entrepreneur has the obligation to confirm the receipt of the order immediately,⁴² if the consumer submitted that through one of the means of distant communication.⁴³ The purpose is mainly to provide consumers with assurance that their expression of will reached the entrepreneur and to provide the evidence that such expression has expected legal consequences (in practice it is often created automatically). The order means any expression of the will of the consumer from which the will of the consumer to conclude the contract is evident. Such assurance should decently identify the order and also that the order was received by the entrepreneur; the order should be confirmed by the electronic means; however, it does not have to be the same means which was used by the consumer to place the order.⁴⁴

The concluded contract has to be offered to the consumer in written form.⁴⁵ The same applies also to the text of the standard commercial terms.⁴⁶ The purpose of this provision is to protect the consumer and provide him/her with evidence (the consumer thus has the copy of the contract). The burden of proving that the contract was really offered to the consumer lies on the entrepreneur.

*“If a contract concerns the provision of services, the entrepreneur starts performing his duty within the time limit for withdrawal from the contract only at the express request of the consumer made in textual form.”*⁴⁷ If such a contract is being fulfilled without the consent, the consumer is not obliged to provide any compensation.

*“If a contract is negotiated over the phone, the entrepreneur shall, at the beginning of the call, provide the consumer with basic information about himself and with the purpose of the call.”*⁴⁸ It is not then important whether the contract was finally concluded by the phone or not.

As partially mentioned above, the possibility to withdraw from the contract without penalty and without giving reasons is another part of the consumer protection in distant sales if this is done within the statutory period.⁴⁹ The explicit statement of the consumer

⁴¹ Section 1826. Civil Code.

⁴² Section 1827 (1). Civil Code.

⁴³ *“This does not apply when a contract is concluded exclusively by exchange of electronic mail or equivalent individual communication.”* Section 1827 (1). Civil Code.

⁴⁴ The failure of the entrepreneur to do so will not, however, affect the validity of the contract.

⁴⁵ The Civil Code does not use the term “written form” consistently and sometimes it uses the term “textual form”. This could seem confusing. In our opinion, these are similar terms (using a logical interpretation), although the wording is unfortunate. This supports also the statement that *“the textual form is observed if the information is provided in such a way that it can be kept and displayed repeatedly.”* Section 1819. Civil Code.

⁴⁶ Section 1827 (2). Civil Code.

⁴⁷ Section 1823. Civil Code.

⁴⁸ Section 1825. Civil Code.

⁴⁹ Such possibility thus does not apply e.g. to the situation when the consumer purchased the goods physically in the store.

is sufficient for withdrawing from the contract; to make the withdrawal from the contract only in written form cannot be negotiated by the parties.⁵⁰

The consumer has the right to withdraw from the contract within fourteen days. Such information can be offered to the consumer also through the withdrawal form (established in Section 1820 (1) (f)).⁵¹ The time limit generally starts on the date of the conclusion of the contract, and in the case of “*a) a contract of sale, from the date of the takeover of goods, b) a contract concerning several kinds of goods or the supply of several parts, from the date on which the last supply of goods is taken over, or c) a contract concerning a regular recurrent supply of goods, from the date on which the first supply of the goods is taken over.*”⁵²

A longer period for withdrawal from the contract is offered as the possibility to the consumer⁵³ if the consumer was not informed about the possibility to withdraw from the contract within fourteen days (without giving a reason). In such a case the period for withdrawal from the contract is prolonged to one year and fourteen days (or the new fourteen-day period starts at the moment the entrepreneur informs the consumer).

The mutual obligations (and rights) are cancelled by withdrawal from the contract. The parties are required to return the consideration.⁵⁴ “*If a consumer withdraws from a contract, he shall, without undue delay and no later than fourteen days after the withdrawal, dispatch or hand over to the entrepreneur the goods received from him.*”⁵⁵ Goods should be returned to the entrepreneur (his/her headquarters or premises), and also to a third person if this option has been agreed. The consumer is not obliged to return the packaging, but the condition of the goods must conform to the necessary handling with respect to their nature and characteristics, otherwise the consumer is obliged to pay compensation. In the case of provision of services the consumer is not obliged to return the service, as with regards to its nature it is not possible; the consumer has to pay a proportionate part of the price.⁵⁶ As a result of the withdrawal, some costs related to handing over and accepting the returned goods may incur to the parties. The consumer pays packing of the goods, postage and other costs in connection with delivering the goods to the entrepreneur, but only if the consumer was informed about that (otherwise it is paid by the entrepreneur).⁵⁷ Additionally, it is possible to request only the factual costs following the strict interpretation mentioned by CJEU, e.g. in the case C-511/08.⁵⁸ It is specifically es-

⁵⁰ However, it is not possible for the consumer to withdraw from the contract in the cases listed in Section 1837 (such as customized goods, accommodation, transport, repair or maintenance work, digital content, etc.) or if the scope of the contract itself falls outside the legal regulation of distant sales described under Section 1840 (such as health care, gambling, social services, etc.).

⁵¹ “*If an entrepreneur allows a consumer to withdraw by completing and dispatching a standard withdrawal form on a website, he shall provide the consumer with a confirmation of its receipt in textual form without undue delay.*” Section 1830. Civil Code.

⁵² Section 1829 (1). Civil Code.

⁵³ Section 1829 (2). Civil Code.

⁵⁴ Some aspects are, however, not cancelled such as a contractual penalty, dispute settlement or interests on arrears.

⁵⁵ Section 1831. Civil Code.

⁵⁶ Section 1834. Civil Code.

⁵⁷ Section 1820 (1) (g). Civil Code.

⁵⁸ The decision of the Court of Justice of the European Union of 15 April 2010, *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV* (C-511/08).

established for the distant sales to inform the consumer about the costs of returning goods if the goods cannot be returned by usual postal service due to their special characteristics.

If the consumer fulfilled the duty to return the goods or services, so the entrepreneur must return the payment. It does not include only the price of the goods, but all the financial resources that the entrepreneur received from the consumer on the basis of the agreement; so it includes taxes, shipping, delivery, packaging and other similar costs. In addition, the entrepreneur is obliged to return such payment in the same way (e.g. cash, bank transfer) he/she received it (if not agreed otherwise).⁵⁹ “...*the entrepreneur is obliged to return the funds received from him only after the consumer has handed over the goods to the entrepreneur or proved to him that the goods were dispatched to him.*”⁶⁰ The consumer has to pay the reduction in the value of the goods he/she was handling the goods in another way than they were supposed to be handled with regards to their nature and characteristics.⁶¹ Such compensation is provided in the amount of the difference of the returned value of the goods and their usual value. This is then a certain statutory balance assisting the consumer to return the goods, but not allowing him/her to misuse such right and not to unduly destroy the goods.

If the consumer withdraws from the contract, he/she does not have to bear any costs in the case of provision of services where the entrepreneur has provided the consumer with no prescribed information (the information described in Section 1820 (1) d) and (f)), or if the entrepreneur began to perform before the end of the time limit for withdrawal without the consumer having expressly requested him/her to do so. The consumer also does not bear any costs in the case of the supply of digital content if it was not supplied on a tangible medium and the entrepreneur supplied it before the end of the time limit for withdrawal without the consumer having expressly asked him/her to do so.⁶² The third case when the consumer does not have to bear any of the above described costs is if he/she has not received the approval of the concluded contract from the entrepreneur on a durable basis. The contracts from which the consumer cannot withdraw are described under Section 1837 (the contracts concerning customized goods, accommodation, transport, repair or maintenance work, digital content, etc.).

If the entrepreneur has supplied a product to the consumer without the consumer's order and if the consumer assumed the possession thereof, he is considered to be the possessor in good faith. The consumer is not obliged to return anything back to the entrepreneur at his/her own expense, or even to inform him.⁶³

*“In case of doubt, an entrepreneur must prove that he provided a consumer with the information which he is required to provide under this Subdivision.”*⁶⁴ This basically means that the burden of proof lies primarily on the entrepreneur's side and it does not include only pre-contractual information, but also, for example, provision of a copy of the contract and its exact wording.

⁵⁹ Cf. Sections 1832 and 1834 - increased costs to deliver the goods, etc.

⁶⁰ Section 1834 (4). Civil Code.

⁶¹ Section 1833. Civil Code.

⁶² For more, see Section 1836. Civil Code.

⁶³ Section 1838. Civil Code.

⁶⁴ Section 1839. Civil Code.

Although in some cases the contract would be concluded with the consumer (then Section 1820 et seq. of the Civil Code should apply), Section 1840 lists the contracts that are excluded from such legal regime. The reason for this exclusion is either that it is self-regulated in specific sectors or the application of the described legal regime on these types of contracts is not appropriate. These are for example the contracts on social services, health care, betting, intangible things, carriage of persons, foods, and beverages, using automatic vending machines, etc.⁶⁵

6. THE INFORMATION MODEL UNDER PRESSURE AND THE PROBLEM OF DISINFORMATION

The information overload is generally reflected by the legal regulation in the Civil Code. *“All of an entrepreneur’s communications with a consumer must be made clearly and understandably in the language in which the contract is concluded.”*⁶⁶ A more general set of information can also be found in the Consumer Protection Act (described hereinafter). As mentioned above, it is not allowed to provide the consumer with the information in a chaotic way; all the information has to be presented in one place (no distant linking) and the text itself has to be normally readable.⁶⁷ It is however not explicitly prohibited by the Czech law to provide additional (voluntary) information⁶⁸ by the entrepreneur if it fulfils the main condition, which is that necessary information (the information which has to be provided on the basis of legal regulation) have to be stated in clear, true and correct way. That additional information thus cannot confuse the consumer in revealing the information which has to be offered to the consumer on the basis of law.

Generally, in this context, we are speaking about the average consumer, which could be deduced from the definition of the consumer incorporated in the Civil Code⁶⁹ or in the Consumer Protection Act.⁷⁰ Czech courts are then following the definition of the average consumer in the same sense as it was interpreted by CJEU, e.g. in C-210/96 of 16 July 1998.⁷¹ Therefore we use the principle that the average consumer has enough information, however, such information is provided in such a way that the consumer is not deceived or confused.

⁶⁵ Section 1840. Civil Code.

⁶⁶ Section 1811. Civil Code.

⁶⁷ In the Consumer Protection Act, there are however no specific conditions on distant sales (as it is in the Civil Code). In Section 9 and 10 there is however general information duty on how to inform the consumer, which is rather same as it is stated in the Civil Code – the information about goods or services has to be clear, it has to describe characteristics of the goods etc. In Section 11a it states that *“When selling products or providing services by electronic means through websites, the entrepreneur is obliged to clearly inform the consumer in advance of any restrictions on the delivery of products or the provision of the service, and what payment methods are accepted.”*

⁶⁸ Such as information proving quality of offered services which promotes the trust in the entrepreneur.

⁶⁹ *“A consumer is any individual who, outside his trade, business or profession, enters into a contract or has other dealings with an entrepreneur.”* Section 419. Civil Code.

⁷⁰ *“A consumer is any natural person who is not acting in the course of the business or as part of a separate exercise of the profession.”* Section 2 (1) (a). Consumer Protection Act.

⁷¹ The decision of the Supreme Court of the Czech Republic of 24 April 2013, file no. 23 Cdo 3845/2012.

The general principles of public law not to confuse consumers are incorporated in the Consumer Protection Act. It is stated there that the information has to be clear, true, correct, and only substantial information (in the sense of the legal regulation) may be provided to the consumer.⁷² On the basis of such information, the consumer has to be able to make an informed decision.⁷³ Other general principles not to confuse the consumer are incorporated in the provisions of the Consumer Protection Act regulating the fair selling of products and services, unfair trade practices, deceptive acting, misleading omissions, aggressive commercial practices, consumer non-discrimination, etc.⁷⁴

The fact is that Czech expert literature says that the range of information obligations starts to have a negative impact as well; in the context of information overload and time-consumption the consumer often tends to skip the information and mechanically agrees to the terms without reading it to the end.⁷⁵ There is however no further and more specific regulation or court decisions dealing with the information overload of the consumer in Czech law.

7. CONCLUSION

In general, we can say that Czech private law is based, in the case of consumer protection, on the requirement and presumption of an informed consumer. The consumer thus has the right to obtain all relevant information during the contracting process that is necessary for his/her informed decision to conclude the contract. In connection with it, we have analysed the general regulation of consumer information, pre-contractual information requirements, misleading practices adversely affecting consumers' decisions, unfair contract terms and reasonable consumer expectations. We however also focused on specific sectors – financial area and online environment connected with electronic commerce. The last chapter is presenting few specifics connected with disinformation of consumer.

Czech law is hugely influenced by European law; the main problem is, however, that the transposition was at some point not done properly or we are lacking more detailed court decisions. We thus hope that this article will help to address some of the problems in the area of consumer information and will invoke further discussions.

⁷² Information Obligations, Section 9 et seq., Consumer Protection Act.

⁷³ Section 2 (1) (s), (t). Consumer Protection Act.

⁷⁴ Section 3 et seq. Consumer Protection Act.

⁷⁵ ONDŘEJ, J. *Spotřebitelské smlouvy a ochrana spotřebitele: ekonomické, právní a sociální aspekty* [Consumer Contracts and Consumer Protection: Economical, Legal and Social Aspects]. 1st edition. Prague: C.H. Beck, 2013, p. 32.