

THE EU REGULATION ON AFTER-SALES SERVICES IN THE CONSUMER RIGHTS DIRECTIVE: MISSED OR SEIZED THE OPPORTUNITY?

TÜKETİCİ HAKLARI DİREKTİFİ'NDEKİ SATIŞ SONRASI HİZMETLERE İLİŞKİN AB DÜZENLEMESİ: FIRSATI KAÇIRMAK YA DA YAKALAMAK?

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ÖZET

Avrupa Birliği'nin İç Pazar projesi önemli ölçüde sınır ötesi satımlara dayanmaktadır. Bu resimde tüketiciler, güveninin sağlanması gereken asli aktörlerden biri haline gelmektedir. Anketler tüketicilerin, diğerlerinin yanı sıra, satış sonrası hizmetlere ilişkin de endişeleri olduğunu göstermektedir. Ancak AB yakın zamana kadar bu konuda harekete geçmekten kaçınmıştır. 2011 tarihli Tüketici Hakları Direktifi değişik tipte tüketici sözleşmeleri için satış sonrası hizmetlere ilişkin hükümler ihtiva etmektedir. Bu direktifte benimsenen yaklaşım, Komisyon'un 1993 tarihli Tüketici Malları için Garanti ve Satış Sonrası Hizmetlere ilişkin Yeşil Kitap'ında tartışmaya sunulan bilgi-odaklı rejimi yansıtmaktadır. Bu çalışma, Yeşil Kitap'ta önerilen rejimleri incelemek ve Tüketici Hakları Direktifi'nde benimsenen metodun potansiyelini tüketicinin güveni açısından değerlendirmek amaçındadır. Bu bakış açısı ile bilgi-merkezli rejimi güçlü kılmamanın ve tüm potansiyelini ortaya çıkarmanın anahtarı olduğu için, önerilen rejime uyulmasını sağlayacak yollar tespit edilmeye çalışılacaktır.

***Anahtar Kelimeler:** Avrupa Birliği hukuku, tüketici güveni, tüketici sözleşmesi, satış sonrası hizmetler, Tüketici Hakları Direktifi, sınır ötesi ticaret*

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ABSTRACT

The Internal Market project of the European Union is largely dependent on cross-border sales. Consumers in this panorama become one of the vital actors, yet whose confidence needs to be maintained. Surveys indicate that consumers have concerns regarding the provision of after-sales services, *inter alia* others. Yet the EU avoided acting on it until recently. The Consumer Rights Directive of 2011 encompasses provisions regarding after-sales services in different types of consumer contracts. The approach adopted by this Directive reflects the information-based regime, which was presented for discussion in the Commission's Green Paper on Guarantees for Consumer Goods and After-sales Services of 1993. This article examines the proposed regimes of the Green Paper and explores the potential of the method adopted by the Consumer Rights Directive, *vis-à-vis* consumer confidence. In this perspective, a strong compliance with the proposed regime will be sought to be maintained, since it is the key to empowering the information-oriented regime to reach its potential.

Keywords: *European Union law, consumer confidence, consumer contracts, after-sales services, Consumer Rights Directive, cross-border trade*

INTRODUCTION

Regulation of after-sales services for consumer goods within the EU framework has been in the EU's agenda since the beginning of 90's, hence with a fading interest in the area. The 1990-1992 action plan on consumer policy of the Commission made a reference to the subject by including 'examination of possible initiatives to simplify cross frontier consumer contracts, guarantees and after sales service' into its action plan for the period.¹ In its following three year action plan, the Commission clearly declared its intention to prepare a green paper on guarantees and after-sales service conditions, emphasising the significance of the area with reference to its key role for the single market, and states that: 'Transfrontier shopping can only flourish if the consumer is assured that he can enjoy the same after-

¹ Commission (EEC), 'Three Year Action Plan of Consumer Policy in the EEC (1990-1992)' COM (1990) 98 final, 3 May 1990, p.16

sales and guarantee terms no matter where the supplier is domiciled.² A few months into this declaration, the Green Paper was ready and up for a discussion. In spite of the strong argumentation and reference of the Green Paper on Guarantees for Consumer Goods and After-sales Services³ (hereinafter referred as ‘the Green Paper’) for the subject, it was avoided to be enacted. In the Consumer Guarantees Directive of 1999⁴, which is the product of the process that started with this Green Paper, it was decided to not to regulate the after-sales services. The ambitious Proposal for a Consumer Rights Directive 2008,⁵ which intended to replace eight of the existing consumer protection directives,⁶ one of which is the Consumer Guarantees Directive, with a horizontal approach structure, transformed along the way and ended up as the Consumer Rights Directive (the CRD),⁷ which only repealed two directives⁸ and amended further two,⁹ one of which

² Commission (EC), ‘Second Commission Three-Year Action Plan (1993-1995)’ COM (93) 378 final, 28 July 1993, p.26

³ COM (93) 509 final, 15 November 1993

⁴ Council Directive (EC) 99/44 on certain aspects of the sale of consumer goods and associated guarantees (the Consumer Guarantees Directive) [1999] OJ L171/12

⁵ Commission (EC), ‘Proposal for a Directive on consumer rights’ COM (2008) 614 final, 8 October 2008. This project was the product of the Commission’s Green Paper on the Review of the Consumer Acquis, which sought to implement a framework instrument. Commission (EC), ‘Green Paper on the Review of the Consumer Acquis’ COM (2006) 744 final, 8 February 2007

⁶ Council Directive (EEC) 85/577 to protect consumer in respect of contracts negotiated away from business premises (the Doorstep Selling Directive) [1985] OJ L372/31; Council Directive (EEC) 90/314 on package travel, package holiday and package tours (the Package Travel Directive) [1990] OJ L158/59; Council Directive (EEC) 93/13 on unfair terms in consumer contracts (the Unfair Terms in Consumer Contracts Directive) [1993] OJ L95/29; Council Directive (EC) 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (the Timeshare Directive) [1994] OJ L280/83; Council Directive (EC) 97/7 on the protection of consumers in respect of distance contracts (the Distance Selling Directive) [1997] OJ L144/19; Council Directive (EC) 98/6 on consumer protection in the indication of the prices offered to consumers (the Price Indications Directive) [1998] OJ L80/27; Directive 98/27/EC (the Injunctions Directive) [1998] OJ L166/51; and Council Directive (EC) 99/44 on certain aspects of the sale of consumer goods and associated guarantees (the Consumer Guarantees Directive) [1999] OJ L171/12

⁷ Council Directive (EU) 2011/83 on consumer rights (the Consumer Rights Directive) [2011] OJ L304/64

⁸ Council Directive (EEC) 85/577 (the Doorstep Selling Directive) and Council Directive (EC) 97/7 (the Distance Selling Directive)

⁹ Council Directive (EEC) 93/13 (the Unfair Terms Directive) and Council Directive (EC) 99/44 (the Consumer Guarantees Directive)

is the Consumer Guarantees Directive. The CRD had references to after-sales services, which is an improvement; but the question is whether it is a potent enough reference to tackle consumer confidence issues.

This article aims to provide a closer look into the subject of after-sales services for consumer products, and explore the reach of the regulation of the Consumer Rights Directive on the area with reference to consumer protection in general and consumer confidence in particular. With this purpose in mind, first the relevance of the subject in terms of the Internal Market will be mentioned, with a particular emphasis on consumer confidence. Second, the subject will be tested against the competence of the EU vis-à-vis conferral, subsidiarity and proportionality principles. Next, the possible solutions referred in the Green Paper will be analysed, and the best method to regulate the area will be identified. Then the regulation of the Consumer Rights Directive will be examined in this regard and the possible improvements will be established.

THE INTERNAL MARKET & CONSUMER CONFIDENCE CORRELATION

The Internal Market is asserting to be the largest domestic market in the industrialised world. This big market was created for a number of reasons, the most important of which is the facilitation of Europe's economic and political integration, as can be understood observing the historical background. Although European integration commenced for political rather than economic reasons,¹⁰ the further processes led to the dominance of economic integration over the political agenda.¹¹ Economic co-operation was viewed as a 'politically acceptable way of increasing integration while laying the groundwork for political co-operation at a future date.'¹²

Further integration of the Internal Market demands key actors to participate the process. Consumers, who enter into cross-border transactions

¹⁰ The leading policy was the need for guaranteeing peace, through a number of co-operation establishing agreements, following the Second World War.

¹¹ For further information see: F Scharpf, 'Negative and Positive Integration' in *Governing in Europe: Effective and Democratic?* (OUP, Oxford 1999) p.44

¹² A Sbragia, 'Key Policies' in E Bomberg and A Stubb (eds), *The European Union: How Does It Work?* (OUP, London 2003) p.119

within the EU, are one of the most significant actors that can advance integration; while online purchases made through the Internet is the most available tool to be used in the process. However, the level of participation in cross-border e-commerce within the EU is rather low amongst European consumers. The potential of cross-border e-commerce is suppressed by lack of consumer confidence.

There is no established legal definition of ‘consumer confidence’ within the EU, although this concept is at the heart of most activities within the field of consumer protection. The significance of consumer confidence for the EU is due to its key role in facilitating the Internal Market. Therefore it is of particular importance in relation to cross-border transactions.

Consumer confidence may generally be defined as the consumers’ perception on the level of credibility of the current and future economic outlook. The expression of the sentiment of consumers about the economy is generally exposed by the willingness to make purchases. Therefore, when we say ‘low levels of consumer confidence’, it refers to ‘consumers’ unwillingness to conclude transactions with a variety of traders’. The higher the level of consumer confidence, the higher the level of economic activity is.

The EU consumer policy agenda has long been searching for solutions to address the low levels of consumer confidence. With the Internal Market concerns in mind, ‘consumer confidence’ is now the core of a new approach to consumer protection in the EU. The Consumer Policy Strategy 2007-2013, emphasizing the consumer dimension of the Internal Market, acknowledges the fact that “our need for confident consumers to drive our economies has never been greater...”.¹³ Similarly the current European Consumer Agenda establishes that “Improving consumer confidence in cross-border shopping online by taking appropriate policy action could provide a major boost to economic growth in Europe. Empowered and confident consumers can drive forward the European economy”.¹⁴ Therefore the current Agenda is built on endeavours to identify key policy areas to serve to that end.

With these activities on one hand, lower levels of consumer confidence persist on the other. According to the findings of an extensive survey in the

¹³ Commission (EC), ‘Consumer Policy Strategy 2007-2013’ COM (2007) 99 final, 13 March 2007, p.9

¹⁴ Commission (EC), ‘A European Consumer Agenda- Boosting confidence and growth’ COM (2012) 225 final, 22 May 2012, p.1

EU, 59 *per cent* of consumers feel confident buying online from a domestic retailer, while only 36 *per cent* feel the same as regards retailers located in another EU country.¹⁵ The ratio of consumers who do not feel confident is given as 31 *per cent* and 49 *per cent* respectively.¹⁶ For a fully functioning Internal Market the gap between domestic and cross-border sales needs to be approximated. Another survey conducted within the EU reveals that an average of 27 *per cent* of the people, who do not use the Internet as a shopping medium, cited concerns regarding after-sales services as a reason.¹⁷ It is only logical that should the EU seek to provide a remedy for low levels of consumer confidence in cross-border e-commerce, measures that are capable of tackling consumer confidence weakening components must be taken.

COMPETENCE OF THE EU TO REGULATE THE AREA

Before the entry into force of the TFEU (Treaty on the Functioning of the European Union)¹⁸ most of the consumer law Directives were based on Article 95 EC (now Article 114 TFEU). Therefore, any consumer protection harmonisation activity based on this Article was constructed on ‘eliminating barriers to trade and distortions of competition’ along the lines of ‘Internal Market integration’ purpose of the Article. It is observed that this approach has not changed in the Consumer Rights Directive. The other legal basis was Article 153 EC (now Article 169 TFEU),¹⁹ which presented a supplementary competence limited to measures designed to ‘support, supplement and monitor’ Member States’ policies, and has been hardly ever used as a legislative base.²⁰ The fact that this provision embodies a minimum

¹⁵ Flash Eurobarometer 358, ‘Consumer attitudes towards cross-border trade and consumer protection’ (Report) (2013) p.23

¹⁶ *ibid.*

¹⁷ Special Eurobarometer, European Opinion Research Group, ‘European Union Public Opinion on Issues Relating to Business to Consumer E-Commerce’ (Executive Summary) (2004) p.17

¹⁸ OJ C 306/1 of 17 December 2007 (entered into force on 1 December 2009)

¹⁹ Article 169 TFEU is the renumbered version of Article 153 EC, except for the second paragraph, which has been moved to Article 12 TFEU and placed as an individual provision.

²⁰ Only the Directive on price indications has been based on Article 153 EC. (98/6/EC on consumer protection in the indication of the prices offered to consumers [1998] OJ L80/27)

harmonisation clause²¹ may also have an effect on this preference, where the current trend is maximum harmonisation.

Although the debate on whether the consumer policy of the EU has an autonomous character independent of the Internal Market is still hot, it will not be discussed here. It is currently sufficient to mention that of the two Articles referred above, Article 95 EC was limited in its scope to market integration, while Article 153 EC could only be used in limited circumstances. Although set down that it is better avoided to use a double legal basis where the measure's centre of gravity mainly relates to one of the relevant matters,²² the ECJ (The Court of Justice of the European Union) acknowledges that it is still possible if the act concerns two subjects equally. Leaving the discussions on whether a legislation regulating after-sales services for consumer products should have a double legal basis or a single one (and if so which one) to one side, taking the Internal Market aspect of consumer policy in the EU, which was briefly given in the previous section, the preferred basis for legislation on after-sales services will be accepted as Article 114 TFEU, following the common practice, and in line with the Consumer Rights Directive.

As clearly established, the limits of the competence of the EU is governed by the 'principle of conferral', according to which, the EU can only act within the domain conferred upon it by the Treaties.²³ This was also reinforced by Art.4 of the TEU, which confirms clearly that 'competences not conferred upon the Union in the Treaties remain with the Member States.' The somewhat complicated division of competence between the EU and the Member States have been relatively clarified in the post-Lisbon era by the introduction of a competence catalogue in the TFEU. Both 'internal market' and 'consumer protection' have been cited as areas of shared competence in Art.2(2) of the TFEU.²⁴ However, the same Article also

²¹ Article 169(4) provides that measures adopted under Article 169 TFEU "shall not prevent any Member State from maintaining or introducing more stringent protective measures." For more information, see: Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (OUP, Oxford 2014) Section 9.3 The Scope of Article 169 TFEU, p.409

²² Case C-178/03 *Commission of the European Communities v European Parliament and Council of the European Union* [2006] ECR I-107, para 42

²³ TEU, Article 5

²⁴ Therefore, even in case of the use of a double legal basis (Internal Market and consumer competence) for such an act would be more straightforward, since it could have been

stipulates that the Member State can exercise competence only to the extent that the EU has not exercised or has decided to cease to exercise its competence within any such area. It is this pre-emption rule, which renders the competence of the EU constantly expanding against the domain of competence of the Member States within the shared competence areas. So far it is clear that the subject matter of this paper is in an area on which the EU is statutorily competent to act, nevertheless, besides the Member States. So this paper will next seek to address the question of who is best to use competence to act on after-sales services, the EU or the Member States.

Confirming the potential competence of the EU on the area, it should now be explored whether an EU-wide action was necessary to regulate the area. It is the ‘subsidiarity test’ that needs to be applied to answer this question.

Subsidiarity principle, along with proportionality, is intended to structure the exercise of competence. Introduced by the Maastricht Treaty, and retained in the Lisbon Treaty, subsidiarity principle has been an important political and legal control mechanism.²⁵ It is contained in Art.5(3) TEU:

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

According to this article there are three preconditions for complying with the principle of subsidiarity: (a) the area concerned does not fall within the Union’s exclusive competence; (b) the objectives of the proposed action

problematic if one of the matters fell in the exclusive competence area. For more information see: Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP, Oxford 2012) p.88

²⁵ Gibson reports that there is a paternalistic assumption that it would be used as a shield to protect Euro-sceptics and disenchanted voters against unwarranted and excessive interference from Brussels. Leigh Gibson, ‘Subsidiarity: The Implications for Consumer Policy’ *Journal of Consumer Policy* 16:323-344, 1993, 325

cannot be sufficiently achieved by the Member States; (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union. As confirmed earlier, both ‘internal market’ and ‘consumer protection’ have been cited as areas of shared competence in Art.2(2) of the TFEU and thus, ‘do not fall within its exclusive competence’, as prescribed by the article. Therefore, it needs to be elucidated that whether ‘sufficient attainment test’ and ‘better attainment test’ could be met in our case.²⁶

Despite the difficulty in interpreting the provision, the Commission proposed a ‘comparative efficiency test’ that entails the examination of factors such as the effect of the scale of the operation (transfrontier problems), the costs of inaction, the necessity to maintain a reasonable coherence and limits on national action which may cause distortions of the end results (where some Member States were able to act and others were not) and also the necessity to avoid distortion of competition within the Internal Market.²⁷ In the light of this ‘comparative efficiency test’ by the Commission, regulation of after-sales services may well be deemed to pass the test with its strong transfrontier argument along with its Internal Market implications given in the previous section. Moreover, the Guarantees Directive was enacted based on the same rationale, hence excluding the after-sales provisions. In the Green Paper, the Commission has affirmed that: ‘Certain Member States have adopted provisions in this regard, (-after-sales services-) but in the context of the single market these proposals may turn out to be ineffective or even provoke distortions in competition. It would be desirable to find a solution at European level.’²⁸ The same point was also emphasised in the Preamble of the Consumer Rights Directive as: “Certain disparities create significant internal market barriers affecting traders and consumers... Disproportionate fragmentation also undermines consumer confidence in the internal market.”²⁹ In short, where there is an Internal Market efficiency concern, cross-national transactions of the consumers become prominent, and this transfrontier aspect requires a regulation at Union level. In any case, this test has more of a moral

²⁶ Margot Horspool and Matthew Humphrey, *European Union Law* (OUP London, 8th Ed. 2014) p.132

²⁷ The Principle of Subsidiarity, Communication of the Commission of the European Communities, SEC(92) 1990 final, 27 October 1992, p.2

²⁸ Green Paper, p.16

²⁹ Preamble of the Consumer Rights Directive, para (6)

aspect rather than practical. As the Commission stated: “Subsidiarity cannot be reduced to a set of procedural rules; it is primarily a state of mind...”³⁰

The final test as regards the exercise of competence is ‘proportionality’. This principle is embodied in Article 5(4) TEU: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” That is to say, the content and the form of the action must be in line with the aim pursued. As regards the content, the Commission in its Green Paper restricted the subject to the services provided in return of a fee, which appears to be followed by the CRD too. The propositions given in this paper shall also take proportionality concerns into consideration and strive to come up with the minimal intervention solution.

THE GREEN PAPER SOLUTIONS ON THE TABLE: A THOROUGH ANALYSIS

After-sales services for the purpose of the Green Paper, and hence for this paper, are to be taken in a narrow sense as to exclude the services for the purpose of honouring a guarantee. Therefore, the services under consideration are provided in return of a payment.

The Green Paper made strong emphasis on the subject and went as far as to say that a product ‘for which after-sales service is poor or non-existent cannot be used in line with the purchaser’s legitimate expectations and may thus be considered defective under the terms of the legal guarantee.’³¹ There the after-sales service is legitimately linked to durability expectation from the product, and thus the lack of it is considered as a defect in the product. The Green Paper also mentions the manufacturers’ role in after-sale services by saying that: ‘Both retailers and repair firms rely on the manufacturer, if not for technical assistance, at least for the supply of spare parts’.³² In addition to these, the Green Paper touched upon the question of environmental effect of after-sales services. With an appropriate after-sale

³⁰ Commission Report on the Adaptation of Community Legislation to the Subsidiarity Principle, COM (93)545 final, 24 November 1993, p.2

³¹ COM (93)509 final, 15 November 1993, p.50

³² *ibid*, p.80

service, it would be assured that the product will have the optimum lifespan, which means a lessened waste and reduced environmental pollution.³³

Here the question arises: what would amount to an ‘appropriate’ after-sales service? After-sales services basically include providing the stock of spare parts and technical assistance necessary for the repair and maintenance of the product for a specific period of time. This period of time varies from product to product as well as from manufacturer to manufacturer, very much depending on the requirements of the legal system indeed. These differentiations will be explored shortly, within the inspection of legal paths chosen to regulate the after-sales services. In any case, it is important that a reasonable after-sales service is provided to the consumers including *inter alia*; the price, speed, and easy accessibility.

It is not feasible to set patent criteria to assess whether a product can be qualified to after-sales services, this needs to be decided individually for every product, taking its specifications into consideration. After-sales services should be offered for products, which can ‘reasonably’ demand that service be available. For instance, this service is not reasonably applicable for products such as food products and disposables. On the other hand, most products with replaceable parts, consumer electronics and consumer durables are subject to after-sales services, unless it is not financially feasible to repair the product.³⁴

To pose the burden of exercising after-sales services on sellers is unjust and ineffective as they have no contribution in the manufacturing or assembling process of the product. Especially in case of a cross-border sale, which is made through distance selling methods, generally consumers can no longer turn to sellers as regards after-sales services. In such a cross-border trading panorama, manufacturers start to become the real actors with growing essential responsibilities. In the end, sellers are customarily local,³⁵ where manufacturers’ facilities often spread out of the national borders.

³³ *ibid.* Though it operates against the desire of most producers, who are inclined to promote the consumption society habits that prefer getting rid of broken items and replacing them with a new one instead of repairing.

³⁴ The costs of fixing some low value products, and especially the electrical products, may be more expensive than the actual price of that product. Therefore, it would not be fiscally viable to provide after-sales services for such products.

³⁵ This statement excludes the retailers who sell through the Internet and have the capability to operate in a wider market than they could possibly achieve through their local shops.

Therefore, providing an appropriate after-sales service should reasonably be the built-in responsibility of the manufacturers.

Besides the representation of the need to regulate the area due to its substance-related importance, this was also addressed to be essential in terms of Internal Market purposes. Each Member State has a different practice as regards after-sales services. This diverse situation was referred as having the possibility to end up with ineffective national laws, if not presenting a potential distortion to competition, in the context of Single Market.³⁶ Therefore, it was suggested to be treated within the EU.

Until recently, after-sales services in the EU had been operating through commitments and codes of conduct. This situation in fact represents one of the possible regimes to regulate the area, the voluntary regime, introduced by the Green Paper. This regime works through commitments such as codes of conduct or direct negotiation of the businesses with the consumers.³⁷ Self-help and growth of codes of conduct has been encouraged by the EU, however as a supplementary to legal regulations, as over-regulation is sought to be avoided. On the other hand, as operating on the basis of voluntary participation, it causes doubts on the level of protection it can offer to consumers. It may be said that the weakness of this regime lies in its capacity. It is noteworthy that, consumer related regulations are generally of mandatory nature, owing to their protective rationale. At any rate, it is evident by the survey results that, the self regulatory system was far from providing the desired level of confidence for the consumers.³⁸

There are two other possible solutions referred in the Green Paper. First one is the stringent regime with a regulatory approach.³⁹ There the manufacturer is obliged with stocking the necessary spare parts during a certain period of time from the date they stop selling the product.⁴⁰ This is a product-specific period assessed according to the normal lifespan of a product. Some national level laws in the Member States already have

³⁶ Green Paper on Guarantees for Consumer Goods and After-sales Services (1993) p.16

³⁷ *ibid*, p.100

³⁸ Special Eurobarometer, 'European Union Public Opinion on Issues Relating to Business to Consumer E-Commerce' (2004) p.17

³⁹ Green Paper on Guarantees for Consumer Goods and After-sales Services (1993) p.100

⁴⁰ The question regarding 'the date the manufacturer stop selling the product' will be discussed below.

provisions to secure an appropriate after-sales service for the lifespan of a product. Each law sets varied, but corresponding prescriptions for defining the lifespan period of a product. In Greece, they employ ‘customary’ lifespan formula,⁴¹ and in Portugal they exercise ‘average’ lifespan,⁴² whereas Irish law prescribes ‘reasonable’ period test.⁴³ Whatever method is followed, calculating this period, the nature of the product should be taken into account, assuming an average or even low usage in order to extend the range of protection to include consumers, who use their products seldom.

The question of what the normal or expected lifespan of a product could be pre-assessed or post-assessed. The pre-assessment could be made through technical harmonisation by European standardisation organisations, or an *ad hoc* institution set up for that purpose.⁴⁴ Doubtlessly the application of the stringent regime would ensure a higher level of legal protection, however, bringing about not only an intervention to the liberated markets, but also too much bureaucracy with it, which are not desirable. Otherwise, the interpretation of the normal lifespan for a product could be left to the discretion of the manufacturers and in case of a conflict, could be post-assessed by the courts on case basis. Yet, this would drastically increase the burden of the courts, which is not advantageous in terms of procedural economy, let alone the vast diversity of judgments.

The second solution was introduced as being purely information oriented.⁴⁵ This scheme operates as the manufacturers voluntarily declare a specific period of time until when they would provide spare parts for the product in question. This declaration would be made on the labelling of the product. This information would provide market transparency and enable the

⁴¹ Green Paper on Guarantees for Consumer Goods and After-sales Services (1993) p.51

⁴² *ibid*

⁴³ Sale of Goods and Supply of Services Act 1980 (Ireland), Article 12

⁴⁴ In Turkish law, the Code on Consumer Protection Art.58 (1) requires manufacturers and importers to provide after-sales services for their products for the duration of the lifespan of their product, which is pre-assessed and published by the Ministry of Customs and Trade, annexed to the Regulation on After-Sales Services. In the annex there is a list that shows the products, for which providing after-sales services is compulsory by law. It also contains information on the assessed lifespan and maximum allowed service duration for every product type, from sunglasses to digital photo frames, and from guitars to toilet seats. The manufacturers or the importers are also required to obtain an approved ‘after-sales services credential’ for the listed products.

⁴⁵ Green Paper on Guarantees for Consumer Goods and After-sales Services (1993) p.100

consumers to make informed choices. Thereby the freedom of providing after-sales services would be established, which also includes the freedom to decide on whether to provide the service at all. Thus, the manufacturers of low value products would also be liberated from liability, where the manufacturers of very long life span products, such as houses, would be ensured to undertake a reasonable period of after-sales service in line with their availabilities. The liability of manufacturers of buildings (constructors) and such similar long lifespan products as regards after-sales services should be restricted with a longstop provision for the sake of fairness. This would on the other hand, not deprive the consumers of their chance to have their houses repaired or maintained, as this service is generally available from various suppliers.

Evaluating the above mentioned systems, the information oriented regime appears to be the most favourable one as compromising the competing rights of both the consumers and the businesses, while allowing a smooth operation of a fully competitive Internal Market. This scheme enables the consumers to be informed of their rights concerning the after-sales services of the specific product that they have bought. Incorporating the information regarding the duration and coverage of the after-sales services for that particular product to the labelling of the product itself, would provide a knowledge-based security for the consumers, without the necessity to giving up a free, competitive market, which is of particular importance for the Internal Market purposes. This would also be easily considered to have met the ‘proportionality test’ requirement in terms of the exercise of the competence by the EU.

By putting this information on the labelling of the product it produces, the manufacturer assumes liability from this product and its maintenance. This information labelled on the product is the declaration of a unilateral undertaking by the manufacturer, which would certainly have legal results. One should be careful in legally classifying this declaration. This declaration, as being a component of the labelling, could also be argued to constitute a part of the sale contract. From what we infer from the wording of Consumer Guarantees Directive, the statements in advertising or on labelling can be constituents of sale contract.⁴⁶ However, it should be highlighted that, the sale contract is concluded between the seller and the

⁴⁶ Consumer Guarantees Directive (1999), Article 2(2)(d)

consumer, where the product is usually labelled by the manufacturer. Moreover, the undertaking as regards the after-sales services is purely concerning the manufacturer itself. In this case, to hold the seller liable with non-conformity with the contract due to non-complying with the after-sales duties, in line with the Consumer Guarantees Directive, would be unfair. In accordance with this outlook, it may be argued that, such a declaration labelled on the product would constitute the terms of a contract between the manufacturer and the consumer, which burdens a one-sided fulfilment upon the manufacturer. This could be qualified as a *sui generis* unilateral consumer contract. The contract would be concluded once the consumer purchases the labelled product.⁴⁷ Therefore, we may say that the formation of this contract depends on the conclusion of the sale contract. They are in some way connected, although technically being independent contracts. Consequently, the contract between the consumer and the manufacturer as regards the provision of after-sales services is established with the formation of the sale contract and becomes independent afterwards.

As we have previously referred, the liability of the manufacturer for providing after-sales services, if he assumed, goes on for a specific period of time after the date the manufacturer stopped selling the product. This specific period of time is determined by the declaration of the manufacturer, which was shown on the labelling of the product in this information based regime. However, the date the manufacturer stopped selling the product does not usually correspond to the date the retailers stop selling. In other words, it is likely that the sellers will sell the product after the manufacturer discontinues. This may cause problems where a retailer sells the discontinued declared product of the manufacturer long after the date the manufacturer stops selling, and the consumer who buys the product turns to the manufacturer for after-sales services after the expiration of the liability period as to the date the manufacturer stopped selling that product. In such a case to not the limit the responsibility of the manufacturer for providing after-sales services could cause unfair results for the manufacturers.

In order to avoid from actually reasonable claims of the consumers that could be unfair on the manufacturers, the manufacturers can call in their

⁴⁷ In this hypothesis, the placing of its products on the market for the purpose of eventually being sold to consumers, the manufacturer makes an 'offer'; and when the product is finally purchased by the consumer, it constitutes 'acceptance' by conduct.

products once they decide to stop selling a product and get out of liability from providing after-sales services for that product by the termination of the undertaken period. To ensure that the sellers return the called in products, the manufacturer could place a term in their contract with the sellers, to make it mandatory for the sellers. In this way, even if a product was sold to a consumer despite the manufacturer's earlier call, the manufacturer would have a right of recourse against the seller, who breached the contract.⁴⁸ Where the goods reach the consumers through long chain of contracts, this condition would be difficult to maintain for the manufacturers. In order to overcome this difficulty, the manufacturer can place an extra term in the sale contract stating that 'the sale' is made with the condition that the provision regarding the obligation 'to return the called in product to the manufacturer' will be required to be placed in the future sale contracts of 'the seller' concerning 'the goods' subject to that initial sale contract.

Another method to implement could be to ensure that the goods in the market are depleted by sale. This could be made indirectly, by means of various marketing techniques. The sales can be improved by magnetising consumers through attractive offers and prices. In this way the goods in the market will be exhausted through sale, which would arguably be more profitable for the manufacturers compared to 'calling in' the products.

THE CONSUMER RIGHTS DIRECTIVE: THE REVIVAL OF AFTER-SALES SERVICES?

The long ignored subject of after-sales services following the Green Paper discussions finally found its way into the Consumer Rights Directive, as opposed to many other issues intended for.⁴⁹ In the CRD we observe two sets of references regarding the after-sales services. The first one is embodied in Art.5, which is on 'information requirements for contracts other than distance or off-premises contracts'.⁵⁰ The provision stipulates that the trader shall provide the consumer with the information on the 'existence and

⁴⁸ This solution is also applicable within the stringent regime.

⁴⁹ Weatherill comments that the CRD 'is trivial in content' as opposed to its 'grandiose title' and explores the reasons for the relative failure of the ambitious project it was based on. For more info see: Stephen Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" has Largely Failed' (2012) 49 *Common Market Review* 1279-1318

⁵⁰ Article 5(1)e of the Consumer Rights Directive

the conditions of after-sales services and commercial guarantees, where applicable' before the consumer is bound with such a contract. Similarly the other reference is in Art.6 under the subtitle of 'information requirements for distance and off-premises contracts', which provides that the trader shall provide the consumer with the information on 'where applicable, the existence and the conditions of after-sale customer assistance, after-sales services and commercial guarantees' prior to the conclusion of the contract.⁵¹ Both provisions lay down pre-contractual information requirements, one for contracts other than distance or off-premises contracts, where the other is for distance and off-premises contracts.

It is good to see that the Commission finally decided to take action on the subject, and what is more to opt-in for the most sensible option discussed in the Green Paper, the information-oriented method. As explored in the previous section, this method facilitates a more liberal, transparent and competitive market, avoiding excessive intervention. It also contributes to the well-functioning of the Internal Market by means of empowering consumers through information.

None of the two provisions on after-sales services have been exempt from the maximum harmonisation level envisaged by the CRD.⁵² Hence, Member States cannot maintain or introduce more or less stringent provisions in their national laws. This impedes the existence of divergent set of rules across the EU, yet at the cost of prevention of more protective measures.

Looking further into the CRD, a penalty provision strikes attention. It makes reference to potential infringements of provisions set out in the CRD, and stipulates that the Member States are required to take all necessary measures to ensure that 'effective, proportional and dissuasive' penalties that are capable of tackling such infringements are introduced in their national legal systems.⁵³

This opens up the subject of the remedies of the consumer for non-conformity with the after-sales services commitment declared on the labelling of a product. This may well be deemed as non-performance of a

⁵¹ Article 6(1)m of the Consumer Rights Directive

⁵² Article 4 of the Consumer Rights Directive

⁵³ Article 24(1) of the Consumer Rights Directive

contract in line with our previously explained hypothetical contract concluded between the manufacturer and the consumer. As we have clarified above, this is an undertaking by the manufacturer, which cannot be claimed against the seller. However, the manufacturer may establish some separate departments or appoint some authorised companies to maintain the after-sales services for that product.

The four remedies cited in the Consumer Guarantees Directive, namely, repair, replacement, refund of the price paid and rescission of the sale contract,⁵⁴ would not be appropriate where the manufacturer fails to honour the commitment he has voluntarily burdened. Repair cannot reasonably be a remedy, since if it could have been done, the after-sales service would probably be carried out, which is the likely cause of a dispute. On the other hand, the product may not be in need of repair, but only need a spare part or supplements; which in any case cannot be remedied through repairs.

Replacement of a product is also not a sensible remedy for non-complying with after-sales services. One may argue that this would also not be desirable for the consumer, as the reliability of the product would be drastically lowered. Considering his position, how the consumer could have benefited from the replaced product is highly questionable. Would the replacement product be under the legal guarantee? What if the replacement product is faulty? Yet it should be credulity to expect after-sales services for a product replaced due to non-conformity with after-sales services promise.

Refund of the price paid, on the other hand, would not be a valid remedy, since the price was paid in return of the product itself in terms of the contract of sale, which was actually obtained. The price paid is the counter performance of transfer and handling of the product purchased. In this case the parties -the seller and the purchaser- have carried out their contractual obligations, and the sale contract has been terminated with full performance. The promise of carrying out after-sales services is not made in return of a payment from the consumer, but it can be argued that it is made in return of consumer preference of that product. As we continuously stress, to carry out the after-sales services should not be an obligation of the seller. Therefore, any kind of payment that may be made by the manufacturer to the consumer as a remedy would not really represent ‘refund of the price

⁵⁴ Article 3 of the Consumer Guarantees Directive

paid'. By way of similitude, to rescind the sale contract on basis of failure to comply with after-sales services is not applicable, as it is not related to the sale contract.

So, what remedies can the consumers be awarded with where no or poor after-sales services is the case? The product that requires after-sales service may be in need of a spare part only. In that case if the manufacturer cannot provide a spare part, one cannot ask or force the manufacturer to make one. Similarly if the product needs repairing or maintenance, and the manufacturer do not have the technical knowledge, equipment or trained staff to carry out this task, this is a matter of capacity, which cannot be forced to go beyond. However, if the repair could have been done by a third party, the manufacturer could be asked to have the product repaired at his cost. Similarly, if an aftermarket replacement to those of the manufacturer's parts is available, the consumer may ask the manufacturer to supply it for him, provided that it perfectly fits the product and would not have a negative effect in the appearance and performance.

Else than that, the most practical option remains as compensating the consumer for failure to provide after-sales services. It could have been worthwhile to see what the CRD has readily offered in practice in the Member States; however such information is not yet made available by the Commission. Nevertheless, it would not be wrong to assume that the Member States have probably prescribed compensation for the breach of information requirements with reference to after-sales services *per se*.⁵⁵

Assessing the nature and the quantum of the compensation, the guidance of the 'effective, proportional and dissuasive' penalties criteria of the CRD could be useful to follow. The present author believes that when calculating the amount of the compensation consideration could also be given to the following facts:

- The consumer is likely to be put in a situation where, he was induced to buy a new product to substitute the non-serviced one, which was not planned for the consumer for that time.

⁵⁵ For instance the UK has implemented the information provisions of the CRD in its Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which gives the consumers a right to claim compensation from traders who do not live up to the information provided prior to the conclusion of the contract.

- Failure to provide after-sales services within the stated period of time constitutes the non-performance of a contractual obligation by the manufacturer.
- The terms of this contract, however, have also influenced the consumer when making a purchase decision in the initial stage.
- The manufacturer was completely free when pledging to provide after-sales services and declaring its terms.
- Not to satisfy this promise also causes unfair competition. Guaranteeing things that would never be complied with, awards an undeserved advantage among competitors.
- Where this declaration is also advertised by any means, non-fulfilment could at the same time be treated as misleading advertising.

Taking the gravity of these facts into account, it is expected that the remedy should be deterrent. Therefore, determining the compensation, an award with a punitive aspect added would be an appropriate attitude to employ. It is also consistent with the ‘penalty’ prescription of the CRD. Moreover, such a formulation would satisfy ‘effectiveness’, ‘proportionality’ and ‘dissuasiveness’ tests of such penalties. Calculating the amount, criteria to compromise them all could be taken as the price of a brand new equivalent of the product, for which after-sales services could not be provided. This test would well be able to remedy the consumer as it awards the amount that allows him to buy a brand new equivalent product, while penalising the manufacturer.

CONCLUDING REMARKS

The regulation of after-sales services for consumer products have long been neglected by the EU. The Green Paper 1993 of the Commission had brought the subject up for discussion, yet resulted in inaction for some reason. It was finally back in the EU’s agenda after nearly two decades. It is now regulated by the CRD, which took effect as of 13 June 2014.

The provisions of the CRD reflect the information oriented regime, one of the three methods of action introduced by the Green Paper. This regime with its liberated approach is more favourable compared to the others

presented in the Green Paper. The information-based regime is more powerful than the mere codes of conduct and soft-law option, but weaker in comparison with the stringent regime. Then why the best?

The power of this regime lies in its capability to regulate with minimal intervention to the market. It enables increased market transparency, while enhancing consumers' ability to choose effectively between different products and services. However, the full potential of such a liberal regime could only be achieved if the compliance with it would be strongly ensured. The present author believes that the relative weakness of this regime could be counterbalanced in that way. The key to ensure compliance could be employing efficient and dissuasive sanctions, which are not excessive, when breaches occur. This could be translated into practice as awarding the consumer with a higher amount of compensation, which encompasses a punitive value added. It could also foster consumer confidence, which in return means consumers that are more likely to take part in cross-border transactions and contribute to the functioning of the Internal Market. This is a valuable input for the EU, and an opportunity to seize, with the support and confidence in the Internal Market is currently reduced.⁵⁶

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