

1ePoint Project Erasmus+ Program Consumer protection in distance contracts



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Consumer/supplier definitions

Consumer: any natural person who acts for reasons that do not fall within his commercial, business, craft or independent professional activity.

Supplier: any natural or legal person, regardless of whether governed by private or public law, who acts even through any other person acting in his name or on his behalf, for purposes related to the commercial, business, his craft or professional activities.

Seller: any natural or legal person, regardless of whether governed by private or public law, who in the context of the sales contract acts for purposes related to the exercise of his commercial, business, craft or professional activity

Definition

- contract of sale: any contract under which the supplier transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price, as well as any contract having as its object the simultaneous supply of goods and services
- service contract: any contract, other than a contract of sale, under which the supplier provides or undertakes to provide a service to the consumer and the consumer pays or undertakes to pay the price

Distance and off-premises contracts

- European Union (EU)
- EU law →
- 98/6/EC, 2005/29/EC, 2011/83/EC, 2019/2161/EC, 2019/770/EC, 2019/771/EC , 2019/2161/EC
- on consumer rights
- Objective of the Directives:
- Full legislative harmonisation
- + legal certainty
- National laws of EU member states → Full harmonisation with EU directives on consumer protection
- Purpose: to create a legal framework that meets the requirements of modern transactions and traders

Distance contract

Definition:

any contract concluded between the supplier and the consumer in the context of an organised distance selling or service provision system without the simultaneous physical presence of the supplier and the consumer, using exclusively one or more means of distance communication, such as electronic mail, telephone, fax or the Internet, up to and including the time of conclusion of the contract.

Off-premises contract

Any contract between the supplier and the consumer which satisfies the following conditions conditions:

- (a) it is concluded with the simultaneous physical presence of the supplier and the consumer in a place which is not the supplier's commercial establishment,
- (b) it is concluded following an offer by the consumer, in the same circumstances as described in the
- (c) it is concluded at the supplier's premises or by any means of distance communication immediately after personal and individual contact with the consumer at a place other than the supplier's premises, in the simultaneous physical presence of the supplier and the consumer,
- (d) concluded during an excursion organised by the supplier with the purpose or effect of advertising and selling goods or services to the consumer,

Commercial shop:

(a) any immovable retail premises, where the supplier carries out his activity on a permanent basis; or (b) any mobile retail outlet, where the supplier carries out its activity on a regular basis

Examples:

shops, market stalls or vans, stalls at farmers' markets and stands at fairs

→ YES if they serve as a permanent or usual place of business.

sales outlets on a seasonal basis (e.g. during the tourist season at a ski or ski resort or in a shopping centre) seaside resort) → YES if the trader carries out his activity on a regular basis.

places to which the public has access, such as roads, shopping centres, beaches, sports facilities and public transport, which the trader uses on an occasional basis for his business activities, as well as private residences or workplaces

→ are NOT considered to be commercial establishments.

Right of withdrawal

- The consumer has the right to withdraw from the contract without justification outside the shop within 14 calendar days of receipt of the product. During the above period, the collection of an advance payment from the selling undertaking is prohibited. If the supplier fails to inform the buyer of the right of withdrawal, the withdrawal period shall expire 12 months after the end of the initial withdrawal period.
- The right of withdrawal shall not apply in the case of the supply of sealed sound recordings or sealed video recordings or sealed computer software, which have been unsealed after delivery.
- the provisions on off-premises contracts shall not apply to contracts for which the consumer pays less than EUR 30

LEGAL GUARANTEE

- A legal guarantee is defined as the seller's responsibility to deliver something that corresponds to the contract. The thing is in conformity with the contract when it is delivered without actual defects.
- The seller fulfils this obligation when
 - (a) the thing has the subjective requirements of conformity
 - (b) the thing has the objective requirements of conformity.
- The thing is not in conformity with the contract when it is defective in fact, when it has been poorly installed, when, in the case of a movable thing, its use is restricted because of a third party's right, and when, in the case of a thing with digital elements, the required updates are not provided. The goods sold are not in conformity with the contract and where the agreed characteristics are missing.
- The legal guarantee to be provided by the seller has a minimum duration of two (2) years.
- A non-conformity that occurs within one (1) year of delivery of the thing is presumed to have existed at the time of delivery, unless this is inconsistent with the nature of the thing or the nature of the defect. After this period and until the end of the statutory warranty, the burden of proving the defect shall be on the buyer.

Digital service:

- (a) a service that enables the consumer to create, process, store data in digital form
 - or access to it; or
 - (b) a service which allows the exchange of data in digital form or any other interaction with such data, which is downloaded or created by the consumer or other users of that service.
-
- Online marketplace: a service which uses software, including a website, part of a website or an application, managed by a supplier or another person on behalf of the supplier and which enables consumers to enter into distance contracts with other suppliers or consumers.
-
- Online marketplace provider: any supplier who provides an online marketplace to consumers.
-
- Compatibility: the ability of digital content or digital service to work with hardware or software with
 - with which digital content or digital services of the same type are commonly used, without the need to modify the digital content or service.
-
- Operational capability (functionality): the ability of the digital content or digital service to
 - perform their functions, having regard to their purpose.
-
- Interoperability: the ability of the digital content or digital service to operate with hardware or software other than those with which digital content or digital services of the same type are commonly used.

DIRECTIVE 2019/2161 DIGITAL CONSUMER

With Directive 2019/2161, the European Union has taken measures to protect consumers from the risks of digital transactions while enhancing the transparency of online shopping (e.g. Amazon). The new legislation comes to increase consumer safety in the digital space.

Consumer protection in digital transactions has been an increasing need as this is an area with an increased risk of manipulation.

Some important changes brought by the new legislation are:

- 1) Completion of the blacklist with cases such as ranking by search engines without informing the consumer whether the ranking is the result of paid advertising or due to payment of a fee. It is now necessary for the search engine to indicate whether the ranking displayed is the result of a fee, otherwise there is a question of manipulation

DIGITAL CONSUMER

- 2) In addition, the submission of false ratings or positive reviews by virtual consumers (influencers, bots) in order to promote products was considered an unfair commercial practice. At the same time, even the interference in consumer reviews and comments by the supplier was considered unfair since this is considered to have a negative impact on consumers.
- 3) In addition, the failure to inform the consumer before the conclusion of the contract whether the third party offering the products is a supplier or a private person is now considered an unfair commercial practice (as if it is a private person, there is no right of 14-day withdrawal).
- 4) Digital contracts where the consumer provides personal data in exchange for the use of a platform are explicitly defined (Facebook, Instagram). Now on these platforms the consumer is given the right to withdraw without justification within 14 days while claiming the deletion of his data.
- 5) The penalties imposed on suppliers if they violate the law are increased.

A thing with digital elements is any mobile thing that incorporates or is interconnected with digital content or a digital service in such a way that the absence of the digital content or service prevents the performance of its functions.

A thing with digital elements is, for example, a 'smart' phone that has an application provided in accordance with the sales contract, such as an alarm clock or a camera. The provisions of the Civil Code on sale apply to things with digital elements.

In case of doubt as to whether the provision of embedded or interconnected digital content or an embedded or interconnected digital service is part of the sales contract, the digital content or digital service shall be presumed to be covered by the sales contract.

A legal guarantee is defined as the seller's responsibility to deliver something that complies with the contract. The thing is in conformity with the contract when it is delivered without actual defects.

The legal guarantee to be provided by the seller has a minimum duration of two (2) years and on digital items.

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Exceptions to the scope

- (a) social services related to social housing, childcare and support for families and families of children; persons in permanent or temporary need, including long-term care;
- (b) health care services, whether or not provided through health care facilities; (c) health care services, whether or not provided through health care facilities
- (c) gambling activities, which include games of chance in which the player wagers money, including lotteries, casino games and transactions involving betting;; (d) gambling activities, which include gambling services provided by health care providers or other services
- (d) financial services; (d) financial services;
- (e) the creation, acquisition or transfer of rights in immovable property or rights in immovable property; (f) the creation, acquisition or transfer of rights in immovable property; (g) the creation, acquisition or transfer of rights in real estate;
- (f) the construction of new buildings, the radical alteration of existing buildings and the letting of accommodation as a dwelling;; (g) the construction of new buildings, the fundamental alteration of existing buildings and the letting of accommodation as a dwelling
- (g) package travel, package holidays and package tours .
- (h) consumer protection with regard to certain aspects of timeshare, long-term rental and long-term rental contracts holiday products, resale and exchange.
- (i) a person appointed by the public authority with a statutory duty of independence and impartiality and a duty to ensure, through the provision of comprehensive legal information, that the consumer enters into the contract only after mature legal consideration and with knowledge of its legal consequences;
- (j) the supply of food, beverages or other goods intended for current consumption within the household and the which are delivered by the trader on a frequent and regular basis to the consumer's home, residence or place of work;;
- (k) passenger transport services,
- (l) contracts which are concluded through vending machines or commercial vending machines; (m) contracts which are concluded by means of a vending machine or a commercial vending machine
- (m) contracts concluded with telecommunications operators through public payphones for their use or concluded for the use of a single call made by the consumer by telephone, Internet or fax.

Information requirements BEFORE the conclusion of the contract

O the supplier shall provide the consumer with the following information in a clear and comprehensible manner:

- (a) the main characteristics of the goods/services, the main characteristics of the goods or services, to the extent appropriate in relation to the medium and the goods or services
- (b) the identity of the supplier (e.g. trade name)
- (c) the geographical address where the supplier is established and the supplier's telephone number, fax number and his/her e-mail address, if available
- (d) if different, the geographical address of the commercial headquarters

e) the total price of the goods/services,
including VAT and any other charges
if, because of the nature of the goods/services, the price cannot
reasonably be
the manner in which the price is to be calculated; and
all additional charges for dispatch, delivery or postage and any other
charges

(f) the cost of using the means of distance communication for the
conclusion of the contract
where it is calculated on the basis of a price other than the basic price
(e.g. a telemarketing telephone that does not have a local rate)

(g) the arrangements for payment, delivery, performance, the time
limit for delivery of the goods or provision of the services and, where
applicable, the supplier's policy for dealing with complaints

- ▶ where there is a right of withdrawal, the conditions, the time limit
- ▶ the time limit, deadline and procedures for exercising the right of withdrawal
- ▶ i) the cost of returning the goods in case of withdrawal

j) in the event that the consumer exercises the right of withdrawal after having made use of the option provided for in Article 3c par. 3 or Article 3d(3) or Article 3d(3d). 8, that the consumer undertakes to pay the reasonable costs to the supplier in accordance with Article 3j(8)

(k) where no right of withdrawal is granted,
information that the consumer will not have a right of withdrawal

(l) a reminder of the existence of the seller's liability for actual defects and lack of agreed characteristics

(n) the existence of relevant codes of conduct,

(o) the duration of the contract, where applicable, or, if the contract is of indefinite duration or automatically renewable, the conditions for termination of the contract

(p) where applicable, the minimum duration of the consumer's obligations under the contract

(g) where applicable, the existence and terms of deposits or other financial guarantees to be paid or provided by the consumer at the request of the supplier

(k) where applicable, the possibility of recourse to an out-of-court complaints and redress mechanism to which the supplier is subject and the means of accessing it.

Comments:

- The above information forms an integral part of the contract
- If the supplier has not complied with the obligations to inform about additional charges or other costs or the costs of returning the goods
- the consumer shall not pay those charges or costs.
- As regards the fulfilment of the information obligations,
- the burden of proof shall be on the supplier.
- If the supplier fails to comply with the information obligations laid down by law, the contract is void in favour of the consumer.

Standard requirements for distance contracts

- The supplier shall provide the information in plain and intelligible language
- in a manner appropriate to the means of distance communication used
- If it is a fixed medium → legible.
- If the contract is to be concluded by electronic means
- and imposes an obligation on the consumer to pay
- → information in a clear and distinct manner
- and immediately BEFORE the consumer places the order

- The information should appear very close to the confirmation
- required to place the order.

- The consumer, when placing his order, must expressly acknowledge that the
- order implies an obligation to pay.
- If the supplier does not comply, the consumer is NOT bound
- by the contract or the order.

- E.g. labelling that includes the words "order with payment obligation".

- Commercial websites → clearly and legibly indicate at the latest at the start of the order process whether delivery restrictions apply and which means of payment are accepted.

- If the supplier does NOT comply with the formal requirements → contract CANCELLED in favour of the consumer. Telephone call → at the beginning of the conversation state
- his identity and the commercial purpose of the communication.

- Contract by telephone for the provision of services (or goods/services at the same time)
- → the supplier is obliged to confirm his offer to the consumer
- → he is only bound when he has signed the offer or sent his written consent.
- These confirmations must be communicated on a durable medium.

- The supplier provides the consumer with the confirmation of the concluded contract
- on a durable medium within a reasonable time after the conclusion of the distance contract
- at the latest at the time of delivery of the goods or before the performance of the service begins.

- Provision of services at the beginning of the withdrawal period → express request

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Right of withdrawal

- Deadline 14 calendar days
- without stating the reasons and without any charge
- unjustified withdrawal

- The withdrawal period shall expire 14 calendar days:
 - (a) from the date of conclusion of the contract, for service contracts
 - (b) for sales contracts, from the day on which the consumer acquires physical possession of the goods
 - (or a third party indicated by him, other than the carrier)

Special cases of possession of goods:

case of several goods with one order and separate delivery

→ physical possession of the last goods

case of delivery of goods consisting of several lots or several pieces

→ physical possession of the last lot or last piece

in the case of a contract for the regular delivery of goods over a fixed period of time

→ physical possession of the first good

Failure to inform on the right of withdrawal

- If the supplier has not provided the information
- on the right of withdrawal → the withdrawal period expires 12 months after the end of the initial period

- If the supplier has provided the information within 12 months from the day the period would normally start
- → the withdrawal period ends 14 calendar days
- from the day the consumer receives this information

Exceptions to the right of withdrawal

- products manufactured according to consumer specifications,
- products which are liable to deteriorate or expire soon,
- products which are not suitable for return for reasons of health protection or hygiene, provided that they are sealed and have been unsealed after delivery,
- products which, because of their nature, are, after delivery, inseparably mixed with other items,
- the supply of digital content not supplied on a tangible medium, if performance has begun with the prior express consent of the consumer and confirmation by the consumer that he thereby forfeits his right of withdrawal,
- the supply of food, drink or other goods intended for current consumption within the household and which are delivered by the supplier on a frequent and regular basis to the consumer's home or place of work,
- sealed sound recordings, sealed video recordings and sealed computer software, unsealed after delivery,
- newspapers and magazines, unless there is a subscription contract for their supply.

Exercise of the right of withdrawal

- Before the expiry of the time limit, the consumer informs the supplier of his decision to withdraw.
- Possibilities:
 - (a) to use the model withdrawal form (b) to make any other clear statement
- The withdrawal must be made before the deadline.

- Some suppliers also provide an option for electronic submission:
 - either using the model withdrawal form
 - or by any other clear declaration available on the supplier's website.
- The supplier shall notify the consumer without delay
 - a confirmation of receipt on a durable medium.

- The consumer bears the burden of proof that he has exercised the right.

Results of the withdrawal

- The exercise of the right of withdrawal
- terminates the obligations of the parties to perform the contract

- Obligations of the supplier

- Obligations of the consumer

Obligations of the supplier

- Refunds any payment received including delivery costs
- within 14 calendar days
- from the day on which it was informed of the consumer's decision to withdraw

- Refund by the same means of payment

- Additional delivery costs (if the consumer had not chosen the cheapest standard delivery method) → NOT obliged (e.g. instead of post the consumer had chosen an express courier instead of post)

- Can withhold the refund of the price
- until it has received the goods back or until the consumer provides proof that he has sent them back

Obligations of the consumer

- Return the goods within 14 calendar days
- from the day on which he notified the supplier of his decision to withdraw

- Is charged only the direct cost of returning the goods

- Is liable for any reduction in the value of the goods only as a result of handling the goods other than that necessary to ascertain the nature, characteristics and functioning of the goods

- The consumer is not liable
- for the provision of services during the withdrawal period if:
 - the supplier has failed to provide the information required by law; or
 - the consumer has not given his prior express consent
 - to commence performance of the contract during the withdrawal period