

Upcoming challenges for consumer law (from the Volume Editor)

ARTICLES

Iga Małobęcka-Szwast, **The use of personalised prices in the light of the amendment to Directive 2011/83/EU on consumer rights and Regulation 2016/679 (GDPR)**

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- I. Introduction
- II. The concept of personalised pricing and its application in practice
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- IV. Consumer rights related to the use of personalised prices
 1. Consumer rights under Directive 2011/83/EU on consumer rights
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- V. Summary

Summary: With the increasing availability of consumer personal data, advanced pricing algorithms and the rise of e-commerce, the widespread use of personalised pricing by traders seems to be a matter of time. Directive 2019/2161, although allows the use of personalised prices, makes the legality of this practice conditional, in particular, on the fulfilment of new information obligations and compliance with the provisions of the GDPR, including the rights of data subjects contained therein. Both Directive 2019/2161 and the GDPR guarantee consumers a package of rights that are designed to counteract information asymmetry between the trader and the consumer, and enable the latter to make informed purchasing decisions. If effectively implemented by traders, these rights will allow for the elimination or mitigation of possible negative effects of personalised pricing for consumers, as well as the further development of the digital single market.

Key words: personalised pricing; online price discrimination; consumer protection law; data protection law; GDPR; New Deal for consumers; Digital Single Market

JEL classification: K24, K23, K39

Klaudia Koman, **Remedies for lack of conformity of the digital content or digital services with the contract**

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Summary: Directive 2019/770, adopted on 20 May 2019, focuses on the rights and obligations of parties contracting for the supply of digital content or digital services. Member States shall

implement the EU act into their domestic legal systems by 01 July 2021. Until the publication of the proposal for the Directive, digital content and digital services were not extensively regulated in most Member States. Providing real consumer protection while buying digital content or digital services depends on the correct interpretation of the provisions of Directive 2019/770. Therefore, this article focuses on the analysis of the key issues of the Directive, namely the requirements for conformity of digital content or digital services with the contract, and the remedies for consumers for the failure to conform.

Key words: digital content; digital services; consumer protection; harmonization; directive; conformity of the digital content or digital services with the contract; remedies; implementation; contract law

JEL classification: K12; K15; K24

Lena Helińska, Bartosz Paczocha, Arkadiusz Piskorz, **Legal aspects of consumer protection and responsibility for damages in the context of autonomous cars**

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- II. Consumer protection in relation to a contract of sale
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 2. Statutory warranty for defects
- III. Responsibility for damages
 1. Responsible actors
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- IV. Conclusions

Summary: The popularization of autonomous cars will result in the emergence of hitherto unknown factual situations, in which the relationship between consumers and producers or sellers will play an important role. This article examines these relationships, with a particular emphasis on the responsibility of producers. Problems that could be linked to the fifth (highest) level of automation are analyzed in relation to the existing legal framework in terms of freedoms, information requirements, warranty for defects, tort liability and strict liability. The aim is to identify possible areas where the current regulations would be insufficient. The above-mentioned issues lead to the conclusion that although law-making should be based on knowledge about the functioning of the autonomous system, and it is not advisable to close any potential gaps haphazardly, an early debate on responsibility and liability plays a crucial role in the context of legal certainty.

Key words: Autonomous vehicles; autonomous cars; liability; delict; strict liability; constitutional freedoms; manufacturer; user; legal relations; trade in autonomous vehicles; automation

JEL classification: K13

Anna Nowak, Magdalena Węglowska, Miłosz Gapsa, **Profiling based on personal data of consumers processed by an autonomous vehicle**

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 - 1. Failure to fulfil the information obligations towards the consumer as a misleading omission
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- VI. Evolution of the average consumer model in relation to data processing by autonomous vehicles
- VII. Summary

Summary: Profiling is increasingly entering the lives of consumers, and in parallel with it, the phenomenon of collecting and using consumer data from various sources, including data processed by autonomous vehicles, is also progressing. This article aims to characterize the key risks for consumers that may result from the profiling process based on personal data obtained from autonomous vehicles, with particular emphasis on the practice of personalization. In this context, two legal acts will be discussed in more detail. First, the General Data Protection Regulation, on the basis of which the process of obtaining personal data from autonomous vehicles will be characterized. Second, Directive 2005/29/EC on unfair business-to-consumer commercial practices, in the context of which, the paper will examine the possibility of qualifying personalization of advertisements and using profiling to contractual terms optimization as an unfair commercial practice.

Key words: artificial intelligence, data, personal data, autonomous vehicles, new deal for consumers, consumer protection; unfair commercial practices, personalization, profiling, consumer rights

JEL classification: K15, K24, K42

Bartosz Wyżykowski, 'Consumer' protection of certain natural persons conducting a business activity – selected issues

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VII. Conclusions

Summary: From 1 January 2021, the application of selected provisions in the field of consumer protection was extended to natural persons concluding a contract directly related to the conducted business activity, if it follows from the content of such contract that it is not of professional nature for such person, in particular taking into account the subject of the business activity, revealed on the basis of the provisions on the central registration and information of business. Subject of the new regulation are provisions regarding unfair contract terms, provisions on the warranty for defects that previously applied only to consumers, and, finally, provisions regulating the consumer's right of withdrawal in distance and off-premises contracts. The aim of the article is to clarify interpretation doubts that arise with the entry into force of the new regulations.

Key words: consumer, entrepreneur, professional nature of the contract, unfair contract terms, warranty for defects, right to withdraw

JEL classification: K12, K15, K22

REVIEWS OF LAW AND JURISDICTION

Filip Wiaderek, **New Consumer Agenda – strengthening consumer resilience for sustainable recovery**

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VIII. Concluding remarks

Summary: The paper provides a shortcut of the ‘New Consumer Agenda – strengthening consumer resilience for sustainable recovery’ that is enshrined in the EC Communicate from 13 November 2020. The programme constitutes an outline of goals, which the European Commission plans to achieve between 2020 and 2025 that were divided into five priority areas: (1) the green transition; (2) the digital transformation; (3) redress and enforcement of consumer rights; (4) specific needs of certain consumer groups and, (5) international cooperation. The burden of proper implementation of the solutions outlined in the Agenda, especially with regard to green transition, is to a large extent contingent on consumers. Promoting and enhancing grassroots actions is thus intended to bring most efficient and stable effects. An additional aspect of the programme is to provide effective measures of keeping high level of consumer protection in the COVID-19 reality and afterwards. The challenges that need to be met revolve around the impact that the pandemic had on the travel and tourism sector, online commerce and social consumption patterns, with regard to the increased waste production in particular. The shortcut of the Agenda enshrined in this paper concentrates on the initiatives, which the Commission intends to take up in the upcoming years, from the perspective of the declared goals of the programme.

Key words: New Consumer Agenda, consumer protection, COVID-19, green transition, digital transition

JEL classification: D18, K23, K32

Dominika Rogoń, **Shaping and controlling of consumer credit costs according to the latest judgments of the Court of Justice of the European Union**

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3. Criteria for assessing the unfair nature of a cost condition

IV. Summary

Summary: In the study, the author discusses the conclusions of the judgments of the Court of Justice of the European Union in cases: C-621/17, C-779/18, C 224/19 and C-259/19, C-84/19 and C-222/19 and C-252/19 concerning the shaping and control of the cost of consumer credit.

Key words: total cost of the credit to the consumer; non-interest credit costs; commission; fee; unfair contractual terms; main subject matter of the contract; plain intelligible language of the contract terms

JEL classification: K20

Małgorzata Sieradzka, Magdalena Zawisza, **Obligation to ex officio examine the unfairness of terms and conditions in the event of the consumer's failure to appear in court in cases of unfair market practices in the financial market. Commentary to the judgment of the Court of Justice of the European Union of 4 June 2020 in case C-495/19 Kancelaria Medius SA v RN**

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 2. Scope of protection under Directive 93/13
 3. Duties of the court to examine the terms of a consumer contract
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- IV. Comment

Summary: The aim of the article is to discuss and analyze the judgment of the Court of Justice of 4 June 2020 in case C-495/19 Kancelaria Medius SA vs. the Supervisory Board, from the point of view of its importance for the examination of cases related to unfair market practices on the financial market, where one of the parties is a consumer. On the basis of the judgment in question, the obligation to examine the unfairness of contract terms by the court will be presented in particular. The article covers the analysis and commentary of the decision made by the Polish Supreme Court. Moreover, the impact of the judgment on the later practice of common courts will be presented.

Key words: consumer protection; Directive 93/13/EEC; Article 7(1); consumer credit; review of whether the contractual terms are unfair; failure of the consumer to appear at the hearing; scope of the court's powers and obligations

JEL classification: K41

Zofia Mazur, ***Dieselgate* and the legal consequences of the manipulation of air pollution emissions**

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- IV. Criminal proceedings
- V. *Dieselgate* and the violations of competition law
- VI. Conclusion

Summary: The subject of the present article is the analysis of the well-known ‘Dieselgate’ affair, which has involved Volkswagen. The scandal in question concerns the installation of software (‘defeat device’) to manipulate the results of emissions tests that in fact did not corresponded to the values declared in the approval certificates of vehicles produced by Volkswagen. In addition, through advertising campaigns, Volkswagen promoted its car models as particularly environmental friendly, illegally using environmental and green claims. These activities of the German car manufacturer led to many legal actions both in Europe and in the United States. The aim of the article is to present the administrative proceedings and the current legal situation of the ‘Dieselgate’ scandal in Poland and in Italy.

Key words: Dieselgate; Volkswagen; AGCM; UOKiK; air pollution emissions

JEL classification: K15; K19

Jan J. Zygmuntowski, Blanka Wawrzyniak, **The economic value of personal data and consumer (user) protection on online platforms**

Table of contents:

- I. Introduction
- II. Motives for the ruling – decision of the Italian antitrust authority and its consequences
- III. Commentary on the economic value of personal data
- IV. Ambiguities related to the case and consequences of the judgment
- V. Conclusion

Summary: The subject of this commentary is an in-depth analysis of the ruling of the District Administrative Court issued in relation to the decision of the Italian antitrust authority (Autorità Garante della Concorrenza e del Mercato) imposing a fine of EUR 10 million on Facebook in relation to the entrepreneur’s violation of consumer law. The study focuses on the economic value of personal data, as well as on the ability of digital companies to commercialize and exploit the data. The Authors’ reflections are based on the analysis of EU and national regulations along with the latest legislative changes to the data-related framework. The Authors indicate that although

personal data is of a non-commodity nature, enabling their processing by the user may be equated with a non-monetary service provided by the user to the platform, and thus should be protected under the national legislation regulating entrepreneur-consumer relations.

Key words: personal data; unfair commercial practice; consumer welfare; economic value; digital platforms; information labour; data processing; non-monetary benefit.

JEL classification: D46, K21, K24

Bartosz Kotowicz, Małgorzata Sieradzka, Magdalena Zawisza, **Request to cancel the contract pursuant to the Act on Counteracting Unfair Market Practices as a form of a claim for the restoration of the previous state. Commentary on the judgment of the Supreme Court of September 11, 2020, III CZP 80/19**

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- I. Introductory remarks
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 2. The nature of the claim under Article 12 (1) (4) of the Act on Counteracting Unfair Market Practices in the light of the jurisprudence
 3. Consequences of the resolution of the Supreme Court

Summary: The purpose of the article is to discuss the Resolution of the Polish Supreme Court of 11 September 2020, III CZP 80/19, where the Supreme Court decided that the request to cancel a contract provided for in Art. 12 sec. 1 point 4 of the Act of 23 August 2007 on Counteracting Unfair Market Practices is a form of a claim for the restoration of the previous state, the effective investigation of which depends on the fulfilment of general conditions for liability for damages. The article includes an analysis of the positions presented so far in the doctrine and jurisprudence, as well as a commentary on the resolution adopted by the Supreme Court. Moreover, the impact of the ruling on the subsequent practice of common courts is presented.

Key words: counteracting unfair market practices, claims for damages, cancellation of the contract

JEL classification: K21

Anna Urbanek, **Overview of decisions of the President of the Office of Competition and Consumer Protection concerning infringements of collective consumer interests in 2019 and the first half of 2020**

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- I. Introduction
- II. Infringements of the Unfair Market Practices Act
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- IV. Infringements of the Telecommunications Law
- V. Infringements of the Payment Services Act
- VI. Infringements of the Consumer Rights Act
- VII. Infringements of other selected legal acts
- VIII. Conclusions

Summary: This overview is a presentation and commentary on the decisions of the President of the Office of Competition and Consumer Protection concerning infringements of collective consumer interests issued in the period from January 2019 to June 2020. The analysis concerns cases of failure to comply with the provisions of selected legal acts regulating the provision of various types of services, and consumer rights in relations with entrepreneurs. The study presents the most common practices used by entrepreneurs, as well as those that are particularly interesting due to the amount of the fine imposed in the decision or the media coverage of the case.

Key words: Office of Competition and Consumer Protection; collective consumer interests; decisions of the President of OCCP; consumer protection

JEL classification: K12, K15, K42

Aleksandra Wędrychowska-Karpińska, **Non-conforming declarations of performance on construction products as a misleading practice relating to product performance – discussion based on Polish regulator’s decision of 4 October 2019 (DOZiK-6/2019)**

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- I. Introduction
- II. The President of the UOKiK as horizontal competition and consumer protection authority
- III. Non-conforming declarations of performance on construction products as an unfair commercial practice
- IV. Non-conforming declarations of performance on construction products as an unfair commercial practice – evidence taking
- V. Removal of continuing effects of an unfair commercial practice
- VI. Unfair commercial practice as basis for parallel actions by authorities, consumers and competitors
- VII. Conclusions

Summary: The article discusses the decision of the Polish competition and consumer protection authority (*Prezes UOKiK*) of 4 October 2019 (DOZiK-6/2019) regarding the unfair commercial practice of marketing certain construction products (XPS foam boards) that do not have declared performance characteristics. The way the decision was argued shows when *Prezes UOKiK*, as the horizontal competition and consumer protection authority, intervenes in cases which are, or have been, dealt with in parallel by sectorial regulators (such as the building supervision inspectors, whether provincial or the Chief Building Supervision Inspector), using public documents collected by them. The article discusses how to construe the term ‘unfair commercial practice’ where certain technical or professional information given by an undertaking about its product’s performance is false. The article also considers the penalties applied in the regulator’s decision of 4 October 2019 in the context of the need to remove the continuing effects of the unfair commercial practice.

Key words: declaration of performance; construction products; unfair commercial practices; misleading practices; UOKiK; WINB; GINB; evidence; public documents; consumers

JEL classification: K32, K21, K230

CONFERENCE REPORTS

Report on the “Annual Conference on European Consumer Law 2020”, ERA, Trier, 8–9 October 2020 (Anna Urbanek)

Report on the 1st edition of the TechLawClinics project at the Jagiellonian University and the University of Lodz (academic year 2019/2020) (Monika Namysłowska, Piotr Tereszkiwicz)

Contents, Summaries and Key Words