

Delimitation of Consumer Protection in Czech Law in the Context of the European Consumer Acquis

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Introduction

The system of consumer protection may be classified from several points of view. The most elementary classification distinguishes between private law protection and public law protection. While private law protection is provided for mainly in the Civil Code No. 40/1964 Sb., as subsequently amended, and in other legal regulations containing norms governing private law relations – such as the Act No. 99/1963 Sb., the Rules of Civil Procedure, and the Act No. 59/1998 Sb. on Liability for Damage Caused by Faulty Products, the public law protection of consumers is to be found mainly in the following legal regulations:

- the Act No. 634/1992 Sb., on Consumer Protection;
- the Act No. 64/1986 Sb., on Czech Commercial Inspection;
- the Act No. 526/1990 Sb., on Prices;
- the Act No. 146/2002 Sb., on State Agricultural and Food Inspection;
- the Act No. 110/1997 Sb., on Foodstuffs and Tobacco Products;
- the Act No. 102/2001 Sb., on General Safety of Products;
- the Act No. 22/1997 Sb., on Technical Requirements on Products;
- the Act No. 40/1995 Sb., on Regulation of Advertising

- the Act No. 455/1991 Sb., on Trades; and
- the Act No. 143/2001 Sb., on the Protection of Economic Competition.

Criminal Code No. 140/1961 Sb. defines the offence of “harm caused to a consumer” (Section 121) as an act committed by anyone who “causes damage to the property of another person in a not insignificant amount by harming a consumer by, above all, cheating him as regards quality, quantity, or weight of goods, or who launches products, works, or services on the market in a large extent, concealing any of their significant faults. Any such person shall be punished by a term of imprisonment of six months to three years or the prohibition of activity or a monetary punishment.” The Criminal Code also deals with consumer protection in its provisions defining some economic crimes (Chapter II of the Criminal Code).

When dealing with the distinction between private law protection and the public law protection of consumers, one may note that the boundaries – or, to be more precise, the legal regulations – do not often draw a strict line of separation between them. For instance, Section 39 of the Civil Code declares as null and void all legal acts that are either in conflict with law (*contra legem*) or try to circumvent it (*in fraudem legis*). Although the Civil Code is a typical private law norm, it declares as null and void not only those legal acts that are made in conflict with the mandatory norms of

private law but also those that contravene the mandatory norms of public law. Similarly, the Consumer Protection Act affects private law relations, although it is a typical public law regulation (cf., for instance the ban on the conclusion of purchase contracts, donation contracts, and other contracts where their indirect subject matter¹ consists of a dangerous product that may be mistaken for foodstuffs, cf., Section 7a).

The Consumer Protection Act describes the basic duties of suppliers (as defined in Section 52 of the Civil Code) as follows: to sell honestly, i.e., to sell in the correct weight, measure, or amount and to allow consumers to verify the correctness of such data; to sell products and services in the prescribed quality, the quality stated by the seller or the usual quality. The price must be negotiated in harmony with price regulations; it must be correctly charged and must be rounded in case of cash payments. Suppliers are expressly required to observe good manners (“The seller may not act in conflict with good manners when selling goods and providing services, primarily not discriminating the consumer in any way”, as provided in Section 6 of the Consumer Protection Act). Any discrimination of consumers is offered as an example of such immoral behaviour.

The Consumer Protection Act prohibits any production, import, export, offer, sale, and donation of dangerous products that may be mistaken for foodstuffs, as well as any offer, sale, and export of products or goods intended for humanitarian purposes.

The key provision protecting consumers in the Consumer Protection Act is Section 8, which prohibits any deception of consumers (e.g., by incorrect, non-attested, incomplete, imprecise, ambiguous, or exaggerated data, as well as by any non-disclosure of information, etc.). In connection with the general clause prohibiting consumer deception, it needs to be pointed out that where any behaviour deceiving consumers is classifiable as unfair competition, one may seek redress not only on account of liability for breach of a legal duty – thanks to consumer protection (under the Consumer Protection Act) – but may also seek protection within the context of business competition (under the Commercial Code).

Another important provision overlapping with the private law protection of consumers is contained in Section 9 of the Consumer Protection Act on information duty. The duty to inform is one of the key duties placed on suppliers (typically in the case of “distance contracts” defined in Sections 53 (3), (4), (6) and 53a of the Civil Code).

Private law protection of consumers mostly has a subsequent nature, while public law protection is mainly preventive. Public law protection typically does not require any active behaviour on the part of the consumer, but the consumer has little authority over possible proceedings. By contrast, private law protec-

tion usually requires the consumer to take active steps and become involved in the proceedings.²

Although the overlap of consumer protection under private law and public law is quite clear in the legal system, the mutual harmony and conceptual interconnection (e.g., of terms, institutes) is not entirely unproblematic.

The grounding of consumer protection in private law regulations

The basic private law regulations governing private law relations are the Civil Code and the Commercial Code. The most elementary aspects of the private law protection of consumers could be identified in the “actual protection of consumers” in private law relations arising mainly from legal acts, i.e., consumer obligations (cf., the Civil Code, the Commercial Code, and other regulations), consumer protection within business competition (cf., the Commercial Code and other regulations), and analysable from the perspective of substantive law and procedural law.

An explicit legal foundation of consumer protection in Czech private law has been developing since the 1990s. Amendments to existing legal regulations (mostly the Civil Code) implemented consumer protection directives in the Czech legal system. Although the legal regulation prior to the implementation of directives could – and did – serve for consumer protection, the general provisions tended to be used for this purpose (most typically Section 39 of the Civil Code providing for ‘immoral agreements’, which could be characterised – from the point of view of consumer protection – as immorally advantageous to one of the contracting parties – the supplier).

However, it would be wrong to assume that consumer protection got into the Czech legal system only as a result of implementation of EC consumer protection directives. In a certain way, the pre-1989 consumer protection (e.g., the sale of goods in shops, as defined in Section 612 and subsequent sections of the Civil Code) was stricter than is currently required by EC law (namely Directive 1999/44/EC). This was, however, a fragmentary, case-by-case protection, since the general principle of consumer protection (cf., Section 55 of the Civil Code, Directive 93/13/EEC, and Directive 2005/29/EC) was not introduced into the Czech legal order.

The first step of Czech legislators when implementing the private law protection of consumers was to adopt a new contractual type of travel contract in the Civil Code. This occurred on the basis of Act No. 159/1999 Sb. on Some Conditions for Business Activities in the Field of Tourism, effective from 1 October 2000, whereby Directive 90/314/EEC was implemented.

This amendment to the Civil Code, however, was just a partial assertion of consumer protection because neither the Civil Code nor the Commercial Code had previously been operating with the notion of the “consumer”. The provision on the sale of goods in shops uses the terms “buyer” and “seller” (though a specific one), while the contracting parties to the travel contract are referred to as “customers” and “travel agencies”. The consumer as a specific contracting party requiring special protection has been present in the Czech Civil Code only after the passage of amendment No. 367/2000 Sb., effective from 1 January 2001, whereby the Directives 93/13/EEC, 97/7/EC and 85/577/EEC were implemented into the Czech legal order. The amendment introduced the pair of terms “consumer” and “supplier”, defined a “consumer contract”, provided for a general protection of consumers, and added a special provision protecting consumers when concluding agreements by distance and in other than usual business premises.

The Commercial Code did not escape the legislators’ attention when providing for the protection of consumers in private law. Act No. 370/2000 Sb., effective from 1 January 2001, introduced consumer protection in the Commercial Code, e.g., by banning the exclusion – by mutual agreement – of applying those consumer protection provisions that are contained in the Civil Code. This is because the Commercial Code had previously contained consumer protection only within provisions prohibiting unfair competition of entrepreneurs (Section 44 and subsequent sections).

A special provision on timesharing contracts was introduced into the Civil Code by Act No. 135/2002 Sb., effective from 1 July 2002, whereby Directive 94/47/EC was implemented.

In 2002, an extensive amendment of the provision on the sale of goods in shops within the context of Directive 1999/44/EC was carried out (by adopting Act No. 136/2002 Sb., effective from 1 January 2003).

In 2002, an essential amendment of general provisions protecting consumers in the Civil Code was adopted (Act No. 56/2006 Sb., effective from 8 March 2006). The provisions on consumer contracts (Part I, Chapter V of the Civil Code) were supplemented with provisions on agreements on financial services concluded at a distance – these were essentially shifted from the Securities Act (Section 44b-44i of Securities Act No. 591/1992 Sb., prior to its amendment by Act No. 56/2006 Sb.). The provisions on agreements on securities concluded at a distance were incorporated into the Securities Act (Part 2, Chapter V) by an amendment in the form of Act No. 257/2004 Sb.

In 2008, Act No. 36/2008 Sb. implemented into the Czech legal order the Directive of the European Parliament and of the Council 2005/29/EC on Unfair Commercial Practices towards consumers in internal markets, amending the Directive of the Council

84/450/EEC, the Directives of the European Parliament and of the Council 97/7/EC, 98/27/EC and 2002/65/EC, and the Regulation of European Parliament and of the Council (EC) No. 2006/2004 (Directive on Unfair Commercial Practices). Changes were made mainly in the Act on Consumer Protection, which presently contains an express ban on unfair business practices, which subsumes, among other, aggressive and deceptive practices. Changes also occurred in the Commercial Code in connection with a ban on comparative advertising – or, more precisely, permitting it under certain conditions (comparative advertising is allowed in case the seller uses any of the unfair business practices defined in the Act on Consumer Protection).

The implementation of Directive 2005/29/ES in the Czech legal order has not become, however, reflected in the Civil Code, which cannot be considered as correct. Thus, for instance, the issue of a real offer, which is to be explicitly forbidden in the context of Directive 97/7/EC, Directive 2005/29/EC, and the legal regulations of EU member states, is essentially allowed in the Czech Republic: consumers are simply not obliged to return the subject matter of any unsolicited supplies back to suppliers (cf., Section 53(9) of the Civil Code).

In addition to amendments of the two fundamental codes regulating private law relations, i.e., the Civil Code and the Commercial Code, some independent legal regulations on consumer protection have been adopted as well. This concerns, above all, Act No. 59/1998 Sb., on Liability for Damage Caused by Faulty Products (effective from 1 June 1998) and Act No. 321/2001 Sb., on Some Conditions for the Conclusion of Consumer Loans (effective from 1 January 2002).

Apart from special regulations protecting, among others, also consumers, there are special provisions within some other regulations offering consumer protection, e.g., Act No. 37/2004 Sb., on Insurance Contracts Amending Related Acts (the Insurance Contract Act), as subsequently amended.

From the above-mentioned outline, one may conclude that private law regulation of consumer protection seems to be rather scattered in various regulations. A similar method of implementing directives occurs in, e.g., Estonia, which has adopted a general act on consumer protection, has implemented some directives into its Civil Code, and has passed special acts implementing specific consumer protection.³

It is worth noting in this connection that the draft version of the new Civil Code avoids the issue of consumer protection⁴ (save for some exceptions, e.g., accessory contracts, late payment charges, unfair competition, sale of goods in shops) on the grounds that consumer protection will be subject to a special law.

The currently valid Civil Code includes consumer protection among its general provisions (Part I, General Provisions), which cannot be considered as a structu-

rally correct solution. Since contracts form one of the reasons for the formation of obligations (Section 489 of the Civil Code), it would be more suitable to respect the system of the Civil Code and subsume consumer protection within the general provisions of law of obligations (Part VIII, Law of Obligations). Another solution might be to adopt a special law providing for a complex protection of consumers in private law relations (this is the case in, for instance, Slovakia, where private law consumer protection is contained within Act No. 108/2000 Z.z. on Consumer Protection in Door-to-door Trade and Home-Shopping Sale).

An analysis of the actual provisions in Sections 51a-62 of the Civil Code does not, in our opinion, reveal any system:

- Section 51a CC: consumer contracts – general issues
- Section 52 CC: general definitions of consumer contracts
- Sections 53–54 CC: distance contracts
- Sections 54a–54d CC: distance contracts for financial services
- Sections 55–56 CC: general consumer protection
- Section 57 CC: consumer contracts concluded outside the supplier’s customary business premises
- Sections 58–62 CC: time sharing (contracts to use a building or its part on a timeshare basis)

The general provisions (Section 52 CC) are followed by a legal regulation of specific consumer contracts (distance contracts, distance contracts for financial services) and further general provisions (Sections 55-56 CC) offering general protection to consumers, i.e., having a direct connection to Section 52 CC). What follows is a legal regulation of specific consumer contracts.

It would be logical – in order to preserve the systematic progression from general to specific – to deal with the general regulations first, i.e., rearrange the provisions as follows: the current provisions in Sections 51a, 52, 55 and 56 should be followed by special regulation, as delimited by the current provisions in Sections 53-54, 54a-54d, 57, 58-62. (Moreover, time-sharing might be more correctly included in provisions dealing with the regulation of leases.)

The unsystematic character and the fragmentation – both in the Civil Code and the actual regulation of private law protection of consumers – are highly typical of the attitudes of Czech legislators towards consumer protection in the Czech legal order.

Consumer contract

Consumer contracts involve, within the sense of Section 52(1) of the Civil Code, contracts of purchase, contracts for specific work, or other contracts provided that the contracting parties are the consumer on the one hand and the supplier on the other.

Prior to the amendment of the Civil Code by Act No. 56/2006 Sb., amending Act No. 256/2004 Sb., on Business in Capital Markets, as subsequently amended, and other related legislation, Section 52(1) of the Civil Code delimited the consumer contract as follows: “contracts of purchase, contracts for specific work and other contracts regulated in Part VIII of this act.” The amendment removed the limitation on the subject competence of consumer protection in private law relations. A highly debated issue was, among others, the question of whether there is subject competence of legal relations arising from, e.g., innominate contracts or some contracts regulated by the Commercial Code.

Referring to the definition of the consumer contract *de lege lata*, it may be claimed with confidence that the provisions of consumer contracts will apply to all private law relations arising from both nominate and innominate contracts, be they regulated by provisions of whatever private law regulations, as long as the contracting parties involve the consumer and the supplier. This concerns not only legal relations which are exclusively subject to the regimes of the Civil Code or the Commercial Code, but also legal relations established by contracts defined (and named) in other legal regulations, e.g., the Act on Ownership of Flats (i.e., legal relations established by a construction agreement and an agreement on the transfer of ownership of a unit⁵).

The legal regulation of consumer contracts will apply to legal relations according to the legal instruments effective at the time of the making of the legal act giving rise to such relations. Thus, for instance, where a construction agreement was concluded prior to the effective date of amendment No. 56/2006 Sb., it cannot be considered as a consumer contract because it was not regulated in Part VIII of the Civil Code.⁶

A consumer contract does not have any prescribed form. Its form depends on the relevant contract type. A consumer contract can, thus, be concluded as a written, oral, or implied agreement.

A consumer contract may be characterised as a bilateral, addressed legal act giving a legal reason for a synallagmatic legal relation between a consumer and a supplier (i.e., a consumer law relation).

A consumer contract does not represent any special type of agreement⁷; what is decisive for determining whether a certain contract is a consumer contract or not is the nature of the parties to the contract. The subject matter (i.e., the classic element for general agreements) is entirely irrelevant.

On the most general level, a debate may be led about the suitability of the concept of “consumer contract”. The individual language versions of EC directives approach the notion in two ways. The French, Spanish, Portuguese, and Italian versions use the term “contracts concluded with consumers” (*les contrats conclus avec les consommateurs, los contratos celebrados con consumidores, contratos celebrados com os consumidores, contratti stipulati con i consumatori*), while the German, English, Polish, and Czech versions operate with the term “consumer contract” (*Verbrauchervertrag, consumer contracts, umowa konsumencka, spotřebitelská smlouva*).

From the point of view of legal theory, the term “contract concluded with a consumer” is more precise because it is a contract concluded with a specific party to the contract.

Consumer contracts may be classified into general consumer contracts (Section 52 of the Civil Code) and special consumer contracts. The latter are further divided according to the manner in which they are concluded (contracts concluded at a distance, contracts concluded outside the supplier’s customary business premises).

Distance contracts for financial services – concluded at a distance or by means of distance communication – may be characterised as distance contracts but, at the same time, as a special type of distance contracts because they are consumer contracts whose subject matter is financial services.

Conclusion

Since private law protection of consumers in Czech law *de lege lata* is quite fragmented and unconnected, the exact classification of the consumer contract is crucial, mainly in order to find out which provisions of the Civil Code or some other legal regulation will regulate a private law relation established under the contract. The mutual relationship of such provisions also needs to be taken into account because where a certain obligation falls within the applicability of several directives protecting consumers, it is impossible to exclude the applicability of some directive by applying another. In other words, the legal relation is regulated by all directives on consumer protection which may be applied (*C-423/97 Travel Vac SL v. Manuel José Antelm Sanchis*).

Apart from the general provisions protecting consumers (Sections 52, 55 and 56 of the Civil Code),

a special consumer legal relation will also always be regulated by provisions regulating special consumer obligations. Where, however, it expressly follows from the nature of the provision that both or, as the case may be, all of the provisions regulating the special consumer relation cannot apply at the same time, the principle of *lex specialis derogat legis generalis* will apply. This concerns, for instance, time-sharing contracts concluded by means of distance communication. Such a legal relation will be regulated by the general provisions on the protection of consumers (Sections 55 and 56 of the Civil Code) since it is a legal relation established on the basis of a consumer contract, and the provisions of the Civil Code on consumer contracts concluded by means of distance communication (Sections 53-54 of the Civil Code) and time sharing (Sections 58-65 of the Civil Code). What will also apply in such a case will be provisions regulating leases (Section 663 and subsequent sections of the Civil Code), obligations, legal acts, etc. However, where the contract is concluded outside the supplier’s customary business premises, only provisions on general consumer and time sharing will apply because provisions on consumer contracts concluded outside one’s customary business premises do not apply to leases [Section 57(4)a of the Civil Code].

By way of conclusion, it needs to be noted that the draft proposal of the new civil code neither rectifies the sad situation nor strives to improve it.

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¹ “... what the specific behaviour of subjects of civil law focuses on, i.e., the subject matter of a specific social relation regulated by civil law. The amendment to Civil Code No. 509/1991 Sb. specified – in view of the new social developments – the conception of the subject matter of civil law relations in such a way that it considers things to be the subject matter of such relations where the nature of the things, law, or some other property value makes it possible (Section 118(1)).” Fiala, J. et al.: *Občanské právo hmotné [Substantive Civil Law]*, 3rd edition. Brno, Doplněk, 2002, pp. 96–97.

² Kanda, A., Matejka, J. “Spotřebitelské smlouvy a jejich význam v informační společnosti” [“Consumer Contracts and Their Importance in the Information Society”]. In *Pocta Martě Knappové k 80. narozeninám*, Praha: ASPI, 2005, s. 162.

³ Pisuke, H., In Wilhelmsson, T., Tuominen, S., Tuomola, H. *Consumer Law in Information Society*. 1st ed. The Hague/London/Boston : Kluwer Law International, 2001, pp. 36-37.

⁴ “A fragmentary, case-by-case regulation of consumer protection by means of a detailed take-over of the normative content of the relevant European directive is not, however, anticipated by the code. According to the proposed intention

of the code, so-called 'consumer law' should be regulated – similarly to Austria and other countries – by a particular law. The reason for this solution consists in the instability of legal regulation in this area since amendments are very frequent.” *The Draft of Civil Code*, commentary to Sections 361-370, p. 72.

⁵ Similarly to Section 612 and subsequent sections of the Civil Code, cf. the Judgment of the Supreme Court of 27 July 2006, ref. No. 33 Odo 1314/2005.

⁶ The Judgment of the Supreme Court of 26 February 2002, ref. No. 25 Cdo 1957/2000, published in the *Set of Decisions*

of the Supreme Court, Balák, Púry et al., vyd. C.H.Beck Praha, 2002, vol. 14, ref. No. C 1028; also the Judgment of the Supreme Court of 28 July 2004, ref. No. 32 Odo 1155/2003; and the Judgment of the Supreme Court of 29 November 2005, ref. no. 33 Odo 1351/2004.

⁷ Named contracts, expressly regulated contracts, nominal contracts. For details, see Fiala, op. cit., p. 525; Knappová, M., Švestka, J. et al.: *Občanské právo hmotné*, Svazek II., třetí aktualizované a doplněné vydání [*Substantive Civil Law*, volume II, 3rd ed.] Praha: ASPI Publishing, 2002, pp. 32–34.