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Emilia MIŠĆENIĆ, Dr. iur. (KFU Graz), LL.M. (Saarland)*

THE CONSTANT CHANGE OF EU CONSUMER LAW: THE REAL DEAL OR JUST AN ILLUSION?

EU consumer law is in a process of constant change. Over the past several decades EU consumer law has gone through many changes, reaffirming the statement by Greek philosopher Heraclitus: the only constant is change (Panta Rhei). This paper emphasizes the transformative nature of EU consumer law and its constant changes. Firstly, the paper addresses the changes in legal grounds and competences, as the roots of EU consumer law. Secondly, it presents the changes of the levels of harmonization and their impact on EU consumer directives and the national laws of the Member States. It continues by observing the impact of the CJEU's uniform and autonomous interpretation on the national case law of the Member States and consumer law enforcement. In conclusion, the paper accentuates the role of the transparency requirements and information duties in online 'business-to-consumer' (B2C) transactions as fundamental aspects affecting the future of EU consumer law.

Key words: *EU consumer law. – Harmonization. – CJEU. – Consumer protection. – Change.*

* Associate Professor, Department of European and Private International Law, University of Rijeka, Faculty of Law, Croatia, emilia.miscenic@pravri.uniri.hr.

1. INTRODUCTION

EU consumer law is in the process of constant change. Over the past few decades EU consumer law has gone through many changes, reaffirming the statement by the Greek philosopher Heraclitus that the only constant is change (*Panta Rhei*): from changes in the level of harmonization of EU consumer directives, changes affecting the legal grounds for adoption of these approximation measures, to changes in the CJEU's case-law interpretation. The development of EU consumer law and policy has experienced various phases, which prove that the change is constant,¹ which leads to another key aspect of EU consumer law related to its implementation and enforcement in legal orders of the Member States. It is here that the important changes are taking place. The goal of EU consumer law measures is to harmonize the Member States' legal rules to the benefit of both internal market and consumer protection. So far, this has been only partially achieved and the Union is still searching for the right solution. The constant changes that are occurring at the EU level occasionally have adverse effects on the legal orders of the Member States, causing legal fragmentation, enforcement issues and legal uncertainty in B2C (business-to-consumer) relationships.

Over the years, the effects of the changes in EU consumer law have had various forms: different legal solutions caused by the minimum harmonization, different definitions of important concepts (such as trader and consumer), different withdrawal periods in different Member States, and a variety of other issues related to consumer law enforcement (Schulte-Nölke, Twigg-Flesner, Ebers 2008). There have been many attempts to improve EU consumer law, through the introduction of maximum and full (targeted) harmonization, as well as through various initiatives and programmes, such as the Review of the Consumer Acquis,² DCFR (Bar, Clive, Schulte-Nölke 2009), REFIT, Fitness Check, the New Deal for Consumers, and the New Consumer Agenda.³ During the process of writing this paper,

¹ The legal scholarship addresses different aspects of change and transformation in EU consumer law. See Micklitz, Twigg-Flesner (forthcoming); Howells, Twigg-Flesner, Wilhelmsson (2018); Stuyck (2013, 385–402).

² Commission Green Paper on Review of the Consumer Acquis of 8 February 2007, COM (2006) 744 final.

³ European Commission, Evaluating and improving existing laws, REFIT; European Commission, Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive; European Commission, A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement; European Commission, Consumer policy – the EU's new 'consumer agenda'.

the European Commission launched yet another important initiative, titled 'Digital fairness – fitness check on EU consumer law', questioning three key consumer directives on unfair contract terms, consumer rights and unfair commercial practices.⁴ All of these initiatives intended or intend to offer better legislative solutions and introduce more effective enforcement of consumer law across the Union.

Rather than focusing on in-depth analysis of certain specific issue or concept of EU consumer law, this paper emphasizes the transformative nature of EU consumer law and its constant changes. EU consumer law is observed as it is, but from a different angle, and an overview of the process of changes that started long ago is provided. In order to do so, the paper follows a logical order of firstly addressing the changes affecting the very roots of EU consumer law, i.e., its legal grounds. Secondly, it presents the changes affecting EU consumer directives that are founded on these legal grounds, and thirdly it observes the changes resulting from directives' transposition into the laws of the Member States. The paper continues with an analysis of the CJEU case law offering uniform and autonomous interpretation of EU consumer law and its impact on national jurisprudence. In conclusion, the paper focuses on the role of the transparency requirements and information duties in online B2C transactions, as key aspects for the future development of the EU consumer law.

2. THE LEGAL GROUNDS OF EU CONSUMER LAW

Initially there was no recognition and only incidental mention of consumer protection in the provisions on agricultural and competition policies of the Treaty of Rome.⁵ Today, consumer protection presents one of the main EU policies. The consumer protection requirements are 'taken into account in defining and implementing other Union policies and activities' (Art. 12 TFEU).⁶ Under Art. 38 of the EU Charter of Fundamental Rights, the Union policies 'ensure a high level of consumer protection'.⁷ However, at the time consumer protection and B2C relationships were not in the sights of EU law,

⁴ European Commission, Digital fairness – fitness check on EU consumer law, 2022.

⁵ Treaty Establishing the European Economic Community, 25 March 1957, not published in OJ.

⁶ Treaty on the Functioning of the European Union (consolidated) [2016] OJ C 202/1.

⁷ Charter of Fundamental Rights of the European Union [2016] OJ C 202/391.

which focused on other barriers to trade (Schmidt-Kessel 2016, 280). In 1975 the consumer protection and fundamental consumer rights were included in the EEC Resolution on a Preliminary Programme for a Consumer Protection and Information Policy⁸ and in 1978 the ECJ (now CJEU) recognized consumer protection as a requirement in the *Cassis de Dijon* case.⁹

The discussion on the legal grounds for the approximation of laws was triggered almost ten years later by the 1985 White Paper on Completing the Internal Market.¹⁰ It resulted in the adoption of Art. 100a TEEC (now Art. 114 TFEU) as the legal grounds for the approximation of Member States laws related to the internal market. This provision, introduced by the Single European Act in 1987,¹¹ required that the Commission in its para. 3 apply a high level of protection in consumer legislative proposals. Once the Maastricht Treaty¹² introduced Art. 129a TEC (now Art. 169 TFEU) on consumer protection, the ‘internal market’ provision remained the main legal grounds for the adoption of the consumer law approximation measures. Article 129a, para. 1(a), TEC referred to ‘measures adopted pursuant to Article 100a in the context of the completion of the internal market’, meaning to the internal market legal grounds (*ex ex* Art. 100a TEEC, *ex* Art. 95 TEC, now Art. 114 TFEU) (Weatherill 2016, 68). This process of development of legal grounds was followed by several other changes. Although the Treaty provisions on the approximation of laws and consumer protection remained mainly unchanged, the Treaty of Amsterdam¹³ introduced the horizontal policy clause in *ex* Art. 153(2) TEC (Stuyck 2000, 379). The Treaty of Lisbon¹⁴

⁸ Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, OJ C 92/1 listed five fundamental consumer rights: the right to protection of health and safety; the right to protection of economic interests; the right of redress; the right to information and education; and the right of representation (the right to be heard).

⁹ CJEU judgment of 20 February 1979, C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

¹⁰ Completing the Internal Market: White Paper from the Commission to the European Council, Milan, 28–29 June 1985, COM(85) 310, June 1985.

¹¹ Single European Act, OJ L 169, 29 June 1987.

¹² Treaty on European Union, OJ C 191, signed at Maastricht on 7 February 1992, 29 July 1992.

¹³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10 November 1997.

¹⁴ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17 December 2007.*

transferred the latter to Art. 12 TFEU, while its constitutional dimension was recognized in Art. 38 of the EU Charter of Fundamental Rights (Józson 2021, 319). The ‘internal market’ provision (Art. 114 TFEU) continued to play the most important role in the harmonization of consumer law and was placed before the less used unanimity rule of Art. 115 TFEU. The content of the Treaty provision on consumer protection (*ex ex* Art. 129a TEC; *ex* Art. 153 TEC) was literally transposed into the renumbered Art. 169 TFEU and remained overshadowed by Art. 114 TFEU. As rightly emphasized in Rösler (2009), the amendments introduced in the Treaty of Lisbon were a missed opportunity for the development of EU consumer law (Rösler 2009, 84). Nevertheless, the Treaty of Lisbon clarified the long-debated issue of competence in the area of consumer protection and established that both the internal market and consumer protection belong to competences shared between the EU and the Member States (Art. 4(2) TFEU).

The competence division was not always easy to understand and before the Treaty of Lisbon, the ECJ dealt with the issue in the renowned *Tobacco* cases.¹⁵ In *Tobacco Advertising I* the ECJ clarified that the Union does not have the general competence to regulate the internal market and emphasized that an approximation measure has to ‘genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market’.¹⁶ Under the so-called Tobacco test, the measures should actually contribute to the elimination of obstacles to fundamental freedoms and to the removal of competition distortions that must be ‘appreciable’.¹⁷ The ECJ also explained that the ‘recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws’.¹⁸ However, the emergence of such obstacles must be likely and the measure in question designed to prevent them.¹⁹ The next section of the paper therefore explores whether this is always the case with EU consumer protection directives.

¹⁵ Callies (2001, 311 *et seq.*).

¹⁶ CJEU judgment of 5 October 2000, C-376/98, *Germany v. Parliament and Council*, ECLI:EU:C:2000:544, paras. 83 and 84.

¹⁷ *Germany v. Parliament and Council*, paras. 95, 106, and 107.

¹⁸ *Germany v. Parliament and Council*, para. 86.

¹⁹ For more on the *Tobacco* cases see Delhomme (2017, 1).

3. THE LEVEL OF HARMONIZATION IN EU CONSUMER DIRECTIVES

Whether the consumer law measures are always successfully designed to prevent obstacles to trade and the internal market is a question worth discussing. This issue can be examined *inter alia* against the backdrop of the application of subsidiarity and proportionality principles. These principles underpin the adoption of approximation measures in areas of shared competences, such as the internal market and consumer protection (Miscenic 2016, 144). According to the subsidiarity principle, the Union may act in areas that do not fall under its exclusive competence ‘only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States’ and can be better achieved at the Union level (Art. 5(3) TEU). The proportionality principle, on the other hand, guarantees that the content and the form of the measure does not exceed ‘what is necessary to achieve the objectives of the Treaties’ (Art. 5(4) TEU). Despite of existing surveillance mechanisms, such as the orange and yellow card parliamentary procedures,²⁰ the realization of principles can be questioned in EU consumer law, in particular with respect to the level of harmonization of the approximation measures. The adoption of EU consumer directives as approximation measures is usually justified in their preambles by accentuating the benefits of the fair market competition, the proper functioning of the internal market, and the high level of consumer protection. For instance, the aim of Directive (EU) 2019/771²¹ on certain aspects concerning contracts for the sale of goods is ‘to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity’.²² This aim cannot be sufficiently achieved by the Member States and therefore the Union adopted the directive, in line with the principles of subsidiarity and proportionality.²³ Recital 70 emphasizes ‘the fact that each Member State individually is not in a position to tackle the existing fragmented legal framework by ensuring

²⁰ Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, OJ C 83/206.

²¹ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22 May 2019, 28–50.

²² Directive (EU) 2019/771, recital 2.

²³ Directive (EU) 2019/771, recital 70.

the coherence of its law with the laws of other Member States'. The recital goes on to explain that 'the principal contract law-related obstacles [will be removed] through full harmonisation'.²⁴

Similar reasoning can be found in many other EU directives, such as Directive 2011/83/EU on consumer rights²⁵ or Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.²⁶ Their preambles focus on the shortcomings of minimum harmonization, which enabled differences and legal fragmentation in the legal orders of the Member States. According to Directive (EU) 2019/771 these differences were caused by the Member States, which went beyond the regulated minimum standard in order to increase the level of consumer protection and 'acted on different elements and to different extents'.²⁷ Disparities between certain legal rules, such as the conformity criteria and legal remedies affect both businesses and consumers and cause legal fragmentation and legal uncertainty in B2C relationships.²⁸ What seems to be neglected in the directives' preambles is the fact that the Union introduced the minimum harmonization standard as a legislative option for the Member States.²⁹ The application of this principle and the results of it can hardly be seen as a 'failure' on the part of the Member States. Most of EU consumer directives adopted prior to 2000 followed the minimum harmonization approach, which resulted in a different set of rules across the Member States. Being aware of negative effects on the internal market and consumer protection, approximately 20 years ago, the EU legislator initiated the shift from the minimum to maximum and full harmonization.³⁰ Moreover, the

²⁴ Directive (EU) 2019/771, recital 70.

²⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22 November 2011, 64–88.

²⁶ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22 May 2019.

²⁷ Directive (EU) 2019/771, recital 6.

²⁸ Directive (EU) 2019/771, recitals 6 and 7.

²⁹ The minimum harmonization formed part of the 'new strategy' proposed in the Completing the Internal Market: White Paper from the Commission to the European Council, Milan, 28–29 June 1985, COM(85) 310.

³⁰ This shift was first announced in the Communication from the Commission of 7 May 2002 – 'Consumer Policy Strategy 2000–2006', COM (2002)208 final. See Basedow (2021, 112); Weatherill (2012, 175); Reich (2010, 7–39); Wilhelmsson (2008, 225 *et seq.*).

EU legislation in force does not seem to offer much improvement either. According to the provisions of Directive (EU) 2019/771, full harmonization should guarantee a high level of consumer protection.³¹ However, under Directive (EU) 2019/771 the Member States may offer consumers to choose specific remedies under certain circumstances in cases of non-conformity (recital 19), regulate differently sellers' information obligations (recital 20), extend *ratione persone* to persons not covered by the definition of the consumer under the directive (recital 21), etc.³² Consequently, the Member States remain free to regulate 'differently' various legal aspects at the national level, thus enabling further discrepancies in the regulation, enforcement and the level of consumer protection.³³

The changes of the level of harmonization can be observed in many EU consumer directives. The repealed minimum harmonization Directive 87/102/EEC on consumer credit³⁴ was transformed into full (targeted) harmonization Directive 2008/48/EC on credit agreements for consumers.³⁵ Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property³⁶ combines both minimum and several maximum harmonization provisions.³⁷ The same happened to repealed minimum harmonization Directives 97/7/EC and 85/577/EEC,³⁸ which

³¹ Directive (EU) 2019/771, recital 10.

³² See Franceschi, Schulze (2022); Morais Carvalho (2019, 194–201).

³³ Similar concerns are expressed in Milà Rafel (2016, 50–63).

³⁴ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 42, 12 February 1987, 48–53, Art. 15.

³⁵ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22 May 2008, 66–92, Art. 22(1).

³⁶ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (Text with EEA relevance), OJ L 60, 28 February 2014, 34–85, Art. 2.

³⁷ Under Art. 2(1) of Directive 2014/17/EU the Member States are allowed to maintain or introduce more stringent provisions in order to protect consumers, while under Art. 2(2) they are not permitted to maintain or introduce into their national law provisions diverging from those laid down in articles on standard pre-contractual information in the European Standardised Information Sheet (ESIS) and articles concerning the calculation of the annual percentage rate of charge (APRC). See Miscenic (2014, 219 *et seq.*).

³⁸ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4 June 1997, 19–27, Art. 14; Council Directive 85/577/EEC of 20 December 1985

were replaced by the full (targeted) harmonization Directive 2011/83/EU on consumer rights.³⁹ The minimum harmonization Directive 94/47/EC on timeshare contracts⁴⁰ was transformed into full harmonization Directive 2008/122/EC on timeshare, long-term holiday product, resale and exchange contracts.⁴¹ As acknowledged in various studies, green papers and proposals of measures, changing the level of harmonization is a direct consequence of the shortcomings of minimum harmonization.⁴² The latter caused differences between the main consumer protection instruments and definitions across the Member States, which prescribed different withdrawal periods for the same type of consumer contracts; subsumed different persons under the definition of the consumer, or applied harmonized national laws to different types of consumer contracts.⁴³ The inconsistent use of legal terminology describing the same person or a right with a different legal term or expression was another bonus to issues caused by the minimum harmonization standard. For instance, Directive 85/577/EEC used the legal terms ‘right of cancellation’ and ‘right of renunciation’, while Directive 94/47/EC used the ‘right to withdraw’ and the ‘right of cancellation’ as synonyms (Šarčević, Čikara 2009, 204–206; Mišćenić 2016a, 99). Consequently, the ‘minimum level of protection’ remained unrecognizable to ‘average consumers’, who are unaware they are a ‘consumer’ in another Member State (Leczykiewicz, Weatherill 2016).

to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31 December 1985, 31–33, Art. 8.

³⁹ Directive 2011/83/EU, Art 4.

⁴⁰ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 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, OJ L 280, 29 October 1994, 83–87, Art. 11.

⁴¹ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 33, 3 February 2009, 10–30, recital 4.

⁴² As stated in the Explanatory Memorandum to the Proposal for a Regulation on a Common European Sales Law (CESL), the Union initially started to regulate in the field of consumer law by means of minimum harmonization directives and ‘this approach has led to divergent solutions in the Member States even in areas which were harmonised at Union level’ (5, No. 2). The CESL confirmed that such solutions ‘deter the exercise of fundamental freedoms [...] and represent a barrier to the functioning and continuing establishment of the internal market’ (rec. 1). See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels, 11 October 2011.

⁴³ The legal scholarship addressed these issues extensively, see in particular Howells, Twigg-Flesner, Wilhelmsson (2017).

The introduced changes, in the form of maximum and full targeted harmonization, however, continue to allow further discrepancies between the important concepts of EU consumer law at the national level of the Member States. Even now, options and exemptions offered to the Member States by EU consumer directives result in differences related to the main consumer law definitions and concepts, or create discrepancies with respect to the scope of application and content of harmonized national consumer law rules.⁴⁴ These differences are reflected differently, both legally and practically. Different legal solutions affect the legal certainty in B2C relationships, burden the traders with additional costs, which are necessary for the adjustment to the legal rules of the other Member States. According to the European Parliament Study ‘Legal obstacles in Member States to Single Market rules’ from 2020, differences in consumer protection impose burdens on the traders, in particular online merchants (Dahlberg *et al.* 2020, 135). Finally, they adversely affect consumers’ confidence in cross-border B2C transactions. As explained previously, divergent legal solutions also create barriers to trade and the internal market and therefore bring into question the above presented justification of the subsidiarity principle. It seems that the changes of the level of harmonization in EU consumer directives have not brought optimal and expected results, and they remained invisible or at least not visible enough to their addressees.

4. THE TRANSPOSITION OF EU CONSUMER DIRECTIVES INTO THE LAWS OF THE MEMBER STATES

Probably the best way to observe the process of changes of EU consumer law is when EU consumer directives are transposed into the national law of the Member States. It is at this moment that EU consumer law serves its purpose and becomes the harmonized national law. As emphasized in Lando (2000), the approximation of laws aims to remove or mitigate the diversities created by the national laws that ‘may be regarded as a non-tariff barrier to trade’ (Lando 2000, 61). However, despite of attempts to improve EU consumer legislation, the Union has not been very successful in eliminating barriers to trade, which are more of a private law nature. The transposition of minimum harmonization directives caused both systematic and substantive discrepancies between the laws of the Member States. Moreover, the guaranteed minimum standard of protection remained unrecognizable to an average consumer. For example, due to different withdrawal periods

⁴⁴ See the forthcoming books edited by Micklitz, Twigg-Flesner (2023); Franceschi, Schulze (2022).

for different consumer contracts in different Member States, the consumer from one Member State could not rely on making use of this right in another Member State (Loos 2009). Due to differences in the scope of application of national consumer rules, the very same consumer might not be considered as a consumer in another Member State or their contract might not fall under the scope of application of the national consumer rules of another Member State (Schulte-Nölke 2009, 133; Schulte-Nölke, Twigg-Flesner, Ebers 2008, 286 *et seq*). Nonetheless, the changes introduced by the shift to the so-called 'pure' maximum harmonization endangered the subsidiarity and proportionality principles and lowered the level of protection in some Member States. This approach in its purest form was abandoned soon after the adoption of Directive 2002/65/EC on distance marketing of financial services⁴⁵ and Directive 2005/29/EC on unfair business-to-consumer commercial practices (UCTD).⁴⁶ The very nature of these directives was against the approximation of laws and the definition of the directive itself, since their rigidity forced the national legislators to literally transpose the directives' provisions into the national law.⁴⁷ For example, the transposition of the UCTD was heavily discussed in the Croatian Parliament, because its members could not understand the concept of the maximum harmonization not allowing the proposed amendments, nor the meaning of some of the UCTD concepts and definitions (Čikara 2007, 1067). Therefore, the newly proposed Consumer Protection Act (CPA) in 2007 failed during the first reading, and it wasn't until the second reading that it was adopted.⁴⁸ However, the literal transposition of the directives' terms and concepts left its scars in the consumer law practice and case law, where it created resistance to these 'strange' new and unfamiliar concepts that differed from the national law.⁴⁹

⁴⁵ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9 October 2002, 16–24.

⁴⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') OJ L 149, 11 June 2005, 22–39.

⁴⁷ There is extensive legal scholarly literature on the limitations of maximum harmonization, see Basedow (2021, 116); Faure, (2008, 433 *et seq*); Mak (2009, 55–73).

⁴⁸ Consumer Protection Act, OG Nos. 79/07, 125/07, 75/09, 79/09, 89/09, 133/09, 78/12, and 56/13 (not in force).

⁴⁹ On the possible conflict between the general clauses of the UCPD and the maximum harmonization see Vries (2011).

As confirmed by the results of the Fitness Check in 2017,⁵⁰ the transposed UCTD provisions remained neglected in the Croatian case law, despite of the widespread use of unfair commercial practices (Mišćenić, Mamilović 2019, 273–299; Mišćenić, Mrak 2018, 145–169).

The following changes attempted to soften the maximum harmonization approach through the introduction of the full (targeted) harmonization in EU consumer directives. This nowadays commonly accepted harmonization approach has, however, shown limitations, mostly due to numerous options and exemptions contained in the directives' provisions.⁵¹ For instance, when transposing the full harmonization Directive 2011/83/EU, the Member States could have decided to widen the *ratione personae* 'to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises'.⁵² As a consequence, the changes introduced by the transposition of the directive's provisions into the national consumer laws of the Member States resulted in different definitions of the notion of the consumer in different Member States. According the EU Commission Evaluation Study from 2017, the consumer is the natural person in some Member States (Belgium, Croatia, Bulgaria, Cyprus, Estonia, Finland, Italy), but it may be a legal entity in others (Austria, Denmark, France, Greece).⁵³ The definition of the consumer may also differ within the legal framework of a single Member State. This usually happens when different EU consumer directives are fragmentarily and unsystematically transposed into different national consumer acts.⁵⁴ For instance, in the Croatian legal system, the consumer is protected by the recently adopted CPA 2022 as *lex generalis*,⁵⁵ but also through a number of other legal acts, such as Obligations Act,

⁵⁰ Final report Part 3 – Country reporting, *European Commission Study for the Fitness Check of EU consumer and marketing law*, European Commission, 2017, 160.

⁵¹ E.g. Art. 3(4) and Art. 5(3) Directive 2011/83/EU. See Loos (2010/03).

⁵² Directive 2011/83/EU, recital 13.

⁵³ European Commission, An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Strand 2 Procedural Protection of Consumers, JUST/2014/RCON/PR/CIVI/0082, 2017.

⁵⁴ Hess, Law (2019, 217 *et seq*); Terryn (2016, 271).

⁵⁵ Consumer Protection Act, OG No. 19/22, in force since 28 May 2022, replaced the former Consumer Protection Act, OG Nos. 41/14, 110/15, and 14/19 (not in force).

Insurance Act, Consumer Credit Act, Credit Institutions Act, Insurance Act, Payment Services Act, General Product Safety Act, E-Commerce Act, Electronic Communications Act etc (Miscenic 2018, 191).⁵⁶

The transposition issues also occur with respect to the material scope of the application of EU consumer directives. For example, full harmonization Directives 2008/48/EC and 2011/83/EU allow the Member States to widen the *ratione materiae* and include contracts excluded from directives' material scope of application.⁵⁷ Under recital 13 of Directive 2011/83/EU, the Member States may include contracts that are not distance contracts within the meaning of the directive 'for example because they are not concluded under an organised distance sales or service-provision scheme' and remain competent to apply provisions to areas that do not fall within the scope of directive. However, both directives regulate that the Member States cannot deviate from the directives' rules, 'unless otherwise provided' by the directives.⁵⁸ Therefore, despite full harmonization, the main areas of regulation can be changed within the national legal orders.⁵⁹ In the *SC Volksbank România* case the CJEU concluded that 'the Member States may, in accordance with European Union law, apply provisions of that directive [2008/48/EC] to areas not covered by its scope'.⁶⁰ In reality, this leads to discrepancies not only between rules of the Member States, but also to unusual national legal solutions and legal fragmentation. For instance, the Croatian legislator used the mentioned option in the Consumer Credit Act⁶¹ to cover mortgage credit agreements, which are excluded from the material scope of Directive 2008/48/EC. However, during the transposition of its Twin sister, namely Directive 2014/17/EU, into the Mortgage Consumer

⁵⁶ Similarly, in the Austrian legal order the KSchG (Consumer Protection Act) is *lex generalis*, combined with other special laws, such as the FAGG (Distance and Off-Premises Contracts Act), the UWG (Unfair Competition Act), the VKrG (Consumer Credit Act), the TNG (Timeshare Act), the VRUG (Consumer Rights Implementation Act), and the AStG (Alternative Disputes Resolution Act).

⁵⁷ Directive 2008/48/EC, recitals 10 and 13; Directive 2011/83/EU, recital 13.

⁵⁸ Directive 2008/48/EC, Art. 22(1); Directive 2011/83/EU, Art. 4.

⁵⁹ According to the Report from the Commission on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, COM/2017/0259 final: 'With the exception of the limited areas still open to national regulatory choices, the CRD has largely removed such differences among Member States, thus contributing to increased legal certainty for traders and consumers, especially in the cross-border context.'

⁶⁰ CJEU judgment of 12 July 2012, C-602/10, *SC Volksbank România*, ECLI:EU:C:2012:443, para. 40.

⁶¹ Consumer Credit Act, OG Nos. 75/09, 112/12, 143/13, 147/13, 9/15, 78/15, 102/15, and 52/16.

Credit Act, it covered the very same types of contracts again and regulated that mortgage credit agreements covered by this Act are not subject to the Consumer Credit Act.⁶² In addition to the created legal fragmentation, caused by separate implementation of the two complementary directives,⁶³ a number of transposed directives' options and exemptions actually lowered the level of consumer protection related to mortgage credit agreements (Mišćenić 2017, 595–649).

Besides these, there are many other examples of legislative changes and challenges that occur once EU consumer law is about to be transposed into the national law of the Member States. The legislative technique chosen to transpose the directive, where the national authorities enjoy the choice of form and methods (Art. 288(3) TFEU), is an important factor that shapes the very change itself. All things considered, it is not surprising that instead of integrating EU legal terms into their national legal orders, the national legislators often use the 'copy-paste' technique and transpose EU directives literally. However, such an approach can create a conflict between the EU legal term to be transposed and the substantive meaning of the corresponding civil law concept. This can possibly also lead to the misinterpretation of the autonomous EU legal term at the national level and in the case law of the Member State. For instance, the notion of the 'credit agreement', from Art. 3(c) Directive 2008/48/EC or Art. 4(3) Directive 2014/17/EU, has a different meaning than the credit agreement or 'credit contract' defined in the Member States' civil law codifications. Directives use the above-mentioned term to define the material scope of application, while their national equivalents circumscribe the contractual parties and main elements of the credit contract (Miscenic 2014, 219). Another example is Art. 4(2) Directive 93/13/EEC on unfair contract terms (UCTD),⁶⁴ which contains the categories of terms related to 'the definition of the main subject matter of the contract' and 'the adequacy of the price and remuneration'. These are often interpreted in the spirit of national civil laws and equated with the essential elements of the contract (Lat. *essentialia negotii*) (Miscenic 2018, 131). As emphasised in the CJEU *Matei* case, these categories of terms 'must normally be given an autonomous and uniform interpretation throughout the European Union'.⁶⁵ By equating a linguistically corresponding EU legal

⁶² Mortgage Consumer Credit Act, OG No. 101/17, Art. 4(6).

⁶³ Directive 2014/17/EU, recital 20: 'the core framework of this Directive should follow the structure of Directive 2008/48/EC where possible'.

⁶⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993, 29–34.

⁶⁵ CJEU judgment of 26 February 2015, C-143/13, *Matei*, ECLI:EU:C:2015:127, para. 50.

term with the original national concept, national courts bring the consistent interpretation of EU directives and their *effet utile* into question (Bajčić 2021, 1433–1449). In another CJEU case, *Messner*, the German courts struggled with the interpretation of civil law provisions related to the legal consequences of the ‘termination’ of a contract, which were *mutatis mutandis* applicable to the consumer’s right of ‘withdrawal’ and return.⁶⁶ The CJEU found that Directive 97/7/EC precludes a national provision, which generally requires the payment of compensation in case of the consumer’s withdrawal from the contract. However, the compensation is allowed in cases where consumers use the goods in a manner ‘incompatible with the principles of civil law, such as those of good faith or unjust enrichment’.⁶⁷ The *Messner* case illustrates vividly how the change caused by an incorrect transposition of the EU consumer law concept and the right of withdrawal into the national law, caused another change in the form of an incorrect interpretation of a EU legal term at the national level, which was corrected by the autonomous and uniform interpretation of the CJEU.

5. THE INTERPRETATION OF EU CONSUMER LAW IN THE CASE LAW OF THE CJEU

The process of constant change of EU consumer law can also be observed from another interesting aspect related to the interpretation of EU consumer law. The CJEU case law presents a decisive thread between EU consumer protection measures and the Member States’ consumer laws and their enforcement in B2C relationships. The CJEU and national courts, as well as other enforcement bodies, are destined to cooperate, promote and guarantee effective enforcement of consumer law. The preliminary ruling proceeding under Art. 267 TFEU is one of the main tools that enables national courts to refer questions to the CJEU in cases of necessity or doubts related to consistent interpretation of EU law.⁶⁸ Within this process the CJEU both interprets and further develops EU law by providing uniform and autonomous interpretation of EU legal terms and concepts. In the *Leitner* case, for example, the CJEU clarified that the term ‘damage’, from former Directive 90/314/EEC on package travel, is to be interpreted as covering

⁶⁶ CJEU judgement of 3 September 2009, C-489/07, *Messner*, ECLI:EU:C:2009:502, para. 8.

⁶⁷ *Messner*, para. 30.

⁶⁸ CJEU judgment of 16 January 1974, C-166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:3, para. 2.

both material and immaterial damage caused to the consumer.⁶⁹ In the *Quelle* and *Putz* cases, the CJEU interpreted the aim of the relevant EU legislation to make ‘the “free of charge” aspect of the seller’s obligation to bring goods into conformity an essential element of the protection afforded to consumers by the Directive’.⁷⁰ In doing so, the CJEU goes far beyond the uniform and autonomous interpretation of the notions in question, by further developing and sometimes even amending the substantive meaning of the EU legal term in question. The CJEU often clarifies sometimes vague and general EU legal concepts and helps the national courts to correctly interpret and apply the law.⁷¹ Nonetheless, the national courts of the Member States still face many difficulties related to the consistent interpretation of EU law in practice (Barnard, Mišćenić 2019, 111).

The principle of EU consistent interpretation, developed by the extensive CJEU case law, requires national courts to interpret the whole body of national law so far as possible in the light of the wording and the purpose of the directive (*effet utile*).⁷² In the *Faccini Dori* case, the ECJ recognized the importance of the duty of EU consistent interpretation as one of the main tools to achieve justice for the consumer, who was deprived of the right of withdrawal.⁷³ In judicial practice, the Member States’ courts still struggle with the understanding and application of the duty of EU consistent interpretation (Basedow 2021, 608; Brenncke 2018, 134). In the first Croatian collective redress proceeding on unfair contractual terms related to variable interest rates and currency clauses in Swiss Franc (CHF) loans (Miscenic 2020, 226), the national courts ignored the interpretation of the UCTD provisions given by the CJEU. The Croatian Supreme Court argued that

⁶⁹ CJEU judgment of 12 March 2002, C-168/00, *Leitner*, ECLI:EU:C:2002:163, para. 25.

⁷⁰ CJEU judgment of 17 April 2008, C-404/06, *Quelle*, ECLI:EU:C:2008:231, para. 33; CJEU judgement in joined cases of 16 June 2011, C-65/09 and C-87/09, *Gebr. Weber and Putz*, ECLI:EU:C:2011:396, paras. 45–46.

⁷¹ Many legal scholars address the issue of general clauses, see Grundmann, Mazeaud (2005); Vries (2012, 913–932).

⁷² CJEU judgment of 10 April 1984, C-14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, para. 26; CJEU judgment of 13 November 1990, C-106/89, *Marleasing v. Comercial Internacional de Alimentación*, EU:C:1990:395, para. 8; judgment of 14 July 1994, C-91/92, *Faccini Dori v. Recreb*, ECLI:EU:C:1994:292, para. 26; judgment of 27 June 2000, CJEU joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, ECLI:EU:C:2000:346, para. 30; CJEU judgment of 5 October 2004, joined Cases C-397/01 to C-403/01, *Pfeiffer et al.*, ECLI:EU:C:2004:584, para. 115.

⁷³ *Faccini Dori v. Recreb*, para. 25.

the ‘factual differences’ between the Hungarian *Kásler and Káslerné Rábai*⁷⁴ case and the Croatian *Franak* case preclude the CJEU’s interpretation related to the transparency requirements.⁷⁵ This failure was eventually corrected by the Croatian Constitutional Court, which pointed at the duty of observing EU law, including the CJEU case law, and sent the proceeding to a renewed trial due to a violation of the right to a fair trial.⁷⁶ The Croatian jurisprudence was criticised in the 2017 EU Commission Evaluation Study, which stated that ‘Croatian courts, including the Supreme Court still do not see themselves as European courts.’⁷⁷ In the renewed proceeding, the regular courts observed the settled CJEU case law and applied the so-called ‘substantive transparency requirements.’⁷⁸ In terms of change, the renewed proceeding resulted in a significant change of both substantive and procedural aspects of the first Croatian collective proceeding on consumer protection by reaching a completely opposite result and finding the contractual term denominating the loans in the foreign currency of the CHF unfair and invalid (Mišćenić 2020, 226; Miscenic, Petrić 2020; Miscenic 2022, forthcoming).

This all leads to another inseparable aspect related to the effectiveness of judicial protection and the CJEU jurisprudence on the right of effective judicial protection in EU law.⁷⁹ By respecting the procedural autonomy of the Member States, the CJEU developed two principles setting the criteria for exercising effective judicial protection across the EU. According to the principle of effectiveness, the national procedural law rules should not make the application of EU law or exercise of rights conferred by it ‘impossible or excessively difficult’ before the Member States’ courts. The principle of equivalence on the other hand requires national rules not to be ‘less favourable’ than those governing similar domestic actions (Mancaloni, Poillot 2021, 7–16). The settled CJEU case law on consumer protection confirms that the principle of effectiveness is gaining more attention

⁷⁴ CJEU judgment of 13 April 2014, *Kásler and Káslerné Rábai*, C-26/13, ECLI:EU:C:2014:282.

⁷⁵ Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14–2, 22. For more information about the case see Miscenic (2016b, 184 *et seq.*).

⁷⁶ Decision of the Constitutional Court of the Republic of Croatia of 13 December 2016, U-III-2521/2015 *et al.*, 20.

⁷⁷ EU Commission Evaluation Study, 61.

⁷⁸ Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ 2019/C 323/04, 24.

⁷⁹ Art. 19(1) TEU, Art. 47(1) EU Charter, Arts. 6 and 13 ECHR. See Arnull (2011, 51–70).

than the principle of equivalence.⁸⁰ In the *Duarte Hueros* case, the CJEU established that Spanish procedural law rules on *ne ultra petita*, *ne bis in idem* and *res iudicata* 'are liable to undermine the effectiveness of the consumer protection intended by the European Union legislature'.⁸¹ Once Ms. Hueros lost the case on non-conformity of goods against the seller, she was unable to initiate the same proceeding in the same matter (*ne bis in idem*). Moreover, the CJEU criticised the lack of possibility for the national court to recognise the right of the consumer of its own motion (Jansen 2014, 975). The duty of courts to observe the consumer law of its own motion contributes significantly to the effective protection of consumer rights (Beka 2018, 66 *et seq*). In the *Océano Grupo and Salvat Editores* case,⁸² the ECJ accentuated that 'effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion'.⁸³ Over the years, the *ex officio* duty of the national courts to monitor the unfairness of contractual terms was conditioned with 'factual and legal elements' needed for the review of terms.⁸⁴ In the *Asturcom Telecomunicaciones* case, the CJEU interpreted that Art. 6 UCTD on the non-binding nature of unfair contractual terms 'must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy'.⁸⁵ This argument was abandoned in the later *Lintner* case,⁸⁶ where the CJEU required *ex officio* observance of the unfairness of only those contractual terms that were invoked before the court by the consumer (*ne ultra petita*).⁸⁷ So, the point is that the changes occurring within the constantly developing CJEU case law also affect the

⁸⁰ CJEU judgment of 6 October 2009, C-40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C:2009:615, paras. 39 and 49; CJEU judgment of 3 October 2013, C-32/12, *Duarte Hueros*, ECLI:EU:C:2013:637, paras. 33–34; CJEU judgment of 14 June 2012, C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349, para. 49; CJEU judgment of 14 March 2013, C-415/11, *Aziz*, ECLI:EU:C:2013:164, para. 53; CJEU judgment of 10 September 2014, *Kušionová*, C-34/13, ECLI:EU:C:2014:2189, para. 52; CJEU judgment of 18 December 2014, *CA Consumer Finance SA*, C-449/13, ECLI:EU:C:2014:2464, paras. 23 and 25.

⁸¹ *Duarte Hueros*, para. 39.

⁸² CJEU judgment of 27 June 2000 in the joined cases C-240/98 to C-244/98, *Océano Grupo and Salvat Editores*, ECLI:EU:C:2000:346.

⁸³ *Océano Grupo and Salvat Editores*, para. 26.

⁸⁴ CJEU judgment of 4 June 2009, C-243/08, *Pannon GSM*, ECLI:EU:C:2009:350, para. 32; *Asturcom Telecomunicaciones*, para. 53.

⁸⁵ *Asturcom Telecomunicaciones*, para. 52.

⁸⁶ CJEU judgment of 11 March 2020, C-511/17, *Lintner*, ECLI:EU:C:2020:188, para. 50.

⁸⁷ *Lintner*, para. 50.

national jurisprudence and the effectiveness of judicial protection at the level of the Member States. The 2017 EU Commission Evaluation Study confirmed the existence of issues and misunderstandings of the national courts' duty related to *ex officio* observance of mandatory consumer law rules.⁸⁸ These are, of course, not only reserved for the procedural aspects, since the effectiveness of judicial protection can clearly be seriously affected by the substantive misinterpretation of important EU legal terms and concepts and therefore lead to an unwanted, but also unjust outcome for the consumer. Despite of abundant guidance on the interpretation and application of EU consumer directives, the national courts and other competent authorities find it difficult to follow the changes occurring in the interpretation of the CJEU case law. For instance, the CJEU case law makes a clear distinction in the interpretation of Art. 4(2) UCTD on the exemption of contractual terms from the unfairness test in cases such as *Andriciuc*,⁸⁹ in which the loan is to be repaid in the same foreign currency in which it was contracted, from cases such as the *Kásler and Káslerné Rábai*,⁹⁰ in which the loan is only denominated in the foreign currency. If not recognized or understood properly, changes such as these have the potential to directly affect the work and results of judicial and other national authorities, as well as the effectiveness of judicial protection and enforcement of consumer law (Miscenic 2019, 129).

6. INFORMATION DUTIES AND TRANSPARENCY REQUIREMENTS

To most striking changes affecting EU consumer law in this new era are undoubtedly fast-developing digitalization and the increase of B2C transactions in online marketplaces. Speedy development of digital technologies has fostered e-commerce and online shopping, which completely transformed B2C transactions and the consumer behaviour as we know it, while the line between the two worlds, offline and online, has gradually faded (Durovic, Tridimas 2021; Mišćenić 2018a, 219 *et seq.*). A number of studies, agendas, new directives and other consumer law

⁸⁸ EU Commission Evaluation Study, 208.

⁸⁹ CJEU judgment of 20 September 2017, C-186/16, *Andriciuc et al.*, ECLI:EU:C:2017:703, paras. 39–41.

⁹⁰ *Kásler and Káslerné Rábai*, para 58: 'the exclusion cannot apply to terms that [...] merely determine the conversion rate of the foreign currency in which the loan agreement is denominated'.

measures have been adopted at the EU level.⁹¹ The *Digital Single Market Strategy for Europe*⁹² ensures a high level of consumer protection in online B2C transactions and the recent Eurostat statistics confirm a significant increase in online shopping by private individuals, in particular during the COVID-19 pandemic.⁹³ However, this high standard of consumer protection in online B2C transactions is ‘ensured’ through a variety of different EU legal acts. When ‘shopping’ online, consumers rely on the national provisions harmonized with the E-Commerce Directive, Directive 2011/83/EU, the Omnibus Directive (EU) 2019/2161, the UCTD, the UCPD, Directive (EU) 2019/770 and Directive (EU) 2019/771, the ADR/ODR rules,⁹⁴ or directly applicable regulations, such as the famous P2B Regulation (EU) 2019/1150⁹⁵ and many others. The complex setup of the EU consumer legal framework and the high level of legal fragmentation of measures protecting consumers in online marketplaces renders the practical enforcement of consumer law difficult in practice (Synodinou, Jogleux, Markou, Prastitou 2020). For instance, the European Commission ‘sweep’ actions from January 2020 confirm that more than 70% of traders engaged in online shopping are in violation of information duties towards consumers.⁹⁶

Now more than ever, the transparency requirements and information duties play an utmost important role in the protection of consumers. When making online purchases, the consumers need to be properly informed about all relevant elements of online contracts. The Regulation on consumer ODR defines online contracts in B2C relationships, as contracts to sales or

⁹¹ Commission’s Communication on Shaping Europe’s digital future Communication, Shaping Europe’s digital future, COM(2020) 67 final, Brussels, 19 February 2020; European Parliament resolution of 20 May 2021 on shaping the digital future of Europe: removing barriers to the functioning of the digital single market and improving the use of AI for European consumers.

⁹² Communication from the Commission: A Digital Single Market Strategy for Europe, COM(2015) 192 final.

⁹³ Eurostat, Internet purchases by individuals (2020 onwards), Last update: 30 March 2022, available at: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_ec_ib20&lang=en.

⁹⁴ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18 June 2013, 63–79.

⁹⁵ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11 July 2019, 57–79.

⁹⁶ European Commission, Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law, 31 January 2020.

services ordered on the traders website or by other electronic means.⁹⁷ In distance and online contracts, the traders' information duties towards consumers are regulated extensively by Art. 6(1)(a)-(t) Directive 2011/83/EU, extended by Art. 6.a of the Omnibus Directive providing 'additional specific information requirements for contracts concluded on online marketplaces'.⁹⁸ Pre-contractual information, which traders are obliged to provide to consumers prior to the contract conclusion, do not preclude information from the E-Commerce Directive or any additional information imposed by the national legislation, and the burden of proof regarding the compliance with the information duties is on traders.⁹⁹ The transparency of provided information is guaranteed in many forms, not only by making the information available in the first place, but also by offering information that is substantively understandable to an average consumer. Different EU consumer directives use different formulations in order to guarantee transparency in B2C relationships. According to Directive 2011/83/EU,¹⁰⁰ all information must be provided to the consumer in a 'clear and comprehensible manner' and the trader 'shall give the information' or 'make that information available' to the consumer in a way appropriate to the used means of distance communication and in 'plain and intelligible language'.¹⁰¹ Nonetheless, the CJEU case law in cases such as *Content Services*, *Messner*, *Kamenova*, *VKI v. Amazon*, *Planet49 GmbH*, and many others,¹⁰² reveal that the high level of consumer protection is not so high when it comes to the transparency requirements and information duties. The 'informed choice' of the consumer transformed into a 'mouse click', by which the consumer

⁹⁷ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18 June 2013, Art. 4(1)(e).

⁹⁸ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18 December 2019, 7–28.

⁹⁹ Directive 2011/83/EU, Art. 5(4) and Art. 6(9).

¹⁰⁰ Directive 2011/83/EU, Art 8(1).

¹⁰¹ On the breaches of information duties and transparency requirements see Tigelaar (2019, 27–57); Mak (2020, 144–146).

¹⁰² CJEU judgement of 5 July 2012, C-49/11, *Content Services*, ECLI:EU:C:2012:419; CJEU judgement of 3 September 2009, C-489/07, *Messner*, ECLI:EU:C:2009:502; CJEU judgement of 4 October 2018, C-105/17, *Kamenova*, ECLI:EU:C:2018:808; CJEU judgement of 28 July 2016, C-191/15, *Verein für Konsumenteninformation*, ECLI:EU:C:2016:612; CJEU judgement of 1 October 2019, C-673/17, *Planet49 GmbH*, ECLI:EU:C:2019:801.

accepts the traders' 'terms and conditions' available on the website. In some cases, this leads to an illegal waiver of the right of withdrawal, such as in the *Content Services* case. In others, like in the *Planet49 GmbH* case, it results in 'explicit' and allegedly 'informed' consent to the processing of personal data, despite the GDPR requirements.¹⁰³

Therefore, in online marketplace practice, the traders' information duties are very often 'fulfilled' by the consumer's acceptance of the general terms and conditions available online, which *nota bene* form part of the B2C contract (Loos 2017, 54–59). The terms and conditions usually include or refer to some of the pre-contractual information and to the consumers' right of withdrawal, but fail to provide information about certain relevant features of the product or service purchased online and about basic consumer rights (Lodder, Morais Carvalho 2022, 537–556). The insertion of pre-contractual and contractual information into business terms and conditions, which are only available online and can be unilaterally altered at any moment, is likely to lead to the violation or circumvention of consumer protection rules. Such practices risk the transparency and information requirements from the above-mentioned EU consumer legal framework and protection measures. As argued in the *Content Services* case or the recent *Tiketa* case,¹⁰⁴ pre-contractual and contractual information must in any case be provided to consumers in a valid form, meaning on a durable medium. Although there are substantive differences between the two cases, they both address the transparency and information requirements arising from EU consumer directives. By interpreting the provisions of former Directive 97/7/EC, in the *Content Services* case the CJEU reached the conclusion that an active conduct in the form of a mouse click is not required from the consumer in order to acquaint themselves with the information.¹⁰⁵ In the *Tiketa* case the CJEU found it acceptable for the consumer to tick the box containing pre-contractual information in terms and conditions of the intermediary's website: 'provided that that information is brought to the consumer's attention in a clear and

¹⁰³ According to recital 42 GDPR the subject's consent on data processing 'should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment'. Pre-formulated declaration of consent 'should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms' in accordance with the UCTD. See also the Opinion of Advocate General Richard de la Tour of 2 December 2021, C-319/20, *Meta Platforms Ireland*, ECLI:EU:C:2021:979 and therein referred paper Mišćenić, Hoffmann (2020, 44–61).

¹⁰⁴ Judgement of 24 February 2022, C-536/20, *Tiketa*, EU:C:2022:112.

¹⁰⁵ *Content Services*, paras. 33 and 35.

comprehensible manner’.¹⁰⁶ The CJEU emphasized though that ‘such a means of providing information cannot act as a substitute for providing the consumer with the confirmation of the contract on a durable medium’ within the meaning of Directive 2011/83/EU.¹⁰⁷ In both of the cases, the CJEU confirmed that a durable medium is an adequate replacement for paper and that the website does not correspond to the definition of a durable medium ‘since it does not mean that that information is addressed to that consumer personally, it does not ensure that its content is not altered and that the information is accessible for an adequate period, and does not allow the consumer to store that information or to reproduce it unchanged’.¹⁰⁸

The presented CJEU case law only confirms the need for the better enforcement and strengthening of transparency and information requirements in online B2C transactions. There are of course other existing legal mechanisms in place, such as the UCPD or the UCTD, the role of which has been proven as extremely important in the protection of consumer rights (Helberger, Lynskey, Micklitz, Rott, Sax, Strycharcz 2021, 47). The UCPD provisions fight non-transparency, for example, by qualifying the traders’ hiding or providing of unclear, unintelligible, ambiguous material information about the product as misleading omissions (Djurovic 2019, 29–42). The UCTD provisions, on the other hand, present an important tool for protecting consumers from unfair and usually non-transparent contractual terms. The findings from the settled CJEU case law on the ‘substantive transparency requirements’ under Arts. 5 and 4(2) UCTD are adequately applicable to business terms and conditions used on traders’ web-sites and in online marketplaces (Gardiner 2022; Miscenic 2018b, 131). The provisions of the Omnibus Directive (EU) 2019/2161 promise a more effective sanctioning mechanism for violations of consumer rights and traders’ obligations, in particular in the online surrounding.¹⁰⁹ Nonetheless, change is needed. Due to extensiveness and complexity of information to be provided in B2C relationships, transparency will be undermined even if consumers receive and read all the information. The ‘information overload’ effect is opposed to the ‘informed choice’ of the consumer and adversely affects the concept of transparency (Howells, Wilhelmsson 2003, 370 *et seq.*). An average consumer, who is reasonably well informed, reasonably observant and circumspect,¹¹⁰

¹⁰⁶ *Tiketa*, para. 54.

¹⁰⁷ *Tiketa*, para. 54.

¹⁰⁸ *Tiketa*, para. 51; by analogy *Content Services*, paras. 41, 42, 43 and 50.

¹⁰⁹ Directive (EU) 2019/2161, Arts. 1, 8, 13. See Đurović (2020, 62–79); Prastitou Merdi (2020, 347 *et seq.*).

¹¹⁰ On the position and role of an average consumer see Elizalde (2021, 29).

cannot truly understand all the listed complex information and recognize what is 'essential'. The EU legislator should adapt to speedy development of online marketplaces, digitalization and e-commerce, and recognize the need for rewriting and reenforcing of consumer-related EU legal rules on the information duties and transparency requirements. These basic consumer protection rules should be reformulated in a manner that is transparent to an average consumer and the change should result in simplification of information and reduction to only the information that is 'essential' to consumers when buying online (Segger-Piening 2021, 96 *et seq.*; Schaub 2017, 25–27; Oehler, Wendt 2017, 179).

7. CONCLUDING REMARKS

EU consumer law is characterised by constant changes happening at all possible levels: from changes to the legal grounds for the adoption of EU consumer directives, changes in the level of harmonization, changes resulting from the transposition of directives into the Member States laws, changes in the constantly developing CJEU case law, changes caused by digitalization and developing online marketplaces, etc. Over the years, these have been followed by numerous initiatives, agendas, reports, projects and programmes either attempting to change the existing legal regulation and proposing new solutions or just verifying the current state of legislation and enforcement of consumer law. However, what appears as the change on the surface of EU consumer law, does not in fact present a change in real life. Despite of constant changes, some of the main consumer issues remain unsolved: a high degree of legal fragmentation, variations between the main concepts and definitions, differences between harmonized consumer protection rules in different Member States, practical ineffectiveness of consumer rights and consumer protection tools, such as the information and transparency requirements. All of these issues have an adverse effect on the enforcement of EU consumer law (Micklitz, Saumier 2018).

Therefore, the real question is: how to 'change' the constantly changing EU consumer law, in order to make it more effective, to the benefit of both consumers and traders? Of course, there is no simple answer to such a difficult question nor a simple legal solution to complex consumer issues. Many legal scholars have tried or are still trying to contribute to EU consumer law by offering new legal proposals and different suggestions that would improve its enforcement (Micklitz 2021, 234; Howells, Twigg-Flesner, Wilhelmsson 2018). However, the purpose of this paper is not to solve the impossible task and provide answers to all of the obstacles standing in the

way to the proper functioning of EU consumer law. Its main purpose is to acknowledge the ever-growing tree of EU consumer law and the constant changes affecting its growth and development. By telling the story of the constant changes occurring in EU consumer law, the paper points to the various attempts at improving EU consumer law and gives a short overview of the achieved results and legal consequences. These should be observed in light of the events happening at the global level, such as the expansion of EU internal market, the development of digital technologies, the COVID-19 pandemic and many other important developments (Alderman *et al.* 2020). However, this kind of analysis would go far beyond the scope of this paper and therefore remains to be investigated in further research.

Nonetheless, there are some important lessons to be learned from observing the constant changes in EU consumer law. It seems to the author that yet another change is needed in order to improve EU consumer law and its enforcement, and this time, it is a change of perspective, which would allow a different legal approach to the regulation of EU consumer law. Instead of focusing primarily on the legal and economic consequences of consumer issues, more attention should be given to the very cause of these issues. Legal regulation that would be more focused on preventing the causes of consumer issues would contribute significantly to the better enforcement of consumer law. The change is therefore needed both in terms of better regulation and better enforcement of EU consumer law, as something that has been recognised by EU institutions long ago (Valant 2015, 1–24). By achieving more sustainable legal solutions for consumer issues, the *acquis* would experience a change that actually matters to traders and consumers. However, in order to achieve this, the EU consumer law needs to change from the inside out and not the other way around.

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