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POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**



Economic and Monetary Affairs

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**Internal Market and
Consumer Protection**

**Compilation of Briefing
Papers on Consumer
Vulnerability**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Compilation of Briefing Papers on Consumer Vulnerability

Abstract

This set of Briefing Papers assesses the current legislation and policy measures with regard to consumer vulnerability in five Member States: Denmark, Estonia, Germany, Spain and the United Kingdom. The focus is on e-commerce, telecommunications and utilities contracts, and transport.

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CONTENTS

1. VULNERABLE CONSUMERS IN DANISH LAW	5
2. VULNERABLE CONSUMERS IN ENGLISH LAW	17
3. VULNERABLE CONSUMERS IN ESTONIAN LAW	25
4. VULNERABLE CONSUMERS IN GERMAN LAW	41
5. VULNERABLE CONSUMERS IN SPANISH LAW	55



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Vulnerable Consumers in Danish Law

Abstract

Consumer protection law in Denmark is based on the notion of the consumer as the weaker party in relation to businesses. For this reason, consumer protection legislation is mainly focused on situations in which consumers in particular are vulnerable. In this regard, consumer vulnerability is especially connected to the characteristics of the traded product, e.g. financial products, and/or the circumstances under which it is marketed or sold. Furthermore, certain general measures protecting consumers will, to a larger degree, protect the so-called vulnerable consumers. Only in a few cases, Danish law provides explicit protection of vulnerable consumers, due to their age, lack of knowledge, mental state, or health.

CONTENTS

EXECUTIVE SUMMARY	7
1. INTRODUCTION	7
2. RULES PROTECTING VULNERABLE CONSUMERS EXPLICITLY	8
2.1. Guardianship	8
2.2. Contractual invalidity	8
2.3. Reduction of liability in damages	9
2.4. Children and young people	9
3. RULES DE FACTO PROTECTING MAINLY VULNERABLE CONSUMERS	10
3.1. The general reasonableness clause of contract law	10
3.2. Rules of particular importance to financially vulnerable consumers	10
3.2.1. Retention of title	10
3.2.2. Ordinary current accounts	10
3.2.3. Insurance contracts	10
3.2.4. Price information	11
3.3. Rules of particular importance to consumers in vulnerable situations	11
3.3.1. Guarantee obligations	11
3.3.2. Risk labelling of investment products	11
3.3.3. Distance selling, unsolicited communication and door-to-door selling	11
3.3.4. Termination of contracts	12
3.3.5. Procedural rules	12
4. ANTI-VULNERABILITY MEASURES WITHIN PARTICULAR AREAS	13
4.1. E-Commerce	13
4.2. Telecommunication	14
4.3. Utilities Contracts	15
4.4. Transport	16
5. CONCLUSION	16

EXECUTIVE SUMMARY

This note describes the current state of play of legislation and policy measures addressing consumer vulnerability in Denmark. General rules concerning guardianship, contractual invalidity and reduction of liability in damages explicitly protect certain types of vulnerable consumers, such as children and young people. Furthermore, the Danish Marketing Practices Act contains a provision requiring businesses that direct their marketing at children and young people to take into consideration their natural credulity and lack of experience and critical sense, as a result of which they are readily influenced and easy to impress.

Besides these provisions protecting specified groups of vulnerable consumers explicitly, Danish legislation provides de facto protection of mainly vulnerable consumers in general and in relation to especially financially vulnerable consumers. The general reasonableness clause in Danish contract law allows relevant differences between B2B and B2C to be taken into account, when deciding whether a contract or a part of a contract is unfair. Furthermore, different rules provide protection of financially vulnerable consumers, e.g. the rules on retention of title clauses according to which the right to repossess the object sold is limited, where the possession of the object is vital to the household of the consumer. Danish legislation also contains rules protecting consumers in vulnerable situations, due to the product and/or the circumstances under which it is marketed or sold. Such rules are i.a. related to guarantee obligation and investment products.

In a procedural context, Danish law provides protection of consumers' small claims by providing the possibility of group actions. Also consumers, who are unable to solve a conflict with a business person, are offered procedural protection by the existence of several different consumer complaint bodies.

Anti-vulnerability measures within the particular areas of e-commerce, telecommunication and utilities as well as transport are mainly connected to information requirements.

1. INTRODUCTION

The purpose of this note is to describe the current state of play of legislation and policy measures addressing consumer vulnerability in Denmark. Focus will in particular be on »anti-vulnerability measures« in e-commerce, telecommunication and utilities contracts, and transport. The note also contains a brief general introduction to Danish consumer protection legislation.

Consumer protection measures are generally introduced on the basis of a general assumption that consumers are the weaker part in their relation to businesses. Thus, consumers may in general be considered vulnerable in their interaction with businesses. Consumers are, in an economic context, assumed to make rational choices, and consumer protection measures are generally introduced to support the consumer in his decision-making, and to deprive businesses of undertaking certain practices that are considered harmful to consumers. The preferred consumer protection measure seems to be information requirements which support the consumers' rational choices.

Other measures include certain rights, such as the right of withdrawal, the ban of certain practices in marketing and contracts, certain interpretation rules for clauses in consumer contracts, and measures concerning access to redress. In some cases, the protection of consumers provided for by the law does to a larger extent protect the so-called vulnerable consumers or consumers in vulnerable situations. These rules are in focus in this note.

Consumer protection legislation is to a large degree harmonised at EU level. The Unfair Commercial Practices Directive (2005/29) provides full harmonisation of business-to-consumer (B2C) commercial practices. In a civil law context, there is also substantial harmonisation of consumer protection, including also particular information requirements.

Danish consumer protection law contains rather few provisions protecting specified groups of vulnerable consumers explicitly. See part 2.

Danish consumer protection law defines a consumer contract as a contract concluded by a business person for purposes relating to his/her trade, business or profession when the other party to the contract (the consumer) mainly acts for purposes outside her/his trade, business or profession.¹ The burden of proof lies with the business person to show that a contract is not a consumer contract. Thus, the concept of the consumer under Danish law is attached to the general role of the consumer in the market rather than (other) societal or personal characteristics.² Consumers may, however, be particularly vulnerable in certain situations, depending on the product in question, the circumstances under which it is marketed/sold, and the state and/or capacity of the consumer. Although the protection rules concerning such situations apply to consumers in general they *de facto* mainly protect consumers who for some reason are particularly vulnerable. See part 3.

Anti-vulnerability measures in e-commerce, telecommunication and utilities contracts, and transport are described in part 4.

2. RULES PROTECTING VULNERABLE CONSUMERS EXPLICITLY

2.1. Guardianship

The Act on Guardianship (“værgemålsloven”)³ provides a general rule whereby children and young people under the age of 18, as a starting point, cannot be bound by their own legal transactions or dispose of their financial means. According to the same act, individuals who are unable to handle their own affairs due to mental illness, including severe dementia, or impaired mental development, or other seriously impaired health are not bound by a contract entered into and can be put under guardianship.

2.2. Contractual invalidity

Another ‘classic’ general rule applicable to all types of contracts and particularly protecting vulnerable contract parties against exploitation is found in section 31 of the Contracts Act («aftaleloven»)⁴.

¹ See e.g. section 38(2) of the Contracts Act, Consolidated Act No. 781 of 26 August 1996, with later amendments. Also a contract concluded or negotiated by a business person on behalf of a non-business party is considered to be a consumer contract.

² See Møgelvang-Hansen, Peter, “Forbrugerrollen som retligt begreb”, Hyldestskrift til Jørgen Nørgaard, 2003.

³ Consolidated Act. No. 1015 of 20 August 2007, with later amendments.

⁴ Consolidated Act No. 781 of 26 August 1996, with later amendments.

According to section 31, a person can be released from a promise if another person has exploited his/her financial or personal distress, lack of knowledge, thoughtlessness or an existing dependency relationship to obtain or contract for a benefit that is substantially disproportionate to the consideration or for which no consideration is to be given.

2.3. Reduction of liability in damages

The Act on Liability in Damages ("Erstatningsansvarsloven")⁵ sections 24A and 24B have maintained some old rules on reduction or lapse of tort liability when the tortfeasor is under the age of 15 or lacks mental capacity because of mental illness, impaired mental development etc. Reduction or lapse is considered by taking into account mainly the nature of the conduct of the tortfeasor, a comparison of the tortfeasor's and the injured party's ability to bear the loss and the prospect of recovering the loss from others. In 1984, these rules were supplemented by a general rule of reduction or lapse of liability, cf. The Act of Liability in Damages section 24. This rule applies to all liability in tort as well as in contract(s), including the consequences of an injured party's contributory negligence. According to section 24, the liability may be reduced or may lapse, if the liability would be 'unreasonably burdensome' for the tortfeasor.

2.4. Children and young people

Specific rules focusing on consumers, who are particularly vulnerable, are only found in the Marketing Practices Act («Markedsføringsloven»)⁶, which provides particular protection for children and young consumers in section 8.

The Marketing Practices Act implements parts of the Unfair Commercial Practices Directive as well as parts of the Service Directive and the Directive on misleading and comparative advertising.⁷ Section 8 requires businesses that direct their marketing at children and young people to take into consideration their natural credulity and lack of experience and critical sense, as a result of which they are readily influenced and easy to impress.

The provision further prohibits businesses from inciting children and young people to violence, use of intoxicants (including alcohol) or other dangerous or inconsiderate behaviour. Display of sex and sexual undertones must also be avoided, cf. the Consumer Ombudsman's guidelines.⁸ Furthermore, commercial practices directed at children and young people must not make unwarrantable use of violence, fear or superstition in order to influence children and young people.

The principles set out in section 8 work as a general clause when it comes to marketing directed at children and young people and imply that in the assessment of the other rules of the Marketing Practices Act, special consideration must be taken in relation to marketing practices directed at these consumers. According to the Consumer Ombudsman's guidelines, the provision also implies that traders are neither allowed to involve children and young people in sales and marketing activities as staff - nor as intermediaries in friend recruitment schemes. Children and young people are according to the explanatory notes defined as a group of people below 18 years of age.

⁵ Consolidated Act 885 of 20 September 2005.

⁶ Consolidated Act. No. 839 of 31 August 2009, with later amendments.

⁷ 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, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version)

⁸ See <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/childrenmarketing>.

The Appendix of the Unfair Commercial Practices Directive is implemented as an appendix to the Marketing Practices Act.⁹

Consequently, advertising including a direct exhortation to children to buy or persuade their parents or other adults to buy the advertised products is considered unfair, cf. no 28.

3. RULES DE FACTO PROTECTING MAINLY VULNERABLE CONSUMERS

3.1. The general reasonableness clause of contract law

According to section 36 of the Contracts Act the courts can, in whole or in part, disregard an agreement if it would be "unreasonable or contrary to principles of fair conduct" to enforce it. The decision can rely not only on the circumstances surrounding the formation of the contract, but also on its content and on subsequent circumstances. The rule applies to contracts in general, including B2C and B2B. The basic criteria of the unfairness test under the Contracts Act are the same in B2C contracts, cf. section 38C, cf. section 36, and other contracts, including B2B, cf. section 36. They are, however, flexible enough to allow the relevant differences between B2B and B2C to be taken into account when the individual case is decided, cf. section 38C, and also to allow a similar differentiation between more or less vulnerable consumers.

3.2. Rules of particular importance to financially vulnerable consumers

3.2.1. Retention of title

The Act on Credit Agreements ("kreditaftaleloven")¹⁰ contains rather detailed rules protecting consumers in relation to retention of title clauses. In section 36 (2) the right to repossess the object sold is limited where the possession of the object is vital to the household of the consumer. Furthermore, if the creditor's demand for payment in a consumer credit sale agreement exceeds the value of the sold object, the creditor can only claim his deficit or levy execution under special circumstances, cf. sections 41 and 42.

3.2.2. Ordinary current accounts

Executive Order on Good Business Practices for Financial Undertakings ("Bekendtgørelse om god skik for finansielle virksomheder, investeringsforeninger mv.")¹¹ section 19 states: "A bank may not refuse to open an ordinary current account without an individual objective reason. On request the reason shall be provided on paper or in another durable medium."

3.2.3. Insurance contracts

Similar rules protecting consumers are found in e.g. the Insurance Contracts Act ("forsikringsaftaleloven")¹². According to section 3b, an insurance company shall upon request by the customer specify in writing the reason for a refusal to write an insurance contract as requested. The same rule applies to the company's termination of an insurance contract.

⁹ Executive Order No. 1084 of 14 September 2007.

¹⁰ Consolidated Act. No. 761 of 11 June 2011.

¹¹ Executive Order No. 769 of 27 June 2011.

¹² Consolidated Act No. 999 of 5 October 2006, with later amendments.

3.2.4. Price information

Section 13 of the Danish Marketing Practices Act lists a rather detailed set of rules obliging traders to provide price information to consumers. As an example, clear information of the overall price of the product, including fees, costs, VAT and all other expenses collected directly from the consumer must be provided to the consumer. The objective of section 13 is to provide consumers with relevant information. However, it can be argued that primarily vulnerable consumers gain from the detailed rules on price information. A rule similar to section 13 is found in section 14 regarding purchase on credit.

3.3. Rules of particular importance to consumers in vulnerable situations

3.3.1. Guarantee obligations

Section 21(1) of Executive Order on Good Business Practices for Financial Undertakings states that a bank or mortgage-credit institution may not grant loans against guarantee by a surety, where the guarantee obligation is out of proportion to the financial situation of the guarantor. The rule aims at protecting individuals, who want to help family members etc. but tend to underestimate the financial risk involved in a guarantee, for example business loans taken out by their children, against ruinous financial collapse.

3.3.2. Risk labelling of investment products

Executive Order on Risk-Labeling of Investment Products ("Bekendtgørelse om risikomærkning af investeringsprodukter")¹³ aims at safeguarding especially investors with no or little experience concerning investment products. The Executive Order requires financial undertakings arranging purchases of investment products to risk-label their different investment products. Risk-labelling means that the type of investment product is divided into the traffic light categories: green; yellow or red, respectively.

3.3.3. Distance selling, unsolicited communication and door-to-door selling

The Act on Certain Consumer Contracts («forbrugeraftaleloven»)¹⁴ implements the European directives on contracts negotiated away from business premises, distance contracts and distance marketing of financial services.¹⁵

The Act applies to consumer contracts as defined in the Danish Contracts Act as dealt with above, however exempting certain types of contracts such as e.g. insurance contracts and contracts on the use of publicly available telephones or other means of telecommunication, where the contract with the telecommunications provider is concluded by using the means of communication. It establishes a set of information requirements before and after concluding a distance selling contract as well as rules on consumers' right of withdrawal. Furthermore, it prohibits unsolicited communication in person or by telephone with a consumer at his residence or workplace or another place to which there is no public access, with a view to obtaining, immediately or subsequently, an offer or acceptance of an offer to conclude a contract. Promises made by consumers in connection with such unsolicited communication are not binding, cf. sections 6 and 7.

¹³ Executive Order No. 345 of 15 April 2011.

¹⁴ Act. No. 451 of 9 June 2004, with later amendments.

¹⁵ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, European Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts and European Parliament and Council Directive 2002/65/EC 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. The first two directives will by 13 June 2014 be replaced by European Parliament and Council Directive 2011/83 of 25 October 2011 on consumer rights, which provides for full harmonization.

A similar prohibition against door-to-door selling of insurance contracts is found in the Insurance Contracts Act section 34B, whereas unsolicited telephone selling of insurance is not prohibited per se. The ban on door-to-door sales was introduced into Danish legislation in 1978.

3.3.4. Termination of contracts

Section 25 of The Act on Certain Consumer Contracts protects consumers against terms in contracts concerning the continuing delivery of goods or services for an indefinite period by giving the consumer a general right to terminate the contract with one month's notice when five months have passed since the conclusion of the contract.

3.3.5. Procedural rules

In the context of "small claims" most consumers are in a vulnerable situation and the following special enforcement/redress mechanisms can be of particular importance:

The independent public authority, the Consumer Ombudsman Institution, which supervises the Danish Marketing law as well as the Act on Payment Services, the Act on Legal Counseling, the Act on Tobacco Advertising and the E-commerce Act in relation to consumer protection issues, was established by the first Marketing Practices Act of 1975.

Besides this institution and related to the protection of consumers, the Consumer Complaints Board and other relevant complaints bodies has been founded in order to deal with complaints from private consumers in an informal and inexpensive way.

The Consumer Complaints Act ("forbrugerklageloven")¹⁶ sets out the rules related to the Consumer Complaints Board, which considers complaints from private consumers related to certain goods, works and services purchased from traders. The Board considers complaints that consumers have attempted in vain to solve themselves. Consumers can rather easily file a complaint online at www.forbrug.dk. In addition, the Ministry of Economic and Business Affairs has approved 17 private complaint boards dealing with consumer complaints in special sectors of trade pursuant to the Executive Order on Consumer Complaints.¹⁷ Besides the approved bodies, a series of industry bodies and associations have been established, which also deal with consumer complaints.¹⁸

The Group Action is a new civil procedural device made available in 2008.¹⁹ The rules are found in the Administration of Justice Act ("retsplejeloven")²⁰ sections 254A-254K. The purpose of the device is to make it possible for the court system to deal with disputes concerning a large number of uniform claims in a more effective way than under the traditional rules on joinder of plaintiffs and to improve access to the courts in cases concerning small claims belonging to a large number of individuals. The fundamental conditions for bringing a group action are: the group action is deemed to be the best method of dealing with the claims; the group members can be identified and notified about the proceedings in an appropriate manner; and a group representative can be appointed. Furthermore, it is a condition that the Danish courts have jurisdiction, meaning that only claims that can be brought individually before the Danish courts can be included in a group action.

¹⁶ Act No. 1095 of 8 September 2010.

¹⁷ For a list of the approved bodies, see <https://www.forbrug.dk/Dine-klagemuligheder/Saadan-klager-du/Godkendte-ankenaevn>.

¹⁸ For a total list of all boards, associations and appeal boards, see <http://www.consumereurope.dk/Complaints/Complaints-in-Denmark>.

¹⁹ Act No. 181 of 28 February 2007, amending the Administration of Justice Act.

As a main rule, a group action includes only group members who positively request to participate (the opt-in model). If a group action based on the opt-in model is not an expedient way of dealing with the claims, the court can decide that the group action shall include group members, who do not opt out of the group action, provided it is evident that the claims, because of their limited size, cannot be expected to be brought in individual actions (the opt-out model). In an opt-out group action only the Consumer Ombudsman can act as the group representative.

4. ANTI-VULNERABILITY MEASURES WITHIN PARTICULAR AREAS

4.1. E-Commerce

The Danish E-Commerce Act ("Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel")²¹ comprises the Danish implementation of the 2000 E-Commerce Directive²² and is in its wording kept close to that directive. The Danish Act deals with Information Society Services²³ as defined in the directive and with the inherent limitations.²⁴

The protection of consumers is found in the provisions concerning general information, commercial communication and electronic contracts.

The Position Statement on Internet Commerce and Marketing issued by the Nordic consumer ombudsman institutions (May 2010)²⁵ specifies and clarifies the Nordic regulation concerning e-commerce, the Marketing Practices Act, see parts 2.3 and 3.2.4, and the Act on Certain Consumer Contracts, see part 3.3.3. The guidelines in the statement should be taken into consideration, even though these are merely non-binding.

The Position Statement covers e-commerce and marketing in the Nordic market via the Internet and corresponding communications systems in relevant respects. Corresponding systems include SMS, MMS and WAP. The guidelines are, however, in their content focusing on the Internet, and WAP to the extent it resembles traditional Internet (Hyper Text Transmission Protocol, HTTP).

²⁰ Consolidated Act No. 1063 of 17 November 2011.

²¹ Act No. 227 of 22 April 2002 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce.

²² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

²³ Services in the information society (Information Society Services): any service that has a commercial purpose and that is delivered online (electronically over a certain distance) at the individual request of a recipient of the service.

²⁴ The Act does not apply under circumstances relating to: 1) Taxation, 2) Personal data protection, 3) The rules of the Competition Act governing competition-restricting agreements, resolutions and coordinated practice, abuse of dominant position and merger control, 4) The activities of notaries or similar activities linked to the exercise of official authority, 5) The representation of clients in court, and 6) Games that involve wagering a stake with monetary value, including lotteries and betting transactions.

²⁵ See <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/~media/Consumerombudsman/dco/Guidelines/Nordic%20Consumer%20Ombudsmens%20Position%20on%20Internet%20Commerce%20and%20Marketing%20May%202010.pdf>

4.2. Telecommunication

The universal service obligation in relation to telecommunication is governed by the Danish Act on Competitive Conditions and Consumer Interests in the Telecommunications Market ("lov om konkurrence- og forbrugerforhold på telemarkedet")²⁶ and by Executive Order on Universal Services ("forsyningsbekendtgørelse").²⁷ These implement the Universal Services Directive.²⁸

Executive Order on Supply of Electronic Communication Networks and Services ("udbudsbekendtgørelsen")²⁹ regulates the supply of electronic communications networks and services, requirements for owners of networks and provision of telecommunications terminal equipment used for mobile communication services, however exempting some services regulated by other instruments. The principle of freedom of contract normally governing Danish law also governs this Order, cf. section 1(4), it is however limited in regard to contracts concluded with consumers.

The general rules in the Marketing Act also apply to commercial practices in relation to telecommunication, and consequently imply a special protection of children and young people. The Danish Consumer Ombudsman and The Danish Consumer Council (NGO), and various business organizations have established a set of guidelines on marketing, terms of contract and customer services in the telecommunication industry.³⁰ According to the guidelines, consumers must be provided with adequate information as regards e.g. use of equipment, terms of e.g. subscription period(s) and price(s), especially in connection with marketing of combined offers of both equipment and services. In relation to pricing and fixed subscription periods, the total minimum charge including all fixed costs to be paid under the contract must be given. Furthermore, manuals shall be provided for in written Danish, except in the case of technically advanced products, where an English manual can be supplemented by an installation folder given in Danish or Swedish. In relation to children and young people, the general requirement for traders to be especially careful when directing commercial practices at these consumers apply. In this context, parents and other adults, who are likely to distribute mobile telephones to minors, should be properly informed about "control of telephone usage" options. The Nordic Consumer Ombudsmen have also issued a Common Position Statement on Marketing within the area of telecommunication.³¹

The Executive Order on Information and Content Services with Integrated Charging³² regulates premium rate service. The Order provides that telecommunication operators are responsible for ensuring and supervising compliance with the rules on pricing, content and categorization of information and content services.

A special consumer complaint board, approved by the Danish Ministry of Economic and Business Affairs pursuant to the Executive Order on Consumer Complaints, has been established in the telecommunication area.

²⁶ Consolidated Act No. 780 of 28 June 2007

²⁷ Executive Order No. 701 of 26 June 2008

²⁸ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services

²⁹ Executive Order No. 715 of 23 June 2011

³⁰ See <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/goodmarketingpractis>, for an updated Danish version see <http://www.forbrugerombudsmanden.dk/Love-og-regulering/Retningslinjer-og-vejledninger/Markedsfoeringsloven/teleomraadetretningslinieromgodmarkedsfo>.

³¹ See <http://www.forbrugerombudsmanden.dk/Love-og-regulering/Retningslinjer-og-vejledninger/Markedsfoeringsloven/teleomraadetfaellesnordiskholdning> (only Danish version).

³² Executive Order No. 991 of 6 November 2000, with later amendments.

This is the Danish Telecommunications Complaints Board (“teleankenævnet”).³³ Also the Danish Consumer Complaints Board and the National IT and Telecom Agency (“IT og Telestyrelsen”) handle complaints concerning telecommunication services.³⁴

4.3. Utilities Contracts

Danish legislation on utilities (electricity, gas and district heating) is characterised by liberalisation in regards to end users’ free choice of supplier and centralised (indirect) price regulation.

Free choice of supplier follows from the Act on Electricity Supply (“elforsyningsloven”),³⁵ section 6. According to this section, a consumer cannot be charged when switching to another supplier. A similar rule applies to supply of natural gas, cf. section 7 of the Act on Natural Gas Supply (“naturgasforsyningsloven”).³⁶ Section 6A of the Danish Act on Electricity Supply provides authorisation to the relevant Minister to issue rules on e.g. terms in relation to consumers’ right to terminate a supply contract and prior notification in relation to price changes. Again, the same applies to the supply of natural gas, cf. section 7A of the Act on Natural Gas Supply.

Consumer protection in relation to contractual terms are found in two Executive Orders on Consumer Protection in relation to Electricity Supply and Natural Gas Supply (“bekendtgørelse om forbrugerbeskyttelse i medfør af lov om elforsyning” and “bekendtgørelse om forbrugerbeskyttelse i medfør af lov om naturgasforsyning”).³⁷ The orders implement parts of the Electricity Directive³⁸ and the Natural Gas Directive.³⁹

Regarding rules on prior notification, these are found in two Executive Orders on Issuing of Prices, Tariffs, Rebates and Terms by Undertakings in the Electricity and Natural Gas Sectors (“bekendtgørelse om elforsyningsvirksomhedernes offentliggørelse af priser, tariffer, rabatter og vilkår” and “bekendtgørelse om naturgasvirksomhedernes offentliggørelse af priser, tariffer, rabatter og vilkår”).⁴⁰ The orders implement parts of the Electricity Directive.

In relation to supply of district heating, the Danish Energy Regulatory Authority (“Energitilsynet”) is authorized to take regulatory action if prices and terms of a network operator are unfair or not in line with the non-profit regime governing the district heating market, cf. section 21 (4) of the Act on District Heating (“varmeforsyningsloven”).⁴¹

Complaints concerning the contractual relationship between energy consumers and electricity, natural gas and district heating suppliers can be brought before the Energy Supplies Complaint Board (“ankenævnet på energiområdet”)⁴² approved by the Ministry of Economic and Business Affairs.

³³ See http://www.teleanke.dk/t2w_1.asp

³⁴ See <http://www.consumereurope.dk/indhold-FE/Indhold-consumereurope/Complaints-in-Denmark/Telephones-and-telephones-subscriptions?tc=8D3B7BBE881444429036CF62E15079DA>

³⁵ Consolidated Act No. 516 of 20 May 2010.

³⁶ Consolidated Act No. 996 of 13 October 2011.

³⁷ Executive Order No. 161 of 23 February 2011 and Executive Order No. 162 of 23 February 2011.

³⁸ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC

³⁹ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

⁴⁰ Executive Order No. 770 of 8 August 2005 and Executive Order No. 771 of 8 August 2005.

⁴¹ Consolidated Act No. 1184 of 14 December 2011.

⁴² See <http://www.energianke.dk/english/>

4.4. Transport

Most Danish law on transport is based on EU or International law with only a few modifications.

The Danish Act on Travellers' Warranty Fund ("rejsegarantifondsloven")⁴³ implements Article 7 of Council Directive on package travels.⁴⁴ The Fund has as its task to finance and run the Travel Arbitration Council and to assist the customers, who have entered into a contract concerning a package travel (as defined in the Directive with some minor extensions). If the financial situation of the organizer makes it necessary, the customer can demand that the Fund refunds money paid, organizes and pays for accommodation and repatriation.

By 1 January 2010, an amendment to the Danish Act on Travellers' Warranty Fund came into force. This Amendment entails a more stringent protection of consumers than granted by the Directive, since the Warranty Fund also warrants consumers if they buy only air transport or car rental, and the consumer has chosen and paid for the extended coverage, cf. sections 2(1)(4), 2(1)(5) and section 5A (1).⁴⁵

Complaints concerning package Travels can be brought before the Travel Arbitration Council⁴⁶, which is approved by the Ministry of Economic and Business Affairs.

The general rules relating to commercial practices in the Danish Marketing Act also apply to transport. The Consumer Ombudsman has also in this field established guidelines, which are based on Norwegian guidelines. The guidelines require businesses to present clear and unambiguous price information. Where a certain price is only available in a limited period or not at all week days or where the marketed price only concerns a limited number of seats, this must be stated.⁴⁷

Guidelines have also been established within the area of passenger transport by rail and bus.⁴⁸ Contract terms have to be provided in a clear and simple language. Further, in the Danish Act on Railway ("Lov om jernbane"),⁴⁹ section 12 lists which information must be provided for in the contract terms.

5. CONCLUSION

Danish consumer protection legislation is based on the notion of the consumer as the weaker party in relation to traders. Since Danish law is, to a large extent, based on EU law, the notion of the consumer and the protection of consumers are in line with EU legislation. Danish law does, however, in a number of cases protect consumers to a wider extent, mainly where consumers are considered to be in particularly vulnerable situations, either due to the way trade is undertaken or due to the characteristics of the product traded. Only in very few situations does Danish legislation protect a certain type of consumer, this is the case of Danish Act on Guardianship, section 31 of the Danish Contracts Act as well as the special protection of children and young people in the Danish Marketing Act.

⁴³ Act No. 1192 of 8 December 2009.

⁴⁴ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

⁴⁵ For a detailed description of these rules see Østergaard, Kim, "Etableringsbegrebet I rejsegarantifondslovens § 20", Ugeskrift for Retsvæsen, 2011, p. 373-380.

⁴⁶ See <http://www.pakkerejseankenaevnet.dk/forside/>

⁴⁷ See <http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/airlinetickets>

⁴⁸ See <http://www.forbrugerombudsmanden.dk/Love-og-regulering/Retningslinjer-og-vejledninger/Markedsfoeringsloven/persontransportitogobus>

⁴⁹ Act No. 1249 of 11 November 2010.



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Vulnerable Consumers in English Law

Abstract

This Briefing Note examines the state of English Law in relation to the protection of vulnerable consumers, both generally and in specific areas (e-commerce, telecommunications and utilities, transport, and others). It also notes relevant policy developments.

CONTENTS

- EXECUTIVE SUMMARY** **19**
- 1. CURRENT STATE OF PLAY IN LEGISLATION/POLICY MEASURES** **19**
 - 1.1 Consumer-specific legislation/policies** **20**
 - 1.1.1 Vulnerable consumers generally 20
 - 1.2 Specific situations** **21**
 - 1.2.1 E-commerce 21
 - 1.2.2 Telecommunications and Utilities 21
 - 1.2.3 Transport 22
 - 1.2.4 Others 22
 - 1.3 General rules of law dealing with situations of vulnerability** **23**
 - 1.3.1 Unconscionability 23
 - 1.3.2 Undue Influence 23
- 2. STEPS THAT COULD BE TAKEN AT EU LEVEL TO PREVENT CONSUMER VULNERABILITY SITUATIONS** **24**

EXECUTIVE SUMMARY

English law does not at present have a consistent approach to the treatment of vulnerable consumers. “Vulnerability” is difficult to define as a single concept. English consumer law is flexible enough to consider particular instances of vulnerability in applying most rules. There are few specific legal rules explicitly focusing on vulnerable consumers. A recent government consumer strategy seeks to address some instances of vulnerability.

In the key sectors of e-commerce, telecommunications, utilities and transport, there is varying recognition of consumer vulnerability. There are particular factors giving rise to vulnerability, particularly low-income. These sectors are regulated by dedicated public bodies, and there are statutory obligations for most to take the interests of consumers who are vulnerable for certain reasons into account.

1. CURRENT STATE OF PLAY IN LEGISLATION/POLICY MEASURES

This Briefing Paper outlines the current state of English Law with regard to the protection of vulnerable consumers, as well as any relevant policy discussions particularly in the areas of e-commerce, telecommunications and utilities, and transport. English consumer law largely comprises measures which implement relevant EU consumer legislation, and it is not necessary to give a full account of the English consumer law landscape here. The only observation that needs to be made is that English law, as a non-codified legal system, presently does not have a single measure on consumer law, but rather a number of discrete instruments dealing with particular aspects of consumer protection. The UK government plans to adopt a new “Consumer Rights Act” towards the tail end of the current Parliament, probably in 2014. Moreover, in the areas under discussion, the regulatory responsibility falls on sector-specific regulators, who develop guidance and codes of practice within defined statutory parameters.

The focus will be on *vulnerable* consumers as a distinct sub-category within the overall body of consumers. It is a trite observation that all consumers are, to some extent, vulnerable when dealing with businesses because of their weaker bargaining strength, but this general situation is addressed through the body of consumer (protection) law created both at national and EU level. Instead, the vulnerability at issue here refers to consumers who, through one or more characteristics, are particularly vulnerable. Such characteristics may include their age, mental or physical infirmity, and credulity,¹ as well as vulnerability caused by a particular susceptibility to high-pressure sales tactics, by being unable to access certain goods or services, or by suffering particular severe consequences as a result of making a “bad” decision.² The inability to access certain goods/or services is often due to the consumer’s financial position, which would be the course of his/her vulnerability.

It will be considered to what extent current law and/or policies deal with such instances of vulnerability. From the outset, it can be noted that there is no consistent approach in current legislation to dealing with vulnerable consumers, not least because most consumers could be regarded as vulnerable in particular circumstances. However, in some instances,

¹ These are the criteria found in the Directive on Unfair Commercial Practices (2005/29/EC).

² Cf. P.Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation* (Financial Services Research Forum, February 2011).

particular features of vulnerability are included in legislation, requiring action to be taken to support consumers who are vulnerable as judged against these criteria. More detailed provisions are then usually given in separate codes of practice or guidance, rather than through legislation.

1.1 Consumer-specific legislation/policies

This section deals with legislation/policies specifically adopted for dealing with instances of consumer vulnerability.

1.1.1 Vulnerable consumers generally

As noted, it is not necessary to give a full account of English consumer law here. However, it should be noted that much of consumer law is sufficiently flexible to allow an adjudicator to take a particular situation of vulnerability into account.

Thus, in considering whether a contract term is unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (implementing Directive 93/13/EEC),³ it is necessary to consider “all the circumstances attending the conclusion of the contract”.⁴ This is broad enough to allow the vulnerability of a consumer to be a factor. The same is true of the test of “satisfactory quality” in the Sale of Goods Act 1979.⁵

In line with all other EU Member States, the provisions of the Unfair Commercial Practices Directive (2005/29/EC) are the key measure dealing with vulnerable consumers. The UCPD was implemented in the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR),⁶ which mirror the provisions of the Directive. The UK did extend the scope of the Regulations to cover circumstances where a consumer sells goods to a trader, and the provisions on vulnerability extend to these circumstances. However, the CPUTR do not, at present, provide for individual redress, which means that a vulnerable consumer who has been harmed by an unfair commercial practice does not have an immediate right of redress, unless the practice in question also infringes another rule of law which does provide for individual redress.⁷

The Consumer, Estate Agents and Redress Act 2007 (CERA) established *Consumer Focus* as an agency responsible for dealing with a range of consumer issues.⁸ This includes its power to investigate complaints regarding a matter connected with the supply (or refusal to supply) goods or services to a vulnerable consumer.⁹ Here, a person is regarded as vulnerable if Consumer Focus is satisfied that it would not be reasonable for the consumer to pursue the complaint himself. It can provide advice to or take action on behalf of such a vulnerable consumer.

In terms of policy developments, the Department for Business, Innovation and Skills (BIS), the government department responsible for consumer matters, published a Consumer Empowerment Strategy in April 2011.¹⁰ This contains a number of suggestions for additional support for vulnerable consumers. In general terms, the Strategy notes that there has not been an attempt to deal with “vulnerable consumers” specifically as it is

³ S.I. 1999/2083.

⁴ Regulation 6(1).

⁵ See sections 14(2)-14(2C), Sale of Goods Act 1979.

⁶ S.I. 2008/1277.

⁷ For example, the general contract law doctrines of undue influence or duress.

⁸ Note that the current government has proposed to abolish Consumer Focus and to transfer its functions to other bodies concerned with consumer matters.

⁹ Section 12 CERA.

¹⁰ BIS, *Better choices: better deals - consumers powering growth* (April 2011).

difficult to define this concept clearly, but it notes that those who have never used a computer, those who are widowed, those on low incomes and certain age groups are most vulnerable in at least some respects. It acknowledges the lessons to be drawn from research into behavioural science in informing future policy developments. Three particular initiatives are mentioned: (i) reforms to the post-transaction redress system to make dispute resolution easier; (ii) supporting the most vulnerable and disadvantaged consumers, particularly in dealing with information overload, product design and control, and in increasing awareness of alternative products and services; and (iii) making customer feedback provided on-line available to consumers who do not use the internet in order to facilitate their decision-making process.

1.2 Specific situations

1.2.1 E-commerce

The main provisions dealing with e-commerce are the Electronic Commerce (EC Directive) Regulations 2002,¹¹ which implement the E-commerce Directive (2000/31/EC), and the Consumer Protection (Distance Selling) Regulations 2000,¹² which implement the Distance Selling Directive (97/7/EC). Both measures are generally applicable rather than dealing with specific instances of consumer vulnerability, although provisions on information and the right to withdraw from a contract within 7 days could assist some vulnerable consumers. However, the effectiveness of these rights depends on the ability of consumers to know about these rights and being able to enforce them.

The Government's Consumer Empowerment Strategy 2011 mentions plans to help the less confident or able to make use of the opportunities offered by the internet. In addition, its specific plans to reform the post-transaction redress system will concentrate on encouraging on-line retailers to develop a universal e-commerce dispute resolution system, including establishing an Ombudsman for e-commerce.

1.2.2 Telecommunications and Utilities

Under the legislation dealing with the privatised utilities and telecommunication services, various regulators have been given the responsibility to monitor the relevant markets: for the energy sector (gas and electricity), the Gas and Electricity Markets Authority (OFGEM); for the telecommunications sector, the Office of Communication (OFCOM); and for the Water sector, the Water Services Regulation Authority (OFWAT).

With regard to telecommunications, the Communications Act 2003 imposes a general duty on OFCOM to "further the interests of consumers" in the relevant markets.¹³ In doing so, it has to consider, *inter alia*, the vulnerability of children and of others whose circumstances appear to put them in need of special protection; the needs of persons with disabilities, of the elderly and of those on low incomes; and the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas.¹⁴ In addition, OFCOM is required to ascertain, from time to time, the state of public opinion about a range of matters regarding the supply of telecommunication services. It has general regulatory power in these markets and has powers conferred on it by the relevant legislation.

¹¹ S.I. 2002/2013.

¹² S.I. 2000/2334.

¹³ Section 3(1)(b) Communications Act 2003.

¹⁴ Section 3(4)(h), (i) and (l).

With regard to gas and electricity supplies, OFGEM is required to consider consumer complaints about a gas supplier¹⁵ or electricity supplier. In discharging its regulatory functions, OFGEM is required to consider the interests of vulnerable consumers, defined non-exhaustively as those who are disabled, chronically sick, of pensionable age or residing in rural areas.¹⁶ In addition, OFGEM provides guidance to vulnerable consumers who are finding it difficult to pay for their energy supplies on a dedicated web-page.¹⁷ Government policy initiatives include the “Winter Fuel Payments” for those over 60 to assist with the cost of energy bills, and the “Warm Front” initiative for those on benefits/low-incomes to assist with heating and insulation improvements.

In addition to the general power to investigate complaints made by a vulnerable consumer, *Consumer Focus* has the power under s.13 of the Consumer, Estate Agents and Redress Act 2007 to respond to complaints made by gas or electricity consumers in respect of a disconnection of the consumer's supply. Possible responses are to provide advice to the consumer concerned or to make representations on behalf of the consumer. Although this section is not phrased in terms of “vulnerability”, its application is likely to be of particular significance to vulnerable consumers. However, if the complaint falls within the enforcement powers of OFGEM, then *Consumer Focus* must refer the complaint to the regulator.

With regard to water, the Water Industry Act 1991 imposes duties on OFWAT which are comparable to those of OFGEM; in particular, in discharging its obligation to further the consumer objective, regard must be had to vulnerable consumers, with the same non-exhaustive list provided in this legislation.¹⁸

1.2.3 Transport

For air transport, the Civil Aviation Authority has general regulatory responsibility for air transport, and in discharging its functions, it is required to further the reasonable interests of air transport users.¹⁹ There is no specific mention made of vulnerable consumers in this regard.

For rail transport, the Office of Rail Regulation is required, *inter alia*, to protect the interests of users of railway services.²⁰ As far as vulnerable consumers are concerned, the rail regulator has to prepare and keep under review a code of practice to protect the interests of passengers who are disabled.²¹

1.2.4 Others

In the field of consumer credit, English law contains provisions dealing with so-called “unfair relationships”.²² This allows a court to intervene where a consumer credit agreement is unfair to the debtor (consumer) because of (a) the terms of the agreement or a related agreement; (b) the way in which the creditor has exercised/enforced any of his rights under the agreement or a related agreement; (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after making the agreement). In deciding

¹⁵ Section 32 Gas Act 1986, as amended.

¹⁶ Section 4AA(3) Gas Act 1986; section 3A(3) Electricity Act 1989.

¹⁷ <http://www.ofgem.gov.uk/Consumers/hfvc/Pages/hfvc.aspx>

¹⁸ Section 2(2C) Water Industries Act 1991.

¹⁹ Civil Aviation Act 1992, section 4.

²⁰ Railways Act 1993, section 4.

²¹ Railways Act 1993, section 71B. See Department for Transport, *Accessible Station Design for Disabled People: A Code of Practice* (September 2010).

²² See sections 140A – 140D of the Consumer Credit Act 1974, as amended.

whether to intervene, the court can consider all matters it thinks are relevant, which should include the fact that a consumer is particularly vulnerable.

In addition, in deciding whether to grant or renew a consumer credit licence, the Office of Fair Trading (OFT) has to consider whether an applicant is “fit to hold a licence”.²³

A relevant consideration here is whether the applicant is engaged in business practices which appear to be deceitful, oppressive or otherwise improper (whether unlawful or not),²⁴ which includes consideration of whether the applicant has been engaged in “irresponsible lending”.²⁵ The OFT has issued guidance as to how lenders should act when a borrower appears to have a mental capacity limitation (a particular form of vulnerability).²⁶

1.3 General rules of law dealing with situations of vulnerability

Outside the specific field of consumer protection, there are doctrines developed by the courts which seek to deal with situations of vulnerability. These doctrines are not enshrined in legislation, and knowledge of relevant case-law is essential to determine the scope of these rules. Of particular relevance are the doctrines of “unconscionability” and “undue influence”. Both of these have their origins in the principles of *equity*.

1.3.1 Unconscionability

Where one party to a contract is in a position that makes it possible for them to exploit a particular weakness of the other party, equity will grant relief if this amounts to an “unconscionable bargain”. Where a contract is challenged, it is for the “stronger” party to justify its actions.²⁷ In general terms, relief is available where the weaker party is “poor, ignorant or weak-minded, or is for some other reason in need of special protection”.²⁸ It is not enough that the transaction itself is unfair; rather, the stronger party must have taken advantage of the particular vulnerability of the other party.

1.3.2 Undue Influence

If one party (A) has exerted undue influence on another party (B) to bring about a contract, then equity will permit this contract to be set aside. This is because the fact that the contract has been entered into cannot “fairly be treated as an expression of [B’s] free will”.²⁹ It is necessary for a claimant to show that undue influence existed, that it was exercised, and that as a result of this, the claimant entered into a transaction.

In many cases, the relationship between two parties is a sufficient indicator that undue influence might exist; in particular, where the relationship is one of trust and confidence, there is a presumption that there is undue influence (although it is still necessary to show that there was the exercise of such influence to bring about a transaction). The key test is whether there is a relationship of trust and confidence between A and B (with B has put trust and confidence in A) and whether the nature of the transaction is such that it “calls for explanation” or is “not readily explicable by the relationship of the parties”.³⁰ Recent litigation has focused on cases where banks offered to provide credit facilities for a business operated by a husband in return for security over the matrimonial home. In order to resist a potential finding of undue influence, the House of Lords determined that the party potentially subject to undue influence should have the benefit of independent legal advice before entering into the transaction.

²³ Section 25 of the Consumer Credit Act 1974, as amended.

²⁴ Section 25(2A)(e).

²⁵ Section 25(2B).

²⁶ Office of Fair Trading, *Mental Capacity – OFT Guidance for Creditors*, OFT 1373 (September 2011).

²⁷ *Aylesford v Morris* (1873) L.R. 8 Ch.App. 484.

²⁸ E.Peel, *Treitel – The Modern Law of Contract*, 12th edition (Sweet & Maxwell, 2007).

²⁹ *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44

³⁰ *Royal Bank of Scotland v Etridge (No.2)*, above.

2. STEPS THAT COULD BE TAKEN AT EU LEVEL TO PREVENT CONSUMER VULNERABILITY SITUATIONS

“Vulnerability” is a concept that is notoriously difficult to define. It can arise through limitations in mental or physical capacity as much as from the financial circumstances in which a consumer finds him-/herself. This suggests that it would be rather difficult to come up with a common set of legal rules to tackle consumer vulnerability at the EU level. In particular, it would seem difficult to design specific legal rules dealing with instances of vulnerability because of the fluidity of the concept.

It should be possible to adopt an approach which requires that vulnerability considerations are taken into account in devising regulatory measures, as well as applying existing consumer protection rules. Many consumer law provisions are sufficiently flexible that it should be possible to take vulnerability into account, but this could be made more explicit by including “vulnerability” as a relevant consideration. Moreover, in sectors where regulators are responsible for laying-down rules on how businesses should deal with consumers, an obligation to take due account of vulnerability can also assist.

However, it might be preferable to consider how consumer vulnerability could be tackled at an earlier stage. Once a vulnerable consumer has made a “bad” decision, it can be difficult to unravel what has happened. Research is needed into how vulnerability situations arise and what can be done to ensure that there are fewer instances of consumer detriment caused by consumer vulnerability.



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Consumer Vulnerability in Estonian Law

Abstract

The most critical issues of consumer vulnerability in Estonia concern the use of mobile content services by minors and the usurious practices of SMS loan providers. In order to tackle the problems with mobile content services, the cost control methods should be further developed and the mobile operators should be prohibited from restricting the provision of communications services, if the consumer contests the invoice for content services and is entitled to withhold payment. The consumer protection authority should be afforded the right to order the mobile operator to close the short number used to offer fraudulent mobile content services. The best way to protect consumers against usurious lending practices is to introduce APRC ceilings at European level.

CONTENTS

LIST OF ABBREVIATIONS	27
1. OVERVIEW	28
2. COMMUNICATION SERVICES	29
2.1 Overview of the problems	29
2.2 Statistical Data	30
2.3 Voluntary Codes of Conduct	31
2.4 Restriction of Usage of Mobile Services in Case of Contested Invoices	32
2.5 Means of Cost Control	33
2.6 Ordering Mobile Operator to Close Numbers Used to Offer Fraudulent Mobile Content Services	34
3. SMS LOANS	34
3.1 Overview of the Problem	34
3.2 Statistical Data	35
3.3 The Efficiency of Relative APRC Caps	36
3.4 Administrative Methods	38
REFERENCES	39

LIST OF ABBREVIATIONS

APRC	Annual Percentage Rate of Charge
CCP	Civil Procedure Code
CPB	Consumer Protection Board
ECA	Electronic Communication Act
GPCCA	General Part of Civil Code Act
ZPO	Zivilprozessordnung

EXECUTIVE SUMMARY

The most critical issues of consumer vulnerability in Estonia in recent years concern the following aspects:

- the vulnerability of young (under-age) people as the users of communication services, especially mobile phone content services;
- the vulnerability of young people (18-25 years old) as well as people in a poor financial situation using consumer credit with excessive APRC obtainable via mobile phones (the so-called SMS-loans).

In my view, the best way to protect consumers against usurious lending practices and impulsive borrowing is to introduce APRC ceilings on European level. It should further be guaranteed that the APRC (Annual Percentage Rate of Charge) restrictions can be applied *ex officio*.

Alternatively, if less restrictive measures are preferred, administrative methods could be used such as setting further age restrictions for obtaining electronic unsecured consumer loans or limiting the opening hours of the instant credit providers.

The cost control methods for mobile phones should be further developed (for example, providing that offering the balance limit service should be mandatory for the operators). The mobile operators should be obliged to inform customers about those methods.

In order to tackle the problems with mobile content services the mobile operators should be prohibited to restrict the provision of communications services if the consumer contests the invoice for content services and is entitled to withhold payment. The idea of such regulation would, in essence, be similar to the institute of linked consumer credit agreements. A less intrusive measure would be setting legal limits so that operators are not entitled to restrict the provision of communication services for minor debts.

The authorities should be given an opportunity for effective intervention in the fraudulent provision of mobile content services. The consumer protection authority should have the right to order the mobile operator to close the short number used to offer fraudulent mobile content services.

1. OVERVIEW

Under the Estonian law consumers are generally considered to be weaker parties resulting in a vast amount of mandatory provisions aimed at their protection. The consumer contract provisions (including those based on the consumer *acquis*) are not regulated in a separate legal act but are instead integrated into the general contract law system in the Law of Obligations Act. The purpose of those provisions is, as a rule, not to tackle problems related to specific vulnerable consumer groups but rather to lay down a protection standard for an “average” consumer.

A general provision that can be used for protecting vulnerable consumers (i.e. consumers who are inexperienced, impoverished etc) against ***unconscionable contracts*** is Section 86 of General Part Civil Code Act (GPCCA) which is prohibiting legal transactions contradicting good morals.

Pursuant to Subsection 86 (2) of GPCCA, a transaction is deemed contrary to good morals (and thus void) if, inter alia, a party knew or had to know that the other party entered into the transaction due to urgent needs, dependence or inexperience of the person, or other similar circumstances ("gross disparity") and if 1) the transaction was made on grossly unfair terms for the other party or 2) if an imbalance exists between the value of mutual obligations of the parties deemed contrary to good morals. Subsection 86 (3) of GCPA further provides that if the value of mutual obligations of the parties is unreasonably out of balance to an extent that is contrary to good morals, it is assumed that the other party knew or had to know that the other party entered into the transaction due to urgent needs, dependence or inexperience of the person, or other similar circumstances. However, it must be added that until now Section 86 of GPCCA has only very rarely been applied in practice so that the institute of unconscionability has not turned out to be an effective tool for solving consumer vulnerability issues (see further in Chapter 3.3).

The following report concentrates on two most critical consumer vulnerability issues in Estonia in recent years: the problems of mobile content services used by minors and SMS-loans (payday loans obtainable via mobile phones). There are currently no specific consumer vulnerability issues in the areas of transport, online-shopping or utilities contracts in Estonia.

2. COMMUNICATION SERVICES

2.1 Overview of the problems

In recent years, starting from 2008, the Estonian Consumer Protection Board (CPB) has received a vast amount of complaints from the parents of minors and teenagers concerning communication services, especially the so-called value added services (mobile content services) obtainable via mobile phone.

Particular harm has been caused by periodic subscription contracts concluded via mobile phones (and computer) which consumers have committed to without noticing. Mobile content services are often marketed with intentionally misleading and aggressive advertising designed to get consumers to involuntarily commit to expensive periodic subscriptions. As a consequence, a large number of people have experienced situations where they have received invoices with substantial sums from the mobile operators for using periodic mobile content services. Often, when a consumer is just wanting to download a new logo, a new mobile tone or to answer a quiz, he has - without being previously informed so – „joined a club“ for which he has to pay a periodical and often expensive fee.

It has not been rare that the costly service is advertised as being „free“ or „without charge“ or the prices, related charges and conditions are not indicated in a clear way. Joining such „clubs“, i.e. subscribing to periodical value added services is often possible via Internet home page of the content provider and mobile phone: the user inserts his mobile number on a web page and then receives an SMS with a certain code. Then, he sends an SMS with the code to the service provider or inserts the code to the same web page. Usually, the service provider sends messages containing horoscopes, ring tones, etc. to the user on a regular basis. The fees for the mobile content services are not paid directly to the content service providers; instead, they are added to the mobile phone invoice of the customers sent by the mobile operators.

Most children in Estonia older than 7 years have their own mobile phones but they are not party to the contract for using mobile services. All mobile operators operating in Estonia – Elisa, EMT and Tele2 – are concluding contracts for mobile services only with persons of 18 years or older. Thus the majority of minors are using mobile services (often including mobile content services) but the parents as the contract parties are responsible for paying the mobile phone bills. Thus, technically speaking, the vulnerable consumer group is not the minors but rather their parents.

The provisions stipulating for the invalidity of the transactions of minors without the parent's consent (Sections 10-11 of GPCCA) have not proved to be effective in protecting the interests of mobile phone users. There have been no court cases as the parents are not ready to contest the validity of the mobile content service agreements but are rather willing to pay the bills because otherwise the mobile phone operators will – according to their standard terms - switch off their services. Whether such standard terms of the operators could be regarded unfair, has not been tested in the court practice, either. In addition, different views exist in the legal literature on whether such transactions could be considered void because of the lack of consent of the parents, or not.¹

The right of withdrawal set forth in the EU Directive 97/7/EC on the protection of consumers in respect of distance contracts is also ineffective in such cases as according to Art. 6 (3) the consumer may not exercise the right of withdrawal for the provision of services if performance has begun, with the consumer's agreement, before the end of the seven working day period. This is not going to change after the new Directive of consumer rights² is transposed in the domestic law as according to its Art. 16 (a) and (m) the right of withdrawal is not applicable if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal.

Thus, neither the provisions concerning the invalidity of the transactions of minors nor the right of withdrawal from distance contracts have proved to be useful tools for protecting vulnerable consumers in Estonia against the problems concerning mobile content services. The problems connected with mobile services have repeatedly appeared in newspapers and internet news environments but until today they have unfortunately not been addressed and analyzed in detailed manner in legal journals or literature.

2.2 Statistical Data

In 2008 the Estonian CPB received 49 complaints and 107 inquiries concerning telecommunication (including mobile phone) services. One of the main problems pointed out in this annual survey concerned unsolicited mobile content services.³

¹ Cf. Ots, who argues that such contracts are void without the parents' consent, and Varul et al, p. 57 where it is rather generally stated that a minor can make transactions via mobile phone if the parent has concluded a respective contract for him. It has been argued convincingly for German law that such contracts might be void without the consent of the parents, see Mankowski, p. 808 et seq; Spindler/Anton, Vorbem zu §§ 104ff, Rn 7; Leupold/Glossner, 2. Teil, Rn 93-98. As the Estonian rules on the transactions of persons with restricted contracting capacity are largely modelled after the relevant norms of BGB, those arguments would, in my view, also apply for Estonian law.

² Directive of the European Parliament and of the Council 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.

³ Tarbijakaitseamet 2008.a aastaaruanne, pp. 133-134.

In 2009 the CPB received 63 complaints related to the mobile communication services. The vast majority of those complaints were “related to the value added mobile communication services – games, background images, games in the Internet”.⁴ In addition, the CPB answered 205 inquiries from consumers concerning telecommunication and mobile services. The most urgent problems according to the annual survey of 2009 were unsolicited periodical mobile content services where consumers (mostly minors) had activated such service by calling or SMS-ing to a certain number or inserting a certain code to a web page without understanding that thereby they subscribe to a periodical costly service.⁵

In 2010 the CPB received 59 complaints and 287 inquiries regarding phone and mobile communication services. Most of them, i.e. 18 complaints and 220 inquiries concerned periodic content services, which is 91 more than in the previous accounting period.⁶

In 2011 the number of consumer complaints and inquiries about mobile content services decreased considerably, the numbers of complaints and inquiries being 2 and 74, respectively. The problems associated with mobile content services have nevertheless remained acute and several administrative proceedings against service providers have been planned for the next year.⁷

2.3 Voluntary Codes of Conduct

There are currently two voluntary codes of conduct concerning the business activities and obligations of the mobile operators and content providers aiming at protection of minors in mobile communication in Estonia:

1) On 30 June 2010 the Estonian mobile operators acceded to the GSMA European Framework for Safer Mobile Use by Younger Teenagers and Children, signing the „Estonian Code of Conduct for Safer Mobile Use by Younger Teenagers and Children“. This code of conduct, inter alia, contains certain regulations of access control mechanisms to protect children from commercial content which would be classified as only suitable for adult customers. It also, in rather vague terms, provides that individual mobile providers should offer capabilities which can be used by parents to customize access to content by children using mobiles. These may include specific services, phones, barring or filtering, and/or billing control (Art. 2.4.). However, this code of conduct does not set any specified obligations on mobile operators in respect to (periodical) content services provided by third parties.

2) On 23 May 2011 CPB in cooperation with communication companies and the mediators of the services compiled Advisory Guidelines for the Provision of the Periodical Mobile Content Services. Those Guidelines contain rather detailed rules on advertising, information obligations and subscription/un-subscription process of the mobile content services. As the Guidelines have been out only since May 2011 there is no reliable statistical data yet available whether those Guidelines have been voluntarily followed by the market participants. While the number of consumer complaints have decreased in 2011 (see 1.2. above), in some cases the self-regulation by the industry has nevertheless remained inadequate.

⁴ Activities of the Consumer Protection Board in 2009, p. 45.

⁵ Tarbijakaitseamet 2009.a aastaaruanne, p. 168.

⁶ Consumer Protection Board Annual Report 2010, pp. 33-34.

⁷ Tarbijakaitseamet 2011. aastaaruanne 2011 (not yet published).

The legal situation should further improve by 2014 when the new Directive of consumer rights will be transposed into Estonian law: Articles 6 and 8 of the Directive lay down more specified information requirements for the trader as well as the rule that if the requirements concerning contractual charges and costs are not complied with, the consumer shall not bear those additional charges or other costs.

2.4 Restriction of Usage of Mobile Services in Case of Contested Invoices

It seems that one of the central problems of the mobile content services is the fact that under the standard terms of the mobile operators the consumers (i.e. the parents of the minors) are forced to pay for the services to the mobile operator under the threat that otherwise the usage of mobile services will be restricted. This also explains why the customers have little incentive to go to court or to a consumer dispute resolution body even if they feel the claims of the content providers are unfounded. All standard terms of the Estonian mobile operators currently provide that if the customer disputes the invoice before payment deadline, the service will not be limited before the circumstances stated in the complaint have been examined. However, the standard terms further provide that the mobile operators will examine the complaint and if, according to their view, the customer's complaint is not justified, then the disputed amount is to be paid or otherwise the mobile operator has the right to limit the usage of services.

It is not clear whether such standard terms might violate the rule provided in Subsection 98 (6) of ECA, thus being void. According to Subsection 98 (6) of ECA, a communication enterprise (i.e. the mobile operator) may not restrict the provision of communication services if the end-user contests the amount of the charge payable for provided communication services in writing before the due date for payment and pays, in a timely manner, for the part of the communication services the charge which is not contested. If the standard terms were considered to violate this provision, thus being void, then the consumers could initiate court proceedings and withhold payment without fearing that their usage of mobile phone services will be restricted.

Therefore, I think that setting forth a European rule similar to the provisions of linked consumer credit agreements would be well-suited for the protection of vulnerable consumers in such cases. Such rule should prohibit the mobile operators to restrict the provision of communication services if the consumer contests the invoice for content services and is entitled to withhold payment. This approach has already been taken by the Finnish Consumer Disputes Board, stating that in such cases the state of interests of the participants is similar to the one present in linked consumer credit agreements and deciding that "operators should bear the same kind of responsibility as credit card companies. /.../ In its decision, the Board equates the ordering of mobile phone services with buying on credit and highlighted the rules regarding consumer credit in the Consumer Protection Act. According to the rules, the consumer has the right to withhold payment or receive a refund of the price or damages from the supplier of credit who funded the purchase, if he or she has the same right in regard of the seller or service provider as a result of their breach of contract."⁸

⁸ Current Issues in Consumer Law, 4/2011.

A less intrusive measure for the mobile operators would be setting legal limits so that the operators are only entitled to restrict the provision of communication services if the debt of the customer is not minor.⁹

2.5 Means of Cost Control

The most effective way for a parent to control the mobile phone bills of his child would be setting balance limits or blocking certain services (for example, the use of internet, use of mobile content services, calling or SMS-ing to certain special service numbers). The means of cost control currently available in Estonia are analyzed below:

Balance limits: currently, 2 mobile phone operators (EMT and ELISA) are offering the possibility of setting a balance limit for the mobile phone services. Such balance limit service costs 0,65 € to 0,97 € per month. It is not worthy that in ELISA, mobile content services are not included in the balance limit service so that it is possible to subscribe to them even if the balance limit is exceeded.

The maximum balance limit is an extra service where the customer can define a maximum sum for the monthly phone bill. When the limit set in advance is reached, the phone can no longer be used for calling, sending text messages, surfing, receiving picture messages or for using any other paid services before the beginning of a new billing period. However, the limit is usually checked only once (in case of one operator, also twice) a day, i.e. not in real time and the bill can exceed the limit (which in some situations involving minors has been considerably high). If the maximum balance is exceeded during the time lag, the customer is responsible for the resulting costs.

The third mobile operator, TELE2, only offers the credit limit service, i.e. monitoring the credit limit set by the consumer by the mobile operator. The credit limit service does not offer effective protection against excessive billing as in the mobile operator only has the *right* but not the *obligation* to limit services if credit limit is exceeded.

Blocking Certain Service Numbers: two of the Estonian mobile operators (EMT and ELISA) offer the possibility to block all outgoing calls to special service numbers (900 numbers). In ELISA, however, this possibility is not mentioned on the web-page of the operator.

None of the mobile operators offers the possibility to block certain costly SMS-service numbers or number groups; the only possibility to create „black list“ of SMS numbers is to buy a phone where the user can create such list himself. The other opportunity available is to block the use of SMS-s altogether.

Blocking Mobile Content Services: currently there is no legal obligation for the mobile operators to allow blocking all value added services. The Advisory Guidelines for the Provision of the Periodical Mobile Content Services stipulate that if the service providers and communications undertakings possess appropriate technical equipment, they must allow the customers to totally block the access to short numbers distributing the periodical content services (Art. 1.2.). The Guidelines also set forth the obligation of the operators to inform customers about the possibility of blocking or limiting periodical content services (Art. 1.2). However, the obligation of allowing blocking the periodical content services only arises if there is „appropriate technical equipment“ available.

⁹ Cf the decision of the German Supreme Court of 17 February 2011 No. III ZR 35/10, BGH NJW 2011, 2122, where a standard term of a mobile operator allowing him to restrict the service in case of a debt of 15,5 euros was considered to be unfair.

The Estonian mobile phone operators claim that it is technically not possible to block all value added services; it is only possible to block sending SMS-s completely but not sending SMS-s to certain numbers or number groups. Thus there is currently no possibility to block all value added services. For comparison, it seems that blocking all value added services is technically possible in Norway¹⁰ and in Switzerland.¹¹

If it is technically possible, then the mobile operators should be obliged to – if so requested by the customer - totally block the access to short numbers distributing the periodical content services. In addition, they should be obliged to inform customers about the possibility of blocking or limiting periodical content services. Blocking and limiting services should – at least if the user of the mobile phone is under-age - be offered free of charge.

All mobile operators should further be required to provide more information to consumers about the possibility to control their costs at the point of sale and at any other point of contact. Information concerning cost control should be easily available on the web-pages of the mobile operators, especially in case of mobile phone packages targeted at children and teenagers. Right now, the information about cost control methods is very difficult or in certain cases even impossible to find.

2.6 Ordering Mobile Operator to Close Numbers Used to Offer Fraudulent Mobile Content Services

An effective way to protect consumers against fraudulent market practices of mobile content services would be the opportunity of the state authority to order the mobile operator to close the short number used to offer mobile content services of a fraudulent nature. Currently, under the Estonian legislation, the Estonian CPA has no such explicit right.

In recent years, many Estonian consumers have experienced problems with a Portuguese mobile content service provider Natta.com who has been continuously using unfair commercial practices and has not responded to several orders of the Estonian CPA. The cooperation with the Portuguese consumer protection authority has also not led to a solution. In order to protect the consumers against fraudulent provision of mobile content services, the authorities (preferably the Consumer Protection Board) should be given an opportunity for effective intervention with the right to order the mobile operator to close the short number used by such content providers.

3. SMS LOANS

3.1 Overview of the Problem

During the last 5 years electronic unsecured consumer loans – i.e. instant loans obtained via text message (so-called SMS loans) - have become extremely popular in Estonia. It is essentially a very fast way to get small-scale consumer credit: to obtain an SMS loan, consumers have to conclude a framework contract via the Internet homepage of the creditor and then send a message by a mobile phone with the expected sum and deadline of the loan together with a personal code to the number provided by the creditor. After a short background check the creditor sends back a message conforming the issuance of

¹⁰ See Art. 5.3. of the Consumer Ombudsman's Guidelines on Mobile Content Services and Section 5a of Regulations on Electronic Communications Networks and Services (Ecom Regulations).

¹¹ See the web page of a Swiss mobile operator Orange at <http://www1.orange.ch/support/mobile-services/value-added-services/>

credit and transfers the credit sum to the consumer's bank account.¹² SMS loans are widely offered – partly by the same companies (such as BIGBANK or Ferratum) - also in Finland, Sweden, Latvia and Lithuania. The market share of instant loans is rather small, remaining below 5% of the whole lending market in 2010.¹³

Despite the low market share, irresponsible SMS borrowing has quickly developed into an escalating social issue in Estonia leading to consumer indebtedness. The main reason is the usurious nature of the loans as an extremely high APRC is charged on them: for example, if taking a credit of 100 euros for one month, the average APRC could be slightly over 600 per cent.

It has not been rare in Estonia for an APRC of an SMS loan to exceed 1000 per cent.¹⁴ In addition, if the consumer defaults, he must also pay considerable debt recovery costs, default interest and contractual penalties set forth in the contract. As a consequence, a considerable number of consumers are facing disproportionate claims compared to the original credit sum. Creditors usually claim such an enormous APRC to be justified by the lack of collateral to secure such loans and the high risks resulting there from.¹⁵

There is no scientific statistical research available showing which consumer groups are the main users of the SMS loans service in Estonia. In daily press and social networks, however, the debt counsellors have repeatedly reported of people in desperate economic situation (for example the unemployed) using those loans to cover their daily expenses, children's school costs or pay back mortgage loans in order to avoid expelling from their homes. Another consumer group using those credit products are young people often taking the loans during late evening or night hours to finance impulsive consumption. An empirical study carried out in Finland where similar problems with SMS loans exist revealed that the age group 20–24 was the biggest single group (43 %) among SMS loan debtors.¹⁶

The information obligations of the creditor and the right of withdrawal of the consumer set forth in the European consumer protection directives have appeared to be ineffective against usurious practices in Estonia.¹⁷ As the principle of responsible lending deriving from the new EU consumer credit directive¹⁸ has been transposed into Estonian law only since 1 July 2011, there is no data available yet on how – if at all – it has influenced the malpractices of SMS loan industry in Estonia. The Estonian CPB has planned to carry out a respective research and surveillance in 2011-2012.¹⁹

3.2 Statistical Data

The problems with the SMS loans started in 2006 and have ever since given reason for complaints to the Estonian CPB. For example, it is stated in the annual report of the CPB of 2007 that the SMS loan practices remains to be of vital interest for the Board; in addition, very aggressive advertising practices of certain SMS loan providers have been reported.²⁰ In 2008, 4 complaints and 97 inquiries have been filed with the CPB.²¹

¹² See further Saare, Sein, Simovart a, p. 129 et seq.

¹³ Lending Review, November 2010, p. 19.

¹⁴ See, for example, the APRC figures of the company SMSLaen at https://www.smslaen.ee/?menuID=56&lang=est#two_tables_euro

¹⁵ Saare, Sein, Simovart a, p. 130.

¹⁶ Valkamaa, Mutttilainen, p. 74.

¹⁷ See further Saare, Sein, Simovart a, pp. 131-136.

¹⁸ 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.

¹⁹ Tarbijakaitseameti aastaaruanne 2010, p. 55.

²⁰ Tarbijakaitseameti aastaaruanne 2007, pp. 135-136.

²¹ Tarbijakaitseameti aastaaruanne 2008, p. 98, 140.

In 2009 the numbers were 6 and 29, respectively, and in 10 cases warnings were issued by the CPB to the creditors to comply with the information and advertising requirements.²²

In 2010, there was a considerable decrease in the amount of complaints (only 16 inquiries and no complaints) which shows that consumers have become more aware of the dangers and problems connected with SMS loans.²³

3.3 The Efficiency of Relative APRC Caps

The Estonian legislator has tried to tackle the problem of usurious SMS loans by setting forth a relative APRC cap. In 2009, the Estonian Parliament passed an amendment (which entered into force on 1 May 2009) changing the regulation of transactions violating 'good morals' (*gute Sitten*) under Section 86 of GPCCA. According to Subsection 86 (1) of GPCCA, a contract which is deemed to be against good morals, is void. Pursuant to the new Subsection 86 (2) of GPCCA, a transaction is deemed contrary to good morals if, inter alia, a party knew or had to know that the other party entered into the transaction due to urgent needs, dependence or inexperience of the person, or other similar circumstances ('gross disparity') and if 1) the transaction was made on grossly unfair terms for the other party or 2) if an imbalance exists between the value of mutual obligations of the parties deemed contrary to good morals.

Consequently, under the new provision, it is not sufficient to consider a transaction contrary to good morals and thus void simply because the transaction is extremely costly (including an unreasonably high APRC) for the consumer. In addition, it is also required that the other party knew or could be expected to know that the consumer entered into the transaction due to reasons of gross disparity. Subsection 86 (3) of GPCCA further provides that if the value of mutual obligations of the parties is unreasonably out of balance to an extent that is contrary to good morals (that is, if the objective component exists), it is assumed that the other party knew or had to know that the other party entered into the transaction due to urgent needs, dependence or inexperience of the person, or other similar circumstances. In order to ease the consumer's burden of proof, the second sentence of Subsection 86 (3) of GPCCA stipulates that in case of consumer credit contracts it is assumed that an imbalance exists between the value of mutual obligations of the parties deemed contrary to good morals if, inter alia, at the time of issuing the loan the APRC payable by the consumer exceeds more than three times the average APRC charged on consumer credit by credit institutions according to the figures of the latest statistics of the Estonian Central Bank.

The Estonian Central Bank publishes the average APRC for all consumer loans granted by credit institutions to individuals on their website every month: currently this APRC published amounts to 27,13 per cent.²⁴ Thus, all consumer credit contracts with an APRC exceeding ca 90% could be considered to be against good morals and thus void. This point of view, however, has not been held up by the Estonian Supreme Court in a decision where the APRC of the SMS loan contract amounted to 791 per cent.²⁵ The Supreme Court took the position that establishing that the APRC under a particular consumer credit agreement exceeds more than three times the average APRC it is not enough to assume the existence of the subjective component, and, as a result, to consider the transaction to be against good morals. According to the Supreme Court, the consumer must additionally plead and prove that he concluded the credit contract due to gross disparity or inexperience.

²² Tarbijakaitseameti aastaaruanne 2009, pp. 131-132, Tarbijakaitseameti aastaaruanne 2010, p. 54.

²³ Tarbijakaitseameti aastaaruanne 2010, pp. 54-55.

²⁴ See <http://statistika.eestipank.ee/?lng=en#listMenu/981/treeMenu/FINANTSSEKTOR/147/979>.

²⁵ The Estonian Supreme Court decision of 17 June 2011 in case No. 3-2-1-49-11.

This means that the provision providing for the invalidity of a usurious consumer credit contract cannot be applied *ex officio*, particularly if the consumer is not present in the proceedings. But even if the consumer is present and claims to be inexperienced, he must – according to the Supreme Court – either prove that he is very young or that it is his first or one of his first credit contracts. While it is possible to prove that one is very young, it is much more complicated – if not impossible – to prove that one has not concluded credit agreements before as there are hundreds of potential creditors in Estonia. But without such proof it is not possible to consider the contract to be against good morals and thus void.²⁶

It is also the Estonian reality that most debtors of SMS loans are usually persons who are not ready or do not possess financial means necessary to assert their rights in the courts. Therefore I share the view of the Estonian CPB that the APRC restrictions have not fulfilled their purpose of effectively limiting the usurious practices of SMS loan providers.²⁷

This conclusion is supported by the fact that SMS-loan business is still blooming and profitable in Estonia and the Estonian credit providers have also entered the Latvian, Lithuanian and Finnish credit markets and are offering similar products there. One of the credit providers (BIGBANK) is even offering consumer deposits with very favourable interest rates in Germany and Austria. In addition to reasons described above, following aspects contributing to consumer vulnerability in SMS loan market should be brought out:

- Firstly, the creditors are usually asserting their claims against consumers not in ordinary court proceedings but rather by using debt collection agencies. The consumers are often afraid that the creditor reports their default to the credit information registry resulting in their stigmatization for the whole credit market and are therefore often ready to pay voluntarily.
- Secondly, they are using the order for payment procedure hoping that consumers are not lodging a statement of opposition. Namely, if the debtor does not lodge a timely statement of opposition to the claim, the court will issue a payment order according to Section 489 of the Estonian CCP. Such payment order can be enforced without any other formalities. Thus in summary proceedings - if the debtor remains passive which is often the case in Estonia - the validity of the claim is not examined by the court at all. In comparison, the interests of consumers seem to be better protected in Germany as the order for payment procedure can not be used in consumer credit claims if the APRC of the credit contract exceeds the average market interest by 12 per cent (Subsection 688 (2) p 1 of German ZPO). Such restriction does unfortunately not exist in Estonian civil procedure law.²⁸

It must be noted that the APRC restrictions are not favoured by all authors. In the Estonian legal literature even the constitutional compliance of APRC restrictions has been doubted with the assertion that „the APRC limit disproportionately restricts the constitutionally protected right of entrepreneurship freedom of service providers.“²⁹ It is stated that “instead of limiting the cost of credit through setting a relative limit by law as it is the case today I much more favour high information, disclosure and prudent marketing requirements which go hand in hand with the idea of responsible borrowing.”³⁰

²⁶ Similarly Ulst, p. 75.

²⁷ Tarbijakaitseamet aastaruanne 2010, p. 55.

²⁸ Saare, Sein, Simovart b, p. 49.

²⁹ Ulst, p. 79.

³⁰ Ulst, p. 81.

Other authors however, are of the opinion that setting an APRC limit is justified in order to protect the vulnerable consumers, taking also into account the fact that in various European countries similar or even more restrictive interest limits exist.³¹

In my view, the best way to protect vulnerable consumers against usurious lending practices and impulsive borrowing is to introduce APRC ceilings on European level. When shaping the relevant provisions it is further necessary to make sure that the consumer does not have to prove that he has entered the credit agreement due to gross disparity or inexperience. It should be guaranteed that the courts are able to apply the APRC restrictions *ex officio*.

To ensure that the interest rate caps set forth in material law are not avoided by procedural means it should further be regulated that claims arising out of consumer credit contracts exceeding that rate ceiling cannot be asserted via order for payment procedure. However, because of the principle of procedural autonomy of the Member States, this can probably not be done on European level, at least not for domestic cases.

3.4 Administrative Methods

No administrative methods have been used in Estonia to tackle the problem with SMS loans. The Finnish legislator, on the contrary, has not provided for interest rate restrictions but has, instead, limited the opening hours of the SMS loan providers. In Finland, it has been seen as a part of the problem that some creditors grant loans late at night which increases impulsive borrowing. In order to avoid this, in Finland the credit service must close between 9 pm and 6 am on weekdays as well as on weekends and public holidays.³²

³¹ Saare, Sein, Simovart a, pp. 141-142; see also an extensive comparative study of interest rate restrictions in Member States by iff/ZEW.

³² Basic Rules on SMS Loans, p. 4.

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DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Vulnerable Consumers in German Law

Abstract

This briefing paper summarises the extent to which particularly vulnerable consumers are specifically protected in German law. This is the case in the area of Unfair Commercial Practices Law where EU law is transposed. In other areas of law, general rules of consumer law or contract law may protect particularly vulnerable consumers, without expressly using this notion or specifically addressing vulnerable consumers.

CONTENTS

LIST OF ABBREVIATIONS	43
EXECUTIVE SUMMARY	44
1. SCOPE OF THE PAPER	44
2. DEFINITION OF “VULNERABLE” CONSUMER IN EU LAW AND GERMAN LAW	45
3. CURRENT STATE OF PLAY IN LEGISLATION/POLICY MEASURES	46
3.1. General rules of law dealing with situations of vulnerability	46
3.2. Consumer law specific legislation	47
3.2.1. Vulnerable consumers generally	47
3.2.2. Specific situations	49
4. STEPS WHICH COULD BE TAKEN AT EU LEVEL TO PREVENT CONSUMER VULNERABILITY SITUATIONS	53
REFERENCES	54

LIST OF ABBREVIATIONS

- AG** Local court (*Amtsgericht*)
- BGB** German Civil Code (Bürgerliches Gesetzbuch)
- BGH** Federal Court of Justice (*Bundesgerichtshof*)
- ECJ** European Court of Justice
- EU** European Union
- Dir.** Directive
- UWG** Gesetz gegen den unlauteren Wettbewerb

EXECUTIVE SUMMARY

A rather clear and express protection of particularly vulnerable consumers has been developed in German law particularly for advertising and other commercial practices (e.g. for medical services, pharmaceutical products or products for children). In the course of the transposition of the Unfair Commercial Practices Directive this aim has been strengthened and expressly inserted in the Unfair Commercial Practices Act (UWG). The scope of the German specific provision on vulnerable consumers (which, however, does not expressly use this notion at all) is significantly broader than the Unfair Commercial Practices Directive requires. Other than the Directive, German law also expressly protects consumers because of their commercial inexperience and consumers who are in fear or under pressure.

Outside the area of Unfair Commercial Practices Law, especially in general consumer and contract law, there is no specific legislation which expressly protects vulnerable consumers. However, many rules of general contract and consumer law in fact protect vulnerable consumers. Examples are provisions protecting good morals or good faith, the regulation of unfair terms in consumer contracts and many provisions for specific sectors (e.g. consumer credit, telecommunication services). In the e-commerce sector there is some legislation protecting against expensive internet or mobile phone services, such as ring tones or news alerts. Recently legislation has been enacted against 'contract traps' (i.e. internet sites where consumers order seemingly free services and are then subsequently billed because they allegedly concluded a contract). Further legislation against this abusive practice and against excessive sanctions for infringements of intellectual property rights (in particular unlawfully downloading music or videos) is in preparation. Although this legislation does not contain express references to particularly vulnerable consumers, it in fact protects characteristic groups of vulnerable consumers such as minors or inexperienced internet users. The regulatory density in favour of particularly vulnerable consumers in other areas such as utilities or transport is lower.

The individual examples of legislation and case law in favour of vulnerable consumers are often reactions to commercial practices of which it is unknown and doubtful whether they are also being applied outside Germany in other EU member states. Therefore it might not be advisable to make use of these examples without further enquiry as to whether they represent pan-European problems.

The German experience might be useful for a more precise and broader EU definition of 'vulnerable consumers', which could, in particular, include commercially inexperienced consumers or consumers in fear or under pressure. Moreover, EU consumer legislation could expressly state that consumer provisions shall be applied in a way that particularly vulnerable consumers receive the specific protection they require. Such an express legislative statement of principle could help to improve the situation of vulnerable consumers because courts and consumer authorities would have to take that into account when interpreting and applying consumer law.

1. SCOPE OF THE PAPER

There are different ways to answer the question to which extent vulnerable consumers are protected under German Law. Consumer law as such has the purpose of protecting weaker market participants. One could even say that every consumer is typically vulnerable. In order to avoid simply giving a short account of German consumer law, the question must be further refined by asking how particularly vulnerable consumers are protected. This

more precise question can again be answered in two ways. Firstly, one could take a legalistic approach and look for legislation and case law where consumers are granted a higher level of protection because they are particularly vulnerable. Secondly, an empirical and sociological perspective is possible by asking whether there are particularly vulnerable consumers and how they are currently being protected under German Law (and if there is need for better protection). This briefing paper provides examples of both approaches.

A further clarification is necessary with regard to the meaning of "German" law. German law, of course, transposes the EU legislation on vulnerable consumers. At the same time, there is German regulation and case law dealing with vulnerable consumers in areas where there is no or hardly any European legislation. In order to give a complete picture, both areas, the German transposition of EU law and the autonomous development, are discussed (but it is indicated where there is a European source).

2. DEFINITION OF "VULNERABLE" CONSUMER IN EU LAW AND GERMAN LAW

For the purposes of clarity, an initial definition of consumer vulnerability (or of the notion "particularly vulnerable consumer") is needed - or at least some examples of which consumers in which situations are meant. In German legal language, however, the precise term vulnerable consumer ("verletzlicher Verbraucher") is hardly used, if ever. The closest technical term in German legal language is "besonders schutzbedürftige Verbraucher" (literally: consumers in specific need of protection). This notion stems from the German language version of the Unfair Commercial Practices Directive 2005/29, Art. 5 (3).

The German transposition of this Article in § 4 Nr. 2 of the Unfair Commercial Practices Act (UWG)¹, however, shows characteristic differences in comparison to the Directive:

Unfair Commercial Practices Directive	German Transposition
Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group ²	A person is in particular regarded to act unfairly where ... it applies commercial practices that are capable of exploiting consumers' mental or physical infirmity, age, commercial inexperience, credulity, fear, or in situations where consumers are under pressure. ³

There are at least three main differences of legal technique and substance:

- The Directive only regulates the test to be applied for assessing unfairness in case of a certain group of particularly vulnerable consumers. German law directly declares practices unfair which are capable of exploiting certain consumers.

¹ Gesetz gegen den unlauteren Wettbewerb.

² Article 5 (3) Dir. 2005/29; see also recital 19 of the Directive.

³ Unlauter handelt insbesondere ... wer geschäftliche Handlungen vornimmt, die geeignet sind, geistige oder körperliche Gebrechen, das Alter, die geschäftliche Unerfahrenheit, die Leichtgläubigkeit, die Angst oder die Zwangslage von Verbrauchern auszunutzen.

- German law does not use the generic term “consumers who are particularly vulnerable” (besonders schutzbedürftige Verbraucher) at all; it directly addresses the criteria for consumers who are being granted specific protection.
- German law precisely transposes the three criteria for consumer vulnerability named by the Directive ([mental or physical] infirmity, age, credulity), but adds some more: commercial inexperience, fear and consumers under pressure.

In particular, the third point differs in substance. The criteria for vulnerability of the Directive (infirmity, age, credulity) are rather stable characteristics of a person or a group of persons. The same is true for commercial inexperience. In contrast, the criteria “fear” and “consumers under pressure” describe a rather momentary situation of individual persons. One can therefore say that under EU law “vulnerable consumers” mainly mean a rather stable group of consumers who are vulnerable because of their specific characteristics such as (mental or physical) infirmity, (young or old) age or credulity. In German law, the protection of vulnerable consumers (although the notion is not being expressly used) is broader and also includes rather momentary and individual (unusually) exceptional situations of individual consumers in fear or under pressure.

Examples of particularly vulnerable consumers are thus consumers in the case of

- (Mental or physical) infirmity
- (Young or old) age
- Credulity
- Commercial inexperience

Moreover, consumers are being regarded as particularly vulnerable, if they are

- In fear, or
- Under pressure.

The *travaux préparatoires* of the German Act Against Unfair Competition explain that the provision shall protect consumers who find themselves in an exceptional situation such as fear or pressure. Moreover, consumer groups in special need of protection, particularly children and adolescents, but also fellow citizens who are linguistically or commercially inexperienced, are protected from exploitation of their inexperience.⁴

3. CURRENT STATE OF PLAY IN LEGISLATION/POLICY MEASURES

3.1. General rules of law dealing with situations of vulnerability

In German Law, there are several institutions which serve as protective instruments of weaker parties. Many of them are not part of consumer law, but of general private law. Nevertheless, their function is the protection of vulnerable consumers (without using these notions, neither consumer nor vulnerable). A very prominent example are the provisions of the German Civil Code on good morals (§§ 138, 826 BGB). These provisions have been widely used by the courts to protect children or spouses (or other close relatives) who had given a guarantee for debts of their parents or spouse, although their income and assets were far from sufficient to perform the guarantee. This case law has been developed, because banks, when granting credit, systematically had required personal guarantees from family members.

⁴ Bundestagsdrucksache, 15/1487, S. 17.

This example is characteristic, since this relatively effective provision is not considered a part of consumer law in a strict sense, since it applies to all close relatives who undertake an excessive guarantee. It can even be doubted, as the ECJ does, whether a close relative who undertakes a guarantee for a commercial debt of, e.g. his father, is a consumer at all. In any case, the specific consumer legislation on credit does not cover such guarantees.

3.2. Consumer law specific legislation

3.2.1. Vulnerable consumers generally

The main provisions regarding vulnerable consumers in German Contract Law can be found in the field of unfair commercial practices. Not only does § 4 No. 2 UWG (German Unfair Competition Act) protect certain vulnerable consumers. The jurisdiction of the Federal High Court regarding the rules on commercial practices has also developed quite an extensive list of criteria, in particular, concerning the protection of minors.

The protection of minors against unfair commercial practice is of fundamental importance due to their enormous purchasing power and their correspondingly big role as a target of advertising. The market segment of minors between the age of 6 and 19 years is becoming more and more significant. Given that this young generation had a purchasing power of 19 billion € in 2010 alone, the focus of advertising agencies on the group is unsurprising. Despite a loss of purchasing power of about 4 billion € compared to 2009, minors remain a decisive economic factor. Furthermore, the influence of minors on the purchasing decision of their parents is increasing steadily.⁵

Regarding the protection of this important group of consumers, it has first to be understood that the general orientation of the Law of Unfair Competition along the average, well informed and reasonably attentive and critical consumer cannot apply to minors. The extent of protection offered has to match the age-specific state of development as has already been stated by article 5 (2) Directive 2005/29/EG (implemented in German Law in § 3 II 2 UWG). However, the German transposition of the Directive is facing various difficulties:

When interpreting the norm in a rigorous, literal way, it would not apply if an advertisement does not only address the vulnerable group but also the general public (i.e. a promoting measure for sweets that does not only - but certainly also and above all - focus on minors). The unfair consequence that in these situations there would be no special and extensive protection of the vulnerable group simply because of the fact that other groups are being addressed simultaneously has to be corrected in accordance to the Directive.⁶ In situations such as these, the view of an average member of the vulnerable group has to be the starting point when judging the fairness of the commercial practice.⁷ When designing and creating advertising, companies therefore have to consider the needs of vulnerable consumers which might be addressed by it. However, this increased burden of care is only justified if the advertisement will affect a clearly identifiable group in a foreseeable manner.

⁵ Data taken from Böhler, *Wettbewerbsrechtliche Schranken für Werbemaßnahmen bei Minderjährigen, Wettbewerb in Recht und Praxis* 2011., 827-833.

⁶ Böhler, *Wettbewerbsrechtliche Schranken für Werbemaßnahmen bei Minderjährigen, Wettbewerb in Recht und Praxis* 2011, 827-833.

⁷ Köhler, in: Köhler/Bornkamm, 29. Aufl. 2011, § 3.

Certainly, the evaluation of commercial practices which directly address minors and therefore a group of consumers in a specific need for protection is only conducted with stricter criteria if it is suited to explode the minors' inexperience in reviewing the promoted product or service concerning fair price and financial consequence.⁸ However, if even the average minor is deemed to have sufficient knowledge of the market and the value of the offer, the advertisement does not exploit his age and inexperience and therefore may not be regarded as unfair. Anything else only applies in so far as the acquisition of the promoted product exceeds the minor's normal financial capabilities.⁹

Protection against unfair commercial practices is also granted to minors by the appendix of the Unfair Competition Act. No. 28 appendix UWG (in conjunction with Art. 3 (3) UWG) which governs the use of promoting measures that include direct appeals to children. Accordingly, advertising addressed to children and containing a direct appeal either to the children to purchase the promoted goods or services themselves (Alt. 1) or to ask their parents or other adults to do so (Alt. 2), is not permitted.

However, the legal definition of a child and therefore the scope of the norm are highly controversial due to the fact that the Directive 2005/29/EG concerning unfair business-to-consumer commercial practices does not provide any definition of the term "child". Furthermore, the legal definition of "child" in the national provision Art. 1 (1) No. 1 Youth Protection Act (which considers persons under the age of 14 as "children"), is not applicable to the terminology of "child" taken from the directive. Neither the opinion sometimes expressed, that all minors should be regarded as children for the purposes of No. 28 appendix UWG, nor its reasoning, that European Law does not use the differentiation between "child" and "youth" such as German Law, are convincing though. Instead, it seems to be more appropriate to exclude youths with a wider range of business experience (aged between 14 and 17 years) from the scope of the norm. However, final clarity must be ensured by the European Court of Justice (ECJ). The same applies to the norm-feature of the "direct appeal".

According to No. 28 Alt. 2 appendix UWG, advertising directly appealing to children to purchase the promoted product or the use of the promoted service by their parents or other adults, is not permitted either. In this context, the primary group of protected persons is not the children themselves, but their manipulated parents.

However, the equal treatment of adults on the one hand and parents on the other hand seems to be problematic and – at national level – is indeed controversial: Do underage parents belong to the protected group as well?¹⁰

The Federal High Court has also offered guidance on the classification of vulnerable consumers in the decision „Verkaufsveranstaltung in Aussiedlerwohnheimen“ (Selling Event in Immigrants Asylum)¹¹.

⁸ Decision of the Federal Court of Justice (BGH), 6.4.2006, "Werbung für Handyklingeltöne in Jugendzeitschrift", case number I ZR 125/03, *Gewerblicher Rechtsschutz und Urheberrecht* 2006, 776 ff.; as well as BGH, *Gewerblicher Rechtsschutz und Urheberrecht* 1994, 304, 305 and BGH, *Gewerblicher Rechtsschutz und Urheberrecht* 2006, 161-163 (162) - „Zeitschrift mit Sonnenbrille“.

⁹ BGH judgment, 17.07.2008, „Sammelaktion für Schokoriegel“, *Gewerblicher Rechtsschutz und Urheberrecht* 2009, 71-73 (72).

¹⁰ In the affirmative: Köhler, *Wettbewerb in Recht und Praxis* 2008, 700 (704); contra: Scherer, *Wettbewerb in Recht und Praxis* 2008, 430 (433).

¹¹ BGH, *Gewerblicher Rechtsschutz und Urheberrecht* 1998, 1041 f.

A specific need of protection is to be guaranteed when consumers are unable to inform themselves about the product or the services in the usual manner (i.e. because of their inability to read or write, language barriers or physical infirmities like blindness, impaired sight or deafness) or if they are unable to understand and reflect upon the promoted product or service because of below average intellectual capabilities. A mere negligence or inattention of the consumer does not mean that special protection is to be offered towards him.¹²

With regard to the protection of foreign nationals it has to be considered that not only language barriers but also the lack of experience and knowledge about the local legal and economic system makes them susceptible to all kinds of dubious offers and products. The extraordinary need of protection of the illiterate, infirm seniors and persons held under arrest for a long time is based on similar restrictions of knowledge and judgment.¹³

A particular vulnerability of a consumer might also be the result of a relationship of confidence between the consumer and the businessman.¹⁴ Such a relationship which i.e. arises out of former business contacts regularly leads to an elevated receptiveness for advertising measures and thus to an increased need of protection.

Regarding the particular vulnerability caused by a situation of fear or pressure described above (Chapter 2, Definition), § 4 No. 2 UWG (German Unfair Competition Act) includes every circumstance of anxiety because of accidents, diseases, lack of means or similar phases of extraordinary pressure.¹⁵ The improper influence over consumers in such a situation has to be understood as an unfair commercial practice.¹⁶

3.2.2. Specific situations

a. E-commerce

Under the legislation dealing with e-commerce (the transposition of the E-Commerce-Directive has been effected by new regulations in the BGB and the Telemediengesetz (Telemedia Act)), there seems to be no particular consideration given to vulnerable consumers.

However, a special need of protection of some consumers in the area of the e-commerce should be established, due to the digital divide. Even nowadays, many non-users of internet-technology lack digital know-how and experience as for the quality and seriousness of websites and thus become much more susceptible to dubious web offers.¹⁷

The German Ministry of Justice has recently announced a legislative package to strengthen consumer rights in e-commerce which particularly aims at the protection of vulnerable consumers. The impetus for this initiative is, in particular, the perceived growth of abusive business practices on the Internet. The campaign against illegal downloads had given rise to the disturbing practice of sending large quantities of warning letters to the users of file sharing services and charging high fines for this. The music and film industry intends to counteract abuse by tracking the IP addresses of these users (which seem to be minors in

¹² BGH, *supra*; Heermann in: *Münchener Kommentar zum Lauterkeitsrecht*, § 4 Nr. 2 Rn 6.

¹³ Heermann, *supra*; Stuckel in Harte-Bavendamm/Henning-Bodewig, UWG, § 4 Rn 38.

¹⁴ Plaß in Handkommentar - Wettbewerbsrecht, § 4 Rn 217.

¹⁵ See in general: Knubben, Werbung unter Ausnutzung von Angst, 2007.

¹⁶ Stuckel in Harte-Bavendamm/Henning-Bodewig, UWG, § 4 Rn 42

¹⁷ Micklitz/Oehler/Piorokowsky/Reisch/Strünck,

http://www.vzbv.de/cps/rde/xbcr/vzbv/Strategie_verbraucherpolitik_Wiss_BeiratBMELV_2010.pdf.

many cases) during the downloading process which can be used to determine the direction of the net surfer (by the legal trick of making a complaint against the unknown user at the public prosecutor's office and thus being provided with information on his identity). However, this practice has to face up to a serious problem: it is doubtful whether the data transmission programs work error-free and therefore whether they provide a reliable basis for the persecution of copyright infringers.¹⁸ The distribution of dynamic IP addresses, which change every time the subscriber of the connection logs onto the internet and at latest after 24 hours, may constitute a particular threat to the protection of vulnerable consumers, because it could result in completely innocent consumers being warned. Therefore, the extent to which the information gained by these means is reliable is still the subject of controversial discussion. Moreover, the claims made and the fines charged in the case of the (actual or alleged) theft of intellectual property might be excessive. The German Ministry of Justice has just announced the preparation of legislation in this field with a view also to protect the interests of internet users who are subject to such warning letters. The proposed legislation would aim to stop systematic warnings being sent for alleged copyright violations by advocates, for which internet users (often minors or their parents) are being charged with excessive fees.

b. Telecommunications and Utilities

With regard to telecommunication, especially the protection of children and underage persons has been the subject of extensive case-law.

On the one hand, advertising especially for value-added telephone services has been a problematic sector for a long time, regarding the protection of underage persons. In this context the Federal High Court has stated in the very important decision of "Werbung für Handyklingeltöne in Jugendzeitschrift" (Advertising of ringtones in teen magazine) that the fairness of advertising is to be judged according to its transparency. Therefore, the fact of not reasonably being able to foresee and to control the costs when using a value-added telephone service is highly questionable. In this sector (i.e. downloading a mobile ring tone), it is common to charge per minute, without giving information about or even putting a limit on the final costs. This is a problematic practice because not completing the download if it takes too long is not an option either: in that case the consumer would have to pay the costs incurred without receiving any service in return whatsoever. Moreover, the customer cannot foresee the actual financial burden until receiving an invoice at least one month later. However, minors in particular are not usually capable of calculating such costs and still have to learn in managing their money.

Advertising in this area is even more dubious because it is available regardless of time and location. Thus it does not leave any room for informed decisions but encourages spontaneous reactions among impulsive minors. The protection of underage persons in the sector of telecommunications therefore is based on the prohibition of advertising measures to quite a large extent.

On the other hand, the protection of minors is ensured by the general rules and principles of the German Civil Code (BGB) regarding the effectiveness of a contract concluded with underage persons (§§ 106 ff.).

¹⁸ Compare in relation to this problem the Judgment of the OLG Köln (Beschluss vom 10.02.2011; AZ 6 W 5/11).

In most occasions, contracts in the sector of telecommunications are entered into by way of a distance contract. However, according to § 110 BGB (the so-called "Taschengeldparagraph" [pocket-money rule]) underage persons are only bound to a contract if they already have made their corresponding performance (that is to say paid). This condition often will not be fulfilled because of the minors' lack of their own electronic means of payment.¹⁹

Even if minors pay for a tele-service using prepaid mobile phones charged by their parents (which might be the case when downloading mobile ring tones), the German Law does not recognise a valuable contract between the minor and the telephone services company. The requirements of § 110 BGB are not met because the parents have not given the money to their child just and only for the purpose of downloading ring tones (as it is required by the norm). The courts have also been particularly careful in confirming the existence of a contract between the company and the minor's parents. Such a contractual relationship cannot be construed as an effective contract because the provider of the telecommunication services may not reasonably assume that the originator of the request and therefore the contracting party automatically has to be the subscriber of the connection and thus must be an adult. Such an assumption would be against general life-experience: Prepaid mobile phones are often handed out to minors. Above all, providers of value-added telephone services actually identify minors as their principal target group and therefore even deliberately display advertisements in youth magazines.²⁰

Therefore, the sole case for which a payment obligation will arise from a telecommunication contract involving minors is the receipt of call collects incoming on the telephone of their parents from abroad. A contractual duty though cannot be imposed on the minor himself, simply because he cannot conclude a valid contract without having provided the counterpart. However, according to § 45i Telekommunikationsgesetz (TKG, literally: Telecommunication Act) the parents are liable for being subscribers of the telephone connection.²¹

In the field of telecommunications, special protection to vulnerable consumers is also offered by the Telekommunikationsgesetz itself. In the course of privatising the former public monopoly, it had been necessary to place the main businesses of this sector under certain market-regulating obligations in favour of disabled persons. § 45 (2) Telecommunication Act thus imposes the duty to consider the interests of disabled (in particular deaf and hearing impaired) end-users and to provide the brokering services at an affordable prize according to their special technical needs. The companies that do not procure the required brokering services have to bear the additional costs of this measure which are not already covered by the fees paid by the end-users.

A provision for the protection of minors as a vulnerable group of user also has been included in the code of conduct "Freiwillige Selbstkontrolle Telefonmehrwertdienste" (literally: voluntary self-control value-added telephone services). According to the code, services that have minors as the target group are only allowed up to a maximum prize of 3 € per call (in November 2005 raised to 5 € per call).

¹⁹ Grunewald, Verbraucherschutz im Zivilrecht, S. 64.

²⁰ AG Düsseldorf vom 02.08.2006 (case number 52 C 17756/05, *IT-Rechtsberater* 2007, 36-37) mit Anmerkung Rössel *IT-Rechtsberater* 2007, 37.

²¹ Compare Grunewald, *supra*; BGH, *Neue Juristische Wochenschrift* 2006, 1971 mit Besprechung Zagouras, *Neue Juristische Wochenschrift* 2006, 2368.

Moreover, the providers shall not make any appeals to repetition calls. Breaches of the codex by members of the Freiwillige Selbstkontrolle Telefonmehrwertdienste can be sanctioned through requests for remedying the unfair practice, complaints and penalties.

c. Transport

In the field of transport, no express specific provisions regarding the protection of vulnerable consumers have yet been made. As far as vulnerable consumers are concerned, the service providers must protect the interests of passengers who are disabled. For instance, according to § 8 (2) Behindertengleichstellungsgesetz (German Equal Treatment of Disabled Persons Act) traffic installations used by the public and transport vehicles should be designed in a barrier-free way in order to permit the use of this infrastructure by disabled persons. In this context § 4 Behindertengleichstellungsgesetz adds that an installation is barrier-free if it is suitable for access and use by disabled persons without the help of others.

As regards rail transport, there might be other specific issues of consumer vulnerability. One example could be the occasionally reported practice of train conductors who expel any passenger – regardless of minority or physical infirmity – from the train who cannot show a valid ticket.²² Irrespective of the temperature outside or darkness, underage persons have been removed from the train at the next railway station (even in cases when this station has been closed). This practice does not only affect those who intentionally fare dodge but also incriminates the mere (and often typical) unthoughtfulness of minors, such as forgetting to bring their student identity card or having purchased the wrong ticket. Taking such drastic measures against underage persons is even more problematic taking into account that these passengers normally do not have enough money readily available with which to buy a replacement ticket and thus cannot avoid being expelled from the train. Police investigations against the conductors and employment actions taken against them after the incident might not be sufficient to guarantee an appropriate level of protection.

d. Others

Because of failures of the Federal Republic of Germany to implement the Directive 2003/54/EG of 26 June 2003 (concerning common rules for the internal market in electricity and repealing Directive 96/92/EC) and the Directive 2003/55/EG of 26 June 2003 (concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC), the Federation of the Energy Consumers (Bund der Energieverbraucher) has filed a complaint to the European Commission. The Federation argues that the German state has not adopted the measures laid down in the Directives to establish a higher level of protection in favour of vulnerable consumers: “Statutory regulations for the protection of consumers in specific need of protection do not exist in German Energy Law. The German legislation provides neither a definition of this group nor does it grant an easy and assured access to the energy supply, as article 3 (3) of the Electricity Directive and the Natural Gas Directive require. In contrast to many other EU member states, the interests of such consumers that particularly often will be dependent on the energy supply and can defend themselves against measures of the energy concerns only with difficulty, have not been taken into account within the new version of German Energy Law.”

²² See: http://www.focus.de/panorama/welt/schaffnerin-erneut-kind-aus-zug-geworfen_aid_347614.html;
http://www.focus.de/panorama/welt/deutsche-bahn-erneut-13-jaehrige-aus-zug-geworfen_aid_347014.html;
<http://www.spiegel.de/panorama/0,1518,674844,00.html>.

4. STEPS WHICH COULD BE TAKEN AT EU LEVEL TO PREVENT CONSUMER VULNERABILITY SITUATIONS

In general, it might turn out to be rather difficult to come up with a common set of legal rules to tackle consumer vulnerability at the EU level. Issues of vulnerability may have very different reasons, may arise in very different situations and may require measures of different kinds in different places. The individual examples of legislation and case law in favour of vulnerable consumers reported here are often simply reactions to specific commercial practices. It is unknown and doubtful whether they are also being used outside Germany in other EU member states. Therefore, it might not be advisable to make use of these examples without further enquiry as to whether they represent pan-European problems and whether a remedy applied in the German legal system would also operate in a different jurisdiction.

Since 'vulnerability' is a notion which is difficult to define some clarification might be useful. The German experience could be exploited for the development of a more precise and broader EU definition of 'vulnerable consumers' than the current one in the Unfair Commercial Practices Directive. Such a broader definition could in particular include commercially inexperienced consumers or consumers in fear or under pressure.

Moreover, EU consumer legislation could try to ensure that vulnerability considerations are taken into account in the transposition and application of EU consumer law. A way forward could be to expressly state in all relevant pieces of EU legislation that consumer provisions shall be applied in a way that particularly vulnerable consumers receive the specific protection they need. Such an express legislative statement of principle could help to improve the situation of vulnerable consumers because courts and consumer authorities would have to take it into account when interpreting and applying consumer law.

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Consumer Vulnerability in Spanish Law

Abstract

This briefing paper gives an overview of the regulations concerning the protection of vulnerable consumers in the Spanish legal system. It distinguishes between the general concept of consumer and the special protection that the Law grants to vulnerable consumers in different specific sectors.

CONTENTS

LIST OF ABBREVIATIONS	57
EXECUTIVE SUMMARY	58
GENERAL INFORMATION	58
1. DEFINITIONS ON CONSUMER VULNERABILITY	59
1.1. Definition of Consumer	59
2. DEFINITION OF VULNERABILITY	60
2.1. Definition of Vulnerable Consumers	61
3. SITUATIONS OF CONSUMER VULNERABILITY	62
3.1. E-commerce	62
3.2. Telecommunications and utilities contracts (gas, electricity)	62
3.3. Transport	63
3.4. Publicity	64
3.5. Unfair competition	64
3.6. Videogames	65
REFERENCES	66
ANNEX	67

LIST OF ABBREVIATIONS

CA Autonomous Community / *Comunidad Autónoma*

CE Spanish Constitution 1976 / *Constitución Española de 1976*

LCD Unfair Competition Act / *Ley 3/1991, de 10 de enero, de Competencia Desleal* (revised by *Ley 29/2009, de 21 de diciembre*)

LGP Publicity Act / *Ley 34/1988, de 11 de noviembre, General de Publicidad*

LSSI Services of Information Companies and Electronic Commerce Act / *Ley 34/2002, de 11 de julio, de Servicios de la Sociedad de la Información y de comercio electrónico*

RD Royal decree / *Real Decreto*

RDLeg Legislative royal decree / *Real Decreto Legislativo*

RLCDP Unfair Competition and Publicity Act / *Ley 29/2009, de 30 de diciembre, Régimen Legal de la Competencia Desleal y de la Publicidad para la Mejora de la Protección de los Consumidores y Usuarios*

TR- Consumer Protection Act 2007 / *Texto Refundido de la Ley General para la*

LGDCU *Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por RDLeg 1/2007, de 16 de noviembre*

TS Spanish Supreme Court / *Tribunal Supremo*

EXECUTIVE SUMMARY

The Spanish Consumer Protection Act (2007) has a general concept of consumer and user. The protection of consumers in a weaker position than the average (vulnerable consumers) in the Spanish law system is mostly regulated at national level through the implementation of EU law and at regional level through the legislation of the Autonomous Communities, like Valencia or Catalonia. According to the regional statutes, special treatment is to be granted by public authorities to groups in situations of inferiority, helplessness or lack of protection, such as children, disabled, elderly, pregnant women, large families, economically and socially disadvantaged consumers, immigrants and unemployed, among others.

Situations of consumer vulnerability have given rise to a patchwork of statutes, as well as practical measures, in different policy areas like e-commerce, publicity and trade with videogames (protection of young people, but also the accessibility of disabled persons, e.g. the blind), utilities contracts (protection of groups with low-income and implementation of social bonds), transport (special care of persons with reduced mobility and unaccompanied minors in aerial transport, but not in terrestrial transport).

Two recommendations result from the paper. Firstly, consideration should be given to the Spanish legislation at a regional level as an example of how issues on consumer vulnerability, such as situations of vulnerability and special protection groups should be defined. Secondly, it is advised that there should be proper control of the effectiveness of those measures and actions taken (e.g. the issue on social bonds in utilities contracts).

GENERAL INFORMATION

The protection of vulnerable consumers in Spain is regulated both by national State law (*legislación estatal*) and by the legislation of the regions or *comunidades autónomas* (CAs).

Consumer protection is not a matter expressly included in the distribution of legislative competence between the State and the CAs (arts. 148 and 149 CE). Under art. 149(3) CE ("matters not expressly assigned to the State by this Constitution may fall under the jurisdiction of the Self-governing Communities by virtue of their Statutes of Autonomy"), the CAs have the competence at legislative as well as executive and judicial level.¹ As a result, of all the 17 CAs, only La Rioja still does not have its own legislation on consumer protection.

This is important when studying the particular protection of vulnerable consumers as we will see that the protection afforded to this type of consumer is, at the State level, limited to only some sector-specific legislation and specific areas of the law, whereas in the legislation at regional level on consumers protection, there are indeed the so-called "special protection groups" (*colectivos de protección especial*) to whom particular protection is given.

¹ E.g. for Aragon Art 71.26 *Ley Orgánica 5/2007, de 20 de abril, de reforma del Estatuto de Autonomía de Aragón* (Organic Act 5/2007 of 20.04.2007, on the reform of the Autonomy Statute of Aragon), which grants exclusive competence to this CA on consumption issues, which in any case involves the regulation of protection of consumers and users, promotion of associations; training and education on responsible consumption, as well as the regulation of mediation bodies and procedure.

Although the definition of the consumer according to Spanish legal writers does not admit differentiations,² the idea of special protection to vulnerable consumers has been slowly introduced into Spanish Law during the last ten years. This can be seen in 9 out of 16 regional Acts on consumer protection, as well as in the sector-specific legislation as modified through the transposition of respective EU Directives, which will be discussed in this paper.

1. DEFINITIONS ON CONSUMER VULNERABILITY

1.1. Definition of Consumer

A general concept of “consumer and user” is provided by art. 3 of the Consumer Protection Act 2007 (TR-LGDCU): “Art. 3 The general concept of consumer and user. For purposes of this rule and without prejudice to the dispositions in books 3 and 4 [arts. 128-149 on product liability and arts. 150-156 on package travel, respectively], consumers or users are natural or legal persons acting for purposes outside their business or professional activities”. This so-called general concept of consumer and user (“*concepto general de consumidor y de usuario*”) derives from the definitions contained in the Directives the implementation of which has been consolidated in TR-LGDCU and in other Directives.³

The exceptions from the general concept of consumer are fully justified due to the references to “*perjudicado/injured*” rather than to “consumer” in the Product Liability Directive 85/374 (cf. art. 128 ff TR-LGDCU) and in art. 2.4 of Directive 90/314 on Package Travel (cf. art. 151.g TR-LGDCU).⁴

Art. 3 TR-LGDCU does not limit the notion of the consumer with other adjectives or parameters where the person already fulfills the general criteria in the statute. Because of this, “consumer” as to TR-LGDCU is not the average consumer (“normally well-informed, reasonably observant and circumspect, taking into account social, cultural and linguistic factors”) in the notion coined by the ECJ for certain areas (mainly on misleading labeling and advertising, see Judgement ECJ 16.7.1998 on Gut Springenheide, among others) and adopted by European Union law in art. 5.2.b Directive 2005/29/EC and by Spanish legislation and case law in the areas of trademarks, illegal advertising and health care.⁵

Nor does the notion of vulnerable consumer (as stated in art. 5.3 Directive 2005/29 and implemented in art. 4.3 LCD by Ley 29/2009, but not in TR-LGDCU, cf. arts. 19, 20 and 43c TR-LGDCU) fit in TR-LGDCU, at least not for the time being and in the general concept.⁶ Otherwise the Catalanian Consumer code (*Código de consumo de Cataluña, Ley 22/2010*) provides autonomous definitions of “average consumer person” (“*persona consumidora media*”) and “specially protected groups” (“*colectivos especialmente protegidos*”).⁷

In conclusion, the “general concept of consumer” under art. 3 TR-LGDCU does not vary depending upon the high or low competence of the consumer (expert, average or vulnerable consumer / “*consumidor experto, medio o vulnerable*”).⁸

² If the consumer is expert, average or vulnerable, cf. Cámara Lapuente [-*Cámara Lapuente*], Comentarios, p. 142, note 5.3.

³ Details on the directives available in Cámara Lapuente [-*Cámara Lapuente*], Comentarios, p. 103-105, note 1.

⁴ So Cámara Lapuente [-*Cámara Lapuente*], Comentarios, p. 103, note 1.

⁵ See details in Cámara Lapuente [-*Cámara Lapuente*], Comentarios, p. 142, note 5.3.

⁶ So Cámara Lapuente [-*Cámara Lapuente*], Comentarios, p. 142, note 5.3.

⁷ So Cámara Lapuente [-*Cámara Lapuente*], Comentarios, p. 142, note 5.3.

⁸ So Cámara Lapuente [-*Cámara Lapuente*], Comentarios, p. 142, note 5.3. Commentators have already presented suggestions in the case of an eventual legislative reform of the TR-LGDCU, but both the aspect of the competences of the consumer, as well as the appreciation of the consumer *in concreto* as expert, average or

In general, the concept of consumer in the autonomous legislation does not differ from the concept in art. 3 TR-LGDCU, as for example in art. 2 of the law in Valencia⁹: "*Ley 1/2011, Art. 2.1. For the purposes of this law, consumers and users are natural or legal persons acting outside their business or professional activities*". However, 9 of the 16 regional Acts on consumer protection do make reference to vulnerable consumers in different ways.

2. DEFINITION OF VULNERABILITY

Apart from the regional legislation, there is no definition of vulnerability in the TR-LGDCU law. Nevertheless, in the context of the Constitution under art. 51.1¹⁰ on the means of effective measures to protect consumers and users, it is possible to say that, as in art. 2.1.f of the former act (LGDCU-1984), the TR-LGDCU (2007) classifies under art. 8.f as one of the fundamental rights of consumers and users "the protection of their rights through effective measures, especially in situations of inferiority, subordination and helplessness".¹¹

The new TR-LGDCU repealed chapter 7 of the former act LGDCU, whose purpose was to describe "the appropriate measures to supplement or to balance the situations of inferiority, subordination and helplessness", which was done in considerable detail under art. 23 LGDCU.

The elimination of the detailed measures does not in reality imply a legislative abolition of the legal significance of these hypotheses of situations of inferiority, subordination and helplessness, as this is still mentioned *ad exemplum* in art. 8.f; they can give rise to situations of unfair contract terms ("*cláusulas abusivas*"), as in arts. 82-91 TR-LGDCU.¹²

Art. 86 TR-LGDCU deals with unfair contract terms which infringe the fundamental rights of consumers and users ("*cláusulas abusivas por limitar los derechos básicos del consumidor y usuario*"). Unfair contract terms are subject to nullity, as stated in art. 83 TR-LGDCU. Unfair contract terms provide an example of protection of consumers in general. As a result, it does not contribute to a definition of vulnerability or, in other words, it does not contribute to an understanding of which groups are given special protection because of their vulnerability.

In relation to art. 86, commentators write that "the greatest potentiality of this disposition - with the necessary contextualisation to avoid exorbitant judicial decisions - is the reference to the unfair nature of contract terms which limit or deprive the consumer of the rights recognised by law (*normas dispositivas/legal dispositions*).¹³ The inclusion of unfair contract terms in art. 86ff. is a *numerus apertus*, which is not considered problematic.¹⁴

vulnerable, were not considered as relevant criteria for a reform, see on this Cámara Lapuente [-Cámara Lapuente], Comentarios, p. 148, note 7.

⁹ Ley 1/2011 of 22 March 2011. Estatuto de los Consumidores y Usuarios de la Comunitat Valenciana.

¹⁰ CE, Artículo 51. 1. The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests.

¹¹ So Cámara Lapuente [-García Cantero], Comentarios, p. 211, note 5.6.

¹² Compare Cámara Lapuente [-García Cantero], Comentarios, p. 211-212, note 5.6.

¹³ So Cámara Lapuente [-Cámara Lapuente], Comentarios, p. 831, note 2.1.

¹⁴ So Cámara Lapuente [-Cámara Lapuente], Comentarios, p. 831, note 2.3.

2.1. Definition of Vulnerable Consumers

As noted already, various regional statutes contain a similar concept of vulnerable consumer, which is usually understood as “groups of special protection or subject to privileged protection” (*colectivos de especial protección o supuestos de protección prioritaria*).¹⁵ Thus, for example, art. 6 of the Consumer Act in Valencia (Ley 1/2011), provides:

“Art. 6. On special protection groups

1. Groups in need of special protection by the handling of the public administration in the Comunitat Valenciana are those groups of consumers at the end of art. 2, who are in situation of inferiority, subordination, helplessness or lack of protection more acute because of their age, origin or condition and in particular

a) children and adolescents

b) persons with disabilities

c) the elderly

d) immigrants

e) persons who are temporarily displaced from their usual [place of] residence.

2. The present catalogue of consumer groups in need of special protection may be extended by regulation.”

All the regional statutes contain several common denominators:

- they grant protection and special, privileged, or preferential treatment to these consumers groups by public authorities;
- they cover situations of inferiority, helplessness or lack of protection due to a particular reason;
- most add a list of groups in such situation: children, adolescents, disabled, sick, elderly, pregnant women, economically and socially disadvantaged consumers, immigrants, unemployed, persons who for whatever reason are temporarily displaced from their habitual residence, single women with family responsibilities and low income and women affected by processes of marginalisation, are listed.
- when there is a list of groups with specific groups, there is also a reference to the fact that is not a closed list and that it may be extended by secondary legislation.

¹⁵ These definitions are to be found in the following dispositions in the regional legislation:

a) Aragon, Art. 5 *Ley 16/2006, de 28 de diciembre, de protección y defensa de los consumidores y usuarios de Aragón*;

b) Asturias, Art. 5 *Ley 11/2002, de 2 de diciembre, de los consumidores y usuarios, del Principado de Asturias*;

c) Basque Country, Art. 5 *Ley 6/2003, de 22 de diciembre, de Estatuto de las personas consumidoras y usuarias de País Vasco*;

d) Canary Islands, Art. 4 *Ley 3/2003, de 12 de febrero, del Estatuto de los consumidores y usuarios de la Comunidad Autónoma de Canarias*;

e) Cantabria, Art. 4 *Ley 1/2006, de 7 de marzo, de defensa de los consumidores y usuarios*;

f) Catalonia, Art. 112-2c *Ley 22/2010, de 20 de julio, del Código de consumo de Cataluña*;

g) Castile-La Mancha, Art. 3 *Ley 11/2005, de 15 de diciembre, del Estatuto del consumidor de Castilla-La Mancha*;

h) Navarre, Art. 3 *Ley 7/2006, de 20 de junio, de defensa de los consumidores y usuarios de Navarra*;

i) Valencia, Art. 7 *Ley 1/2011, de 22 de marzo, del Estatuto de los Consumidores y Usuarios de la Comunitat Valenciana*.

3. SITUATIONS OF CONSUMER VULNERABILITY

3.1. E-commerce

Directive 2000/31/EC was implemented by the LSSI in 2002. The LSSI comprises several provisions which refer to special protection granted to two specific groups: children and youth, as well as persons with a physical or mental disability. Art. 8 is relevant because it mentions the protection of youth and childhood as principles that can be adduced to restrict any kind of service of the information society.

This also applies to art. 12bis 3, since the implementation by Ley 56/2007¹⁶ requires services providers to report on tools for filtering and for restricting access to content that may be harmful to young people.

It is important to note that Art. 18 LSSI on codes of conduct makes reference to groups of vulnerable consumers. Art. 18.2 guarantees the participation not only of associations of users, but also of organisations representing persons with a disability. Both CERMI (*Comité Español de Representantes de Personas con Discapacidad*) and ONCE (*Organización Nacional de Ciegos de España*) signed an agreement with the Spanish Ministry of Science and Technology to promote access to the information society for persons with disabilities.¹⁷

Art. 18.2 also provides that when the subject matter may affect minors, protection of minors will be taken into consideration, so that specific codes on the subject can be elaborated. As a consequence, the so-called Code of Ethics in E-Commerce and Interactive Advertising (*Código Ético de comercio electrónico y publicidad interactiva*)¹⁸ dedicates one full chapter exclusively to the protection of minors in the area of advertising and in the area of data processing. This chapter comprises different standards to be met by those attached to the Spanish Association of Electronic Commerce (*AECE - Asociación Española de Comercio Electrónico*).

3.2. Telecommunications and utilities contracts (gas, electricity)

In relation to the utilities contracts, there are two examples of the protection of vulnerable consumers in the Spanish legal system.

Firstly, the bill to amend Act 34/1998 of 7 October on hydrocarbons sector. This bill published on 30 June 2011 by the Government empowers the Ministry of Industry, Tourism and Trade to establish specific conditions of supply to those consumers who are considered vulnerable, due to their economic and social characteristics. In this way, this statute would be in line with Directive 2009/73/CE on common rules for the internal market in natural gas. With the change of government in Spain after the elections held on 20 November 2011, it cannot be said with any degree of certainty that this draft will be approved or otherwise revised by the new government.

More important in this field are the measures taken by the government in the electricity sector, introducing the so-called "social bond" through the Royal Decree-Law 6/2009 of 30 April, which adopts certain measures in the energy sector and approves the social bond. This bond supposes a freeze in the electricity rates for various groups.

¹⁶ Ley 56/2007, de 28 de diciembre, de Medidas de Impulso de la Sociedad de la Información.

¹⁷ Cremades [-Ruiz Núñez], *Ley de Internet*, p. 304.

¹⁸ *Código ético de protección de datos en Internet, inscrito en el Registro General de Protección de Datos de la Agencia Española de Protección de Datos, con el n° CT/0004/2002.*

Four groups can benefit from the social bond: a) household residential consumers who use less the 3 KW; b) pensioners receiving minimum benefits; c) large families and d) the households in which all of its members are unemployed.

According to the Government, this is a measure of a social character designed to benefit the most vulnerable groups.¹⁹ This measure has been taken at a time of economic crisis following a change in the price of electricity (also approved by this regulation), bringing a new threat of higher prices for all consumers, including the most vulnerable groups.

The Government, while not having a legislative act to frame this measure, echoes the claims that some groups had done due to previous increases of the electricity prices.²⁰

The effectiveness of the social bond has been discussed in the Spanish society, as it can be followed by the media reports.²¹ A first point discussed was the criteria of selection that did not include the consumer's income, which could have led to situations of injustice. A second point was that the benefit requirements were sometimes excessive. In fact, the government had to change the requirement of household where all members were supposed to be unemployed.²² And finally the freezing of prices posed on average an economy of 70 Eurocents per month.

In 2011, the Government submitted a bill to amend the Electric Sector Act (*Ley del Sector Eléctrico*). This proposed amendment is for the purposes of transposing Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity. This draft introduces a concept of vulnerable consumer, a concept which was taken from the Directive to be transposed, but that existed already in the Spanish legislation on social bonds.²³

It is to be noted that, similar to the bill amending the Hydrocarbons Act, the future of the bill to amend the Electricity Sector Act is very uncertain due to the recent change of government.

3.3. Transport

Among the statutes governing the aerial transport of passengers in Spain, Regulation (EC) No 261/2004 on compensation and assistance to passengers²⁴ plays an important role. This regulation demands that the transporter give special attention, as well as priority, to persons with reduced mobility and unaccompanied minors, see on this art. 9 and art. 11 Regulation no. 261/2004.

¹⁹ So the Ministry of Industry and Tourism <http://www.minetur.gob.es/energia/Tur/Bonosocial/Paginas/BonoSocial.aspx>

²⁰ The FEFN (Spanish federation of large families, *Federación Española de Familias Numerosas*) tried unsuccessfully to get the TS to declare invalid the Act of the Ministry of Industry, Tourism and Commerce ITC/3860/2007, of 28 December concerning the revision of the electric rates from 1 January 2008, by defending that there was an implicit discrimination of the large families in the increase of the rates. The TS rejected the suit in sentence TS 423/2011 of 14 February 2011, available under <http://www.poderjudicial.es/search/index.jsp#>. To find the sentence please insert in the spaces called N° ROJ the reference numbers 423 and 2011.

²¹ See some examples http://www.cinco dias.com/articulo/empresas/sera-realmente-social-bono-electrico/20090505cdscdiemp_9/; http://www.soitu.es/soitu/2009/07/14/actualidad/1247575662_367831.html; http://www.finanzas.com/noticias/economia/2009-04-30/162231_facua-denuncia-falta-transparencia-bono.html.

²² *Resolución de 26 de junio de 2009, de la Secretaría de Estado de Energía, por la que se determina el procedimiento de puesta en marcha del bono social*, <http://www.boe.es/boe/dias/2009/06/29/pdfs/BOE-A-2009-10672.pdf>.

²³ So the Government of Spain <http://www.lamoncloa.gob.es/ConsejodeMinistros/Enlaces/08072011-enlaceelectricidad.htm>

²⁴ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2] is to be incorporated into the Agreement.

Regarding the law on terrestrial transport, however, there is no special reference to groups of vulnerable consumers in the legislation in force (the Terrestrial Transport Act 16/1987)²⁵ which covers both road and rail transport.

3.4. Publicity

Special protection is granted to the underage consumers in the Spanish Publicity legislation under Art. 3 b) LGP. According to this article, it is illegal advertise information addressed to minors which shall incite them to buy a good or service, exploiting their inexperience or credulity, or in which they appear to persuade their parents or careers to buy it.

The presentation of children in dangerous situations is not allowed, unless justified reason is given. Nor are advertisers allowed to misrepresent the characteristics of products, their security or capacity and ability of children to use them without causing damage to themselves or to others.

This provision has been recently included via RLCDP in order to transpose the Directive 2005/29/EC of 11 May concerning unfair business-to-consumer commercial practices in the internal market as well as Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising.

Also the TS (Spanish Supreme Court) has used the terms of average and vulnerable consumers in a recent case of deceptive advertising. In a judgement on false advertising, the TS refers to Directive 2005/29/EC and reminded the lower courts that the European Court of Justice has paid attention to the effects of the defective advertising through the differentiation between different types of consumer, such as between the average consumer and the vulnerable consumer. This differentiation has to be taken into account also for the interpretation in the case of deceptive advertising which is defined in Article 282 of the Spanish Penal Code. In this case, the victims were classified as average consumers by the TS.²⁶

3.5. Unfair competition

Special protection to groups of vulnerable consumers was introduced in Spanish competition law through RLCDP in 2009.²⁷ Art. 4.3 LCD corresponds to art. 5.3. Directive 2005/29/EC and reads as follows: Art. 4.3. LCD "Commercial practices, which are addressed to consumers or users in general, and are likely to distort in a significant way the economic behaviour of a clearly identifiable group of consumers or users who are particularly vulnerable to the practice or the underlying product or service, because of their disability, because of their affected mental ability or because of their age or credulity, in a way which the trader could reasonably be expected to foresee, will be evaluated from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally."

The legislation requires the existence of three circumstances, so that the fairness or unfairness of a commercial practice can be evaluated not from the perspective of an average consumer (on this art. 4.2 LCD), but from the perspective of an affected vulnerable consumer (art. 4.3 LCD). The first is a practice addressed to the general public

²⁵ Ley 16/1987, de 30 de julio, de Ordenación de los Transportes Terrestres.

²⁶ Judgement TS 7786/2009, of 17 November 2009, available under <http://www.poderjudicial.es/search/index.jsp#> . To find the sentence please insert in the spaces called N° ROJ the reference numbers 7786 and 2009.

and not this particular group of vulnerable consumers.²⁸ On the other hand, it is required that the group under special protection must be clearly identifiable by their disabilities, reduced comprehension capacity, age or credulity. Legal scholars understand these criteria as a closed list, so that new criteria cannot be invoked in identifying a group of vulnerable consumers.²⁹ The last requirement is the foreseeability of the economic behaviour of the consumer groups in relation to the commercial practice. Such reasonable foreseeability is required from the trader as part of his professional duty of care (*diligencia profesional*).³⁰

3.6. Videogames

Following the recommendations of the Council Resolution of 1 March 2002,³¹ the Spanish Association of Distributors and Publishers of Entertainment Software (ADESE - Asociación Española de Distribuidores y Editores de Software de Entretenimiento) has acceded to the Code of Conduct on classification by age, labelling, promoting and advertising of products of the European Industry of interactive software, of the ISFE.³²

This code of ethics provides a mechanism for the consumers to have sufficient information about the contents and recommended ages of the entertainment software products. Consequently, the voluntary ratings provided by this system do not refer exclusively to the content of the product and its suitability to be seen by minors and in no case to the difficulty or skill requirements to play the game. Spain harmonised the different local systems by following the PEGI (Pan European Game Information).³³

The main objective of the PEGI system is to provide parents and educators with sufficient information about the videogames on sale (in Spain or in any other European country that had acceded to this code) in order to choose the products best suited to the user's age, thus limiting the exposure of children to inappropriate content.³⁴

²⁷ RLCDP, Ley 29/2009 is the implementation act of Directive 2005/29/EC. Art. 4.3 LCD corresponds to art. 5.3 Directive 2005/29/EC.

²⁸ *Tato, Fernández, Herrera, Reforma*, p. 98 and *Gualde, Competencia*, page 46.

²⁹ *Tato, Fernández, Herrera, Reforma*, p. 99.

³⁰ *Gualde, Competencia*, page 46

³¹ Council Resolution on the protection of consumers, in particular young people, through the labelling of certain video games and computer games according to age group (2002/C 65/02).

³² Interactive Software Federation of Europe, see <http://www.isfe.eu/>

³³ More information about the PEGI in <http://www.pegi.info/en/index/id/28/>

³⁴ Full text in Spanish of *Código de autoregulación* available under http://www.adese.es/index.php?option=com_content&view=article&id=16&Itemid=25

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 - Aragon, *Ley 16/2006, de 28 de diciembre, de protección y defensa de los consumidores y usuarios de Aragón*;
 - Asturias, *Ley 11/2002, de 2 de diciembre, de los consumidores y usuarios, del Principado de Asturias*;
 - Basque Country, *Ley 6/2003, de 22 de diciembre, de Estatuto de las personas consumidoras y usuarias de País Vasco*;
 - Canary Islands, *Ley 3/2003, de 12 de febrero, del Estatuto de los consumidores y usuarios de la Comunidad Autónoma de Canarias*;
 - Cantabria, *Ley 1/2006, de 7 de marzo, de defensa de los consumidores y usuarios*;
 - Catalonia, *Ley 22/2010, de 20 de julio, del Código de consumo de Cataluña*;
 - Castile-La Mancha, *Ley 11/2005, de 15 de diciembre, del Estatuto del consumidor de Castilla-La Mancha*;
 - Navarre, *Ley 7/2006, de 20 de junio, de defensa de los consumidores y usuarios de Navarra*;
 - Valencia, *Ley 1/2011, de 22 de marzo, del Estatuto de los Consumidores y Usuarios de la Comunitat Valenciana*.

ANNEX

Figure 1: Spain and its Autonomous Communities



Source: Website of Spanish *Ministerio de Fomento*
http://www.fomento.gob.es/MFOM/LANG_CASTELLANO/_ESPECIALES/VIVIENDA_JOVEN/INFO_INQUILINOS/FOR_MULARIOS/

Table 1: Vulnerable consumers on the Spanish Autonomic consumers' legislations.

Aragón (Aragon)	<p>Colectivos de consumidores especialmente protegibles.</p> <p>1. Serán objeto de atención prioritaria y especial protección por parte de los poderes públicos los colectivos de consumidores que se puedan encontrar en una situación de inferioridad, subordinación, indefensión o desprotección más acusada, y especialmente:</p> <ol style="list-style-type: none"> 1. Los niños y adolescentes 2. Los enfermos 3. Las personas con discapacidad. 4. Las personas mayores. 5. Las mujeres gestantes. 6. Los consumidores económica y socialmente más desfavorecidos. <p>2. El catálogo anterior de colectivos especialmente protegibles no constituye un listado cerrado y podrá ser ampliado reglamentariamente.</p>	<p>Art. 5 Ley 16/2006, de 28 de diciembre, de protección y defensa de los consumidores y usuarios de Aragón</p>

<p>Asturias</p>	<p>Colectivos de especial protección 1º Los colectivos de consumidores y usuarios que, por circunstancias especiales, se encuentren en una situación de inferioridad, subordinación, indefensión o desprotección más acusada, serán objeto de atención prioritaria en las actuaciones que se desarrollen en ejecución de esta Ley. 2º Dicha atención prioritaria se dirigirá preferentemente a:</p> <ul style="list-style-type: none"> La infancia y adolescencia. Enfermos. Personas con discapacidad. Personas mayores. Mujeres gestantes. Inmigrantes y Los sectores económicos y sociales más débiles. 	<p>Art. 5 Ley 11/2002, de 2 de diciembre, de los consumidores y usuarios, del Principado de Asturias</p>
<p>Canarias (Canary Islands)</p>	<p>Colectivos especialmente protegidos. Serán objeto de especial protección por las Administraciones Públicas de Canarias, en el marco de lo dispuesto en la presente Ley, los colectivos de consumidores y usuarios que, por circunstancias especiales, se encuentren en una situación de inferioridad, subordinación, indefensión o desprotección más acusada. Asimismo, serán objeto de especial protección los derechos de los consumidores y usuarios cuando guarden relación directa con productos o servicios de uso o consumo común, ordinario y generalizado.</p>	<p>Art. 4 Ley 3/2003, de 12 de febrero, del Estatuto de los consumidores y usuarios de la Comunidad Autónoma de Canarias</p>
<p>Cantabria</p>	<p>Colectivos especialmente protegidos. Las Administraciones públicas dedicarán una atención especial y preferente a aquellos consumidores y usuarios que, de forma individual o colectiva, se encuentren en situación de inferioridad, subordinación, indefensión o desprotección. Sin perjuicio de la posibilidad de incluir a otros colectivos entre los beneficiarios de estas actuaciones, ha de entenderse necesariamente incluidos a niños y adolescentes, mujeres gestantes, personas mayores, enfermos, discapacitados físicos o psíquicos, desempleados, inmigrantes y personas que, por el motivo que fuere, se encuentren temporalmente desplazadas de su residencia habitual.</p>	<p>Art. 4 Ley 1/2006, de 7 de marzo, de defensa de los consumidores y usuarios</p>

Cataluña (Catalonia)	<p>Colectivos especialmente protegidos: colectivos que, por la concurrencia de determinadas características, son especialmente vulnerables en cuanto a las relaciones de consumo. En cualquier caso, la protección especial debe darse teniendo en cuenta la persona consumidora media del colectivo en que se integra la persona consumidora. En particular, son colectivos especialmente protegidos: los niños y adolescentes, los ancianos, las personas enfermas, las personas con discapacidades y cualquier otro colectivo en situación de inferioridad o indefensión especiales.</p>	Art. 112-2c Ley 22/2010, de 20 de julio, del Código de consumo de Cataluña.
Castilla-La Mancha (Castile-La Mancha)	<p>Situaciones de protección prioritaria. 1. Los colectivos de consumidores y usuarios que se encuentren en situación de inferioridad, subordinación, indefensión o desprotección serán objeto de especial protección por la Administración Regional, en el marco de lo dispuesto en la presente Ley, en especial los niños, adolescentes, ancianos, mujeres gestantes, mujeres solas con cargas familiares y con bajos ingresos, mujeres afectadas por procesos de marginación, enfermos, discapacitados, inmigrantes o sectores económicos y sociales más débiles. 2. La Administración Regional extremará su atención con relación a los productos o servicios de uso o consumo común, ordinario y generalizado.</p>	Art. 3 Ley 11/2005, de 15 de diciembre, del Estatuto del consumidor
Navarra (Navarre)	<p>Supuestos de especial protección. 1. Serán objeto de especial protección así como de actuaciones específicas por las Administraciones Públicas de la Comunidad Foral de Navarra, en el marco de lo dispuesto en la presente Ley Foral, los consumidores pertenecientes a colectivos que, por circunstancias especiales, se encuentren en una situación de inferioridad, subordinación, indefensión o desprotección más acusada, tales como menores de edad, ancianos, discapacitados, inmigrantes y otros análogos. 2. Asimismo, serán objeto de especial protección los derechos de los consumidores cuando guarden relación directa con productos o servicios de uso o consumo común, ordinario y generalizado.</p>	Art. 3 Ley 7/2006, de 20 de junio, de defensa de los consumidores y usuarios

<p>Pais Vasco (Basque Country)</p>	<p>Situaciones de protección prioritaria. Los derechos de las personas consumidoras y usuarias serán protegidos prioritariamente:</p> <ul style="list-style-type: none"> • Cuando guarden relación directa con productos o servicios de uso o consumo común, ordinario y generalizado. • Cuando afecten a colectivos de especial protección en situaciones de inferioridad, subordinación o indefensión en que puedan encontrarse individual o colectivamente. 	<p>Art. 5 Ley 6/2003, de 22 de diciembre, de Estatuto de las personas consumidoras y usuarias</p>
<p>Valencia</p>	<p>De los colectivos de especial protección</p> <p>1. Se consideran colectivos necesitados de una especial protección en la actuación de las administraciones públicas de la Comunitat Valenciana, los colectivos de consumidores en los términos del artículo 2 que se encuentren en situación de inferioridad, subordinación, indefensión o desprotección más acusada por razón de su edad, origen o condición, y, en particular:</p> <ol style="list-style-type: none"> a) Los niños y los adolescentes. b) Las personas con discapacidad. c) Las personas mayores. d) Los inmigrantes. e) Las personas que se encuentren desplazadas temporalmente de su residencia habitual. <p>2. Reglamentariamente se podrá ampliar el anterior catalogo de colectivos de consumidores necesitados de especial protección.</p>	<p>Art. 7 Ley 1/2011, de 22 de marzo, del Estatuto de los Consumidores y Usuarios de la Comunitat Valenciana.</p>

Source: Alfonso de la Riva

NOTES

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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