

UDK:383.71:347.951:341.219(4)046:338.266:341.176(4):366.54:616.036.21:651.57:004.778.3

Mr. Nikola L. Filipović¹

INTERNATIONAL COURT PRACTICE

JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE CONTENT SERVICES LTD V BUNDESARBEITSKAMMER

1. Introductory Notes

The judgement of the Court of Justice of the European Union C-49/11, Content Services Ltd v Bundesarbeitskammer concerns the matter of providing prior information when concluding distance contracts, in this particular case, via the Internet i.e. a website. In a broader sense, the judgement concerns the issue of a „durable medium“ concept, namely, under what conditions the contracting party required to provide prior information concerning the consumer contract is considered to have met this obligation.

2. Regulatory Framework

At the time of the Decision, the contracts concluded via the Internet were subject to Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts. Article 4 (1) of the Directive required that the consumer timely, prior to the conclusion of a distant contract, *provides* the following information:

- a) the details of the supplier (identity/business name, legal form and the like and, where the contract requires payment in advance, the supplier's address)
- b) the main characteristics of the goods or services;
- c) the price of the goods or services including all taxes;
- d) delivery costs;
- e) the arrangements for payment;

¹ Lawyer at the “Živković Samarždić” Law Office in Belgrade

f) the existence of a right of withdrawal, except in the cases referred to in Article 6 (3) of the Directive;

Article 5 (1) of the Directive provides the confirmation that this obligation is satisfied, namely, that the consumer must *receive*, prior to or at the time the agreement is closed, a written confirmation or confirmation in another durable medium of all information relevant to the consumer as per items a-f of Article 4(1).

3. Subject of Dispute and Legal Issues

Content Services Ltd, is a limited liability company governed by English law, operating a branch in Mannheim (Germany). On its website, the Company provided the consumers with the possibility to download and use software – some were free but most of them incurred a charge in the form of a „subscription“. Subscribers had the access to all services and software this website offered.

In order to download a software, the internet users had to sign up to the site by filling out a registration form. To download software, they had to declare that they accept the general terms and conditions and that they waive their right of withdrawal by ticking a specific box on the form.

However, the information required by Articles 4 and 5 of Directive 97/7, whilst not directly displayed to the internet users on the site as part of the sign-up process, was available by clicking on a hyperlink.

After completing the registration process, the consumer was sent a confirmation email from the Company containing a link and user details (username and password), telling the internet user that, after entering the user name and password, he will have immediate access to the content and services of the website. That email also did not contain any information referred to in Articles 4 and 5 of the Directive, but only the hyperlink leading to the consumer information.

Moreover, the user received an invoice for access (annual subscription) to the content of the website for 12 months, and the invoice reiterated that the internet user had waived his right of withdrawal and that, therefore, he no longer had the option to cancel the subscription contract and access to the website.

The Austrian consumer protection entity, *Bundesarbeitskammer*, brought the action in the main proceedings against the company Content Services, challenging the described Content Services' business practice on the grounds that it infringes the EU rules on consumer protection and the Austrian consumer protection regulations. Content Services was the unsuccessful party before the Commercial Court, Vienna, and appealed against the decision before the Higher Regional Court, Vienna which considered that it was necessary to obtain an interpretation of the provisions of Directive 97/7 from the European Court of Justice, since the mandatory information were provided to the consumer in a specific form – through the link in the registration form or the link in the email.

Thus, the question referred to the court was - Is the requirement in Article 5(1) of the Directive 97/7 to the effect that “a consumer must receive written confirmation or confirmation in another durable medium”, satisfied where that information is made available to the consumer by means of a hyperlink?

3.1. View of the European Court of Justice

The ECJ focused on two key questions:

1. What is exactly the content of the duty to „inform“, namely, when can a consumer be considered legally „informed“ of his rights, particularly of the right to withdrawal?
2. What means can be used to satisfy the obligation to inform?

Concerning the first question, the Court based its view on the interpretation of the obligation to inform i.e. the requirement of Article 5 that the consumer must *receive* the information of his right to withdraw from the contract, namely, of the obligation stipulated in Article 4 that the supplier must duly provide the information to the consumer.

As the Directive or related documents do not provide any insight into the scope of receiving/providing information, it was necessary to interpret (define) these terms by looking at their use in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part, and rights guaranteed to the consumers.

To that extent, the Court noted that the terms ‘receive’ and ‘given’ refer to a process of transmission, the first from the point of view of the consumer and the second from that of the business (supplier). The Court further noted that, whereas in Article 4 there is a neutral formulation, according to which the consumer is to be ‘provided’ with the relevant information, a term with greater implications for the business is used in Article 5, since it does not require simple “provision of information” to the consumer but the information to be actually ‘received’ (delivered/given to) by the consumer so that he could exercise his consumer rights.

According to the Court, there is a significant difference between the duty to inform and the duty of a consumer to receive required information, since the obligation to give the information to the consumer or the obligation of a consumer to receive the information implies entirely *passive* conduct of the consumer in the whole process. As in this particular business practice the consumer is required to click on a link to be able to access the information, within the meaning of the Directive such information is neither „given to“ or „received“ (provided to) by the consumer, because the *goal* is to avoid a situation where the use of means of distance communication leads to a reduction in the information provided to the consumer during the traditional conclusion of the contract where the consumer is physically present.

Secondly, the Court examined whether the website of a supplier may be regarded as „durable medium“ within the meaning of Article 5(1) of Directive 97/7.

In that regard, it should be stated that that provision gives an alternative, namely that the relevant information must be received by the consumer in writing or on another durable medium, which leads to a conclusion that a durable medium must be equivalent to paper form. The Court held that in the context of new technologies, there may be an alternative to paper form but such solution has to be capable of meeting the requirements for the durable medium as an alternative to the paper form, as follows: ensure that the content of information (document) is not subsequently and unilaterally altered and that the information is accessible to the consumer for an adequate period, and give consumers the possibility to reproduce it. Consequently, the Court concluded that the website containing general terms and conditions, to which the link sent to the consumer connects, could not be considered providing information on the durable medium, because the website of the supplier is not regarded as such.

Therefore, the Court decided that the described business practice does not meet the requirements of the European Law.

4. Brief Overview of the Judgement

In times of Covid-19 epidemic, when communication and transactions are increasingly carried out via the Internet, without physical presence, it is necessary to pay a special attention to the means of meeting regulatory requirements in a digital world.

The decision of the European Court is interesting notably because the Court was willing to consider the qualitative content of the obligation and nuance of the obligation to inform when the provision stipulates “providing information”, and obligations arising from the provision prescribing “receiving information” which, according to the Court, implies passive conduct of consumers.² With particular reservations as to the fact that Directive 97/7 was replaced with Directive 2011/83/EU on consumer rights, the obligation to „deliver“ particular information still exists in distance contracts, in both Directive 2011/83 and the Serbian Consumer Protection Law (Article 30).

To that extent, one should take into account the qualitative aspects of providing information, namely, whether the information was “received” or only “provided”, as well as whether the modality of obligation fulfilment meets the standards of a durable medium as a substitute for a written notification.

Translated from Serbian by: Zorica Simović

² E.g. in the spirit of the Serbian language this can be the obligation to „hand over“ the general insurance terms and conditions in accordance with Article 902 paragraph 5 of the Serbian Law of Contract and Torts.