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CONTEMPORARY E-BUSINESS AND CONSUMER PROTECTION IN THE DIGITAL ENVIRONMENT – ANALYSIS OF THE CURRENT STATE IN THE EU AND THE REPUBLIC OF SERBIA

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Abstract: *This paper describes the contemporary problems of consumer protection in the digital environment both in EU and the Republic of Serbia. The problem of the customers who conclude contracts which transfer the rights over digital content are particularly emphasised. The paper describes the current state of development of ICT and e-business as well as the consequences of this situation concerning the consumer protection. The paper presents the position of consumers in the digital environment as well as sources of the EU and the Republic of Serbia that regulate protection. Current Case Law and theoretical understandings as well as comparative analysis of EU Member States legal systems are also presented. The paper conclusion gathers recommendation for further treatment in the area of research.*

Key words: *digital environment, consumer protection, digital content, Law, ICT*

Introduction

Every citizen finds himself in the role of a consumer at some moment. When the consumer buys different products or uses a service he expects a certain quality that usually depends on the price of goods or services. In a legal sense, a person concludes a contract of sale of goods in order to possess the goods, which usually involves a transfer of ownership from seller to buyer or concludes a contract of service providing. The majority of contracts are not formal in legal terms in order to speed up the legal actions and the procedure for the exchange of goods and services. Consumers are weaker contractual parties because of their lack of knowledge, ignorance, and poor bargaining position in comparison with companies. Therefore, the states adopt a set of legal norms in order to regulate the behaviour of companies so they can protect the weaker party.

Improvements in consumer protection in recent years have been more than evident. Almost all European states have passed legislative acts, usually in the form of law, governing this area. Moreover, a large number of globally unified standards as well as international documents additionally enhance consumer protection. However, are the improvements in consumer protection a consequence of the strong influence of leftist political forces only or has the development of modern economies imposed the need for

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stronger consumer protection? Although it is difficult to give a clear answer to this question, the fact is that the pursuit of a higher level of consumer protection is the consequence of a variety of factors.

One of the most powerful and influential factors is the development of modern information and communications technologies (hereinafter ICT). The contemporary ICT creates a digital environment in which millions of people engage in a number of diverse activities. The digital environment has brought various benefits for both consumers and businesses. The digital environment is likely to have wider economic benefits in terms of increased innovation, creativity, learning, instant and unlimited access and reduced environmental costs associated with transactions.

Modern business is increasingly reliant on the use of ICT, thus forming the framework of "digital economy". Although in the mid-nineties of the 20th the expectations of ICT development and the new “digital economy” were far higher, new ways of doing business do not have a revolutionary character. However, it does represent the evolution of modern business. Electronic commerce, Internet marketing, Behavioral marketing, Contemporary supply chain management, Information society services are phenomena which represent integrative parts of e-business. Nevertheless, the new ICT exposes citizens to new ways of compromising their rights. Therefore, the states have tried to provide an adequate system of consumer protection in the digital environment.

E-business and use of ICT - plans and general reference

The EU Single Market Act recognizes information society services and electronic commerce as a set of activities that provide incentives and strengthen the economic growth of the EU internal market. A major role is given to e-business in the process of sustainable economic growth in the European Union in the period up to 2020 (Single Market Act, European Commission 2011).

The Digital Agenda for Europe defines the goals of e-business development, stressing the great importance of this business form for small and medium size enterprises (hereinafter SME). The development strategy includes a quantitative growth target according to which in 33% of signed contracts concluded by SMEs the purchase or sale will be made online by the year 2020. It is estimated that by 2015 nearly 20% of the EU population will buy goods or use cross-border services online (Digital Agenda for Europe, European Commission 2010).

E-business has a cohesive role in the integration of EU member states’ markets. The conclusion and implementation of cross-border contracts is far easier to accomplish in the virtual than the physical world. For this reason, in 2010 almost 9% of consumers used systems for cross-border e-business transactions (as opposed to 8% in 2009). However, the current state of e-business development in the EU is not as good as expected. Although the legal acts which regulate the field of e-business in the EU were adopted nearly a decade ago, e-business is limited to less than 4% of total trade in the EU. Because of this fact as well as declaratively stated goals, the European Commission undertakes activities in the areas that would increase the participation of "online" shops in the business, particularly in the retail sector (Towards a Single Market Act, for a highly competitive social market economy, 50 proposals for improving our work, business and exchanges with one another, European Commission 2010). In addition, some statistics which are not related to law and

policy are not in favour of the development of e-business in the EU internal market. One of these data is the average age of the EU resident. Nearly 17% of the population in the EU are over 64 years old. In regard to this fact it can not be expected from this group of EU citizens to use ICT. Considering that this group cannot be expected to progressively use ICT, the development must be expected from the younger population, the number of which is decreasing (Retail market monitoring report - Towards more efficient and fairer retail services in the internal market for 2020, European Commission, the European Council, the Economic and Social Committee and the Committee of the Regions 2011).

In addition to the social ones, some economic parameters also negatively influence e-business development. The highest level of online sale of goods is 7.7%, in the UK. In the entire territory of the EU, the percentage is much lower - 3.4%. When it comes to buying and selling of goods among companies, the statistics are more optimistic. 27% of companies offer their products to other companies "online" while 13% of companies have actually purchased goods online. The uneven development of EU Member States also has its negative effects on the e-business development. Nearly 70% of e-business is conducted by the residents of Great Britain, Germany and France, as well as between them. Statistics from other regions and countries (primarily the U.S. and countries in the Asia-Pacific region) show that this sector is more developed in some parts of the world. In the USA, 66% of Internet users made purchases online in 2010, while the percentage in South Korea is even higher - 94%. 57% of the total number of European Internet users have made at least one purchase over the largest global network (Data in Focus 50/2010: Internet Usage in 2010 – Households and Individuals, Eurostat 2010).

If we consider different sectors, users of online services and buyers of goods over the Internet mostly use financial services, travel services, buy electronic devices and play games of chance. In addition, it is important to note that a large number of Internet users purchase multimedia content (music, movies, etc.) and software online, but a far greater number of customers purchase digital content illegally (Commission Staff Working Paper. Online services, including e-commerce, in the Single Market, European Commission 2011).

From a wider perspective, the Internet economy has generated 21% growth in gross domestic product during the past 5 years and it is likely to represents 20% of gross domestic product growth in the period up to 2015. These data and forecasts refer to the UK and the Netherlands, which are undoubtedly highly developed countries. The share of Internet economy in the overall GDP is not negligible, although it could be higher. It ranges from 2% in Spain to the highest in the UK - 7%. The EU market that is used for e-business is between 100 and 150 billion euro (almost same in the United States). Finally, a benefit of the Internet economy is that for each destroyed position in the physical world it can create almost 2.6 jobs in the virtual world (Turning local: from Madrid to Moscow, the Internet is going native, Boston Consulting Group 2011).

The general level of ICT application in the Republic of Serbia is below the average EU level. First of all, the level of e-business development depends on the level of Internet access. According to the data from the Statistical Office of Serbia, in 2009, 36.7% of households had access to the Internet. In comparison to 2008 the number increased by 3.5%. Also, 22.9% of households had so-called broadband Internet access. In fact 14% of households in Serbia still have a very slow Internet connection – dial-up Internet access. In the EU, almost 65% of households have Internet access, while 56% of households have

broadband Internet access. On the other hand, the statistics on Internet access among companies are better in the Republic of Serbia. In 2009, 94.5% of companies had Internet access, which is 3% more than in 2008. Out of the total number of companies that have Internet access, 65.5% of the companies have a DSL connection, 15.5% of the companies have a modem connection and 24.3% possess a cable Internet connection. It can be concluded that the number of companies who have broadband Internet access is increasing, and the number of those who use dial-up Internet access is decreasing. However, the state of e-government is quite poor and below the EU standard. Nearly 15% of the municipalities do not use the Internet in their work because they do not have Internet access or persons in charge of the IT sector. This indicator mostly refers to the poorest municipalities in Serbia. Different strategic plans proclaim their aim for the statistical average of Serbia to reach the one of the EU in almost all indicators on ICT use. Regardless of the statistical indicators which are lower in the Republic of Serbia in comparison to the EU, the field of telecommunications and ICT is one of the few branches of industry which has progressed steadily despite the general phenomena of recession and economic stagnation in recent years, both in Serbia and abroad. There is no statistical indicator on telecommunications and ICT development which is constantly getting lower ("Strategija razvoja informacionog društva do 2020. godine", The Serbian Government, 2008).

Although the use of the Internet in the Republic of Serbia has been progressing rapidly, which implies an increasing presence of this type of connectivity among computer users, the statistics still show that a low percentage of people use a computer or cellular technology for e-business activities. Most commonly computers are used for information search, to receive and send e-mail and for access to multimedia content.

Consumer and the Digital Environment

The first "thought" that comes to one's mind when talking about goods which are the object of a contract and subject to transfer of rights (both in the online and "offline" world) is that goods are a physical, tangible thing. However, the development of modern technology allows the exchange of digital content through various computer networks, primarily through the Internet. Today millions of different types of digital content are exchanged every day over the largest computer network. Music, movies, software, texts are just a part of the digital content accessed by millions of users of the largest computer network in the world. Undoubtedly, the development of technology has influenced the development of business. As a result, a large number of different ways to download digital content from the Internet has appeared. The most widespread forms of digital content offered on the Internet can be divided into following categories:

- on-demand
- near on-demand
- on-demand downloading
- streaming
- webcasting
- IP – television
- electronic books, electronic newspapers and journals offers
- social broadcasting
- cloud computing

Different types of digital content, access to them as well as use influenced the creation of various forms of payment for digital content. Content can be paid per download, per use, based on daily use, the review may be free, can be fully available after a one-time payment, available after the disclosure of personal data, etc.

The problems that arise in the area of consumer protection in relation to digital content are quite complex. The complexity requires an interdisciplinary approach to the topic. The high level of consumer concerns creates a number of problems that can be divided into the following categories:

- access to digital content,
- selection of content,
- restrictions on the use of content,
- informing consumers about the content,
- fair contract terms and fair contracting,
- privacy of consumers,
- safety and security.

Access to digital content is the first problem that a consumer encounters. Statistics show that the problem is the most serious one, not only because it is the first chronologically, but also because it is extremely frequent. Almost one-third of the problems that consumers in the digital environment encounter are related to access to content (Report 3, Europe Economics 2011 pp.75-76). Access to content may be limited due to the existence of Digital Rights Management measures (DRM) and because of Technical Protection Measures (TRM). Digital Rights Management involves a combination of technical measures with a payment mechanism. This is a business model that allows technical access to the digital content to a consumer who is authorized and authenticated. Authorization is done mostly by registering which is most often followed by the payment process. After the authorization, access could be allowed for a specified period or time for a certain amount of data. Typical technical protection measures are primarily intended to protect consumers and to protect content across the network from various abuses.

If we focus on Digital Rights Management, we have to ask ourselves who manages digital rights? Specifically, does a person hold certain rights that he or she can make available to others? Intermediaries in accessing content are quite common on the internet. Usually users are not able to check (or are not interested in checking) a web page where they access some technically protected content. Actually, web users cannot check who really holds rights to the content (both original rights and legitimately acquired rights). Also, the primary aim of the most popular Internet browsers is to redirect the user to the requested content regardless of whether the digital content rights available there are managed legally or illegally. Accessing digital content has become more complicated with the development of so-called "peer to peer" programs and websites for content exchange. Although a large number of them have recently been shut down (Torrent, Megaupload), digital content is still available free of charge on the Internet (Master thesis: “Uporedna analiza prava elektronskog poslovanja Evropske unije i Republike Srbije“, Dusan Pavlovic 2012).

The choice of content is also a burning issue from the viewpoint of consumer protection. Although at first glance it seems that Internet users can still choose what content they would like to access, the situation is distinctly different. Behavioural Marketing and

the presence of unsolicited commercial communications via spamming often influence the selection of digital content. Also, during Internet browsing various technical tools and resources which submit content to the user may be activated without user's consent or intervention. Almost everyone has experienced this while "surfing" the Internet: "Pop-up" windows that represent specific content are activated. This problem adds to the problem of consumer content information. Lack of information on the nature of digital content is one of the most common problems for Internet users. The most common cases are related to the lack of information concerning the possibility of appeal against a product or service purchased on the Internet, the conditions of termination of contract and warranty conditions. Also, the complexity of the presentation of available information on content is often a perfidious action taken by providers in order to violate consumer rights. Of course, not much information on "cookies" and commercial strategies is available, which are common examples of denial of consumer right to information. It is doubtless that modern marketing strategies jeopardize consumers' privacy in the digital environment. How important the privacy right in terms of consumer protection is confirms the fact that almost 87% of German citizens have some kind of concern when they buy online. Violation of privacy rights from the viewpoint of consumer protection in the digital environment is closely linked with the problems related to advertising. Personal information is often illegally used when advertising in the virtual world. These problems are closely linked with safety and security problems. Although DRM and TRM need to improve aspects of safety, modern technical design of digital content creates new vulnerable groups of users of information societies (Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts. FINAL REPORT University of Amsterdam - Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR), Amsterdam Centre for Law and Economics (ACLE), Group of authors, 2011).

New forms of contracting have already been used in practice although most European civil codes, or other laws which regulate contractual relationships, do not recognize new kinds of contracts. These new contracts are known as "shrink-wrap" contracts and "click-wrap" contracts. These contracts have adhesive characters and they are concluded when a consumer buys software and start the installation process. During the installation process the consumer, the future software user, must accept the conditions imposed by the software producer in order to successfully complete the installation process. If conditions are not accepted the installation process cannot be completed, nor the use of the software. The main difference between the "shrink-wrap" and "click-wrap" contract is the following - in the first kind of contracts the consumer buys physical goods, a medium with stored data which is actually an executable file necessary for software installation. In the second type of contracts, the consumer just downloads an executable file from the Internet. The conclusion of these contracts is accompanied by various controversies. First of all, from the aspects of consumer protection the problem is that the consumer usually has to conclude two agreements to be able to use certain software. The first contract is concluded when the consumer buys a medium or downloads an executable file from the network and the second contract has to be concluded during the process of software installation The consumer learns about the conditions of the second contract only after the installation process has started, actually after paying for a product that can only be used under the conditions which are unknown at the moment of purchase. During the conclusion of the second contract ("shrink-wrap" or "click-wrap" contracts), the consumer is given the take-it-or leave-it choice. However, the existence of these contracts can be explained (and

justified in part) by Intellectual property rights to software. Therefore the software user can only have ownership of the data carrier, but not the software itself. This creates confusion among consumers about the rights they acquire.

Additional problems for consumers arise if contracts for software use are concluded without any registration of users. This is quite a common practice that can cause serious legal problems. If the software has some kind of defect it is questionable how an unregistered user may exercise their right to replace or repair the software? In such situations the whole hybrid legal character of digital content becomes obvious. Software maintenance and software installation are topics that are legally disputable and never in favour of consumer protection. It is in the interest of companies that produce software to constantly improve their software in order to be competitive, but also to be able to function properly. However, is a more modern version of the software actually new software or a regularly serviced previous version? This question builds on the following - when is the user entitled to have an advanced, better version of the software, without having to pay additionally? These issues have a practical significance. The answer may be partially guessed by emphasizing the difference between an "up-grade" and "update" of the software. Although a sharp difference between these two processes does not exist, the process known as software "upgrade" is such that the existing software gets new functions and is enhanced, while the software "update" process replaces an installed version of a product with a newer one. However, emphasizing these differences does not give an answer that would make a clear distinction between new and old, serviced software.

Consumer Protection Law and Directive 2011/83

On 25th October 2011, the EU Council of Ministers adopted the new Consumer Rights Directive (Known also as Directive 2011/83). The new directive amended the existing directives on consumer protection and additionally strengthens consumers' rights, particularly when shopping online. After publication in the Official Journal of the EU, the governments of the Member States have two years to transpose the rules to national legislations. The new Directive is a result of the development of contemporary markets and the clear position of the European Parliament that the level of consumer protection needs to be higher.

The content of Directive 2011/83 is divided into five parts (chapters). The first chapter contains common definitions such as "consumer", "trader", "commodity", "contract for the sale of goods", "service contract" etc. This section provides a common set of general rules applicable in all Member States, but with the possibility of deviation from the general rules in a few specific cases.

The second chapter contains a minimum of basic information which should be provided by traders before contract conclusion. Directive 2011/83 provides that Member States can supplement the required information that a trader must provide before completing a contract.

Chapter three regulates consumer protection when concluding contracts through distance communication means and "off-premises" contracts. This chapter provides requirements for consumer information and the right to contract termination. Chapter four of Directive 2011/83 regulates the shipping and passing of risk. In addition, this chapter

contains the rules that are applicable to all types of contracts. These rules are related to costs and ways of payment (credit or debit card), hotline telephone service, additional costs of contracts, etc. Finally, chapter five contains general provisions on transposition.

Directive 2011/83 proclaims ten new rights particularly aimed at the protection of consumers who conclude contracts in a digital environment. The ways of consumer protection are as follows:

1. The proposal will eliminate hidden charges and costs on the Internet - Consumers will be protected against "cost traps" on the Internet. This happens when fraudsters try to trick people into paying for 'free' services, such as horoscopes or recipes. From now on, consumers must explicitly confirm that they understand that they have to pay a price.
2. Increased price transparency - Traders have to disclose the total cost of the product or service, as well as any extra fees. Online shoppers will not have to pay charges or other costs if they were not properly informed before they place an order.
3. Banning pre-ticked boxes on websites - When shopping online – for instance buying a plane ticket – you may be offered additional options during the purchase process, such as travel insurance or car rental. These additional services may be offered through so-called 'pre-ticked' boxes. Consumers are currently often forced to untick those boxes if they do not want these extra services. With the new Directive, pre-ticked boxes will be banned across the European Union.
4. 14 Days to change your mind on a purchase - The period under which consumers can withdraw from a sales contract is extended to 14 calendar days (compared to seven days legally prescribed by EU law today). This means that consumers can return the goods for whatever reason if they change their minds.
    a. Extra protection for lack of information: When a seller hasn't clearly informed the customer about the withdrawal right, the return period will be extended to a year.
    b. Consumers will also be protected and enjoy a right of withdrawal for solicited visits, such as when a trader called beforehand and pressed the consumer to agree to a visit. In addition, a distinction no longer needs to be made between solicited and unsolicited visits; circumvention of the rules will thus be prevented.
    c. The right of withdrawal is extended to online auctions, such as eBay – though goods bought in auctions can only be returned when bought from a professional seller.
    d. The withdrawal period will start from the moment the consumer receives the goods, rather than at the time of conclusion of the contract, which is currently the case. The rules will apply to internet, phone and mail order sales, as well as to sales outside shops, for example on the consumer's doorstep, in the street, at a Tupperware party or during an excursion organised by the trader.
5. Better refund rights - Traders must refund consumers for the product within 14 days of the withdrawal. This includes the costs of delivery. In general, the trader will bear the risk for any damage to goods during transportation, until the consumer takes possession of the goods
6. Introduction of an EU-wide model withdrawal form - Consumers will be provided with a model withdrawal form which they can (but are not obliged to) use if they

change their mind and wish to withdraw from a contract concluded at a distance or at the doorstep. This will make it easier and faster to withdraw, wherever you have concluded a contract in the EU.

7. Eliminating surcharges for the use of credit cards and hotlines - Traders will not be able to charge consumers more for paying by credit card (or other means of payment) than what it actually costs the trader to offer such means of payment. Traders who operate telephone hotlines allowing the consumer to contact them in relation to the contract will not be able charge more than the basic telephone rate for the telephone calls.
8. Clearer information on who pays for returning goods - If traders want the consumer to bear the cost of returning goods after they change their mind, they have to clearly inform consumers about that beforehand, otherwise they have to pay for the return themselves. Traders must clearly give at least an estimate of the maximum costs of returning bulky goods bought by internet or mail order, such as a sofa, before the purchase, so consumers can make an informed choice before deciding from whom to buy.
9. Better consumer protection in relation to digital products - Information on digital content will also have to be clearer, including about its compatibility with hardware and software and the application of any technical protection measures, for example limiting the right for the consumers to make copies of the content. Consumers will have a right to withdraw from purchases of digital content, such as music or video downloads, but only up until the moment the actual downloading process begins.

Serbian Consumer Protection Act

Serbian Consumer Protection Act defines some terms related to the protection of consumers in a digital environment. The Act defines a distance contract as a contract concluded between a trader and a consumer predominantly using one or more means of distance communication, concerning the sale of goods or services. As a supplement to the previous definition ''means of distance communication" is defined as any means that can be used for the conclusion of a contract between a trader and a consumer who are not in the same place at the same time. In addition, ''durable medium" is defined as any instrument that allows data retention to the retailer and the consumer in order to preserve data, to access these data and to reproduce them in an unmodified form in the period corresponding to the purpose of data retention.

The Act contains a set of rules concerning the protection of consumers in exercising their rights in distance contracts. First of all, the Act regulates the duty of informing consumers and the right to unilaterally terminate the contract by stipulating the duty of notification. The trader is obliged, before the conclusion of a distance contract, to do the following:

1. to provide the consumer in a clear and understandable manner with the conditions under which the consumer can unilaterally terminate the contract and the procedure for exercising that right,
2. the complaint handling policy,

3. to inform the consumer about the existence of the codes of conduct which are obligatory for the trader and the way to access that code,
4. to inform the consumer about the cost of using the means of distance communication,
5. the inform the consumer about fact that consumer enters into a contractual relationship with the trader which is protected by the law,
6. to provide information on the possibility of out-of-court dispute resolution.

As regard financial services, the service provider is obliged, before the conclusion of a distance contract, to inform the consumer, in a clear and understandable way, about the basic features of financial services, the total cost of financial services including taxes, expenses and fees, and about the method of calculating the cost if the total cost of financial services is not stated. Finally, the special risks related to a specific financial instrument, the period for which data are valid and ways of payment must be provided.

Before the conclusion of a distance contract, the trader is obliged to provide the consumer with the above information and with regular data which must be available for all contracts under the Consumer Protection Act.

All information must be presented in such a way that the consumer can identify, store and reproduce the final text of the future contract in a simple way. In the same way, the consumer must be able to notice and correct possible input errors before sending the order form and must be able to access the code of conduct which obliges the trader. In addition, the consumer must be able to access following information:

1. instructions for contract conclusion with a description of actions that the consumer must take,
2. Notification about whether the contract will be filed and the manner in which this contract can be accessed,
3. Information about how the customer can detect and correct input errors as well as information about the languages in which the contract can be concluded.

When the contract is concluded the trader must deliver the goods within 30 days from the day of conclusion, unless otherwise agreed in the contract. He cannot require advance payments from consumers on the basis of distance contracts. Also, the trader is obliged to immediately inform the customer that the delivery of the contracted goods or the implementation of contracted services is not possible.

The consumer has 14 days from the conclusion of a distance contract to terminate the contract without having to state the cause of the termination and terminate all contractual obligations, except immediate cost and cost of the return of the goods. Legal consequences of a unilateral termination of the contract are reflected in the fact that the trader is obliged to return to the consumer without delay the amount the consumer paid under the contract, and no later than 30 days from receipt of the declaration of a unilateral termination of the contract. This time limit also applies to distance financial services.

The Consumer Protection Act regulates the exceptions to the right to unilaterally terminate a distance contract in a quite interesting way. A consumer cannot unilaterally terminate distance contract, unless otherwise agreed, in the following cases:

1. In distance service contracts – if the consumer explicitly agreed that provision of the service should start before the expiry of the period for unilateral termination of the contract:
2. In sales of goods or services whose price depends on the changes in the financial market that the trader cannot influence;
3. In cases of delivery of sealed audio, video recordings or computer software if the consumer has unsealed the delivered goods;
4. games of chance.

A Comparative Analysis of EU Member States Legal Systems

The Consumer Protection Law usually requires that the subject of a sales contract is physical and tangible good. The fact is that digital content is often delivered on a physical data carrier, such as a CD or DVD. However, the absence of a physical carrier can affect the applicability of consumer protection rules. Some States apply the consumer protection rules which are applicable to areas not related to the goods. In addition, enjoying the right to digital content is sometimes considered as a service but it in some legal systems it is considered a sui generis category.

The purpose of this analysis is to consider the rules applicable to the transfer of rights over traditional software.

In France, the legal nature of software purchase is unclear. Purchasing a disk or other software data carriers is not regulated by French law. Also, Case Law and the theory of law differ from case to case. Some authors and court decisions consider the whole process of transfer of rights over software as a sales contract (France Supreme Court (Cour de cassation), Case number 89-11390), other authors see it as a type of a contract of hire (Pratique et droit de l'informatique, 5e éd., A. Hollande, X. Linant de Bellefonds 2002), while there are also those who believe that it is a sui generis legal procedure (Les contrats de l'informatique et de l'internet, Larcier, E. Montéro 2005 – p.77). If purchasing software is considered as buying good, the majority of French judges conclude that digital content is intangible despite the existence of a medium. Many provisions of the French Consumer Protection Act that are applicable to goods do not specify whether or not goods are tangible. However, the Act states that a warranty covering defects in goods apply only to contracts regulating the rights over a tangible movable property. French judges are likely to consider a software defect as a defect in intangible property. Such an approach excludes the mentioned warranty system. However, the Consumer Protection Act regulates the responsibility of the seller in distance contracts as well as the responsibility for hidden defects.

In Germany the transfer of rights over software for a monetary compensation was first discussed in the context of software in a tangible form (that is on a data carrier). In the beginning, the debate centred on whether a digital product is a tangible object or not and whether the rules on the sale of goods are directly applicable. The German Federal Supreme Court in the very beginning of the debate decided that digital content is to be treated as a commodity, with the clear intention to apply the rules on defects in goods and the available legal means related to the purchase of goods to the contracts that regulate the rights over digital content (German Federal Constitutional Court (BGHZ), Case number 102-135, Paragraph 144). In addition, the legislator resolved this issue by changing the rules

governing contractual relations (German Civil Code (BGB) Article 453, Paragraph 1). After changing the German Civil Code, it regulates that provisions on the purchase of goods can be applied with necessary modifications. However, in time the concerns about the problem of the disposal of rights over the software transmitted over the network appeared. The problem is obvious - without a CD, or any other data carrier, there is no ownership over software (actually over a data carrier). However, courts apply the rules relating to sales contracts with certain modifications to the general rules (Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 5th ed., Cf. S. Lorenz).

To apply the consumer's protection rules to the contract of the sale of a digital content in Germany is being followed by some difficulties. First of all, the problems are related to the fact that most rules that derive from EU Law concerning the consumer protection do not have clear object of application. The fact is that the proclaimed rules are obligatory for sales contracts in which the subject matter is concerned with the right transfer of a tangible movable property. Some German authors claim that data are tangible matter, not only when they are put on CD, but also on consumers' hardware (hard disk is also data storage). Therefore, they propose an absolute application of consumer protection rules on online shopping of products like music, software and movies. Counter arguments to this view occur among group of lawyers who believe that users of software or music have to reach a license agreement. In this case different rules by its legal nature should be applied. However, the Federal Supreme Court takes a position which considers the copyrights as an auxiliary right without determinative character for the type of the contract that should be concluded in order to dispose rights over the digital content. So, if the software on a CD or DVD contains a defect, the consumer can fully protect their own rights as in any other contract. Considering the software which is delivered online in Germany is still unclear and without reliable answer.

In Great Britain legislation system, essential characteristic of the sale of goods is contained in the Sale of Goods Act. Under this act, the contract of sale of goods is a contract whereby the vendor transfers or agrees to transfer ownership of goods to the buyer for the money that is considered as a cost. In addition to Sale of Goods Act, another important law exists in the UK legislation system which regulates disposal of rights over goods and services - Supply of Goods and Services Act. What is common to both acts is that the definition of goods is identical in both cases (goods are described as movable assets). It is the fact that the physical mediums, data storage mediums, both CD and computer hardware, are physical objects at which software could be stored. According to the British courts decisions transfer of rights over data carrier with installed software apply the rules about supply of goods (not the sale of goods).

Scottish case law interprets contracts which regulate rights over data carrier with installed software as sui generis contracts. Taking into consideration that Common Law and Case Law are far more important in Anglo-Saxon legal area than in European Continental system, the courts have more important role in the creation of law in the UK. Courts create legal principles in accordance with positive legislation and custom, forming precedents useful and applicable for later court decisions in cases with similar or identical subject of debate.

The essence of the Case Law in Great Britain considering the contract which regulates rights over the software is that contracts should not fall under the rules governing relations in the service contract. UK's practice legally treats these contracts under the rules applicable in contracts of sale and supply of goods or they have sui generis character. In

cases where the software is transferred without a durable medium transmission (over the network), the software is "defined" as a commodity in contracts for the supply of goods (and not as a commodity in the contract of sale of goods), although the courts have confirmed the fact that it is a licensing of computer software rather than selling goods. The UK Case Law takes a balanced manner between the licensing and sale of software, classifying use of rights over the software in the so-called supply store. However, some legal scholars argue that such a hybrid legal construction takes no place in the reality and therefore should fit firmly to the view that propagates sui generis character of the contract which regulates rights over the software. Summarizing the case law and legal theory in the UK, we can say that the degree of uncertainty and ambiguity of legal solutions is very high. The analysis of cases in the UK is mainly concerned as a relationship between companies, so it is very difficult to say anything about the implementation of legislation related to consumer protection.

Conclusion

Non-harmonized legal sources which regulate consumer protection in EU member states create legal uncertainty. Beside this problem, high level of differences in the dynamics of law development on one side and ICT development on another, additionally increases legal uncertainty. Consumers who are the contract's parties whose subject is the transfer of rights over digital content cannot be effectively protected. The consumer protection is valid when the contract subject is a transfer of rights over physical, tangible objects. However, when the subject matter is digital content, protection issues are more complicated - to the extent that protection is indescribable and even harder to evaluate. Firstly, the legal definitions of digital content are not uniformed and they are polemic, although it is generally known what the digital content is. Also, it has not been forgotten that the scope of the digital content concept expands on a daily basis and it is very difficult to accurately describe it and even harder to define.

The situation in the Republic of Serbia in the field of consumer protection in digital environment is even more complicated in comparison to EU member states. The legislative practice in the Republic of Serbia was reduced to the adoption of an enormous number of acts that are often made without any serious public debate. Translation of EU directives is the essence of legislative practice in Serbia. As a result, a large gap between the rule of law and state of law was created. Consequences are reflected in the fact that there is no case law which provides legal treatment of a digital content. It is positive that current Consumer Protection Act regulates consumer protection in contracts concluded by (the) means of distance communication.

It is very difficult to give precise legal interpretations about legal problems and legal disputes related to digital content. Therefore legislators as well as case law should be primarily focused on general legal principles, fundamental human rights and fundamental freedom, in order to build a system as fair as it could be to all parties who have an interest in the real disposition of rights over digital content. In relation to the general public interest, which essentially protects fundamental rights and freedoms in all democratic societies, the legal framework of the contract, regarding to digital content, considers fundamental rights and freedom, such as the consumer's right to respect privacy and freedom of expression. Although the basic human rights and freedom originally developed for the protection of

citizens from state authority, Case law concerning contractual disposal over digital content, which occurs in different European countries in recent years, disputes are reviewed and resolved in the light of fundamental rights and freedom recognized by national constitutions and international treaties.

This development assumes that the rules of private law must be consistent with the values of the constitutional provisions. Looking at the legal issues related to digital content, from the perspective of human rights and fundamental freedom, legislators must be convinced that the law provisions, including provisions of private law, are in accordance with the rights regulated by national constitutions and international treaties. In addition, courts must exercise permanent control whether the contracts respect the fundamental values and thus indirectly assess the constitutionality of the relevant rules.

Considering the contracts which transfer the rights over digital content, IT Law and Consumer Protection Law should take into account several basic rights of the contractual parties, including consumers, copyright holders and service providers which supply with digital information. The consumers have primary interest for respect of their rights to privacy, for non-discriminatory treatment and to have the freedom to access the information. The author of a protected work always refers to the protection of intellectual property rights, as indirect protection of property rights. Supplier of digital content, which in some cases is the author, strives to protect its property rights. European legislators have to balance these rights in the legal framework governing contracts which transfer the rights over digital content.

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SAVREMENO ELEKTRONSKO POSLOVANJE I ZAŠTITA POTROŠAČA U DIGITALNOM OKRUŽENJU – ANALIZA STANJA U EU I REPUBLICI SRBIJI

Rezime: Rad opisuje savremene probleme zaštite potrošača u digitalnom okruženju na teritoriji EU i Republike Srbije. Posebno je naglašen problem zaštite potrošača koji zaključuju ugovore kojima se raspolaže pravima nad digitalnim sadržajem. U radu je opisano trenutno stanje razvoja IKT i elektronskog poslovanja, kao i posledice takvog stanja koje se odnose zaštitu potrošača. Radom je prezentiran položaj potrošača u digitalnom okruženju kao i izvori prava EU i Republike Srbije kojim se štite potrošači. Prezentirana je postojeća sudska praksa ovoj oblasti i teorijska shvatanja putem uporedne analize stanja u državama EU. Na kraju rada dat je zaključak sa preprukama daljeg postupanja u istraživanoj oblasti.

Ključne reči: digitalno okruženje, zaštita potrošača, digitalni sadržaj, pravo, IKT