

USER GUIDELINES

A Bill entitled an Act to amend the Consumer Affairs Act, Cap 378 and other laws relating to consumer protection that transposes Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules

Introduction

The transposition of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (the Directive) is an obligation arising under EU Law.

Background

The purpose of the Bill, entitled “the Consumer Affairs Act, Cap. 378 and other laws relating to consumer protection”, is to transpose the Directive that amends the Unfair Contract Terms Directive 93/13/EEC, the Price Indications Directive 98/6/EC, the Unfair Commercial Practices Directive 2005/29/EC and the Consumer Rights Directive 2011/83/EU. The Directive amends the mentioned existing EU instruments and is one of the building blocks of the “New Deal for Consumers”¹, aiming to strengthen consumer protection.

The transposition of the Directive envisaged the amendment of the Consumer Affairs Act (CAA); and of the Consumer Affairs Act (Price Indication) Regulations as well as of the Consumer Rights Regulations, respectively Subsidiary Legislation (S.L.) 378.09 and S.L. 378.17.

Modernised rules in line with digital developments²

1. Transparency on online marketplace(s)

Today when consumers shop on online marketplace(s), they do not always know who they buy the good or the service from. It can be a professional trader or another consumer.

¹ New Deal for Consumers

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0183&from=EN>

² EU Commission Fact Sheet (November 2019): “The New Deal for Consumers - What benefits will I get as a consumer?” https://ec.europa.eu/info/sites/default/files/factsheet_new_deal_consumer_benefits_2019.pdf - The sub-titles and contents in italics thereof are taken from the said EU Commission document

Not knowing the identity of the supplier is a problem because if something goes wrong, consumer protection rules do not apply when buying from another private individual. The new rules as transposed by means of the Bill make it easier for consumers to assess the risks when shopping on online marketplace(s).

From now on consumers will be informed whether the person selling the goods or services online is a trader or another private individual, and warned that EU consumer protection rules do not apply when the supplier is not a trader. The online marketplace will also indicate whether the supplier or the marketplace itself is responsible e.g. for the delivery or for handling the returns under the right of withdrawal. Consumers will also know where to turn in case of problems.

The Bill ensures the transposition of the above:

- by the inclusion of the new definition “online marketplace” in the CAA and in S.L. 378.17, respectively through articles 5 and 16(g) of the Bill, (that respectively amend article 51A of the CAA and regulation 2 (2) of S.L. 378.17);
- by means of the introduction, through article 7 of the Bill, of the new paragraph (f) in article 51D (3) of the CAA (article 51D of the CAA is relative to misleading omissions), to provide that in the case of an invitation to purchase, the following information shall be regarded as material, if not apparent from the context: “for products offered on online marketplaces, whether the third party offering the products is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace.”;
- by means of the new regulation 5A of S.L. 378.17 (this new regulation establishes additional specific information requirements for contracts concluded on online marketplaces) introduced through article 20 of the Bill, so that before a consumer is bound by a distance contract, or any corresponding offer on an online marketplace, the provider of the online marketplace, without prejudice to the provisions regarding unfair commercial practices in the CAA, is to provide the consumer, in a clear and comprehensible manner and in a way appropriate to the means of distance communication, information “whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace;” (regulation 5A(1)(b) of S.L. 378.17).

2. Same consumer rights for “free” digital services

Many consumers use “free” digital services, such as cloud services or social media, for which they do not pay. Instead they provide their personal data that service providers also use to make money.

Today, some important EU consumer rights only apply to services that are paid with money.

Under the Directive, as transposed by means of the Bill, the provider of such “free” services will have to give you clear information about, for example, the main characteristics of the

service, the contract duration and the termination conditions. You will also be able to cancel the online contract within 14 days without providing a reason.

The Bill has hence provided for the introduction of the definition of “personal data” in regulation 2 (2) of S.L. 378.17, through article 16 (g) of the Bill, as defined in point (1) of Article 4 of Regulation (EU) 2016/679 namely the General Data Protection Regulation (GDPR).

Moreover, the Bill has ensured that by the amendment of regulation 3 of S.L. 378.17, wherein sub-regulation (1a) has been added (through article 17 (b) of the Bill) to establish that S.L. 378.17 “shall also apply where the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content which is not supplied on a tangible medium or digital service in accordance with these Regulations or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.”.

The Bill provides for the addition of sub-regulations (4) to (8) in regulation 15 of S.L. 378.17, through article 25 of the Bill, that establish:

- in respect of personal data of the consumer, the trader shall comply with the obligations applicable under the GDPR and the Data Protection Act;
- the trader shall refrain from using any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content:
 - has no utility outside the context of the digital content or digital service supplied by the trader;
 - only relates to the consumer’s activity when using the digital content or digital service supplied by the trader;
 - has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or
 - has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content;
- except in the situations referred to in sub-regulation (5)(a), (b) or (c), the trader shall, at the request of the consumer, make available to the consumer any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader;

- the consumer shall be entitled to retrieve that digital content free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.
- in the event of withdrawal from the contract, the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer, without prejudice to sub-regulation (6).

With regard to regulation 16 of S.L. 378.17, the Bill has, through article 26 thereof, provided for the addition of sub-regulation (2a) and for the replacement of sub-regulations (4) (b) (i), respectively to ensure that:

- in the event of withdrawal from the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.
- the consumer has not given prior express consent to the beginning of the performance before the end of the fourteen (14) day or thirty (30) day period referred to in regulation 10.

3. Ranking of offers

When looking for an offer on an online marketplace or a price comparison site, many consumers only look at the top results. It is therefore important that consumers know what criteria are used to rank the offers, and if an offer appearing on the search page is a paid advertising.

Under the new rules platforms will have to inform consumers about the main criteria determining the ranking of the offers provided in response to a search query, for example, whether these offers are ranked based on price, distance, consumer ratings or a combination of different criteria. They will also have to clearly indicate when search results are based on payments received from the listed traders.

Article 5 (c) of the Bill adds the definition of “ranking” in article 51A of the CAA, meaning “the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication;”.

By means of Article 7 (b) of the Bill, the new sub-article (3a) is added in article 51D of the CAA that establishes that when providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material.

This does not apply to providers of online search engines as defined in point (6) of Article 2 of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

Article 10 of the Bill provides for the addition of new point 11a in the First Schedule to the CAA that establishes that providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results, is considered as a commercial practice that is in all circumstances regarded as unfair.

Article 20 of the Bill adds the new regulation 5A in S.L. 378.17 that in (1)(a) thereof establishes that before a consumer is bound by a distance contract, or any corresponding offer on an online marketplace, the provider of the online marketplace shall, without prejudice to the provisions in Part VIII of the Act, provide the consumer in a clear and comprehensible manner and in a way appropriate to the means of distance communication, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented, on the main parameters determining ranking, as defined in Article 51A of the Act, of offers presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters.

4. Transparency about consumer reviews

The reviews posted on a platform or a trader's website often influence a consumer's purchasing decision. However, those reviews supposedly written by other consumers are not always genuine. The ... Directive, as transposed by the Bill, expressly prohibits submitting or commissioning someone to submit fake reviews or endorsements, and to manipulate consumer reviews. Traders giving access to consumer reviews will have to explain if and how they ensure that reviews come from real consumers. Traders will be allowed to claim that the reviews were submitted by consumers only if they take reasonable and proportionate steps to check this, such as only allowing consumers who purchased or used the good or service to submit a review about it.

With regard to reviews the Bill:

- introduces, through article 7 thereof, the new sub-article (5) in article 51D of the CAA (misleading omissions) that establishes that where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as material; and
- through its article 10, the Bill adds the new points 23b and 23c in the First Schedule to the CAA, that enlists as commercial practices that are in all circumstances regarded as unfair, and are classified under misleading commercial practices:

“23b. Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers.

23c. Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products.”.

5. **Personalised pricing**

Traders can personalise the price of their offers for specific consumers or groups of consumers based on automated decision-making and profiling of consumer behaviour.

Thanks to the Directive, as transposed by means of the Bill, consumers will be informed each time the price presented to them online is based on an algorithm taking into account their personal consumer behaviour, so that they are aware of the risk that the asking price was increased.

Through its article 19 (b), the Bill has included in the amendments with regard to regulation 5 of S.L. 378.17 (relative to information requirements for distance and off premises contracts), in its sub-article (1), the new point (ea), to include in S.L. 378.17 as an information requirement “where applicable, that the price was personalised on the basis of automated decision-making;”.

6. **Prohibition of reselling event tickets bought through bots (automated means)**

A software that automates the online buying process (so-called ‘bots’) makes it possible to carry out a large number of transactions simultaneously. Traders can use bots to buy sought-after tickets and resell them on secondary markets at prices much high than their face value.

To ensure that consumers can purchase event tickets at fair prices, the Directive prohibits traders from reselling event tickets bought through bots and breaching the limits or other rules set by the primary ticket seller.

Through its article 10, the Bill adds the new point 23a in the First Schedule to the CAA, that enlists as a commercial practice that is in all circumstances regarded as unfair, and is classified under misleading commercial practices, hence prohibited: “Reselling events tickets to consumers if the trader acquired them by using automated means to circumvent any limit imposed on the number of tickets that a person can buy or any other rules applicable to the purchase of tickets.”.

7. Ensuring genuine price reduction claims

In some cases, price reductions that claim to be the “best deal” are not always genuine. Thanks to the new rules, the sellers will not be able to advertise fake prices reduction.

For every price reduction claim, sellers will have to indicate as reference price the lowest price applied within a period of at least 30 days preceding the price reduction announcement.

Article 13 of the Bill specifically provides for the introduction of new regulation 5A in S.L. 378.09 with regard to price reductions, that establishes:

- any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction;
- the prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction, provided that:
 - for goods which are liable to deteriorate or expire rapidly, the prior price is the one applied immediately before the price reduction;
 - if the goods have been on the market for less than 30 days, the prior price means the lowest price applied by the trader during this period;
 - when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction.

8. Compensation for victims of unfair commercial practices

Existing EU consumer legislation enables national authorities to stop and prevent unfair commercial practices but does not give consumers a direct right to compensation when they are harmed by such practices.

The ... Directive, hence the Bill, ensure that consumers in all Member States have the right to individual remedies (such as ending the contract, getting a price reduction or financial compensation) when they are affected by unfair commercial practices, such as misleading marketing.

The Bill in article 4 thereof, has provided for the introduction of the above in article 21 of the CAA by means of a new proviso the follows sub-article (1) of the said article 21 of the CAA, so that the Consumer Claims Tribunal “when determining issues in disputes that concern harm suffered by consumers” due to unfair commercial practices, orders proportionate and effective remedies, that include compensation for damage suffered by consumers “and, where relevant, a price reduction or the termination of the contract.” In such cases, the Consumer Claims Tribunal is also to take “into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.”.

9. More effective penalties for cross-border infringements

Today, EU consumer authorities are not sufficiently equipped to tackle ‘mass harm situations’ that affect large numbers of consumers across the EU. When a company breaks consumer rules, the penalties vary widely across the EU and are often quite small, even for very serious infringements. As a result, they do little to prevent dishonest traders from cheating.

The Directive, as transposed by means of the Bill, provides the national authorities with a power to impose effective, proportionate and dissuasive penalties in a coordinated manner when they work together on major cross-border infringements that affect consumers in several EU Member States. In these cases, national authorities will have the power to impose a fine of up to 4% of the trader’s turnover, or up to 2 million EUR when information on turnover is not available. Member States are free to keep or introduce higher maximum fines.

The Bill, by means of article 8 thereof, ensures the introduction of such penalties by means of the addition of three new provisos in article 106A (3) of the CAA.

10. Tackling dual quality of consumer goods

Goods sold in identical or similar packaging sometimes have a different composition or characteristics compared to the same goods in other EU countries (‘dual quality’). This was confirmed by a study carried out by the Commission’s Joint Research Centre (JRC) in 19 Member States, based on a common EU testing methodology.

Consumers should not be misled into believing that they are buying the same product when they are not.

With the transposition of the Directive by means of the Bill, the national enforcement authority has stronger powers to stop misleading marketing of goods that have significantly different composition or characteristics but are presented as being identical. The Directive acknowledges that differences can be justified by objective factors, such as national rules on product composition, use of local or seasonal ingredients or trader’s voluntary commitment to promote healthier food.

The Bill, through its article 6, introduces the new sub-paragraph (iii) in paragraph (c) of article 51C of the CAA, to ensure the classification as a misleading action any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors.

11. Better protection against unfair practices in doorstep selling and commercial excursions

EU law already prohibits misleading or aggressive marketing practices, including when traders make unsolicited commercial visits to a consumer's home (doorstep selling) or organise commercial excursions for promoting and selling goods.

With the transposition of the Directive, the Bill has included additional national measures namely that for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the withdrawal period of fourteen (14) days is extended to thirty (30) days.

Reference is hereby made to article 23(a) and (b) of the Bill that establishes within regulation 10 of S.L. 378.17:

- the addition to sub-regulation (1), of the proviso:

“ Provided that for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the withdrawal period of fourteen (14) days is extended to thirty (30) days.”;

- the replacement of sub-regulation (2) by:

“(2) Without prejudice to regulation 12, the withdrawal period referred to in sub-regulation (1) shall expire after fourteen (14) days or, in cases under the proviso of sub-regulation (1) after thirty (30) days from:”.

Moreover, through article 27(b) of the Bill, regulation 18 of S.L. 378.17 (with regard to the exceptions from the right of withdrawal) has been amended to ensure the alignment with the above-mentioned changes by means of the following proviso:

“Provided that for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the exceptions from the right of withdrawal set out in points (a), (b), (c) and (e) shall not apply.”

Disclaimer

Since these are user guidelines, they only provide a summary of the legal instrument (the Bill) and of the obligations therein contained. Therefore, these user guidelines do not in any manner provide a replacement of the legal instrument itself. Moreover, any oversight, error or omission in these user guidelines will not exempt the users from their legal obligations, including compliance obligations, as required and established in the published legal instrument (the Bill).

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