UNIVERSIDADE CATÓLICA PORTUGUESA

Escola de Lisboa

The E-commerce regulation in the European Union - Are there enough tools for the correct functioning of the Single Digital Market?

Master of Transnational Law

Católica Global School of Law

Author: Camilla de Sá Teixeira

Supervisor: Prof. António Carneiro da Frada de Sousa

March 2020

'When the whole world is silent, even one voice becomes powerful'

Malala Yousafzai

ACKNOWLEDGMENTS

Initially, I would like to thank God for giving me the opportunity to participate of this incredible journey. Also, I would like to express my deepest appreciation to my supervisor, Professor António Frada de Sousa, for his availability, patience and help on this research.

In addition to that, I would like to extend my deepest gratitude to my parents, who believed me the most and gave me strength during difficult times, and my German family, for having welcomed me and supported.

Besides that, I would like to give a special thanks to Tânia Abreu Godinho, one of the sweetest persons I have ever met, and that contributed a lot to me in this path, and Dr. Armando Luís Silva Rocha, a professional extremely committed with the students and opened to offer his assistance in any time.

Camilla de Sá Teixeira

ABSTRACT

The main objective of the present work is to analyze the functioning of E-commerce within the European Union.

In this regard, in order to carry out a solid and reasoned study, we will use as a basis for our analysis the main Directives and Regulations applicable to electronic commerce, as well as the co-related decisions established by the Court of Justice of the European Union and other cases used as a matter to exemplify possible disputes that may occur within the electronic commerce atmosphere.

Therefore, first the work will give an overall perspective about the importance of E-commerce, most particularly the European Union, highlighting the exceptional moment the world is facing and, consequently, the increasing importance of electronic commerce as a mechanism to help public safety.

In the second part, we will make a historical drawing of the main legal instruments adopted by the European Union, namely the directives on E-commerce, Consumer Rights and Alternative Dispute resolution, as well as Regulations about General data Protection and Online Dispute Resolution for Consumer Disputes. Each chapter will be accompanied by a case discussed in court or used as an example by some institution in order to understand the application of the laws, making the subject less abstract.

Last but not least important, the third part will be the conclusion of the work and where we are going to answer if current state of the legal framework applied to E-commerce within the European Union is sufficient for its correct functioning or whether new rules shall be adopted.

Abbreviations

- EU - European Union
- CJEU - Court of Justice of the European Union
- ADR - Alternative Dispute Resolution
- ODR - Online Dispute Resolution
- UK - United Kingdom
- GDPR - General Data Protection Regulation

INTRODUCTION

Since its creation in the 90s, to its expansion worldwide, it is undeniable that online shopping has significantly affected our society. Described as the act of selling or buying goods and services over the internet, the E-commerce not only improved the globalization movement, approaching countries and breaking physical barriers, but also created several new aspects related to business model, companies development, and the relationship between traders and consumers.

The E-commerce demanded from companies an approach much more international and not limited to their original territories, establishing a global presence instead of limiting their market. Consequently, not only big corporations improved their productivity, but also small companies and countries. Besides that, given the improvement of globalization due to electronic commerce, a multilateral dialogue between different governments and industries was generated, as well as the necessity of Co-operation among States and international organizations to harmonize the applicable rules. Therefore, online shopping ended national monopolies, brought a scenario of legal uncertainty to consumers and increased competitiveness among traders.

From the point of view of the European Union, the E-commerce was an excellent opportunity to consolidate the EU digital single market and strengthen the economy. However, besides the language barrier, "*Cross border transactions were specially problematic to the consumer due to problems concerning the applicable law, differences between national laws, and difficulties involved in actually invoking the commercial guarantee*"[1]. In this regard, in order to eliminate the main obstacles

[1] George T. Brady, "Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises?" - North Carolina Journal of International Law & Commercial Regulation 23 (1997) - p.156. Available From: https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1623&context=ncilj

between Member States, as well as improve the functioning of E-commerce within the EU, reducing the negative effects brought by this new method of doing business, the European Union drafted several Directives and Regulations in order to protect not only consumers but also traders in itself, diminishing the cross-border barriers.

Although until the present moment the European Union took important steps towards the protection of consumer rights, and the adoption of alternative dispute mechanisms, a significant party of citizens continues to hesitate to make purchases or any other type of transaction over the internet due to the legal uncertainty and efficient mechanisms applied to protect their data personal data. Besides that, the urge to establish a harmonized legal framework applicable to all Member States of the EU is another aspect that needs to be development. The fact each Member State has its own jurisdiction and develops its own criteria when adopting rules related to online transactions turns to jeopardize the achievement of legal certainty.

Considering aforementioned and the increasing relevance of E-commerce to the European Union, the present work aims to analyze the main EU legal framework applied to E-commerce, as well as co-related cases in order to identify the aspects that may be improved and, consequently, increase consumer confidence with respect to online transactions, but also to develop the EU digital single market. Therefore, we will focus our analysis in four key policy areas: E-commerce functioning; Consumer Protection; Alternative Dispute Resolution and Data Protection.

CHAPTER I

The development of the first mechanisms

As presented previously, in view of the heterogeneous scenario brought by this new way of doing business over the internet, composed of both legal uncertainty and a great potential of economic development, the European Union felt the need to create suitable mechanisms capable to encourage the development of electronic commerce.

After concluding that those technological changes could be used as a relevant ally for the market, the Commission of the European Union pressed the Putting Services to Work Communication[2], proposing special policies to create jobs in the service sector. However, besides the fact the document focused its scope of application on traditional communication services, it also did not mention e-commerce in the body of its text, which ended up not bringing any adequate alternative with regard to the crucial actions to encourage the growth of e-commerce.

Therefore, as a way to complement the Putting Services to Work Communication, the Commission adopted in April 1997 "*A European Initiative on Electronic Commerce"*[3]. With a broader scope of application, which encompassed both services and good areas, including also the electronic processing of data. The Initiative established the necessary measures that should be taken by the year 2000 in order to consolidate a solid framework for the improvement of electronic business. This was the "*first time the Commission stated its intent to: 'encourage the vigorous growth',*

[2] Putting Services to Work Communication - Commission Proposes an EU Policy Initiative for Jobs in Services Sector, 1996.

[3] Communication from the Commission to the Council, the European Parliament, the economic and Social Committee and the Committee of Regions - A European Initiative on Electronic Commerce, 1997.

recognized the 'fundamental importance of electronic commerce in Europe', and envisioned for the European Union to become 'the heartland of electronic commerce''[4].

The Commission took advantage from the circumstances of cultural and social diversity presented inside the European Union to produce policies capable to be applied globally. In this sense, with the objective to achieve the defined goals, the document identified four key[5] areas where actions should be taken:

- *Solid Regulatory Framework* - The establishment of a solid legal system within the European Union digital single market, based on the EU fundamental principles and in accordance with the main objectives of e-commerce.

- *Appropriate infrastructure* - The development of a strong and efficient infrastructure, through the provision of new services, technologies and tolls, in order to make the access to e-commerce easier and more democratic.

- *Friendly Business Environment* - The use of good market practices together with cooperation between governments and the incentive of the competitiveness of the E-commerce within the EU, as well as the development of adequate skills in order to reach a favorable business atmosphere, improving both consumers and producers confidence.

- *Unified legal framework at Global Level* - The accomplishment of electronic commerce Directives and Regulations capable coherent not only with the different existent jurisdictions within the European Union, but also at a global level. Hence, the initiative intends to ensure the promotion of a EU regulatory framework

[4] MURRAY, Andrew D. and LODDER, Arno R. - EU Regulation of E-commerce - A Commentary - Publisher: Edward Elgar Pub (April 28, 2017), p. 4.

[5] Communication from the Commission to the Council, the European Parliament, the economic and Social Committee and the Committee of Regions - A European Initiative on Electronic Commerce, 1997. Available from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0157:FIN:EN:PDF

compatible with the international market rules, including the WTO commitments, for example.

Despite the European Union initiative configured the first step into the establishment of measures applicable to electronic commerce, its lack of normative power ended up making it difficult to obtain advanced changes and significant impacts. Consequently, the need for the establishment of a solid legal system applied at E-commerce level become even more present, leading to the adoption of the first legal instruments applicable to electronic commerce.

CHAPTER II

E-commerce Directive

As discussed above, after determine the elemental significance of electronic transactions for the European Union and define the measures that should be applied in order to achieve the growth of e-commerce, the Commission adopted in 2000 the E-commerce Directive[6].

Recognized as the legal framework Directive, "*due to the coverage of e-commerce key issues*"[7], the provision laid down general rules with the aim to diminish the online barriers that prevented consumers and sellers from doing business over the internet, as well as guarantee the free movement of information society services between the Member States, achieving a strong and harmonized digital single market.

Although the E-commerce Directive was not the first provision elaborated to deal with the issues regarding the electronic commerce, the relevance of such apparatus is because it not only configured a crucial step towards the harmonization of the E-Commerce legislation applied within the EU single market but, most particularly, because it helped to clarify and protect certain juridical aspects about transactions elaborated over the internet that were left uncovered, creating, as a result, a more stable legal scenario.

The Directive is focused on regulate information society services, that is, the services usually provided for remuneration, at distance, and by means of electronic

---

[6] Directive 2000/31/EC on certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market.

[7] MURRAY, Andrew D. and LODDER, Arno R. - EU Regulation of E-commerce - A Commentary - Publisher: Edward Elgar Pub (April 28, 2017), p. 17.

devices for the processing and storage of data, and at the individual request of a recipient of a service. The supply of information society services is not limited to the cases involving business and consumers, being also applied to transactions elaborated between traders. Additionally, regarding the services provided free of charge to consumers, they are also regulated by the Directive, as long as it falls within the context of an economic activity.

Nevertheless, the E-commerce Directive scope is not unlimited, being excluded from its appreciation the following topics: cases involving taxation; information society services related to the processing of personal data (and related topics); transactions ruled by cartel law; services of notaries or correspondent professions; activities regarding the representation of a client before the court and gambling activities (including activities involving money and games of chance). Therefore, "*the Directive must ensure the protection of minors and human dignity, consumer protection and the protection of public health, without prejudice the level of protection in other Directives*"[8].

As described above, the relevance of this Directive is based on the fact it provided a solid legal framework applied to the transactions elaborated over the internet. Among the settled provisions, we will now analyze the most important aspects defined by the E-commerce Directive.

▸ Regulated Professions

Among all the existent occupations around the world there are some professions that because of their individualities, working conditions, impact on society (public healthy, for example) and knowledge requirements, need to be ruled by a regulatory body[9].

[88] Idem, p. 18

[9] Art. 3 of Directive 2005/36/EC on the Recognition of Professional Qualifications.

Each professional association has their own procedures and requirements, being responsible to outline the adequate ethical rules necessary to be respected by their class of professionals. The regulatory body not only may demand the professional to be registered in the association, as well as require the acquirement of a specific license, trough the accomplishment of an internship program or exam, in order to be able to exercise the profession.

Given the importance of regulated professions and the specificities that surround it, the E-Commerce Directive established the obligation of Member States to monitor the exercise of information society services by professional that are party of the group of regulated activities in order to prevent these professional from infringe the ethical rules and requirements defined by the responsible regulatory body[10].

With respect to the ethical rules determined by the professional bodies and associations, the Directive also defined as its main objective the achievement of a single code of conduct applicable within the EU as a way to obtain the harmonization of the type of information that may be provided by professionals that exercise regulated activities.

However, in the absence of a unified code of conduct, the Commission shall adopt the necessary measures in order to maintain the properly functioning of the Internal Market. The action of the Commission must be aligned with the autonomy of that states and, thus, the professional bodies, that is, these essential measures must be in accordance with the ethical codes applicable at EU level and also the regulatory bodies and associations.

---

10 'In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations'- Recital 32, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

▸ Online Contracts

The elaboration of agreements, written or spoken, between two ore more parties are fundamental for the existence of most business dealings around the world. With respect to e-commerce transactions, online contracts are crucial for the successful development of digital market not only because they configure an important mechanism to contract services and/or purchase products, but also as a manner to encourage the use and growth of electronic business. In addition to that, "*of particular importance is that legal requirements may not create obstacles for the use of electronic contracts, and that legal effectiveness and validity may not be deprived on the account of contacts being electronic*"[11].

Consequently, the adoption of an adequate regulation is extremely necessary, being the reason why the E-commerce Directive determined in the body of its text specific requirements to be accomplished by Member States in order to achieve the correct and efficient functioning of contracts made over the internet, we will now study the most relevant aspects.

Treatment of contracts

According to the Directive, Member States must ensure that their legal framework may not create obstacles to the formation of online contracts. The purpose is to prevent the existing requirements in each legal structure of EU members from compromising the formation and validity of electronic contracts.

However, the provision also defined some specific circumstances in which Member States may decide to apply their own rules, they are as follows: contracts related to transfer rights in real states (except for rental rights); contracts that according to the law may require the involvement of courts or public authorities/

[11] MURRAY, Andrew D. and LODDER, Arno R. - EU Regulation of E-commerce - A Commentary - Publisher: Edward Elgar Pub (April 28, 2017), p.39.

professions exercising public authority; contracts governed by Family Law and other related topics. After decide under which justification they will apply their own regulation, Member States shall communicate the Commission their resolution and the respective reason.

Information to be provided

Another subject dealt by the E-commerce Directive and related to online contracts is about the information that needs to be granted by service providers to the recipient of the services. Besides the problems faced by consumers with regard to the available languages in which online contracts are presented, "*for instance, Internet is a cheap and easy way for fraud, especially in resect of the most vulnerable group the electronic consumers. For example, there are pseudo-entrepreneurs, who try to sell goods or services using anonymous e-mail addresses or a mail box number, thus making difficult to find out their actual location (...)*"[12] In this regard, the contractual conditions to which recipients are subject are extremely relevant no only to the creation and validity of contracts and the protection of the parties involved, but also to increase consumer confidence in the internal market, being the reason why the access to certain types of data content, before the order being placed, is so important.

According to the established by the Directive 2000/31 EC, Member States are obligated to guarantee that the essential information about the development of the contract have been given to the recipient of the services without any impediment and before the order being concluded (except in those cases where something different was accorded by parties who are not consumers).

In this regard, the Directive settled the crucial information that must be provided to consumers in advance, defining the following aspects: the technical steps that needs to be taken in order to conclude the contract; if the service provider will be

[12] SKOROCHOD, Galina. Consumer Protection in the European Union. Central European University. Budapest, Hungary. 2007, p.38. Available From: http://www.etd.ceu.hu/2008/skorochod_galina.pdf

responsible for filling the contract and if the document will be accessible; the adequate mechanisms in order to recognize and correct input errors; and the available languages for the contract.

Placing of the Order

With regard to transactions elaborated through electronic means, according to the Directive, service providers must inform consumers that they are aware of the order, without undue delay and through electronic means. In this regard, Member States are responsible to regulate whether the service provider is really complying with duty to confirm the placing of the order.

In addition to that, unless otherwise accorded by the parties that are not consumers, the services providers also have to make available tools capable to make consumers communicate to identify and correct any possible mistake related to the order.

- **Liability of Intermediaries**

According to the defined by the E-commerce Directive, there are certain circumstances among which intermediary of services may exempted from liability; mere conduit, caching and hosting activity.

Regarding the ´Mere Conduit´ condition, the intermediary will not be held liable by the information transmitted if it does not initiate the transmission, select the receiver of such transmission and does not elect or modify the information contained in the transmission.

With respect to the ´caching' aspect, the intermediary must be capable to prove that it only transmitted the information, automatically, and did not storage the data more than the reasonable time. In this sense, the information must not be modified; the intermediary must comply with the conditions of access to the information; the rules related to the updating of the information must be stated in a clear and specific form; the intermediary must not interfere to the lawful use of technology, as well as shall remove the data storage if the information is no longer being stored by the service provider.

As per the hosting activity, it may be understood as the storage of personal data information from recipients. The intermediaries will not be held liable for the information stored if they may prove that they did not know about the presence of illegal content and, upon learning of the illegal activity, took the necessary measures to remove or to lock the access to such content.

Case Discussion

Eva Glawischnig-Piesczek v. Facebook Ireland Limited[13]

In 2016, an anonymous Facebook user shared an article from an Austrian magazine related to the party from which Mrs. Eva is formal a member, and published an offensive comment about the congresswomen. When the complainant became aware about the offensive post, she contacted the Facebook in order to have the publication deleted and the identity of the writer of the post revealed, however, the company remained inert on the subject and did not withdraw the offensive publication.

As a consequence of this lack of response, Mrs. Eva decided to file an action against Facebook Ireland, responsible for users located outside the USA and Canada, under the accusation that not only her right of image has been violated, but also that the defamatory content of the comment was a hate speech and, therefore, the publication configured an infringement of Austrian law.

[13] Judgment of 3 October 2019, Eva Glawischnig-Piesczek v. Facebook Ireland Limited, C- 18/18, EU:ECLI:EU:C: 2019:821.

Initially, the defendant claimed that Austrian law was not applicable to this case, once the company was governed by Californian law, where it has its headquarters, or Irish law. Facebook also argued that under the E-commerce Directive hosting providers are exempted from liability for their users' content. Additionally, the company also stated that the published comment was party of individual's right to freedom of expression, defend by the European Court of Human Rights.

After the primary court disputes, the Supreme Court of Austria referred the case to the European Court of Justice in order to clarify whether the non-obligation of hosting providers to monitor the information transmitted or stored by them, established by Article 15 of the E-commerce Directive, could prevent an order from being issued against the hosting provider in order to have the content similar to illegal information removed, as well as to define the precise territorial scope of the Directive, in order to identify if such provision was applicable or not worldwide.

With regard to the first aspect, the CJEU concluded that the E-commerce Directive does not preclude a Court of a Member State from compelling a hosting provider to remove information considered as unlawful or any content identical to illegal information. Besides that, although Article 14(1) of the Directive exempts the liability of host providers under certain circumstances (not aware about the illegal content or remove it as soon as possible), according to the Advocate General "(…) *a host provider may be the addressee of injunctions adopted on the basis of the national law of a Member State, even if it satisfies one of the alternate conditions set out in Article 14(1) of Directive 2000/31, that is to say, even in the event that it is not considered to be liable".*[14]

The EU court also highlighted that although Article 15 of the Directive does not impose to host providers the obligation to monitor the information transmitted or stored, Recital 47 of the same provision allows Member States to compel host

[14] Ibidem, paragraph 25.

providers to monitor the information dealt by them in the presence of special conditions. In this sense, according to the CJEU, the presence of an illegal content would fulfill this necessary particularity, and, therefore, hosting providers would have to monitor obligatory the information transmitted or stored by them. Therefore, in the present case, since Mrs. Eva previously communicated to Facebook the unlawful content of the publication, the company should have automatically started to monitor the publication in order to remove any illegal information.

In addition to that, the Court of Justice of the European Union also drew attention to Recital 41 of the E-commerce Directive, that established the necessity to balance the different interests and fundamental principles involved in each online transaction case. In the case under discussion while we have the right of freedom of expression on the one hand, on the other both rights of image and honor of Mrs. Eva have been violated. Therefore, according to the CJEU interpretation, when applying the concept established by Recital 41, the penalty or obligation shall not exceed the violation in itself in order to avoid an excessive punishment from the hosting provider

In this sense, "(…) *it should be made clear that the illegality of the content of information does not in itself stem from the use of certain terms combined in a certain way, but from the fact that the message conveyed by that content is held to be illegal, when, as in the present case, it concerns defamatory statements made against a specific person*".[15]

Concerning worldwide application of the Directive, the Court of justice of the European Union stated that the Directive does not provide any limitation with regard to its region domain, and concluded that the use of the Directive, within the framework of international law, will depend on entirely of each Member State decision.

---

[15] Ibidem, paragraph 40

In summary, the CJEU decision is based on the fact its interpretation of the Directive not only allowed Member States to order the removal of information considered as unlawful, as well obliged hosting providers to monitor the information transmitted or stored by them when in the presence of particular circumstances, like illegal content. Additionally, the case also allowed the E-commerce Directive to be applied worldwide, leaving it up to Member Sates the decision about whether to apply the provision or not.

Synthesis

As we may observe, the E-commerce Directive represented a turning point in the history of online commerce, providing the main general rules applied to electronic transactions and, therefore, composing the legal bases to electric transactions. Additionally, as we may observe in the case described above, the Court of Justice of the European Union also played an important role with respect to the interpretation and application of the E-commerce Directive, providing making the scope of the directive much more comprehensive and protective.

Nevertheless, the legal framework of the E-commerce Directive is not complete, and issues related to the privacy of consumers, payment process, the delivery of the purchased goods and their personal data protection remaining existing. One of the main aspects of online shopping is the fact it requires from consumers the main details about their personal data information, which represents an enormous risk to consumers, once they may get exposed to cybercrime (illegal acts that occur over the internet) and fraud. Besides that, with respect to the payment process, for example, "*consumers may also be apprehensive to transact online if the payment be apprehensive to transact inline if the payment process is susceptible to deceptive and fraudulent practices. This may occur where key information regarding the actual* *cost of the transaction is hidden in terms and conditions or where there is inadequate or misleading disclosure regarding the actual cost of the transaction*".[16]

Additionally, the generic nature of the Directive 2000/31 ended up not proving specific rules regarding the consumer rights in electronic transactions, contributing, thus, for the permanence of legal uncertainty and lack of trust from consumers.

Hence, despite the great progress originated by the E-commerce Directive, the need for more effective and specialized mechanisms, capable to regulate not only the protection of the personal data information of consumers, as well as to establish basic consumer rights applied o online transactions.

[16] OGUNSIPE, Damiola. Establishing Consumer Confidence in E-commerce: A Review of the Lesgilative Framework in the European Union. 2015, p. 10. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989837

CHAPTER III

Consumer Rights Directive

With the objective to achieve a higher level of consumer protection within the European Union, as well as increase the transactions between EU Countries, on October 2011 the European Parliament and the Council published the Directive on Consumer Rights[17]. With respect to the online commerce, the relevance of this provision is based on the fact it established important consumer protection rules, including those applicable to transactions made over internet. As a consequence, the Directive configured a fundamental mechanism towards the development of E-commerce and increase of consumer protection.

The new provision took place of the Directives about contracts negotiated away from business premises[18], and, regarding distance contracts[19], however, since these Directives brought a certain level of adjustment to consumer protection in the European Union, some definitions were still preserved, like the concept of ′consumer’, for example, defined as *′any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession′*.

Despite its generic character, the Consumer Rights Directive has a limited scope of application, covering contracts concluded between consumers and traders, regarding the supply of services, products, public utilities (water, gas or electricity, available in unlimited quantity/volume) of district heating and digital content; excluding from its appreciation contracts related to social and healthcare services, gambling, package travel, financial services (insurance and investment) and passenger transport services.

---

[17] Directive 2011/83/EU on Consumer Rights.

[18] Directive 85/577/EEC to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises.

[19] Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts.

As subject matter, the Directive defined the achievement of a higher level of consumer protection, through the harmonization of the different types of existent legal systems within the European Union, as well as the development of the EU single market. In this regard, Member States are compelled to cooperate and not introduce into their national laws concepts distinct from those established by the European Union, including those that differ from the level of protection and do not necessarily are in accordance with the law. However, this does not mean that Member States are obliged to provide full contractual harmonization, that is, they are allowed to maintain a certain level of independence in order to establish their own specific rules.

Regarding the contracts covered by the Directive, we may divide into three main classifications, based on whether the contract was concluded within the trader's business premises or was elaborated through a distance communication tool; they are as follows: On-premises contracts, Off-premises contracts and Distance contracts. Among these categories, the Distance contracts deserves special attention since they configure the base of business transactions concluded over the internet and, consequently, are of fundamental importance for the properly functioning of E-commerce.

Defined as any contract concluded for products or services supply, elaborated at distance between trader and consumer, that is, without the simultaneous physical presence of the parties involved, with the exclusive use of one or more means of distance communication (telephone, mail, internet), up to and including the time at which the contract is concluded.

The Consumers Right Directive play an important role with respect to the elucidation and development of adequate mechanisms to protect the parties involved in such contracts, most particularly, highlighting the importance of identify the place of negotiation and conclusion of the contract in order to define whether the contract may be considered as a distance one. In this sense, if a consumer visits the business premises of the trader in order to acquire information about the contract, but both the negotiation and conclusion occurs through a distance communication tool, for example, then, this contract will be considered as a distance one.

Therefore, the conclusion of the contract through a distance communication tool configured a fundamental element in order to classify the contract as a distance once. As a consequence, the reservations and bookings made by consumers through a means of distance communications, such as booking a hotel over the telephone, may not configure them as distance contracts. The Directive also provides the possibility of schemes offered by third parties other than the trader, but used by the trader, to be configured as organized distance selling or service provision schemes and, therefore, be considered as distance contracts.

As described before, the Consumer Rights Directive has a limited scope and is only applicable to certain types of services and products. Among these contracts, the ones elaborated to the supply of online digital content configure, together with the definition of Distance Contract, another key point not only to understand the development of the transactions made over the internet, and this new type of service, but also as matter to enhance the rules applicable to E-commerce, providing legal certainty and, consequently, more consumer protection.

Even though the concept of ‘contracts for the supply of online digital content’ is not expressly established by the Directive, both Article 2 and Recital 19 provides the concept of ´digital content´, defining it as the ´data which are produced and supplied in digital form, such as computer programs applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means´.(Definition of recital 19).

With respect to the method through which the ‘data’ will be provided, the identification of the medium as tangible or intangible configures a crucial aspect not only to delineate the type of ‘digital content' under negotiation, but also to identify the applicable contract to that specific situation. According to Recital 19 of the Directive, if the content is provided through an intangible medium, this agreement will not be classified in accordance with the concepts of ‘sales contract’ or ‘service contract’ established by the Consumer Rights Directive, but actually as a contract for ‘online digital content’.

▸ **Contracts elaborated for free**

Given the above, an important question to be raised is whether the Consumer Rights Directive is also applicable to the agreements performed for free, most particularly with regard to the contracts for the supply of public utilities and online digital content, once they are not specifically defined by the Directive, and, therefore, have a lack of the ´price element’ as a descriptive factor. As a way to exemplify, we may mention the online contracts elaborated for the supply of online games for free[20]. In such cases, it is important to define the circumstances of the ‘free contract’, most particularly, regarding how the consumer personal data will be used by the service provider and/or the intermediary.

In an overall perspective, the Directive 2011/83 failed to establish a provision regarding the contracts performed for free. However, the Commission Guidance reached a conclusion, stating that since the ´price element’ is a component aspect of the definition of sales and services contracts provided by the Consumer Rights Directive, the contracts performed for free are not covered by the Directive, except for the contracts with free trial period, that are converted into paid contracts after the trial period ends.

With respect to the supply of ‘online digital content’ and ‘public utilities’, according to the Commission Guidance, since these contracts do not have an

[20] Guidance Document on the Consumer Rights Directive issued by the European Parliament and the Council of the EU - 25 October 2011, p.8. Available From: https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0_updated_0.pdf

individual definition and, consequently, do not have the ´price element´, they are covered by the Directive even when performed for free.

▸ General Rules

As per the general rules defined by the Directive, among the main concepts we must highlight trader’s information duty to provide consumers with the main aspects about the contract, that is, the main specificities and instructions about the transaction and subject matter; trader’s data details; consumer’s right to withdrawal from the contract and all the linked information, as well as the applicable codes and alternative dispute resolution for that contract. All these details must be given in a clear and comprehensible manner and prior to the conclusion of the contract, or any further process closely related to it.

Beyond the described information requirements, the Directive also established specific information duties applied to distance contracts. According to the provision, traders of distance contracts concluded trough ‘electronic means’ and that comprises a payment, must provide in a ‘clear and prominent manner’ and ‘before the consumer places his order’ not only the data details described above, but also the main particularities about the good and/or service and the respective price.

With respect to the meaning of ‘electronic means´, although not explicit defined by the Directive, according to Recital 39, it may be understood as distance contracts concluded through websites. Therefore, all the details about the transaction must be available on the trader's online page before the order be placed by the consumer and in a very direct form, not through different links than the original one for the place of the order.

According to the Commission Guidance, in cases in which the consumer must press a button or a similar function to do the order, both the button to place the order and the obligation to pay shall be ‘clearly labelled’. Consequently, if the trader fails to provide the required information, the consumer will not be bound by the contract or submitted order.

In addition to that, traders involved in distance contracts are also obliged to inform consumers, through a durable medium, about the conclusion of the contract, as well as provide all the relevant aspects about the delivery conditions and means of payment. As stated by the provision, traders must keep available in their websites all possible payment conditions and applicable delivery terms, including any territorial restriction. These requirements are of fundamental importance to prevent consumers engaged in distance contracts from discovering delivery or payment restrictions only after submitting the order.

Case Discussion

Walbusch Walter Busch GmbH & Co. KG vs Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV[21]

In 2014, a clothing retailer, Walbusch Walter Busch, decided to distribute leaflet as an advertising strategy for sales. Among the main data presented in the leaflet were the details about the trader and consumer's right to withdraw from the contract, with a link giving access to the withdrawal form.

After became aware about the pamphlets, a consumer association in Germany filed a lawsuit against the clothing retailer in order to prevent the distribution of the leaflets under the accusation the information provided about consumer's right of withdrawal were not in accordance with requirements established in the Consumer Rights Directive. Following the preliminary court discussion, the case was referred to the Court of Justice of the European Union in order to clarify the application of the information requirements established by the Directive 2011/83 with respect to distance contracts and communication tools with limited space and, consequently,

[21] Judgment of 23 January 2019,Walbusch Walter Busch GmbH & Co. KG vs Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV, C-430/17, ECLI:EU:C:2019:47.

define whether the clothes retailer will have to provide all the information delineated in article 6(1)(h) of the Consumer Rights Directive about the consumer's right of withdrawal.

Initially, the Court of Justice of the European Union stated that, in certain cases, the conditions of the means used by traders during their transactions turns to jeopardize the transmission of all the information requirements established by Article 6 of the Consumer Rights Directive. This particular circumstances usually takes place in distance contracts or off-premisses contracts, where the communication medium has lack of space or even limited characters.

In this regard, "*in the event that the contract is concluded through a means of distance communication which allows limited space or time to display the information, Article 8(4) of Directive 2011/83 only requires the trader to provide the consumer, on the means of communication in question and before the contract is concluded, with certain pre-contractual information referred to in Article 6(1) of that directive, including the information concerning the right of withdrawal, as set out in Article 6(1)(h) of that directive. In such a situation, the consumer must be provided with the other pre-contractual information in a way that is appropriate to the means of distance communication used in plain and intelligible language*"[22].

Besides that, the CJEU also highlighted that Recital 36 of the Consumer Rights Directive allows traders of distance contracts to adjust the way trough which they will transmit the information requirements defined by the Directive, in order to adapt such data details to the communication medium applied, once some tools have limited space.

With regard to the right to withdrawal from the contract, although the CJEU stated that the pre-contractual information concerning such consumer right was of

[22] Ibidem, paragraph 33.

"fundamental importance for that consumer and enables him to make an informed decision on whether or not to conclude the distance contract with the trader"[23], it also established that *"in a situation where the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader, when using that means of communication, is not required to provide the consumer with the model withdrawal form, as provided for in Annex I(B) to that directive"*[24].

As we may observe, with respect to distance contracts and off-premises contacts, the information requirements established by the Consumers Rights Directive does not configure an obstacle for traders when choosing the communication mediums that best fit their economic needs, as well as the actual existent distance between the trader and the consumer. On the other hand, with respect to consumers, the decision is important at E-commerce level once it reinforces the necessity of consumers acquire the main information about the contract in advance, even though it is a Distance contract.

Synthesis

Despite having a general character of application, covering different types of contracts, the Consumer Rights Directive configure an important step towards the protection of consumers in E-commerce, which essentially consists of contracts elaborated at distance. Besides that, the "self-regulatory" aspect is another key element of this Directive, providing a more effective and quickly regulation and protection of both consumers and traders. In an overall perspective, the Directive turns to be a fundamental mechanism to encourage the use of E-commerce in EU and consequently promotes its growth.

[23] Ibidem, paragraph 46.

[24] Idem.

Nevertheless, although the Consumer Rights Directive encourage the "levels of protection found in the Consumer Rights Directive especially at the pre-contractual and contractual stage, it has been observed that there is lack of sufficient awareness by consumers of their rights".[25]

In this regard, "*the dilemma a trader may experience is that in complying with the Consumers Rights Directive by supplying the series of information, the information received by the consumers may become too cumbersome and complex, difficult for the consumer to digest. The effect of this is a deficit of sufficient awareness by the consumer about their rights in this aspect*".[26]

In addition to that, although many websites have good descriptions and details about the goods on sale, sometimes consumers have to deal with false descriptions about the products or even with products with different characteristics from the one under offer. The fact consumers are only able to examine the product during the delivery process and cannot fully trust in online descriptions and reviews ends up maintaining consumer insecurity regarding online commerce. Besides that, the long delivery times and low return policies are another key aspects that may cause an extremely negative experience in consumers, preventing them from using e-commerce again[27]. The problems associated to the delivery process are being discussed since the 1997 E-commerce initiative, that established the "development of efficient distribution channels and trans-European network is necessary for the physical delivery of goods ordered electronically, including efficient, modern postal services"[28].

---

25 OGUNSIPE, Damiola. Establishing Consumer Confidence in E-commerce: A Review of the Lesgilative Framework in the European Union. 2015. p,6. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989837

26 Ibidem.

27 What are the problems faced by consumers in E-Commerce? - Article, 2019.Available from: https://www.ecommerce-nation.com/what-problems-faced-consumers-ecommerce/

28Communication from the Commission to the Council, the European Parliament, the economic and Social Committee and the Committee of Regions - A European Initiative on Electronic Commerce - 1997.

The absence of provisions of adequate capable to regulate and maintain consumer protection during online transactions, as well as the few existent communications tools, capable of maintain e-commerce consumers informed about their rights, turns to maintain the lack of consumer trust with respect to transactions over the internet and, consequently, jeopardizes the E-commerce growth, making necessary the adoption of other specific legal and informative mechanisms dedicates to online transactions.

CHAPTER IV

Alternative Dispute Resolution For Consumers

Usually, conflicts involving traders and consumers are characterized as low-cost disputes. In general, although the low-complexity of these cases, the courts take years to solve such disputes, which turns the procedure excessively costly and sometimes may cause ineffective decisions (based on the deterioration of the object, for example). Additionally, adequate dispute resolution procedures are essential with respect to consumer protection, "*consumer protection law, without being coupled with appropriate enforcement mechanisms, does not either increase consumer protection or enhance consumer trust in the internal market*"[29]. In this regard, the European Union adopted the Alternative Dispute Resolution Directive[30] as a way to provide the parties involved in 'consumer disputes' access to more informal dispute resolution mechanisms, capable to solve their conflicts in a very effective way, with no exorbitant costs and of rapidly resolution and, consequently, as a supplementary mechanism to consumer protection.

As subject matter, the Directive defined the properly functioning of the EU internal market, through the acquirement of a high level of consumer protection and the provision of different possible choices to consumers solve their disputes with traders without necessarily use judicial means. In order to achieve the described objectives, the provision established the possibility of consumers to submit their complaints, voluntarily, to Alternative Dispute Resolution (ADR) bodies.

---

[29] CORTES, Pablo. Developing Online Dispute Resolution for Consumers in The EU: A Proposal for the Regulation of Accredited Providers, International Journal of Law and Information Technology, Vol. 19, No. 1, pp. 1-28, 2010, p.4. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819086

[30] Directive 2013/11 on Alternative Dispute Resolution for Consumers Disputes.

In overall perspective, Alternative Dispute Resolutions occur out of the court (non-judicial procedure), consensual extrajudicial processes, and may take place via conciliation, arbitration or mediation, through the figure of a neutral party responsible to give solutions or propose ideas in order to achieve a common agreement between the parties. Regarding the ADR schemes provided by the Directive, they are not completely independent from Member States. Consequently, in order for these bodies to be certified as eligible to solve consumer disputes, they must comply with the requirements established by the Directive: impartiality, transparency, independency, timeliness of their procedures and other.

Although it excluded complaints made exclusive by the trades, according to the Directive, traders are "*legally obliged to inform consumers about the ADR entities that are competent to deal with potential disputes – this means that traders must inform consumers when they have voluntarily adhered to an ADR scheme, and when the law requires them to do so, as is the case in certain sectors where ombudsmen have been created*"[31].

Besides these general conditions, Member States may also implement additional provisions to achieve a higher level of consumer protection, as well as may determine whether ADR bodies established in their territories are capable to enforce any type of settlement/resolution. In addition to that, Member States may also rely on ADR entities established in other Member States or territory in the cases where the trader involved in a dispute is from a different Member State, but covered by the same ADR body.

Member States are also responsible to ensure the existence of ADR bodies in their territory, or at least one single entity, public or private, appropriate to all consumer sectors, configuring a relevant tool with respect to the access of ADR bodies by consumers. However, it is important to highlight that although alternative dispute

[31] CORTES, Pablo and LODDER, Arno R. Consumer Dispute Resolution goes online: Reflection on the Evolution of European Law fo Out-of-Court Redress. Maastricht Journal of European and Comparative Law 2014/1, p. 14. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098

resolution procedures are mandatory in some national laws, the Directive, as well as the alternative procedures do not prevent the access to the court by the parties in conflict.

The Directive is applicable to both domestic and cross-border disputes of contracts made online or offline, related to almost all economic sectors and made between a trader and a consumer established in the European Union. As stated before, the Directive does not cover all circumstances involving contracts, excluding from its appreciation the following scenarios: disputes related to non-economic services; between traders; negotiations between consumers and trader; disputes related to health services provided by health professionals; public providers of higher education; procedures regarding consumer complaint-handling systems operated by the trader; ADR schemes in which the natural persons responsible to solve the dispute are employed or remunerated only by the trader (unless otherwise decided by competent authorities) and judicial settlement mechanisms.

‣ **Online Dispute Resolution**

In addition to the Alternative Dispute Resolutions methods mentioned above, the European Union adopted another dispute resolution mechanism in order to deal with the conflict originated from E-commerce, the so-called Online Disputes Resolution schemes. With the objective of turning online shopping safer for consumers, the ODR procedures enables consumers to have an easy and low-cost access to dispute resolution mechanisms. In an overall perspective, "*dispute resolution mechanisms play a vital role in boosting confidence in online transactions hence it is highly probable that the presence of an online dispute resolution mechanism will inspire trust and confidence among consumers*"[32].

[32] OGUNSIPE, Damiola. Establishing Consumer Confidence in E-commerce: A Review of the Lesgilative Framework in the European Union. 2015, p. 7, Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989837

Although the ODR procedure was established by the Regulation (EU) No 524/2013[33], both Regulation and the Alternative Dispute Resolution Directive are interlinked and, consequently, complementary. Their link does not concern only the legislative content, but also to the fact that the existence of the ODR platform is intrinsically associated to the ADR bodies.

The Online Dispute Resolution platform works almost as a ´guideline´ to ADR bodies, once the online platform is responsible for directing the parties involved in a conflict to the competent ADR institution. Besides that, in some specific cases the online platform may also enable the parties involved in the conflict to access the respective reports made by the ADR body.

In this regard, initially, the claimant will have to fill out an electronic form on the digital platform to make the complaint. The ODR platform will, then, notify the other party in order for it to become aware of the complaint. It is important to highlight that, "*although online traders will not be required to participate in any redress mechanism (unless so established by their sectoral laws), they will have the legal obligation to inform consumers about the existence of the ODR Platform, and when they are already subscribed to an ADR scheme*"[34]. After both parties become aware of the dispute and reach an agreement regarding the responsible ADR body to solve their conflict, the ODR platform will be responsible to redirect the dispute to this respective ADR body, the list of the ADR institutions is the online platform. Consequently, the ADR institution will be in charge of conducting the respective dispute resolution procedure online.

[33] Regulation (EU) No 524/2013 on Online Dispute Resolution for Consumers Disputes.

[34] CORTES, Pablo and LODDER, Arno R. Consumer Dispute Resolution goes online: Reflection on the Evolution of European Law fo Out-of-Court Redress. Maastricht Journal of European and Comparative Law 2014/1, p.16. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098

Concerning the enforceability of both ADR and ODR agreements, as provided by the European Commission, both procedures are part of the EU's toolbox[35] for the public and private enforcement of consumer law, and therefore are enforceable by EU law[36].

To summarize, both ADR and ODR procedures are always voluntary and, therefore, in case the parties do not agree to solve the dispute through these alternative mechanisms, they may always enter with a judicial procedure before the Court.

Case Discussion

The following case is among the many examples used by the United Kingdom European Consumer Center[37] in order to illustrate the conflicts that may be solved by the institution. In this regard, although this case may not have been officially decided by an ADR body, it is excellent illustration about the type of disputes that may be decided through ODR procedures.

[35] "(…) EU policy-makers have therefore developed a set of legislative and non-legislative tools that aim to make the enforcement of consumer rights in the Member States more effective ('EU enforcement toolbox'). Consumer alternative dispute resolution (ADR), i.e. the resolution of consumer disputes through out-of-court dispute settlement mechanisms, is a key component of that toolbox". Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, p. 1. Available from: https://ec.europa.eu/info/sites/info/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf

[36] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, p. 17. Available from: https://ec.europa.eu/info/sites/info/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf

[37] UK European Consumer Center. Available from: https://www.ukecc.net

- Case - Cross border online shopping within the EU[38]

A citizen from Germany, Mr. W, bought some clothes online, from a website based in UK, in order to offer the products to his wife as a Christmas gift. However, after giving the present to his wife, they both realized that one of the pieces was not in the right size and, therefore, they called the company in order to exchange the piece.

The company agreed to do the exchange under the condition Mr. W would pay for the return of the order, as wells a 20% fee for restocking. Consequently, Mr. W considered unfair the measure and an infringement of his consumer rights, contacting the European Consumer Center in Germany for a guidance.

The institution entered in contact with the UK European Consumer Center in order to have the company notified. As established by the EU law, goods purchased online may be returned within a 14-day period, counted from the receipt of the product. After that period, the consumer is obliged to pay for the return of the good, but cannot be imposed any extra fee.

In the case under discussion, Mr. W was within the 14 days period when he first made the complaint and therefore was not obliged to pay the price for the return of the good nor extra values. The UK ECC contacted the company that agreed to exchange the good or do the complete refund.

Although this case has not been taken to an Alternative Dispute of Resolution body, it represents the perfect example of a case that could be resolved through the ODR platform, avoiding excessive costs or taking a long time to complete.

[38] Case Study - Online Shopping, UK European Consumer Center. Available from: https://www.ukecc.net/news/cs-news-item.cfm/newsid/3228

Synthesis

As we may observe, both ADR and ODR procedures are extremely important mechanisms to solve consumer disputes in an efficient, low-cost and expeditiously way. Besides that, with regard to E-commerce, these measures are even more relevant since it enables to solve cross-border disputes easily and, consequently, improve consumer confidence in online market.

However, with respect to the ODR process, although the described positive aspects, the lack of consumer awareness about the possibility of using ODR systems, as well as non-adoption of such procedure by traders, are key factors for the non-efficiency and improvement of such dispute mechanisms.

Even though the ODR Platform is an extremely important apparatus to increase consumer knowledge with regard the ODR procedures, "*consumers with unmet legal needs do not know where to go after an online transaction has gone sour. Businesses know that it is very unlikely that a consumer will commence court proceedings, and they are not aware of what ODR systems may offer them in terms of enhancing consumer redress"*[39]. According to last report issued by the European Commission, among the main challenges to achieve the properly functioning of both ADR and ODR procedures is the awareness of consumers and traders with respect to these alternative solutions, but also the adoption of such procedures by traders.[40]

Therefore, in order to develop such alternative dispute procedures, there is a need to develop not only the communication tools and advertisement procedures, turning

[39] CORTES, Pablo and LODDER, Arno R. Consumer Dispute Resolution goes online: Reflection on the Evolution of European Law fo Out-of-Court Redress. Maastricht Journal of European and Comparative Law 2014/1. p,6. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098

[40]Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. p, 17. Available from: https://ec.europa.eu/info/sites/info/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf

the consumer aware about these different conflict resolution mechanisms, but also the adoption of measures capable of compelling traders to apply such procedures whenever possible.

CHAPTER V

The General Data Protection Regulation

Although the adoption of the E-commerce Directive was fundamental to enhancement of digital market and the adoption of several rules aimed to protect online transactions, one of the largest insecurities of consumers with respect to online shopping remained over the years, their concern about the protection and storage of their personal data. The lack of trust on the part of consumers directly impacted the growth of E-commerce within the EU, creating, as a consequence, the necessity of developing a Regulation that could be capable to protect consumer's personal data information, providing a safer environment and improving the investments and growth of digital market.

The General Data Protection Regulation[41] was the solution found to this lack of security. Adopted in 2016, the objective of this provision was not only to protect the personal data information of natural persons, but also to harmonize the rules applicable to regulate the data protection in the European Union, superseding the Data Protection Directive[42].

As territorial scope, hen compared with the Data Protection Directive, the Regulation has a broad extension and covers personal data information from EU citizens, processors and data controllers located in the EU. In this regard, *"the personal data processing place no longer controls the analysis; instead, under the GDPR, processing merely puts occur 'in the context of the activities of an*

---

[41] Regulation (EU) 2016/679 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such data.

[42] Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such data.

establishment of a controller or a processor in the Union', a definition that expands the analysis to include the activities of the processor that processes personal data on behalf of the data controller".[43] Under certain specific conditions, entities based outside the European Union may also be covered by the Directive, as long as they collect or process personal data of individuals located inside the EU or *"the processing is related to 'the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union"*[44] Consequently, the fact the provision is mainly focused in protect personal data information originated 'from EU citizens' is an extremely important factor that contributes for the use of the provision outside the European Union.

Concerning the scope of application, besides defining the regulation of the processing and storage of personal data as the main objective of the Directive, it also established the circumstances excluded from being appreciated by the provision, they are the following: activities that falls outside the scope of Union law; activities dealt by Member States that are within the extension of Chapter 2 of Title V of the TEU; personal data related to activities purely personal or household and the processing of personal data by competent authorities for investigation, prevention and other related purposes in order to protect public security.

As we may observe, the Regulation does not apply to every personal information of a natural person and, therefore, this specific personal data must be linked somehow with professional or commercial activities.

The provision also established the core principles responsible to govern the processing of personal data, defining, among other concepts, the duty of transparency (from controllers, processors and recipients), the consent of the data (from the data subject/the natural persons including special conditions related to children consent of

[43] W., Gregory Voss. European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting - Business Lawyer, Vol. 72, No. 1, pp. 221-233, Winter 2016/2017 , p.2. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2894571

[44] Idem.

data); the existence of a legitimate purpose for the data analyses/storage and the reasonableness of the period for which the data is stored.

Besides determining general rules, the Regulation defined the rights attributed to individuals/data subject (identified or identifiable) with respect to the use and protection of their personal data. According to the provision, citizens must have the right to have transparency in their procedures, as well as to have access to all the personal data collected by the agents responsible to process and store such information.

Regarding the transparency aspect, the idea here is to grant individuals the possibility to recognize the agents behind the processing and storage of their personal information (the name, address, email and other contacts of processors, controllers and other agents), as well as to perceive what will be done with the data collected. Therefore, access to information must occur in an easy form, through a comprehensible and understandable language, allowing also the request from individuals to acquire more details about their personal data.

On the other hand, with respect to the access factor, the objective here is enable individuals to acknowledge if their personal data are storage or under processing, including for which reasons they are under analysis, with whom the data is shared and for how long they will remain storage.

Among the main rights established to the Data Subject, the GDPR provided two important concepts: the rectification and the erasure[45]. Concerning the rectification topic, according to that right, individuals may request the rectification of their data in the presence of an error or inaccurate information. With regard to the right of erasure, data subject may demand the erasure of their personal data, without undue delay, as long as some specific conditions are met. Therefore, controllers, processors and all

[45]Communication from the Commission to the European Parliament and the Council - Stronger opportunities - Commission guidance on the direct application of the General Data protection Regulation as of 25 May 2018, p.2. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0043&from=EN

the agents related are only binding to perform the deletion of the data if the request was made under the presence of the conditions determined in the Regulation, for example, if the personal data have been unlawfully processed. However, the erasure right may not be applicable if the data has to remain storage for one of the reasons provided by the Regulation, for example, for the establishment, exercise or defense of legal claims.

In addition to that, the General Data Regulation also allows individuals to object the processing of their personal data, as long as it is related to the letter (e) of Article 6 (1) of the Regulation, about the processing of personal data essential to the public interest or if the processing is performed by an official authority vested in the controller, or point (f) of the same article, regarding the processing of personal data in which there is a legitimate interest from the controller or a third party to do the processing of the data, since this objective does not override any fundamental right and freedom. However, it is important to highlight that the right to object is not unlimited, and cannot be applied under certain circumstances, for example, if the controller may demonstrate the legitimate interest in the processing of that data, or if there is a public interest in conflict with the individual right.

Apart from the general definitions and the rights of the data subject, the General Data Regulation is also responsible to define the duties of data controllers, processors and any other party involved in the process of data and storage procedure. In this sense, besides comply with the principles described above, both controllers and processors have a list of responsibilities and obligations that they must comply with in order to respect individuals rights and to ensure lawful process.

Therefore, controllers and processors not only are binding to provide individuals with their private information details (such as their name, means of contact and address), the reason for processing the data and how this action will take place, as well as they must apply adequate measures in order to guarantee the data protection. In this sense, the agents in charge of both processing and storage of personal data shall implement appropriate technical and organizational mechanisms in order to control the use of individuals personal information as well as to prevent any unfair use of personal data and associated risks to this misuse of data.

Last but not least important, the General Data Protection Regulation also defined strong remedies, liabilities and penalties applicable to the cases of breach of personal data protection, as well as determined the obligation of Member States and institutional bodies, like the Independent Supervisory Authorities, to monitor the correct application of the Regulation and the improvement of such rules.

Case Discussion

Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)[46]

In 2015, the Commission Nationale de l'Informatique et des Libertés ("**CNIL**"), a French data protection regulator, demanded that Google de-reference (remove) from its domains worldwide, all links from its search engine related to an individual's personal data, once they were considered as a damage o his image and imposed €100,000 fine. Google refused to remove the content and, consequently, the CNIL imposed €100,000 fine. After google refused to pay the fine, the Conseil d'État referred the case to the Court of Justice of the European Union in order to define wether the EU right to be forgotten or have its personal information removed was limited to the European Union territory or not.

The court analyzed both the Data Protection Directive and the General Data protection Regulation, highlighted the fact the right to protection of personal data was not absolute and, therefore, a proportionality test should be applied in order to define between the right to data protection and others fundamental rights, which one should be applied.

[46] Judgement of 24 September 2019, Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL), C-507/17, ECLI:EU:C:2019:772.

Regarding the de-reference obligation on all the versions of the search engine, the CJEU stated "*(...) it should be emphasized that, while, as noted in paragraph 64 above, EU law does not currently require that the de-referencing granted concern all versions of the search engine in question, it also does not prohibit such a practice. Accordingly, a supervisory or judicial authority of a Member State remains competent to weigh up, in the light of national standards of protection of fundamental rights (...) a data subject's right to privacy and the protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other, and, after weighing those rights against each other, to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine"*[47].

In this sense, the Court concluded that operators are not obligated to comply with the removal request on all versions of its search engine, but only on the versions of the search engine that are directly linked to all Member States of the European Union. Besides that, the CJEU also established the necessity of operators apply not only the necessary measures in order to meet the legal requirements, but also to prevent an internet user from one of the Member States from conducting a search to find the information that was prior object of the removal request.

Synthesis

In summary, the General Data Protection Regulation represents an extremely important step towards the development of consumer protection and trust in online transactions. The Regulation not only increased the level of cybersecurity by imposing the adoption of tougher and more protective measures by traders and host providers, but also influenced the improvement of consumer confidence regarding the use of internet. The necessity of users to constantly give express authorization with

[47] Ibidem, paragraph 72.

regard to the utilization of their personal data, means that they have to have prior access on how their personal information will be used and processed.

However, the fact online operators are not aware of their respective rights and duties jeopardized the correct application of the Regulation and protection of online consumers and internet users. According to 2019 GDPR Small Business Survey[48], almost half of small business within the European Union are failing to comply with the main rules established by the Regulation because they are confused with the technical aspects established by GDPR and also because their not totally aware about the necessary procedures. In this regard, "*even though the GDPR requires the use of encryption technology wherever feasible, a large number of business leaders seem not to understand basic data security concepts*"[49]. Besides that, "a significant portion of organizations (22%) said they do not use technical measures to protect personal data (Article 32)[50]"[51].

---

[48] 2019 GDPR Small Business Survey, Insights fro the European small business leaders one year into the General Data Protection Regulation. Available from: https://gdpr.eu/2019-small-business-survey/

[49] Idem, page 2.

[50] "Security of processing
1.Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:
(a) the pseudonymisation and encryption of personal data;
(b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
(c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;
(d)a process for regularly testing, assessing and evaluating the effectiveness of technical and organizational measures for ensuring the security of the processing.
2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to personal data transmitted, stored or otherwise processed.
3. Adherence to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate compliance with the requirements set out in paragraph 1 of this Article.
4. The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller, unless he or she is required to do so by Union or Member State law".
Art. 32 of Regulation (EU) 2016/679 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such data.

[51] 2019 GDPR Small Business Survey, Insights fro the European small business leaders one year into the General Data Protection Regulation, pg. 2. Available from: https://gdpr.eu/2019-small-business-survey/

Therefore, we may observe that the GDPR rules and enforcement mechanism are not sufficient to obliged online operators to comply with the rules established, being necessary the dissemination of adequate information on the applicability of these rules and accomplishment of necessary requirements in order to truly protect not only the users of internet, but also consumers that are party of online transactions.

CHAPTER VI

Conclusion

As we may observe, both E-commerce Directive and General Data Protection Regulation established an important regulatory framework applicable to E-commerce. While the Directive made it possible for intermediaries to be exempted from liability and limited the provision of services by professionals who exercises activities classified as regulated, the GDPR stated the need for the protection of the data from individuals involved in online transactions and defined important remedies, liabilities and penalties applicable to the cases of infringements of the provided.

Concerning the Consumer Rights Directive, despite defining relevant rules to consumers involved in electronic commerce, the Directive has a general character and is not totally dedicated to E-commerce consumers. Consequently, this lack of specificity ends up leaving many of the issues related to online transactions to the interpretation of the Courts, which jeopardizes the guarantee of legal certainty.

As per the ADR Directive and the ODR Regulation, they both provided important conflict resolution alternatives, instead of restricting consumers to the exclusive use of courts. Nevertheless, the use of ODR platforms and procedures are still extremely linked not only to the application of such process by the trader, as well as to the consumer awareness, which turns difficult the development and implementation of alternative dispute resolutions. Additionally, since the ADR and ODR procedures are essentially voluntary, without the cooperation of the parties, the decision may only be imposed if the case is referred to the court.

In the current context of our society, in which the world is facing a pandemic state due to the spread of the COVID-19 disease, the relevance of E-commerce is even more present[52]. Besides being an important mechanism to maintain the economic activity in the world, in the present context, where we are facing a moment of uncertainty and citizens are being deprived of their right to free movement as an attempt to content the spread of the disease, the online shopping became an important apparatus for the public healthy, as it prevents citizens from having to go out to buy goods[53].

In this regard, within this extraordinary scenario, E-commerce consumers are much more susceptible of suffering damage. The chaotic times we are experiencing not only increase the necessity of consumers to receive their purchased products in a fast and effective way (with respect to foods and medicines, for example), as well as highlight the necessity to improve E-commerce areas related to the security of websites and the transactions in itself.

Another relevant aspect that deserves our attention is the growth social media and the offers of services and advertisements elaborated in the context of the internet, provided in a very informal way and not properly identified/highlighted when provided to consumers. This new way of doing business together with the lack of properly regulation about the topic may end up leading these e-commerce consumers to be deceived by misleading advertisements.

The different existent jurisdictions within the European Union is another detrimental factor for the development of electronic commerce. The variation of legal systems in Member States and, consequently, applicable sanctions and rights, not only impacts the protection of consumers, since it may change from one country to

[52] Amazon workers struggle to stay safe as company swells - Foreign Policy. Available From: https://foreignpolicy.com/2020/03/19/amazon-workers-coronavirus-pandemic-stay-safe/

[53] Impact of the Coronavirus on E-commerce - Survey Results Report, 2020, p.2. Available from: https://www.ecommerce-europe.eu/wp-content/uploads/2020/03/Coronavirus-Survey-Report-Final.pdf

another, as well as influence the level of investment traders are willing to make in a given country, due the amount of benefits they may take form the law or not.

In addiction to that, as described above, the lack of consumer awareness about their rights and the non-comprehension of online operators with respect to the application of the General Data Protection Regulation and its requirements are other two elements that directly impact consumer confidence towards the use of online market and consequently affects the development of E-commerce.

In this regard, there is a necessity for the European Union to adopt legal mechanisms capable to cover not only the specific aspects related to online transactions, providing, for example, more effective regulations applicable to the delivery process, as well as that are able to bring a minimum level of harmonization to the E-commerce law applicable within the European Union, minimizing the different jurisdictions. Besides that, in order to make consumers aware of their rights and Alternative Dispute Resolution mechanisms, a good alternative would be the provision of more communication tools, like advertisements, or informative procedures by the European Commission, capable to make consumers informed and increase consumer confidence in online transactions. Regarding the requirements established by the General Data Protection Regulation, that obliges online operates to comply with specific mandatory rules, a good alternative would be the offering of online courses by the European Commission in order to make these operators informed about the circumstances that must be fulfilled and the tools that must be used.

Unfortunately, there is no single and simple solution to improve the functioning of E-commerce and improve consumers protections, but actually the necessity for the creation of a block of alternatives, capable of acting not only at a legal level, developing more specific online commerce rules, but mainly in what concerns the development of informational content, whether in relation to consumers or in regarding traders / online operators.

BIBLIOGRAPHY

MURRAY, Andrew D. and LODDER, Arno R. - EU Regulation of E-commerce - A Commentary - Publisher: Edward Elgar Pub (April 28, 2017).

CORTES, Pablo and LODDER, Arno R. Consumer Dispute Resolution goes online: Reflection on the Evolution of European Law fo Out-of-Court Redress. Maastricht Journal of European and Comparative Law 2014/1. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098

CORTES, Pablo. Developing Online Dispute Resolution for Consumers in The EU: A Proposal for the Regulation of Accredited Providers. International Journal of Law and Information Technology, Vol. 19, No. 1, pp. 1-28, 2010. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819086

MARTENS, Bertin. What Does Economic Research Tell Us About Cross-Border E-commerce in the EU Digital Single Market?. Joint Research Centre of the European Commission. 2013. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2265305

NOLL, Juergen. The European Community's Legislation on E-commerce - University of Vienna. Department for Business Studies. 2001. Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=288942

SKOROCHOD, Galina. Consumer Protection in the European Union. Central European University. Budapest, Hungary. 2007. Available From: http://www.etd.ceu.hu/2008/skorochod_galina.pdf

GEORGE T. Brady, "Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises?" North Carolina Journal of International Law & Commercial Regulation 23 (1997) - https://scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1623&context=ncilj

LawTeacher. November 2013. Distance Selling and E Commerce directives. [online]. Available from: https://www.lawteacher.net/free-law-essays/commercial-law/distance-selling-and-e-commerce-directives-commercial-law-essay.php?vref=1 [Accessed 29 March 2020].

KOONJOOBEEHARRY, Duksh K. E-Commerce - Extent to which the EU Consumer Rights Directive promotes the use of cross-border e-commerce. Available From: https://www.academia.edu/25108731/E-Commerce_-_Extent_to_which_the_EU_Consumer_Rights_Directive_promotes_the_use_of_cross-border_e-commerce

W., Gregory Voss. European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting - Business Lawyer, Vol. 72, No. 1, pp. 221-233, Winter 2016/2017, p.2 - Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2894571

EU regulatory framework for e-commerce. WTO Workshop. 2013. Available From: https://www.wto.org/english/tratop_e/serv_e/wkshop_june13_e/sparas_e.pdf

OGUNSIPE, Damiola. Establishing Consumer Confidence in E-commerce: A Review of the Lesgilative Framework in the European Union. 2015.Available From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989837

Consumer Rights Directive. Official website of the European Union. Available From: https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive_en

Guidance Document on the Consumer Rights Directive issued by the European Parliament and the Council of the EU - 25 October 2011, p.8 - Available From: https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0_updated_0.pdf

MANKO, Rafal. The notion of 'consumer' in EU law. 2013. Available From: https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf - 2013

Report from the Commission to the European Parliament, the council and the European Union Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes — https://ec.europa.eu/info/sites/info/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf

Data protection in EU - Official website of the European Union - https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en

The GDPR: new opportunities, new obligations - What every business needs to know about the EU's General Data Protection Regulation - Official website of the European Union - https://ec.europa.eu/commission/sites/beta-political/files/data-protection-factsheet-sme-obligations_en.pdf