

EU Consumer Protection and the Implementation in Macedonia and Countries of Former Yugoslavia: Focus on Liability for Defective Products

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Abstract

Consumer protection is one of the core European Union values. The harmonization of consumer protection legislation aims toward the improvement of the consumer's rights. Apart from EU member states, those countries with those countries who aspire to membership of the EU are also obliged to transpose this common legislation into their national legislation. The EU Directive on consumer rights and the Directive on the liability for defective products are an important part of common consumer protection. Macedonia and other countries of the Former Yugoslavia, on their way to approaching the EU have implemented the European Union's consumer protection legislation in a similar way. This paper tries to put more light on the process of the harmonization of consumer protection legislation in the countries of Former Yugoslavia. It focuses on the liability for defective products.

Keywords: EU, legislation, consumer, liability, product, producer.

Introduction

The European Union as a political and economic community has been acting permanently in the field on harmonization of legislation. The harmonisation of legislation often opens up the debate between those arguments in favor of a further strengthening of the EU common legal framework and those against such a process. One of the first EU

efforts in the harmonization of common legislation in the sphere of consumer protection and liability for defective products is Directive 85/374 on the approximation of the laws, regulation and administrative provisions of the Member States concerning the liability for defective products, known as the Directive on liability for defective products. The Directive was adopted in 1985 and amended in 1999 (Directive 1985). The Directive is consumer protection oriented and makes efforts to establish the first steps of harmonization of the liability for damage caused by defective products. It is important to stress that there is a need to connect this Directive with other consumer protection oriented EU legislation, especially with Directive 2011/83/EU on consumer rights, which supplement the overall liability for defective products with the aim of protecting the consumer rights of EU citizens (Directive 2011). The aim of the common consumer policy is to ensure that the EU consumer can draw maximum benefits from the existence of an internal market (Moussis 2006). We can clearly recognize the EU commitment to harmonize the activities in the area of consumer protection, including protection from the damage caused by defective products in the Treaty on the functioning of the European Union. In article 169 of this Treaty it is determined that in order to promote the interest of the consumer and to ensure a high level of consumer protection the European Union will contribute to protect health, safety and the economic interest of consumers as well promoting their right to information, education and to organize themselves in order to safeguard their interests. The measures taken by the member states must be compatible with the Union treaties (Treaty 2010). The legislation on the European Union level and the legislation on the national level must be in compliance with EU treaties, which have constitutional importance.

The countries of the Former Yugoslavia: Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, which aspire to full membership of the EU, have numerous obligations for transposing and implementing EU legislation. This is also the case for Croatia, which joined the EU in 2013. One of the important areas of EU legislation is the area of consumer protection legislation, including the liability for defective products. This liability produces an obligation for compensatory damage for defective products, by the producers and traders. The liability for defective products is a significant part of consumer protection legislation. Shortly

after the dissolution of the Former Yugoslavia, Macedonia, Bosnia and Herzegovina, Serbia, Montenegro and Croatia undertook the provisions from the Law on obligations of the former Yugoslavia adopted in 1978, which regulates some issues related to liability on defective products, as their national laws (Law on obligation 1978). The Law on obligation was very progressive for that period. Later those countries adopted their national laws on obligation, where they regulated the issues relating to liability for defective products. According to the harmonization of their legislation, many of them later regulated this liability in their consumer protection laws.

EU Consumer Protection Legislation and Liability For Defective Products

The EU has been acting permanently in the direction of building common legislation. One of the spheres where the EU has been making big efforts for harmonization is the sphere of consumer protection and in the framework of this the issues related to the liability for defective products. The harmonization of EU legislation has led to a debate on the support or rejection of the strengthening of common legislation. The Eurosceptics emphasize that strengthening harmonization affects the sovereignty of member states. The supporters of the stronger cohesion of the EU underline the needs for a further strengthening of the common legislation as a basis for the performance of common activities, which provides for a more efficient and effective realization of the interests of citizens. The existence of EU law is crucial with the policy implementation (Nugent 2003). In this direction is the standpoint that the Union provisions have precedence over national legislation in the case of conflicts (Mathijssen 2010). However besides the arguments of eurosceptics, especially from the United Kingdom, the process of the harmonization of EU consumer protection legislation continues and provides positive effects, especially in the field of more effective protection of the consumer overcoming the border barriers and strengthening the EU single market. It is important to stress in this part of the paper that in the countries of Former Yugoslavia the harmonization of national legislations with the EU legislation is not really

being addressed. Those countries accept that EU accession means the harmonization of the activities in different areas including the consumer area.

The Directive on the approximation of the laws, regulation and administrative provisions of the Member States concerning liability for defective products, known as the Directive on Liability for Defective products was adopted in 1985 and it was amended in 1999. This Directive determined the principle of liability without fault, applicable to all EU producers. According to the Directive if a defective product causes damage to a consumer, the producer may be liable. It means that for the first time at an EU level (at the time of adoption the Directive, European Economic Community), the obligation that the producer is liable for damages caused by defects in his product was established. The producer is defined as: the producer of a raw material, the manufacturer of a finished product or of a component part; the importer of the product: any person putting their name, trade mark or other distinguishing feature on the products; any person supplying their name and any person supplying a product whose producer or importer cannot be identified. It is important to stress that the extensive determination of the term producer, strongly emphasizes the importance of consumer protection in the single EU market. A product is specified as defective, when it does not provide the level of safety which an individual is entitled to expect, taking all circumstances into account including the presentation of the product, the reasonable use of the product, and the time when the product was put on the market. Besides the extensive liability of the producers, the consumers, as the damaged party must prove the actual damage, the defect of the product and the causal relationship between the damage and the product defect. But the consumer does not have to prove any negligence or fault of the producer or importer, which enables consumers to compensate the damage caused by defective products in a relative easy and simplified procedure. It confirms the assumed liability of the producers. The producer does not have any liability if he proves that he did not put the product into market circulation; the product is not produced to be sold or distributed for profit; the product is not produced and distributed in the course of his business and if the defect appeared after the product was put into circulation. However the

burden to prove the product defect is not the obligation of the consumer. It is the obligation of the producer which gives the consumer a better position and protects them from any deception by the producers. This is completely in compliance with the EU determination for strengthening the rights of consumers and, concomitantly, the responsibility of the producers.

The term product, means all movables, with the exception of primary agricultural product, even though this may be incorporated into another movable or into an immovable and the term also includes electricity. The Directive does not apply to injury or damage arising from nuclear accidents regulated by international convention ratified by the EU as a community and its member states. The Directive limits the period to apply for compensation so that the injured consumer must seek compensation within a period of three years. This period starts from the date when the consumer became aware of the damage of the defect and the identity of the producer. The general producer's liability is limited for a period of ten years after the date when the product was put on the market. The liability of the producer in relation to the injured person, arising from the Directive cannot be limited by other provisions and the member states can not shorten these time limits in their own national legislations. This provision clearly confirms the determination of the EU for the harmonization of legislation. The Directive has applied in the EU already for a period of eighteen years, which confirms the value of these determinations. It has a great significance for the regulation of relations between the consumer as a buyer or end user and the producer as a seller. The Directive has been implemented in the national legislation of EU member states in three ways (Ivancevic 2012). The first one provides the adoption of specific legislation on liability from damages caused by defective products. As is the case in: Austria, Belgium, Denmark, Finland, Ireland, Italy, Germany, Portugal, Sweden, Spain, Luxemburg, the Czech Republic, Slovakia, Estonia, Cyprus and Latvia. The second way is the implementation through the provisions in the civil codes of : France, the Netherlands, Poland and Lithuania. The third way is one that is applied in Greece, the United Kingdom, Malta, Slovenia and Bulgaria, where the Directive has been implemented in consumer protection laws. We want to underline

that a different way of transposing – implementing the provisions of the Directive does not prevent the achievements of the objectives of the Directive. The directives as an important part of EU secondary legislation are characterised with the primary goal of meeting their targets and that could be realized in the national legislation of member states in different ways. The Directive on Liability for Defective products is a typical example of the implementation of the Directive's provisions in a different way. Alongside the regulations, which are also the parts of the EU, secondary legislation is automatically applicable in the national legislation, without transposing any of the provisions.

It is very important in the context of EU consumer protection legislation to elaborate the Directive on consumer rights (Directive 2011). This Directive significantly strengthens and expands consumer protection rights in the EU. The Directive makes serious efforts toward further harmonization and the simplification of common legislation in the field of consumer protection. It enables the free movement of goods and services within the EU single market, eliminating the barriers between member states. It should not affect national legislation for aspects of contract law that are not regulated by this Directive. The Directive regulates distance contracts and off premises contracts. A distance contract is defined as any contract concluded without the simultaneous physical presence of the trader and the consumer by using one or more distance communications. An off premises contract is determined as a contract that is concluded in a place which is not the business premises of the trader. Despite that this Directive determines the term trader, instead of the term producer in the Directive on Liability for Defective Products, it is clear that both directives are closely related and that they are aimed at strengthening and harmonizing consumer rights in the EU. Furthermore the Directive on consumer rights regulates the consumer's right to withdraw from a distance or, off – premises contract without giving any reason. It includes the possibility of withdrawing in the case of a defective product. This clearly shows the determination of the European Union to continue with the further harmonization of common consumer protection legislation, with a goal to provide for the better protection of the interests of consumers.

The Implementation of EU Consumer Protection Legislation in the Countries of the Former Yugoslavia

Any country aspiring to membership of the EU has an obligation to harmonize its legislation with EU legislation according to the treaties for stabilization and association with the EU on the basis of their national programs. After the dissolution of the Former Yugoslavia, Macedonia, Bosnia and Herzegovina, Serbia, Montenegro and Croatia, regulated the liability for defective products by directly undertaking the provisions from the Law on obligations of former Yugoslavia.

Croatia became a member of the EU in July 2013. In the process of the harmonization of its legislation the Law on obligation (Law on obligation of Croatia 2005) was adopted in 2005. The provisions of the EU Directive on Liability for Defective Products were transposed in chapter five which regulates liability for defective products. In this Law the liability for defective products was separated from the liability for damage caused by dangerous objects (products) and dangerous activity. It was made, due to the fact that these two liabilities are separate types of liability which are based on different assumptions and charged against different individuals. Also changes in terminology were made and the term 'defective product' was introduced. With this change the identification of liability for defective products was made, as opposed to liability for material shortages. Croatia adopted the Law on consumer protection as an obligation for the implementation of the EU Directive on consumer rights, but the liability for defective products is regulated primarily in the Law on obligation.

Croatia's Law on obligation imposes the strict liability on producers of defective products. The burden to prove damage and the nature of the defect are placed upon the injured party. The producer cannot exclude liability for defects. The provisions on product liability refer to material damage such as death or personal injury and damage to the other property. It can be concluded that Croatia completely transposed EU legislation in the field of consumer protection and liability for defective products before joining the EU, as the twenty eighth member state.

In **Montenegro**, liability for defective products and the responsibility for defective products is determined by the Law of

Obligation (Law on obligation of Montenegro of 2008). This Law transposes EU Directive 85/374, and stipulates that the individual who has suffered damage is obliged to prove the defect of the product and damage in the context of a causal relationship between the defect product and the damage. The obligations of the producer's liability for defective products are also transposed in the Law on consumer protection (Law on consumer protection of Montenegro 2007), where the terminology defining the terms product and producers are defined according to the EU Directive.

In **Bosnia and Herzegovina** in many spheres there is a duality in legislation, given that there is a parallel legal system operating in the Federation of BiH and in the Bosnian Serb Republic. These two legal systems also operate in the sphere of consumer protection and liability for defective products in Bosnia and Herzegovina. The Law on obligation (Law on obligation of Bosnia and Herzegovina 2003) has transposed the provisions from the Directive on Liability for Defective Products by determining the obligations in the case of damage caused by defective products. Bosnia and Herzegovina has adopted the Law on consumer protection (Law on consumer protection of Bosnia and Herzegovina 2006). This Law regulates that the producer is liable for any damage caused by defects in his product in accordance with the provisions of the law, which regulate the obligations. In this way the Law on consumer protection connects the liability for defective products with the Law on obligations. Besides the existing of two legal systems in this sphere, completely is the same situation in Bosnian Serb Republic, where the Law on obligation (Law on obligation of *Republika Srpska* 1993) and the Law on consumer protection (Law on consumer protection of *Republika Srpska* 2012), regulate consumer protection from the damage caused by defective product.

In **Serbia** the producer's liability for defective products is regulated under the Law on consumer protection (Law on consumer protection of Serbia 2010). The Law defines the basic rights of consumers and the safety of products and services. Consumer protection is linked with the protection of health and the protection of the environment. The Law also regulates distance contracts and off premises contracts, with full implementation of the Directive of consumer rights. The Law determines the liability of the producers for damage caused by defective products.

The injured person has the right to compensation from the producer of the damages if he can prove the relationship between damage and the defective products. The limit for the right to apply for compensation for damages is within three years of the date when the consumer first became aware of the defects and the identity of the producers. Otherwise, liability ceases after a period of ten years from the date of placing the product on the market. This means that the Directive on Liability for Defective Products is fully transposed in Serbian legislation. The Directive on consumer protection and the Directive on liability for defective products, as the most important part of EU consumer protection legislation are implemented in Serbia in an integrated way in the Law on consumer protection, which in our opinion is the most favorable way for the implementation of EU consumer protection legislation.

Implementation in Macedonia

Macedonia as a country with candidate status for membership of the EU, has been expecting the date for the beginning of negotiations and has obligations to harmonize its national legislations with EU legislation. Macedonia over the past few years has been making serious efforts for this harmonization. One of the obligations for harmonization lies in the sphere of consumer protection including the producer's liability for damage caused to consumers by defective products. The last EU Commission 2012 Progress report, related to Macedonia in chapter 28, where it emphasizes some progress in the sphere of consumer protection (Progress Report 2012). The Report underlines the importance of further activities in progress with regard to the practical implementation of the Law on consumer protection which transposes the Directive on Consumer protection (Law on consumer protection of Macedonia 2004). This report stresses the importance of the harmonization of national legislation with EU legislation in the sphere of consumer protection. Also the Report provides that consumer organizations continued organizing awareness raising, education and campaigns. It is noted that the financial support gained by consumer organizations remain insufficient. In this part of the chapter we want to

emphasize that the dialogue between consumers, the business sector and the authorities is an important part of building and implementing consumer protection legislation, but unfortunately in Macedonia it is still only concerns a very small number of consumer organizations. In our opinion this means that the non-governmental sector in the sphere of consumer protection is still not fully developed enough. Furthermore some consumer organizations almost have a monopoly in this area. In this way besides stronger financial support from the central government and local government, there is a need for the further development of consumer organization and the establishing of competitiveness between consumer organizations. This in turn produces a need for amendments of the Law on consumer protection.

The Law on consumer protection regulates the rights and obligations of the trader and the producer. But there is a need to make a clear distinction between the definitions of the terms of trader and producer in this law and also in the other laws which regulate some aspects of consumer protection. Existing definitions could introduce doubt and a lack of precision. Furthermore, the Law regulates the methods of payment, warranties and services, product safety and liability for product safety and liability for defects and shortcomings of the products. According to the Law, when the consumer purchases a product with a shortcoming, he has a right to apply for: a reduction in the selling price; the replacement of the product with a correct product, the cancellation of the contract, the refunding of payment and compensation for any damage caused.

The liability for the defect of a product is regulated by the Law of obligation (Law of obligation of Macedonia 2001). According to this Law the producer who placed the product on the market is responsible for any damage caused, and the production of a defective product, regardless of the producers' fault. The injured person can apply for compensation for non-pecuniary damage, only in accordance with the general rules of liability for damage from this Law. This is not related to the damage caused by nuclear disasters. The injured person is obliged to prove the damage. The Law on obligations in compliance with the Directive on Liability for Defective Products defines the named product, the defective product and the producer. The question of the definition of the product was widely discussed and so far the product is defined by covering all

movable goods including autonomous parts, which may have been fitted to the product. The definition of a product includes electricity and other types of energy. A product is specified as defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account including the presentation of the product, the reasonable use of the product, and the time when the product was put onto the market. Furthermore, the Law defines the producer and equates the liability of the importer with the liability of the producer. The producer is not liable if he can prove that he did not put the product into circulation on the market; if the product is not produced to be sold or distributed for profit; if the product is not produced and distributed in the course of his business and if the defect appeared after the product was put into circulation, which means completely and directly transposing the provisos from the Directive on Liability for Defective Products. Apart from some obstacles to the practical implementation of the above mentioned legislation in Macedonia, this harmonization shows the first positive effects. Towards this end, the activities of the state inspection authorities for the protection of consumer rights and interests are much more intensive. Also the reactions of consumers have a greater intensity in the case of the violation of their rights by defective products.

Conclusion

The European Union, as a community with one of the largest single markets has been acting permanently to improve the quality of health and the quality of life of its citizens. In this context one of the core pillars has been the issue of consumer protection, whereby consumer protection activities and legislation have been introduced, which strengthen the EU single market. In this direction the EU has been making positive steps to harmonize consumer protection legislation, including the liability for defective products as an important part of consumer protection legislation. This harmonization demonstrates the positive effects of EU policy, despite the existence of opponents to the strengthening of this harmonization.

The Yugoslav successor states have expressed their desire for membership of the EU. On their way towards entry into the EU they have had to fulfil a number of obligations. The obligation for the harmonization of their national legislations with the European Union's legislation is very important. Each of these countries finds itself in a different phase of approaching the EU. Croatia has just become a member state of the EU. Montenegro as a candidate state has started negotiations with the EU and Serbia gained candidate status in 2012 and expects to begin negotiations in January 2014. Bosnia and Herzegovina has signed a Treaty for stabilization and association and is expected to gain candidate status in the longer term. Macedonia, by contrast gained candidate status in 2005, and even though it has a recommendation from the European Commission to start negotiations with the EU, has not as yet started negotiations because of a well known problem of being opposed by one particular EU member state.

An analysis of EU legislation and the legislation of the Yugoslav successor states shows that despite the fact each state is at a different phase on the way toward EU entry, generally they have transposed into their national legislation the provisions of EU consumer protection legislation and the most important part of this legislation Directive 85/ 374 on the approximation of the laws, regulation and administrative provisions of the Member States concerning liability for defective products and the Directive 2011/ 83 on consumer rights. These countries have all transposed consumer protection and liability legislation in a similar way. Some of them such as Serbia transposed the EU legislation in an integrative way in the Law on consumer protection. The other countries transposed those directives in Law on the obligation and Law on consumer protection. None of these countries failed to implement these directives by transposing into civil codes, as is a case in some EU member states. This transposing of EU legislation strengthened the position of the consumers in those countries, but there is a need for further activities and the practical implementation of EU consumer standards and a further strengthening of consumer rights. Also in the near future they have to work on the equalization of terminology, especially in relation to the other special laws which regulate some aspects of consumer protection. Taking into account that EU legislation is very dynamic, they have to follow the development

of EU legislation. After becoming a member state of the EU, Croatia has different obligations, from the other countries and regulations, as a part of secondary EU legislation it will automatically become a part of national legislation, without transposing.

Macedonia has transposed Directive 85/374 and Directive 2011/83 into national legislation. It strengthened the position and rights of the consumers in the market, but also contributes towards a stronger competitiveness of Macedonia's products in the EU single market. In the future there is a need for strengthening a dialogue between the authorities and the business sector and consumer organizations. This will contribute towards the better practical implementation of consumer legislation, including the producer's liability as opposed to that of the consumer. Apart from some problems in practical implementation, the harmonization of national consumer legislation contributes towards more effective consumer protection and the acceptance of common EU values in this area.

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