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The Obligations of Entrepreneurs Providing Services by Electronic Means

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Abstract: The development of new information and communication technologies affects economic development. E-services, along with the accompanying social changes, are being implemented in almost every area of human life, and the development of information and communication technologies makes it possible to employ a number of new instruments in its various spheres (e-banking, e-commerce, e-education, etc.). Currently, the information space in the context of the provision and use of e-services includes consumers and entrepreneurs although it assigns them different rights and obligations in this area. It seems necessary to assess the impact of the implementation by entrepreneurs of obligations related to the provision of e-services and their impact on the economy and on consumer safety in online trade. Legal changes concerning the obligations imposed on entrepreneurs in that field appear periodically in response to new threats related to dynamic technological development. The publication is devoted to an analysis of the provision of on-line services and an assessment of the law, in particular with regard to fulfilling information obligations with respect to consumers in cyberspace.

1. Introduction

It is very important for economic development that business processes are streamlined, which enables effective socio-economic development, occurring when innovations are implemented to introduce new, meaningful

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solutions, working methods and new services, including those provided electronically. What we can observe today is the development of a data-driven economy. This is the fourth stage of digitisation (after the development of ICT infrastructure, its networking and its application-based use by businesses and consumers). It is built on the huge volumes of generated data that currently remain only marginally structured and utilised. The world does not yet know how to make full use of them, but the race to shape the future state of the data driven economy is gathering pace and involves large technology companies, international organisations, economic blocs as well as individual countries[1]. Precisely from 1 January 2023, the rules for the sale of goods and digital content, e.g. games, software, photos in cyberspace, have changed, with the obligation to adapt the rules of procedure to the new rules implementing the EU directives: on the provision of digital content[2], the so-called the Sales of Goods Directive[3] and the Omnibus Directive[4].

Poland is also accepting the indicated challenge through active monitoring of new developments in digitalisation, the international environment, as well as exploring its own potential[5]. Unfortunately, the legislative process related to the implementation of the 5G network[6] in Poland is still

1 New services are emerging such as chatbots, ChatGPT, voice applications based on artificial intelligence solutions, which automate iterative learning and discovery with data. More widely: Luigi Lai and Marek Świerczyński, *Prawo sztucznej inteligencji* (Warszawa: Wydawnictwo C.H. Beck, 2020).

2 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services

3 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC

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

5 *Strategia 5G dla Polski,* Ministerstwo Cyfryzacji, styczeń 2018, 7.

6 The 5G network, which consists of fibre-optic lines or other fibre-equivalent telecommunications networks and connected short-range wireless access points with associated hardware and power supply equipment. Next-generation networks will be used for smart cities, the provision of M2M (Machine-To-Machine) services, the provision of services for automated (connected) and autonomous vehicles, and the provision of broadband internet access and interpersonal communication services.

going on. The 5G technology is crucial for the development of modern society and economy, the evolution of a society in which people use interactive public e-services in real time, e-commerce, e-medicine, or have the opportunity to participate in cultural events via digital media without loss of quality. The task of 5G will be to integrate massive amounts of data together with widespread and efficient access to network infrastructure, in order to make a range of new digital services and processes available to consumers. The 5G network is perceived as an agent of revolutionary changes enabling a transformation in the economy through wireless broadband services at gigabit speeds, as well as support for new types of applications where devices and objects will be connected via networks (the Internet of Things[7]) and versatility through software virtualisation – enabling innovative business models in many sectors (e.g. transport, healthcare, manufacturing, logistics, energy, media and entertainment). The key importance of the 5G network in the implementation of the digital single market strategy is highlighted in the European Union, through which Europe will be able to compete in the global marketplace[8].

The functioning of entrepreneurs and consumers in cyberspace involves risks. Alongside the development of new technologies, cybercrime is increasing, which is defined in the European Union as criminal acts committed by using electronic communications networks and information systems or directed against such networks and systems[9]. One should be aware of the fact that the nowadays digital world cannot be considered an oasis of stability and security. Threats in cyberspace affect all players in the market. It is worth noting that cyber security has different meanings for different recipients. For individuals, it is a sense of security, protection of

[7] More broadly: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *5G for Europe: An Action Plan*, Bruksela, 14.9.2016 r. COM(2016) 588 final, 2. Grażyna Szpor, ed., *Internet rzeczy. Bezpieczeństwo w Smart city* (Warszawa: Wydawnictwo C.H. Beck, 2015).

[8] See more: Marta Grabowska, "Europejskie społeczeństwo gigabitowe," *Studia Europejskie,* no. 1 (2020): 151–172; Agnieszka Besiekierska, "Legal Aspects of the Supply Chain Cybersecurity in the Context of 5G Technology," *Review of European and Comparative Law*, 51(4), (2022): 129–147, https://doi.org/10.31743/recl.14623.

[9] Communication from the Commission to the European Parliament, the Council and the Committee of the Regions of 22 May 2007, COM (2007) 267 final.

personal data and privacy. For entrepreneurs, on the other hand, it is ensuring the availability of mission-critical business functions and protecting confidential information through information security management. For the state, the concept will denote the protection of citizens, businesses, critical infrastructure and state ICT systems against attack or breach of integrity. Digital attacks can be accompanied by the use of manipulation and influence technology on people. Unfortunately, many reports and studies strongly indicate that it is the human factor that is the Achilles' heel of security systems[10].

The global economy is becoming a digital economy at an astonishing rate. It is a space in which the free movement of goods, people, services and capital is ensured and citizens and businesses can access or provide services online without obstacles and on a fair competitive basis. In such an area, a high level of protection of consumers and personal data is also guaranteed, regardless of nationality or place of residence. The introduction of a single digital market[11] will help European businesses to expand globally, ensuring that Europe remains a global leader in the digital economy. The main idea behind the Single Digital Market is essentially to remove national restrictions on transactions over the internet. On 6 May 2015 the Commission adopted the Single Digital Market Strategy[12], which is based on three pillars:

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10 Tomasz Zdzikot, "Państwo i administracja publiczna na straży cyberbezpieczeństwa," in *Stulecie polskiej administracji. Doświadczenia i perspektywy* (Warszawa: Krajowa Szkoła Administracji Publicznej, 2018), 246–247.

11 The European Commission published the European Digital Agenda 2020 in 2010, which aims to make better use of the potential of information and communication technologies to support innovation, economic growth and progress. It identified the importance of the digital market for the development of the modern economy and stressed the need to increase consumer confidence in cross-border e-commerce and to strengthen the supervision over the digital market. COM (2010) 245 final version, accessed December 12, 2022, https://ec.europa.eu/digital-single-market/en/europe-2020-strategy, In October 2012 the Commission presented the second set of conclusions – *the Single Market Act II. Together for New Growth (*COM (2012) 0573*)* – containing 12 key actions focused on four key drivers for growth, jobs and confidence: integrated networks, cross-border mobility of citizens and businesses, the digital economy and actions to strengthen cohesion and enhance consumer benefits. Within the framework of the digital single market, the aim was to reduce the costs and increase the efficiency of the deployment of infrastructure for high-speed communication networks.

12 COM (2015) 192.

1. Ensuring that consumers and businesses have easier access to digital goods and services across Europe;
2. Creating an appropriate and equal operational environment enabling digital networks and innovative services to flourish;
3. Maximising the growth potential of the digital economy.

The Single Digital Market Strategy provides, among other things, for better online access with regard to consumers and businesses. Some aspects of consumer and contract law have already been fully harmonised when it comes to online sales, e.g. the information which needs to be provided to consumers before a contract is concluded, or the rules governing the consumer's right to withdraw from a contract if he or she opts out. The main target of the Single Digital Market is to create a climate that encourages investment in digital networks, in research and innovative businesses in the indicated sector. In response to the challenges of the digital single market, the Council of Ministers has established a Government Plenipotentiary for the Single Digital Market[13], whose tasks concern the analysis of existing barriers to the implementation of the principles of the digital single market, including barriers to the development of online services, and the presentation of proposals for their removal; the preparation of guidelines for the development of an electronic economy, consistent with the principles of the digital single market; the elaboration and monitoring of legal or organisational solutions aimed at the implementation of the principles of the digital single market; the initiation of and cooperation with European Union Member States in order to develop projects in the field of the common market for online services.

The entrepreneur providing electronic services is constantly exposed to the need to adapt to new technological reality and, consequently, has to meet a number of obligations imposed by the legislator in a number of legal acts, seeking to protect participants involved in electronic trading in the service market.

[13] The Regulation of the Council of Ministers on the establishment of the Government Plenipotentiary for the Digital Single Market of 14 March 2017 (Journal of Laws 2017, item 563).

2. The notion of electronically supplied services under the EU and Polish law

First, it is worth pointing out the legal definition of the concept of services, provided for in Article 57 of the Treaty on the Functioning of the European Union[14]. These are the services usually rendered for remuneration to the extent that they are not covered by the provisions on free movement of goods, capital and persons. The services concerned comprise in particular activities of an industrial nature, handicrafts and the liberal professions.

By contrast, the e-service is defined in the literature as a new form of service provision, including the satisfaction of needs using the Internet, starting with the contact between the entrepreneur and the customer, through the presentation of an offer, then its ordering and finally executing thereof[15]. It is not possible to clearly define the boundary of an e-service, due to the dynamic nature of the environment in which it is created and developed. Consequently, it becomes difficult to unambiguously determine whether a given activity via the Internet is an e-service or not[16]. An e-service reduces human activity to a minimum and is individually customer oriented.

What distinguishes an e-service from a service delivered in a traditional form is mainly the lack of human involvement on the other side while delivering services over long distances. Due to the highly dynamic nature of ICT, it is difficult to clearly define the boundaries of an e-service. It leads to complications in determining whether an Internet activity is already or not yet an e-service. For a better understanding of what e-services actually are, the characteristics of electronic services are worth mentioning. The most important ones include the simplicity of using this form of service for consumers, the accessibility and openness as well as the individualisation of the services provided. Other characteristics of e-services would include mobility, which involves dedicating them also to mobile devices such as tablets. Moreover, e-services are also distinctive in

[14] Consolidated versions of the Treaty on European Union and the Treaty establishing the European Community of 26 October 2012, Official Journal of the EU, C 326/1.

[15] Anna Dąbrowska, Mirosława Janoś-Kresło and Arkadiusz Wódkowski, *E-usługi a społeczeństwo informacyjne* (Warszawa: Wydawnictwo Difin, 2011), 41.

[16] Kornelia Batko, Grażyna Billewicz, "E-usługi w biznesie i administracji publicznej," *Studia Ekonomiczne* no. 136 (2013): 47–49.

terms of the possibility to build an e-community around a specific service, as well as originality meaning pioneering, providing services in the form of *cloud computing*[17]. E-service can be provided via the Internet, mobile devices, satellite and digital TV[18]. The dynamic development of e-services can be observed in areas such as communication, commerce, banking, health care, finance, science, tourism and culture. E-services include in particular: the web page creation and maintenance, the remote management of programmes and equipment, the supply of software and software updates, the provision of images, text and information as well as database access, the provision of music, films and games, including games of chance and gambling games, as well as political, cultural, artistic, sporting, scientific and entertainment broadcasts and news, distance-learning services.

Given the above, it should be pointed out that e-services should be characterised by simplicity, meaning easy and intuitive use of the service by the user; originality, meaning that the e-service should be something new that has not been on the market before or a new solution based on existing trends in the economy. It should be featured by individualisation and personalisation, i.e. the service should be tailored to the user and his or her preferences, giving the user the impression that the service is addressed directly to him or her; and mobility, the extension of traditional e-services offered as websites to new distribution channels, i.e. solutions for mobile devices (e.g. smartphones, tablets) dedicated to satellite or digital television.

The E-Commerce Directive regulates the provision of electronic services in the EU. The main objective of the Directive is to enable the proper functioning of the single market by ensuring the free movement of such services. The e-commerce Directive uses the concept of *information society*

[17] From English: Cloud computing. A data processing model based on the use of services provided by a service provider. Cloud computing services can be divided into: IaaS (infrastructure as a service), PaaS (platform as a service) and SaaS (software as a service). Cloud computing is a newly developed trend in the use of available information technology. It helps to use and manage IT resources in a simple way using new technologies. Cloud computing is a model that enables comprehensive, convenient access to widely available, configurable computing resources (e.g. networks, servers, databases, storage, applications and services) in an unlimited, convenient, on-demand access via the Internet. These resources can be quickly provisioned and transferred with minimal management or service provider interaction and with minimal involvement of technical services.

[18] Batko, Billewicz, "E-usługi w biznesie i administracji publicznej," 47–49.

service, referring to the definition in the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and requirements and of rules on Information Society services[19], supplemented by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 on the legal protection of services based on or consisting of conditional access[20]. The definitions included in the above mentioned directives define information society services as all services normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including *digital compression*) and storage of data, at the individual request of a recipient of services. Thus, the Directive applies to services provided through online activities such as, for example, information, advertising, shopping and the conclusion of contracts online. The scope of the concept of information society services has been clarified in Annex 5 to the Directive 98/48/EC, which identifies examples of services that are not of this nature and are therefore not provided at a distance, i.e. provided in the physical presence of the provider and the recipient, even if they use electronic devices (e.g. providing electronic games in a living room in the physical presence of the user). The second group concerns services that are not performed by electronic means. The last group covers services which are not performed at an individual request of the recipient of the service, but are provided in the form of data transmission without individual request and are intended for simultaneous reception by an unlimited number of recipients, e.g. television broadcasting.

The provision of services by electronic means is regulated by the Act of 18 July 2002 on Providing Services by Electronic Means (PSEM)[21], with which the EU provisions related to e-commerce were implemented[22]. he Act contains a definition of service provided by electronic means, which, according to Article 2(4), is the performance of a service provided without the simultaneous presence of the parties (at a distance),

19 The Official Journal of the EU L 204/37.

20 The Official Journal of the EU L 217/18.

21 Journal of Laws. 2020, item 344.

22 More broadly on the implementation of the directive: Jacek Gołaczyński, *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz* (Warszawa: Wolters Kluwer, 2009), 27.

through the transmission of data at the individual request of the recipient of the service, sent and received by means of equipment for electronic processing, including digital compression, and storage of data, which is entirely transmitted, received or transmitted via a telecommunications network within the meaning of the Act of 16 July 2004. – Telecommunications Law. The qualification of a given transaction as a service provided by electronic means requires that the following premises occur together: 1) the service must be performed without the simultaneous presence of the parties at a distance (e.g. via the internet), 2) by transmitting data at an individual request of the recipient of the service (e.g. data reception on a smartphone), 3) the sending, receiving or storing of data as part of the service must be carried out by means of electronic processing devices (e.g. computers, laptops, tablets, smartphones), 4) the service should be transmitted, received or broadcast via a telecommunications network. The last element is not present in the EU law on information society services, nor is it specified in the Polish regulation, which is why it is assumed in the literature that it refers to telecommunication networks of all types (e.g. Internet, intranet). The legislator has included exemptions in Article 3 of the Act on Providing Services by Electronic Means (PSEM) to which it does not apply.

The Act contains a number of legal definitions regarding the concepts used in the text of the Act. The act in question first of all regulates the concept of a service provider, which, according to Article 2(6), is: a natural person, a legal person or an organisational unit without the legal personality, providing services electronically, even if only incidentally, in the course of paid or professional activity. The Polish legislator interprets the service provider in two ways: firstly, it is an entity providing its own or third parties' services/content, and secondly, it is an entity involved in mediating access to such services[23]. However, within the meaning of the described Act, the recipient of the service will be: a natural person, a legal person or an organisational unit without legal personality, which uses the service provided electronically. It seems to be interesting that the verb to use the service is employed. It permits to conclude that a recipient of the service will be not only the one who concludes a contract for the provision of services

[23] Gołaczyński, *Ustawa o świadczeniu,* 47.

by electronic means, but also the one who uses such a service[24]. Similarly to the E-Commerce Directive, the recipient of services is not the same as the consumer in the PSEM Act The concept of the recipient of the service is broader. It is sometimes indicated in the literature that the concepts of service provider and service recipient may overlap. Indeed, there are situations in which one entity can be both a service provider and a service recipient. It happens when an entity simultaneously provides a service via a website and is the recipient of a hosting service provided by another entity[25]. Information society services can therefore be grouped into three categories, namely: 1) transmission services (electronic communication services; telecommunication services); 2) services related to the performance of a distance contract (electronic contracts concluded at a distance; 3) services for the supply of content by electronic means[26].

From 1 January 2023, the provisions of the amended Act of 30 May 2014 on consumer rights[27], where a definition of digital service was introduced indicating it to be a service allowing the consumer to: a) produce, process, store or access digital data, b) share digital data transmitted or produced by the consumer or other users of the service, c) interact in other ways using digital data.

3. Obligations of an entrepreneur providing services by electronic means

Following the EU law, detailed solutions with regard to the information obligation imposed on the e-service provider have been introduced in the Polish legislation. The first group of information obligations includes, among other things, a set of pieces of information contained in Article 5

[24] Paweł Litwiński, "Świadczenie usług drogą elektroniczną" in *Prawo Internetu,* ed. Paweł Podrecki (Warszawa: LexisNexis, 2007), 169.

[25] Gołaczyński, *Ustawa o świadczeniu,* 49–51.

[26] Dariusz Wociór, *Ochrona danych osobowych i informacji niejawnych z uwzględnieniem ogólnego rozporządzenia unijnego* (Warszawa: C.H. Beck, 2016), 372.

[27] Journal of Laws of 2020, item 287 and of 2021, item 2105. Consumer Rights Act amended by the Act of 4 November 2022 amending the Consumer Rights Act, the Civil Code Act and the Private International Law Act, Journal of Laws. 2022, item 2337.

of the PSEM Act[28]. Its basic task is to counteract threats that arise as a result of the application of anonymity to services provided online. The imposition of a number of information obligations on e-service providers stems from the will to ensure the transparency of trading, already assumed in the e-Commerce Directive and consistently adopted and implemented by the Polish legislator[29]. In addition to setting out a detailed set of information, the legislator has also elaborated on the form of the provision thereof. As per the classification of the information obligations incumbent on the entrepreneur, a distinction can be made between: information obligations that arise when any activity is carried out on the internet; obligations that arise when messages with a specific content (commercial information, electronic offer) are disseminated; and specific obligations concerning the targeting of messages with a specific content (contract proposal) to a specific group of recipients, i.e. consumers.

Pursuant to Article 5(1) of the Act on Providing Services by Electronic Means, basic information[30], which enables the recipient of the service to contact the service provider directly, shall be given by the service provider in a clear, unambiguous and directly accessible manner via the information and communication system used by the recipient of the service. It is important in terms of exercising the right of withdrawal from agreement. The expressions used in the abovementioned

[28] Katarzyna Chałubińska-Jentkiewicz and Joanna Taczkowska-Olszewska, *Świadczenie usług drogą elektroniczną. Komentarz* (Warszawa: C.H. Beck, 2019), 166.

[29] Dominik Lubasz, *Handel elektroniczny. Bariery prawne* (Warszawa: LexisNexis, 2013), 175.

[30] Basic information as defined in Article 5(2) to (5) of the Act on Providing Services by Electronic Means. These are: electronic addresses, name, surname, place of residence and address or name or company and seat and address. If the service provider is an entrepreneur, he or she shall also provide information on the relevant authorisation and the authorising authority, if the provision of the service requires, under separate legislation, such authorisation. If the service provider is a natural person whose right to practice the profession is subject to the fulfilment of requirements specified in separate acts, he shall also provide: 1) in the case of appointment of a proxy, his/her name, surname, place of residence and address, or his/her name or company name and registered office and address; 2) the professional self-government to which he/she belongs; 3) the professional title he/she uses and the state in which it was granted; 4) the number in the public register in which he/she is entered, together with an indication of the name of the register and the authority keeping the register; 5) information on the existence of rules of professional ethics appropriate to the profession and the manner of access to those rules.

Article should be interpreted in the light of the notion of the prudent and average consumer, in other words someone with sufficient experience of life enabling him to know and guess easily the content of the information given to him or her.

The said provision implements Article 5 of the E-Commerce Directive. The information about the service provider should be displayed in a place that is visible, so that the recipient of the service can easily find it and determine who the service provider is and where the seat thereof is located. Therefore, it is also very significant to present the information in a clear and comprehensible way, so that it does not mislead the recipient of the service. Such information is most often to be found on the website in sections such as contact us, privacy policy, terms and conditions or at the very bottom of the page in the footer. In the event that that the provider fails to include the information referred to in Article 5, or the data he provides is untrue or incomplete, he shall be liable to a fine (Article 23 of the PSEM Act). The information should be presented in a way that is easy to read, not only in terms of its clear wording, but also in terms of its technical ease of access. Therefore, it seems that the service provider's indication of an internet address, for example, where the indicated data can be found, or any other similar form of indirect communication of data about oneself to the recipient of the service, would not be allowed.

It is also necessary to consider a further information obligation stipulated by Article 6 of the PSEM Act, which regulates the scope of security related to the use of the services by electronic means. The service provider is obliged to ensure that the service recipient has access to up-to-date information on specific risks related to the use of a service provided electronically, as well as on the function and purpose of software or data not being a component of the content of the service, introduced by the service provider into the ICT system used by the service recipient. The fulfilment of such an obligation entails that the service provider makes the information available to the recipient of the service upon request[31]. It should be noted that the necessity of immediacy has been omitted and therefore in order to comply with the requirements it is sufficient for the service provider to create a link to that information.

[31] Gołaczyński, *Ustawa o świadczeniu*, 82.

The *ratio legis* of solutions stemming from Article 6 of the PSEM Act is the necessity to protect consumer privacy and issues related to shifting the costs of violation of such privacy only to the entrepreneur, or the supplier acting in agreement therewith. In addition, the provision of Article 7 of the PSEM Act stipulates that the service provider shall ensure the operation of the information and communication system used, permitting, free of charge, the recipient of the service when required by the nature of the service: (a) to use the service provided electronically in a way that prevents access of unauthorised persons to the content of the message constituting the service, in particular using cryptographic techniques appropriate to the characteristics of the service provided, b) to unambiguously identify the parties to the service provided electronically and to confirm the fact of making declarations of intent and their content, necessary for the conclusion of the agreement for the provision of the said service electronically, in particular using a qualified electronic signature. Furthermore, the service provider shall ensure the termination, at any time, of the use of the electronically supplied service. to unambiguously identify the parties to the service provided electronically and to confirm the fact of making declarations of intent and their content, necessary for the conclusion of the agreement for the provision of the said service electronically, in particular using a qualified electronic signature. Furthermore, the service provider shall ensure the termination, at any time, of the use of the electronically supplied service. The quoted provision imposes obligations on the service provider to ensure the security and confidentiality of transactions transmitted over the network. It involves the protection of transmissions from interference by third parties, as well as the guarantee of the certainty that a statement made by a person actually originates from that person. Pursuant to the quoted provision, the service provider is obliged to ensure appropriate conditions for the use of the ICT system and services by the customer in such a way that access to these transmission contents is impossible for unauthorised persons and to enable unambiguous identification of the parties to the e-service provided and to confirm the fact of making declarations of intent and their content, in particular with the use of a qualified electronic signature.

The protection of IT systems and the content processed within them is mainly focused on technical security measures incorporated

into the operating system, based on access control. In addition to this, additional solutions – primarily in the area of software – are also employed to secure IT resources. In particular, it concerns *firewalls,* which operate on the basis of appropriate software filtering and controlling network activity; this type of software makes it possible, among other things, to provide protection against standard external attacks, allowing, for example, early identification of intrusion attempts; anti-virus software, the purpose of which is to secure a computer system against dangerous software; anti-spyware and anti-advertising software used to detect and remove *spyware* or *adware*; anti-spam software used to reduce the number of unwanted commercial messages received by the user[32]. Most crimes can be committed using ICT systems. Particularly popular and frequent forms of crime in electronic communication networks are various types of fraud and attempted fraud. Methods such as identity theft,, *phishing* (password hunting) and ransomware are used to commit fraud on a massive scale. Mass-scale attacks against IT systems, organisations and individuals (often via so-called botnets[33]) are becoming more and more common. Other types of crimes committed using new technologies include illegal *online* transactions, offering non-existent goods and services, or extorting various types of benefits using stolen, lost or even manipulated payment cards. These can also include electronic fund transfer crimes, which involve intercepting the login details of an online bank account in order to take out all the money one has on that account, as well as investment fraud, the creation of fictitious websites offering the possibility of profit from a fictitious investment[34].

It is also important to discuss the issue of unsolicited commercial information. Commercial information shall be clearly distinguished and marked in a manner that does not raise any doubts as to its being commercial information. Pursuant to Article 9 of the PSEM Act commercial information sent out by service providers must contain: the designation

[32] Cf. Brunon Hołyst and Jacek Pomykała, *Cyberprzestępczość i ochrona informacji* (Warszawa: Wydawnictwo Wyższej Szkoły Menedżerskiej, 2012), 14–16.

[33] *Botnet* denotes a group of computers infected with malware under common remote control.

[34] Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press, 2015), 183–199.

of the entity on whose instructions it is disseminated and its electronic addresses; a clear description of the forms of promotional activity, in particular price reductions, gratuitous benefits in cash or in kind and other advantages related to the promoted good, service or image, as well as a clear indication of the conditions necessary to benefit from the said advantages if they are a component of the offer; any information that may affect the determination of the parties' responsibilities, in particular warnings and disclaimers. As in the aforementioned cases, the consequence of breaching this obligation is to consider the service provider's action as a misleading practice or as an act of unfair competition.

Commercial information should be distinguished from SPAM, denoting unsolicited electronic correspondence sent to an unspecified number of addressees, regardless of their identity. Commercial information sent by entrepreneurs to their existing and potential customers may resemble SPAM for the average user of an e-mail account, but the difference is that the sending of information and advertising material under the conditions set by law, including in particular the consent of the addressee, is not in conflict with the law. Art. 9 and 10 of the PSEM Act contain norms regulating the issue of unsolicited commercial information. Under Article 10 of the PSEM Act it is forbidden to send unsolicited commercial information addressed to a designated recipient who is a natural person by electronic means of communication, in particular by e-mail. Commercial information is presumed to be solicited if the recipient has given consent to receive such information and in particularly if he or she has provided an electronic address, identifying him or her for that purpose. On the other hand, according to Article 172(1) of the Telecommunications Act, the use of telecommunications terminal equipment for the purposes of direct marketing is allowed only if the subscriber or end-user has given his or her prior consent[35]. Telecommunications terminal equipment

[35] Work is currently underway on a draft law – the Law on Electronic Communications (parliamentary print 2816), which implements EU provisions into national law, in particular Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Official Journal of the EU L 321 of 17.12.2018, p. 36, as amended). On the basis of Article 393 of the draft, it is prohibited to use: 1) automated calling systems, 2) telecommunication terminal equipment, in particular in the use of interpersonal communication

is any device intended to be connected directly or indirectly to network termination points. It is any product enabling the transmission of information, or a significant component thereof, which can be directly or indirectly connected by any means to an interface of public telecommunications networks. An interface is a network termination point with specific technical characteristics, i.e. the physical part of the network by means of which a user accesses the network. The terminal equipment serves primarily to transmit and receive information. In addition to transmitting and receiving, terminal equipment can also process information. There is no restriction on the type of information that can be transmitted, received and processed by means of terminal equipment (signs, signals, writing, images, sounds). The telecommunications terminal equipment should be directly or indirectly connected to the network. Direct connection is when no other telecommunications equipment is present between the network termination and the terminal equipment. However, there may be a wire (cable) and telecommunications fixtures to connect the device. In the case of indirect connection, there is another terminal device between the terminal equipment and the network termination, which mediates the transmission of signals (e.g. switchboard, modem). Technological advancement reveals that a single device can perform more and more functions in transmitting and receiving information by adding more modules. Typical terminal devices mediating the transmission process are modems, terminal routers and decoders.

What the above-mentioned provisions have in common is, first of all, the need to have the consent of the person to whom commercial or marketing information is addressed (an individual, an end user). It is worth indicating the practice that got stronger recently, namely requesting consent to send such information. This is the aftermath of the judgment of the Warsaw-Praga Regional Court in Warsaw of 4 January 2019. In this

services – for the purpose of sending unsolicited commercial information within the meaning of the Act of 18 July 2002 on the provision of services by electronic means, including direct marketing, to the subscriber or end user, unless he or she has previously given his or her consent. The consent referred to in subsection 1 may be given by the subscriber or end-user providing an electronic address identifying them within the meaning of the Act of 18 July 2002 on the provision of services by electronic means for the purpose of sending unsolicited commercial information.

judgment, dismissing the plaintiff's appeal, the court confirmed the decision of the court of first instance according to which: *'It is not contrary to Article 172 of the Telecommunications Act for the defendant's employees to make calls to randomly selected numbers of subscribers without their consent in order to determine whether they agree to be contacted by telephone for direct marketing purposes. It is only after consent has been given that the party carries out direct marketing activities in relation to subscribers*[36]. The divergent positions of the central authorities in this regard are also worth pointing out. The Office of Electronic Communications (Pol.: UKE) seems to have a more liberal view in this respect. In the letter[37] addressed to the Association of Information Security Administrators (Pol.: SABI) of 21.10.2015, the President of the Office of Electronic Communications indicated that it is permissible to obtain consent during a telephone conversation and then continue it in order to present an offer. A different opinion is presented by the Office of Competition and Consumer Protection (Pol.: UOKiK). In one of its decisions, the President of OCCP stated that *'the notion of direct marketing includes not only activities of a sales nature but also those that serve to provide information if their final effect is to make the addressee interested in the entrepreneur's offer. Therefore, not only the situations in which an entrepreneur contacts a consumer in order to present an offer proposal, but also the contact aimed at obtaining consent for direct marketing, including the presentation of an offer, will be qualified as falling within the hypothesis of Article 172'.* According to the Office of Competition and Consumer Protection, the very request for consent to present an offer will therefore be treated as a direct marketing activity, which requires prior consent[38]. The draft provisions of the new electronic communications law do not resolve the indicated issue.

When it comes to sending unsolicited commercial information by entrepreneurs, the Act on Combating Unfair Competition also applies, as the Act

[36] IV Ca 1873/16 – The Judgment of the District Court Warsaw-Praga in Warsaw, LEX no. 2745113.

[37] Prezes Urzędu Komunikacji Elektronicznej, 21.10.2015, DP.034.32.2015.2, accessed January 12, 2023, https://www.sabi.org.pl/attachments/File/do_pobrania/UKE-2015/odpowiedz-UKE-21-10-2015.pdf.

[38] The decision of the President of the Office of Competition and Consumer Protection, no. DOZIK 3/2019 of 30 May 2019, DOZIK-8.610.20.2017.KA/MO.

on Providing Services by Electronic Means recognises sending unsolicited commercial information as an act of unfair competition[39]. The Article 24 of the Act on Providing Services by Electronic Means sets out a fine for infringement of the provisions on the ban on sending unsolicited commercial information. As this is an offence prosecuted at the request of the aggrieved party, one has to wonder about the effectiveness of such a solution, taking into account the behaviour of the average e-mail user, who either deletes SPAM and advertisements or creates a new account, hoping that it will not be cluttered with advertisements.

Due to the fulfilment of the information obligation imposed on the service provider, it is also necessary to draw up the rules and regulations for the provision of services by electronic means, which results from Article 8(1)(1) of the Act on Providing Services by Electronic Means. The service provider is obliged to formulate such rules and regulations as the basis on which the legal relationship with the consumer may be established. The service provider shall make the rules and regulations available to the recipient of the service free of charge prior to the conclusion of the agreement for the provision of such services and also – upon the recipient's request – in such a manner that enables the content of the rules and regulations to be obtained, reproduced and recorded by means of the ICT system used by the recipient of the service. The risk of ineffectiveness covers the necessity to make the rules of procedure available before the conclusion of the contract, which means that the recipient is not bound by the provisions of the rules of procedure not made available to him/her before the conclusion of the contract.

The minimum requirements for the content of the rules and regulations include: the types and scope of services provided by electronic means and the conditions for the provision of e-services. In this regard, it is necessary for the service provider to specify the technical requirements that are indispensable in order to cooperate with the ICT system used by the service provider, the prohibition of illegal content, the conditions for the conclusion and termination of agreements for the provision of services by electronic

[39] Article 10 of the Act on Providing Services by Electronic Means, an act of unfair competition within the meaning of the provisions of the Act on Combating Unfair Competition of 16 April 1993 (Journal of Laws 2018, item 419 as amended).

means, as well as the complaint procedure. The above-mentioned scope of components of the terms and conditions is not a closed catalogue, and this is evidenced by the expression 'in particular'[40] contained therein. The rules of procedure should contain, for example, clear criteria on which the seller may take action against the buyer if, as a result of the buyer's non-performance of the contract, the seller applies for a refund of the commission charged. The rules on warnings and account suspensions are part of the terms and conditions for the services provided by electronic means and should be included in the terms and conditions for the provision of the said services. Action consisting in informing about the rules for warnings and account suspensions elsewhere than in the terms and conditions should be considered insufficient to assume that the entrepreneur correctly complies with the statutory regulation. In addition, the service provider is liable for damages under the general principles of the Civil Code. Failure to provide certain information may be considered a misleading practice.

The aforementioned terms and conditions shall be identified with the model contract (general terms and conditions)[41]. Code shall be applicable, which stipulates that a model contract agreed by one of the parties, in particular, general terms and conditions, a model contract or rules of procedure, is binding on the other party, if it has been delivered to that party prior to the conclusion of the contract. The aforesaid obligation to establish terms and conditions is to enable consumers to familiarize themselves with the principles governing the provision of services, including, for example, the complaint procedure. It is therefore a document containing provisions significant from the consumer's point of view. Given such content of the provisions, the question should be posed: what are the consequences of an entrepreneur's failure to comply with this statutory obligation and providing services electronically without establishing terms and conditions? At first glance, it seems that the legislator has not introduced any legal consequences for not creating the regulations. However,

40 Konarski, *Komentarz do ustawy*, 103–105.

41 Krzysztof Korus, "Umowy i inne czynności prawne w obrocie elektronicznym," in *Prawo handlu elektronicznego,* ed. Mariusz Chudzik, Aneta Frań, Agnieszka Grzywacz, Krzysztof Korus, Maciej Spyra, Bydgoszcz (Kraków: Wydawnictwo Branta, 2005), 103–104; Dominik Lubasz, Monika Namysłowska, ed., *Świadczenie usług drogą elektroniczną oraz dostęp warunkowy. Komentarz do ustaw* (Warszawa: LexisNexis, 2011), 138–140.

this applies only to the provisions of the Act on Providing Services by Electronic Means, not to all laws. Entrepreneurs are frequently unaware of the fact that the lack of regulations is also punished by the sanction provided for in the provisions of the Act on Competition and Consumer Protection of 16 February 2007 (hereinafter: A.C.C.P.)[42]. Well, the failure to have the terms and conditions required by the Act on the provision of services by electronic means is incompatible with Article 24. para. 2 pt. 2 of the A.C.C.P. and constitutes a violation of the collective interests of consumers. The sanctions imposed for the lack of terms and conditions are regulated by the Act. The disposition of Article 24(2)(2) of the A.C.C.P. stipulates that *a practice infringing the collective interests of consumers is understood as an unlawful action of an entrepreneur against them, in particular infringement of the obligation to provide consumers with reliable, true and complete information.* Thus, the President of the Office of Competition and Consumer Protection – on the basis of Article 106 of the A.C.C.P. – may impose on an entrepreneur, by way of a decision, *a fine of up to 10% of the revenue generated in the accounting year preceding the year in which the fine is imposed, if the entrepreneur, even if unintentionally (...), committed practices infringing the collective interests of consumers within the meaning of Article 24 of the Act on Competition and Consumer Protection* (i.e. he/she did not have terms and conditions for the provision of electronic services).

The Act of 1 December 2022 amending the Consumer Rights Act and certain other acts[43] imposed new information obligations on entrepreneurs. The newly added Article 12a of the Consumer Rights Act specifies an obligation imposed on the provider of an online trading platform to inform the consumer, in a clear and comprehensible manner, at the latest at the moment when the consumer expresses his or her will to be bound by a distance contract, about the general information made available in a special part of the web interface, which is directly and easily accessible from the page on which the offers are presented, concerning the main

[42] Journal of Laws. 2018, item 798.

[43] The Act of 1 December 2022 amending the Consumer Rights Act and certain other acts Journal of Laws. 2022, item 2581.

parameters determining the placement[44] in the search result, and the relative importance of the said parameters in comparison with other parameters. In addition, one must be informed whether a third party offering goods, services or digital content on an online trading platform is an entrepreneur – on the basis of a statement made by that person to the provider of the online trading platform. On the other hand, a catalogue of relevant information that an entrepreneur using a market practice is obliged to provide to consumers under separate regulations has been expanded under the Act on Counteracting Unfair Market Practices. It applies, inter alia, to information about whether and how an entrepreneur ensures that the published opinions come from the consumers who have used or purchased the product – in the case of an entrepreneur providing access to consumer product reviews. The entrepreneur will be obliged to indicate whether the reviews are verified at all and whether they come from people who have actually purchased the product. If he does indeed verify them, he will have to mandatorily communicate how he does so. It does not mean, however, that the entrepreneur will have to verify the veracity of the opinion or the assessment that is expressed in it, which would be very difficult in practice. The only thing to be checked is whether the opinion has been added by a person who has actually bought or used the product. This does not give consumers confidence that an opinion is genuine.

4. Conclusions

In summary, the scale of electronically provided services is growing significantly not only in Poland or the European Union, but also worldwide. The provision of services by electronic means plays an important role at the level of contacts with individual customers through online auctions, electronic shops, retail sales of services (e.g. booking tickets, hotels, cars). Business in the B2C segment is strongly consumer-oriented. Retaining a regular customer is sometimes more important than acquiring a new one. This is linked to the high transparency of online offers and the short

[44] Placement is the attribution of a certain product visibility or weight given to search results by entrepreneurs who provide the Internet search function as it is presented, organised or transmitted regardless of the technological means used (Article 2(11) of the Act on Counteracting Unfair Market Practices).

time needed to review competitive offers. Companies in the B2C segment want to develop a bond with their customers by creating various types of loyalty programmes, consumer clubs or even projects that enable consumers to design new products. Moreover, the consumer is equipped with the tools to analyse the market before deciding to buy or use the services of a particular entrepreneur. It increases confidence and trust in the market on both sides of the transaction. The emerging phenomena of website positioning or influencing consumers with fake reviews have determined the EU legislator and, following it, the national legislator to protect consumers against such phenomena. We have yet to assess the effectiveness of the adopted regulations, but this is probably a step in the right direction.

When examining the changes that may be brought about by the advancement of new technologies, it should not be forgotten that virtual reality may only represent a new dimension of the reality in which we will be functioning with newer and newer products and services. Consequently, it can be concluded that the regulations currently in force are directly applicable to electronic trading, but it is necessary to constantly analyse the effectiveness of the legal acts already in force and to react to emerging threats. There is a fear that legal regulations are lagging behind technological development and the level of consumer protection is still insufficient. It should be noted that legislative measures are being taken both in the EU and in the Polish law. The increase in the transactional level of e-commerce and the growing interest in it as well as in its specifics make it necessary to regulate the phenomena occurring in it in separate legal provisions. Legal regulations are subject to constant review and the EU lawmakers, along with the national ones, are trying to keep up with technological progress with varying degrees of success.

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