

BARRING SOME HOLDS



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EXPLAINS THE IMPACT OF NEW OBLIGATIONS FOR BUSINESS TO BE
INTRODUCED IN POLAND THROUGH THE EU OMNIBUS DIRECTIVE.

The so-called "Omnibus Directive"—legally known as 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 the Council as regards the better enforcement and modernization of Union consumer protection rules—will bring new obligations for businesses in dealings with consumers in business to consumer trade.

BARGAIN PRICES

Some of them, such as the obligation to provide consumers with information about the lowest price of the product before offering it at a discounted price as part of a sale, may pose a particular challenge for companies.

The problem is that to achieve higher marketing impact, businesses sometimes raise prices shortly before sales campaigns such as Black Friday, so the price reduction in the campaign seems like an especially great deal. Most customers do not track the prices before the sale starts and may be under an impression that they get a real bargain.

In Poland, the Office of Competition and Consumer Protection (UOKiK) already regards this as an unfair commercial practice and can impose fines on businesses that use it. Such measures are now taken by UOKiK after the fact, but the proposed regulations would introduce preventive mechanisms. According to the current bill, subject to certain exceptions, a business announcing a price reduction will also have to mention the lowest price from the last 30 days. This could help consumers better assess the attractiveness of the sale price.

The bill does not specify how information about the previous low price should be conveyed. This should be clarified in an executive regulation, but so far the government work on the draft regulation does not contain any guidance on this point. If the regulation enters into force in its current wording many issues would be left unexplained including how this obligation would have to be carried out in practice.

According to the bill, the sanction for failure to comply with this obligation would be a fine of up to PLN 20,000. If a business breaches this duty three times within 12 months, the fine could be elevated to as high as PLN 40,000. It should be expected that compli-

Goods and Services, may result in concluding that it infringes the collective interests of consumers.

CONSUMER REVIEW VERIFICATION

The bill also addresses issues related to publishing product reviews written by consumers. First and foremost, a business publishing consumer reviews must provide information on whether, and in what manner, it ensures that the published opinions come from consumers who have purchased or used the product. This is meant to improve the credibility of consumer reviews, but will also require businesses to introduce appro-

displayed alongside the consumer reviews. The latter solution would greatly undermine the credibility of opinions that are not verified in any way.

The new directive also proposes to add a regulation that would expressly make it an unfair commercial practice to place, or commission another person to place, fake consumer reviews or recommendations, or to rephrase reviews and recommendations originally written by consumers, to promote products. Currently, this conclusion could be inferred from the general regulations, but adding this provision would confirm the dishonesty of this practice.

CORRECTING BAD PRACTICES



The **Omnibus Directive** aims to help online buyers make more informed decisions about products and retailers listed in customer review sections.

ance with this obligation will be monitored by the Trade Inspectorate, which should check periodically whether information on prices is provided lawfully. UOKiK warns that failure to comply with duties relating to the presentation of prices, as defined in the Act on Information on Prices of

appropriate verification mechanisms. If the business does not take this effort, it will also have to state that.

This raises a key question of whether such information could be relegated, for example, to the terms of use relevant to the website, or would have to be

The UOKiK has already looked into how businesses present consumer reviews. The market watchdog scrutinized Ceneo.pl and Opineo.pl—online services that compare product prices from retailers available online. The UOKiK expressed doubts about such practices as hiding

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portions of consumer reviews, including negative reviews, and failing to factor them into product ratings.

Ceneo.pl and Opineo.pl enable correspondence between the store and the customer. Entrepreneurs can use such a communication channel when they are rated low. Previously, if the consumer did not react to the seller's message, his opinion was hidden. It also did not count towards the store's average score. On both sites, negative reviews were not displayed when the dispute was resolved, and the consumer withdrew the review.

As a result of the UOKiK intervention, both services changed this practice.

MARKETPLACE DISCLOSURE RULES

New obligations are also to be imposed on operators of online marketplaces.

An online marketplace is defined as a service using software that allows consumers to conclude distance contracts with other traders (B-to-C) or consumers (C-to-C). In particular, the provider of an online marketplace will be required to describe the main parameters determining the ranking of offers presented to consumers in search results, and the relative importance of these parameters compared to other parameters. This information should be available in a special section of the online interface directly and easily accessible from the page where the ranked offers are presented. It appears that compliance with this obligation will require the inclusion of this information directly on the page where the offers are displayed, or via a link on that page.

In turn, "ranking" is defined in the bill as the prominence given to products, or the weight assigned to the search results by traders offering an internet search function, irrespective of the technological means used for presentation, organization, and publication of the ranking.

The bill expressly provides that it is an unfair market practice to provide results in response to an online search by a consumer without clearly identifying paid advertising or a payment made

specifically for achieving a higher ranking of products within the search results.

ADDITIONAL INFORMATION

The bill would also require the provider of an online marketplace to provide information on whether a third party offering goods, services, and digital content on the online marketplace is a business or not. It must be provided through on a declaration by the third party to the operator of the online marketplace.

Online marketplaces will also need to safeguard the non-application of consumer regulations to a contract concluded on the online marketplace if the party offering goods, services, and digital

ices, and Directive (EU) 2019/771 of the European Parliament and 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.

They will introduce the definition of "digital service." Like the definition of "digital content" already included in the Consumer Rights Act, this definition is essential for determining the scope of businesses' duty under the new bill. According to the proposed definition, a "digital service" is a service allowing a consumer to create, process, store, or access data in digital form; share data in digital

well as a duty to return the content to the consumer.

PRODUCT QUALITY DIFFERENTIATION

The bill would also prohibit the sale of the same goods but with different quality in different EU member states.

This provision is aimed at facilitating the application of the existing regulations by clearly defining this practice as unfair because so far this has not been expressly stated in the regulations.

ROOM FOR INTERPRETATION

The bill implementing the Omnibus Directive, currently being drafted by Parliament, by introducing new duties into the Polish legal system leaves a lot of issues



With the Omnibus Directive, retailers and e-commerce vendors will undergo new regulations concerning verification of sellers, product reviews by customers and information regarding the history of product pricing.

content is not a trader.

On the other hand, they will have to provide the allocation of obligations related to the contract concluded by the consumer on the online marketplace between the third party offering the goods, services, and digital content, and the provider of the online marketplace.

DEFINITIONS AND OBLIGATIONS

Alongside the bill to implement the Omnibus Directive, work is also underway on two other pieces of legislation: Directive (EU) 2019/770 of the European Parliament and the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital serv-

form uploaded or created by the consumer or other users of the service, and interact in other forms using such data.

In turn, "digital content" is defined as data produced and supplied in digital form.

Businesses offering digital content or digital services will have to inform consumers of the functionality of goods with digital elements, digital content, and digital services, including applicable technical protection measures. They will also need to inform about the compatibility and interoperability of goods with digital elements, digital content, and services.

The bill would also prohibit businesses to use content provided or created by a consumer if he/she withdraws from the contract, as

unclear. This is particularly evident for informational obligations concerning previous prices and verification of consumer reviews.

The approach to the presentation of the required information can differ greatly, and only the practice of regulators and courts will determine the proper method for carrying out these duties.

Businesses may adopt very risky solutions which are nonetheless better received by customers or may adopt safer solutions at the expense of the customer experience.

Regardless of the approach adopted, businesses serving consumers should analyze the impact that implementation of the Omnibus Directive will have on their operations.