Stephan Heidenhain*

# Harmonisation of the Czech Consumer Rights in the New Civil Code

## I Reform of Consumer Rights 2014 in the NOZ (New Czech Civil Code)

Only some of the consumer rights are contained in Directive 83/2011/EU (hereinafter 'the Directive'). After highflying plans and a very controversial process of its enactment within the European institutions, the Directive was restricted to distance selling contracts, contracts out of business premises, sale contracts and unfair clauses. Outside the Directive remained timesharing, travel packaging, financial services and aggressive and unfair practices.

However, the Directive contains a new approach: the so-called maximum harmonisation in Art. 4 of the Directive. In this way the Directive departed from the principle of minimum harmonisation, which was until now common for European consumer law. According to the Directive, in the areas of consumer law, covered by the Directive, there is now so-called maximum harmonisation. In all other areas, there is still minimum harmonisation. Maximum harmonisation means that the member states are allowed neither to go under the level of the Directive, nor beyond the Directive. The Commission argued in favour of the Common Market, the functioning of which would be endangered – and is already endangered -, if different levels of consumer protection would be allowed in different countries.

The Directive contains new definitions of consumers and entrepreneurs (traders) – those are now contained in §§ 419, 420 NOZ.[1] However, the NOZ contains further a so-called 'weaker person': this person is not mentioned in the directive, but appears in § 433

* The author is lawyer (Rechtsanwalt / advokát) with bnt attorneys-at-law s.r.o., in Prague (stephan.heidenhain@bnt.eu and stephanheidenhain@gmail.com).

[1] Article of NOZ: § 419 [Definition of a consumer]
A consumer is a person who concludes a contract with an entrepreneur or in any other way negotiates with him and does not act in the framework of his trade activity or independent execution of his profession.
§ 420 [Definition of an entrepreneur]
(1) A person who independently carries on a gainful activity in his own name and at his own liability through a sole proprietorship or in a similar way with the intent to do so constantly for the purpose of making a profit is considered to be an entrepreneur.
(2) A person who concludes contracts related to his business, producing or similar activity or a person who concludes contracts while executing his profession, possibly a person who acts in the name and at the liability of an entrepreneur is for the purpose of consumers protection considered to be an entrepreneur.

cl. 2 NOZ.[2] What has to be understood as a 'weaker person' is quite unclear, but every consumer seems to be a weaker person, but not every weaker person seems to be a consumer (e.g. a weaker person who is not a legal entity). Consumer contracts are defined in § 1810[3] of the new Czech Civil Code and correspond to the § 51a of the old Czech Civil Code (1964). There are several stipulations in the new Czech Civil Code, where consumer related stipulations can be found, but consumers are not directly involved (e.g. § 2158 pp. of the new Czech Civil Code on 'sales in the shop').[4]

Basically, all consumer-related stipulations are contained in part 4 of the new Czech Civil Code (§ 1811 ff. – 1867 of the new Czech Civil Code): this section begins with general stipulations on consumer contracts (§ 1811–1819 of the new Czech Civil Code), including general clauses (§ 1814 of the new Czech Civil Code); for general clauses there are further rules in the general part of obligations of the new Czech Civil Code: § 1751–1753 (general clauses) and § 1799–1801 of the new Czech Civil Code (adhesive contracts) – see further.

Part 4 of the new Czech Civil Code regulates different kind of consumer contracts, thereby reiterating the stipulations of the old § 52 of the old Czech Civil Code, actualising them according to Directive 83/2011/EU:

– distance contracts and contracts negotiated away from business premises (§ 1820–1840 of the old Czech Civil Code);[5]
– financial services (§ 1841–1851 of the old Czech Civil Code);
– timesharing (§ 1852–1867 of the old Czech Civil Code).[6]

Stipulations on consumer credit were not contained in the old Czech Civil Code, but in a special law (Law Nr. 145/2010 Coll. on consumer credit).[7] There they have remained. Further, stipulations on aspects of public consumer law also remained in a special law (Law on consumer protection, Nr. 634/1992 Coll.). This law was not amended at all in 2012/2014, and in some points, which refer to the obligations of the entrepreneur to inform the consumer, its stipulations contradict §§ 1811 ff. of the new Czech Civil Code.

The new Czech Civil Code does not contain the system of several layers of general clauses (clauses which are invalid, clauses, which can be invalid, a general clause) as with § 305–310 BGB.

---

[2] § 433 [Prohibition of abusing a dependence]
(1) A person, who acts as an entrepreneur towards other persons in business contacts, must not abuse his professional qualities or his economic position to create or use a dependence of a weaker party and to achieve an obvious and unreasonable imbalance in mutual rights and duties of parties.
(2) A person who acts towards an entrepreneur in business contacts without a connection to his own business shall be always presumed a weaker party.

[3] § 1810 of the new Czech Civil Code
The provisions of this title shall apply to a contract concluded by the business and the consumer (hereinafter referred to as "consumer contract") and obligations arising from them.

[4] Cf. to the stipulations of the 'sales in the shop' L. Tichý: 'The Sales Contract and the Consumer Sales Contract including the Liability for Faults' (in Czech: '*Kupní smlouva a spotřebitelská kupní smlouva, včetně odpovědnosti za vady*') (2014) 7–8 Bulletin Advokacie 23 et seq.

[5] The relevant stipulations can be found in the German BGB in §§ 312–312a BGB (contracts negotiated away from business premises) and §§ 312b–312i BGB (Distance contracts).

[6] The relevant stipulations can be found in the German BGB in §§ 481–487 BGB.

[7] The relevant stipulations can be found in §§ 491–512 of the German BGB *(Verbraucherdarlehensvertrag).*

The stipulations in the new Czech Civil Code are much shorter, and the main elements of the control of general clauses are missing, for example the system of § 307-309 BGB. As such, the new Czech Civil Code contains only some elements of this German system which are taken over from Directive 93/13/EC, now 83/2011/EU. However, the general parts of the new Czech Civil Code contain elements on the control of the content of general clauses.

A further complication derives from the fact, that after the conference in June 2014, but before the completion of this manuscript in October 2014, the Czech Ministry of Justice published a complete reform of the definitions in § 419 and § 420 NOZ in August 2014: according to this proposal, the whole chapter of the consumer law in § 1810 pp. NOZ shall be replaced by a completely new chapter.[8] However, it is quite unclear whether the Czech Parliament will adopt these changes. In this proposal, a further definition will be proposed, the so-called 'professional' or 'trader' (in Czech: *profesionál*) in a new § 1810 cl. 1 NOZ, which is obviously corresponding to the 'trader' in the Directive. However, whether it makes sense to define two layers on both sides – the consumer and the weak person on the one side, and the entrepreneur and the trader on the other side, has to be seen, but it is very doubtful, as the whole system becomes very complex.

In the current NOZ, the harmonisation of the EU directives, especially the Directive, can be found in § 1810 pp. NOZ. Their relationship to the 'sales in the shop' in § 2158 pp. NOZ[9] is quite unclear. However, these rules are not subject to change in the proposal of August 2014.

Further, I will not go into the details of the Directive, as I assume, that the main content of the Directive is known.[10]

## II Consumer Rights in the NOZ

### 1 Transformation of Consumer Directives in the NOZ

The transposition of the consumer directives in the new Czech Civil Code seems to be complete; however, there are several problems in the transposition. A catalogue of the transposed directives can be found in the official footnote to No. 1 § 3015 of the new Czech Civil Code;[11] however, it

[8] The proposal was published by the Czech Ministry of Justice in August 2014 on www.justice.cz.

[9] L. Tichý (n 4).

[10] Concerning the directive 83/2011/EU see from the German literature: Andreas Schwab, Amelie Giesemann, 'Die Verbraucherrechte-Richtlinie: Ein wichtiger Schritt zur Vollharmonisierung im Binnenmarkt' [2012] EuZW 253–257 (mainly on German law); further concerning the drafts of this directive: Brigitte Zypries, 'Der Vorschlag für eine Richtlinie über Verbraucherrechte' [2009] ZEuP, 225–229; Hans-W. Micklitz, Norbert Reich, 'Der Kommissionsvorschlag vom 8.10.2008 für eine Richtlinie über „Rechte der Verbraucher", oder „der Beginn des Endes einer Ära"' [2009] EuZW, 279–286, Hans-W. Micklitz, Norbert Reich, '„Und es bewegt sich doch"? – Neues zum Unionsrecht der missbräuchlichen Klauseln in Verbraucherverträgen' [2012] EuZW 126 ff., Carsten Herresthal, 'Die Ablehnung einer primärrechtlichen Perpetuierung des sekundär-rechtlichen Verbraucherschutzniveaus' [2011] EuZW 328–333.

[11] § 3015 [Law of the European Union]This law contains appropriate legal regulations of the EU. (All directives are listed in an official footnote.)

is not really understandable that Directive 83/2011/EU is not listed in the official footnote No. 1, although this directive has been partly fulfilled[12] (translations of the New Czech Civil Code are given in the footnotes to this article) and had been adopted when the NOZ was passed in February 2012. However, there is a proposal to change the NOZ of summer 2014 (see further in the text).

The transformation of the directive on certain aspects of the sale of consumer goods 1999/44/EC) is quite problematic, as these stipulations are contained now in the chapter on the 'Sales in the shop' (§ 2158 pp. of the new Czech Civil Code), which is basically a remodelled chapter of the old Civil Code of 1964. It can be stated that the transposition of the EU consumer legislative is only partly fulfilled in the NOZ. A further problem remains its heterogeneous and only sporadic application in practice.

## 2 The System of the Control of General Terms (Unfair Terms in Consumer Contracts, General Terms in other Contracts) according § 1813 p. NOZ

The NOZ contains an enlarged section on general terms and on adhesive contracts. On the one hand, there are rules on general terms which have some peculiarities, but which contain the basic set of rules which are known from the European Directives (93/13/EEC and 83/2011/EU), and the BGB. However, there are also peculiarities (e.g. unilateral changes of general clauses; § 1752 NOZ).

On the other side, the NOZ contains special rules on the invalidity of the content of so-called adhesive contracts (§ 1801 NOZ).[13] However, in this respect it has to be stated that a clear definition of adhesive contracts ('contracts executed by adhesion') is missing. What is meant by

[12] See Stephan Heidenhain, 'Verbraucherschutz und Produkthaftung in Tschechien' [2013] WiRO 200 pp. (with references, in German).

[13] § 1798 [One sided clauses]
(1) Clauses in contracts, executed by adhesion are valid for every contract, which basic terms were decided by one of the contractual parties or on the basis of an order of one of them, when the weaker parte did not have a real possibility to influence the content of those basic terms.
(2) If a contractual form is used for the execution of a contract with the weaker party, which is used in commercial transactions, or a similar mean, the contract is regarded to be executed by adhesion.
§ 1799 [Clause in an adhesion contract]
A clause in a contract executed by adhesion, which refers to the conditions set outside the text of the contract, is valid if the weaker party was familiar with the clause and its significance, or if it is proven that the party had to know the meaning of the clause.
§ 1800 [Defect of clause]
(1) If a contract executed by adhesion contains a clause which could be read only with special difficulty, or clause which was for a person of an average intellect incomprehensible, this clause is valid, unless it harms the weaker party or if the other party proves that the meaning of the clause was sufficiently explained to the weaker party.
(2) If a contract executed by adhesion contains a clause which is particularly disadvantageous for the weaker side without an adequate reason, especially if the contract diverges seriously and without serious reason from the usual terms concluded in similar cases, the clause is invalid. If a fair arrangement of rights and obligations between the parties is needed, the court will decide according to § 577.

contracts executed by adhesion? Further, the rules on adhesive contracts affect only so-called 'weaker parties'; the 'weaker parties' are not defined in the NOZ, either, but under certain circumstances the rules on adhesive contracts also affect contracts between entrepreneurs (§ 1801 2nd sentence NOZ) in cases where there is a gross contradiction between commercial customs and the principles of fair commercial relations.

But the question is why there is a different set of rules for general clauses and adhesive contracts. The reasons are historical, not legal ones. Historically, there were similar rules in the former Czech Civil Code (Law No. 40/1964 Coll.) and the Czech Commercial Code (Law No. 513/1991 Coll.), which were replaced on 1.1.2014 with the New Czech Civil Code. There was a similar situation in Poland (in the *Kodeks cywilny* the so-called *umowa adhezyjna*). Using adhesive contracts was a different technique (separate forms to be filled in). Apart from using general forms (a set of general rules, to be attached to a contract), this differentiation should no longer have played any role since the PC revolution, which is at least since the beginning of this millennium. Nevertheless, in the NOZ, there are two kinds of stipulations for general forms and pre-formulated rules, although in both situations the party who formulates the forms or the rules in advance has an advantage by standardising their contracts and thus by drafting the forms or the rules – which is advantageous for them. On the other side, the other party only has limited possibilities to influence the set of rules. It has to accept them (and the contract under those conditions), or refuse the contract altogether ('take it or leave it'), as in most cases the party who is using the general forms or general rules will not enter into negotiations on different clauses. Thus, it is quite obvious that this situation is the same for adhesive contracts and for general terms. For this reason the different approaches of the NOZ are not convincing.

In the BGB, there is no such differentiation, but the application of the rules for general terms (§ 307 – 309 BGB) was widened by the courts towards standard forms and formulations which are contained in the contract (even if the contract is executed by a notary).

Because of this, the rules for adhesive contracts and general clauses should be read together and applied to both, thus *per analogiam.*

Whether it makes sense or not, the current system of regulating general clauses and of adhesive contracts in the NOZ is the following:

### *a)* The regulation of general clauses

There are rules on the question of how to agree on general clauses in § 1751 NOZ[14] and to include them into the content of a contract. If the general clauses become the content of a contract there

§ 1801 [Invalidity of a deviating clause]
If the parties deviate from the §§ 1799 or 1800 or if they exclude some of these clauses, this will be disregarded. This does not apply to a contract executed between entrepreneurs, unless a party proves that the clause, which is beyond the text of a contract as such and which was proposed by the other party, grossly contradicts commercial customs and the principle of fair commercial relations.

[14] § 1751 [Reference to Trading terms]
(1) A part of the content of a contract can be determined by reference to general terms, that the offeror attaches to the offer or which are known to the parties. Different stipulations in a contract prevail over the general terms.

is, in principle, no control of the content apart from general reasons such as fraud, illegality etc. A new stipulation makes clear that, in the event of contradicting general terms, the contract is validly executed but that only those general terms that do not contradict each other become content of the contract for both users (§ 1751 cl. 2 NOZ). An exception from the inability to control the content of general clauses is a surprising term in § 1753 NOZ.[15] This is a new provision in the NOZ, and § 1753 NOZ sets certain conditions: 'a party could not expect reasonably (a clause) […], unless this party has agreed to it explicitly; a contrary agreement is invalid'. It is clear that stipulations which exclude this are not possible, but it is possible for the party to agree to the clause 'explicitly'. The question of whether there is such a surprising clause shall not only be decided 'as to its content, but also in the manner of its expression'. Whether the explicit agreement means that it is sufficient to let the party sign additionally all possibly 'surprising' clauses remains to be seen. But, from the point of view of the protection of the weaker party, this circumvention in practice is not likely to work.

A problem will be how the expectations of a party will be understood by the Czech courts. Will it be a subjective criterion, or an objective one? There is more reason to ask for an objective criterion. Furthermore, the possibility of explicitly agreeing to such a clause will certainly be abused (such a possibility does not exist under § 305c cl. 1 BGB; so-called *überraschende Klauseln*). This possibility also exists in Art. 2.1.20 of the Unidroit-principles. Not only will the content influence the surprising character of such a clause, but also the 'way it is expressed'. Unfortunately, the materials of the NOZ ('Reasoned report') do not help to explain this meaning (notwithstanding the fact, that the historical interpretation has priority in the New Czech Civil Code, see § 2 cl. 1 NOZ),[16] but these materials explain that the legislator wanted to refer to Art. 2.20 (obviously meant: Art. 2.1.20)[17] of the Unidroit-principles which contain the stipulations on surprising rules.

---

(2) If the parties refer in the offer and the acceptance of the offer on general terms that are contradictory, the contract is still closed with the content specified in the extent to which general terms and conditions are not in conflict; this applies even in the case that the general terms exclude that. If one of the parties excludes that at the latest without undue delay after the exchange of the expression of will, the contract will not be concluded.

(3) When a contract between entrepreneurs is concluded, there is a possibility that part of the contract can be determined by a mere reference to general terms which are prepared by professional and interest organizations.

[15] § 1753 [Invalid stipulations of general clauses]
A general clause, which a party could not expect reasonably, is invalid, unless this party has agreed to it explicitly; a contrary agreement is invalid. Whether there is such a clause shall not only be decided as to its content, but also as to the way of its expression.

[16] For this reason, it is very surprising, that the 'Reasoned report' ('Důvodová správa'), which contains basically the considerations of the authors of the NOZ, but not so much the discussions in Parliament, is partly so slim and basically not saying anything substantial to many norms; various information on the NOZ can be found on the official Czech website of the Ministry of Justice: <http://obcanskyzakonik.justice.cz/>; the 'Reasoned report' can be found in its consolidated version (of beginning of 2012) on <://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf> (only in Czech language).

[17] See so-called 'Důvodová správa' concerning § 1753 NOZ (page 437).

### *b)* The control of general clauses in consumer contracts

The regime of § 1814 NOZ applies to the regulation of the content of consumer contracts; § 1814 NOZ contains a list of banned clauses from Directives 93/13/EC resp. 2011/83/EU). However, the NOZ does not contain the differentiated system of § 307 pp. BGB. Further, the NOZ does not contain in § 1814 NOZ any system information on how these decisions on general clauses will impact not only inter partes, but erga omnes. As such every consumer stands alone and the decisions in other cases have no validity for other consumers who have signed the same contracts with the same users of the general forms. In the end, the system of § 1814 NOZ is minimalistic, but in line with the *acquis communautaire.*

### *c)* The regulation of the content of adhesive contracts

§ 1798-1801 NOZ apply to all adhesive contracts with a 'weaker party'. A clause in those contractual forms is invalid, if - according to § 1800 cl. 2 NOZ – 'this clause is for a weaker party extremely disadvantageous and does not have a reasonable reason, especially if the clause deviates seriously and without a special reason from usual conditions, which are agreed upon in comparable situations.' The result is invalidity of the particular clause in the contractual form, but 'if a just settlement of the rights and duties of the parties requires it, the court decides according to § 577 NOZ'. However, this is a procedure where the content can be decided by the court 'in such a way that (the content) confirms to a just settlement of the rights and duties of the parties'. Basically, the court decides on the content of the rights and duties of the parties. This is the court's own decision on the basis of justice for the parties.

In the BGB, there is general regulation of the content of general clauses. However, there is neither a differentiation between general clauses and adhesive contracts, nor any notion of a 'weaker party' as a category between consumers and entrepreneurs or professionals.

## 3 Unilateral Changes to General Terms (§ 1752 NOZ)

The NOZ introduces the new rules for unilateral changes to general terms in § 1752 cl. 1 and cl. 2 NOZ.[18] According to the legislative materials, this was a compromise found at the last moment. However, it is an exception to the rule that contracts can only be changed on the basis

[18] § 1814 [Forbidden terms]
In particular, terms are prohibited which
*a)* exclude or restrict the consumer's rights in asserting the liability for defects or compensation for injury,
*b)* oblige the consumer to undertake to fulfill, while the entrepreneur becomes liable to fulfill after fulfillment of a condition, which depends on his will,
*c)* allow the entrepreneur not to give the consumer the performance provided by him even if the consumer does not conclude the agreement with the supplier or if he withdraws from it,
*d)* entitle the entrepreneur to withdraw from the agreement without any contractual or legal reason without entitling the consumer to the same,
*e)* entitle the entrepreneur to renounce the obligation without an adequate period of notice without having a special reason for this,

of consensus. Hence, in all other cases, except the one described in § 1752 NOZ, unilateral changes of general terms are not allowed (there is a similar rule in § 11a cl. 2 Energy Law since 2011).[19]

Unilateral changes of general terms according to § 1752 NOZ demand the fulfilment of a set of complicated conditions and rules:

– contracts in usual commercial relations with a larger number of customers,
– contracts with long-term services of the same kind which are rendered repeatedly (e.g.: services for submitting energy, telecommunication services); and
– a reasonable requirement for later changes to the contract, which derives from the character of the obligation already at the time of the negotiation of the contract.

If those conditions are cumulatively met, there can be an agreement upon the following: the party which uses the general terms can change them in an appropriate manner. However, this agreement is only valid if the following conditions are met:

– the change will be announced to the other party in advance, and
– this party has the right to reject the changes and the obligation to cancel the obligation in order to get new services within the time of notice, and
– if such a cancellation is not connected with an obligation which is disadvantageous for the cancelling party.

All these conditions are cumulative, which means they have to be fulfilled at the same time.[20] § 1752 cl. 2 NOZ contains a further restriction for unilateral changes of general terms: if the content of the changes of the general clauses was not agreed upon, a change does not play a role

*f)* oblige the consumer to fulfill conditions he was not enabled to learn of before the conclusion of the agreement,
*g)* allow the entrepreneur to change the rights or obligations of the parties,
*h)* defer the price determination to due date,
*i)* allow the entrepreneur to raise the price, without giving the consumer the right to withdraw from the contract in case of a major increase in price,
*j)* deny the consumer the right to take legal action or to exercise any other legal remedy, or to require the consumer to take disputes exclusively to an alternative dispute court or to arbitration not covered by legal provisions which are oriented to the protection of consumers,
*k)* transferring to the consumer the burden of proof of the fulfillment of an obligation of the entrepreneur, which a stipulation of a contract of financial services obliges him to do that, or
*l)* denying the consumer his right to decide, which obligation shall be fulfilled at the first place by a fulfillment by the consumer.

[19] § 11 cl. 3 Energy Law (Law No. 458/2000 Coll.)
If an owner of the licence to trade in electricity, to trade in gas, to produce electricity or to produce gas raises the price of electricity or gas supply or if he changes other conditions of a contract, a customer is entitled to withdraw from the contract within 3 months from the date of the price raise or the date of the change of other conditions of a contract without giving a reason. This doesn´t apply if the owner of the licence informs the customer of the price raise or the change of other conditions of a contract at least 30 days before the its day of coming into effect and at the same time informs the customer on his right to withdraw from the contract. In such a case the customer is entitled to withdraw from the contract at least 10 days before the price raise or the change of other conditions of a contract without giving a reason.

[20] This was as well confirmed by the results of an expert group, statement Nr. 6 of 19. April 2013, published on the official Czech website of the Ministry of Justice: http://obcanskyzakonik.justice.cz/.

which was evident at the time of the execution of the contract; further, a change does not play a role which is caused by personal or material changes.

It is difficult to evaluate § 1752 NOZ without any practical experience; however, it can be stated that § 1752 NOZ has become a very complicated stipulation (possibly as a result of a compromise), not taking account of the not very promising experiences with § 11a cl. 2 Energy Law (which operates similarly). As such, it has to be seen whether § 1752 NOZ can be applied accordingly by the Czech entrepreneurs and the Czech courts. A challenge is the complicated structure of § 1752 NOZ and, further, the use of terms like 'a reasonable reason', 'an appropriate change' etc.

In the BGB, there is no special stipulation for this situation, but there is a very intensive discussion, especially because of § 307, 308 Nr. 4 and Nr. 5 BGB, which limit clauses which allow unilateral changes to general clauses.

## 4 Law of Sale

On sales contracts, three different layers of regulations are applicable:
– § 1811 pp. NOZ (consumer contracts) – this set of rules applies to distance contracts and contracts out of business premises;
– further, according to § 2158 cl. 1 NOZ, § 2158 pp. NOZ are to be applied if the seller is an entrepreneur. However, § 1811 pp. NOZ is applicable, too, which is not reflected in § 2158 pp. NOZ, as there is no reference to 'consumers' – except in § 2169 cl. 3 in fine NOZ; and § 2158 pp. NOZ are to be applied together with
– the general rules for sale contracts (§ 2079 pp. NOZ).

This makes the sales contract law quite complex, and, unfortunately, there are several questions, which cannot be answered easily, such as whether the rules on 'sales in the shop' are applicable to distance selling or selling outside business premises. In my opinion, they should be applicable, although the wording 'sales in the shop' seems to exclude this. However, there is neither a definition of the 'sales in the shop' in NOZ, nor a definition of business premises (for contracts out of business premises according to § 1828 pp. NOZ). Thus, if consumers are buying goods by distance selling and outside business premises, they should also have the rights of the 'sales in the shop' stipulations, and further the general rules for sale contracts (§ 2079 pp. NOZ).

Initially, the rules on 'sales in the shop' were contained in the 1964 Civil Law Codex as a socialist-style protection of workers´ needs (in §§ 239 of the original Civil Codex of 1964; later they became §§ 612-627 in the old Civil Codex); in 2000, they were reformulated, which should have served the harmonisation of Directive 44/99/EU in the old Civil Codex – now they became part of the NOZ. For example, § 2165 NOZ stipulates a two year time for actions due to bad fulfilment. However, the NOZ did not change the rules on 'sales in the shop' in substance and took them over *in toto* to the NOZ. Unfortunately, this not very well reflected reception of the 'rule in the shop' rules creates a number of problems.[21]

[21] See the article of L. Tichý (n 4).

### 5 Parallel Structure: Administrative Procedures according to the Law on Consumer Protection (Law 634/1992 Coll.; ZOS)

Stipulations on aspects of public law have remained in a special law: the law on consumer protection, Nr. 634/1992 Coll. This law dates from 1992 and addresses consumer issues from an administrative angle. This law is partly outdated, as it was not changed after 2012, although the NOZ contains related stipulations, for example dealing with the obligations of an entrepreneur to inform consumers. Unfortunately, there are now contradictions between the NOZ and the ZOS (e.g.: in which language the contract has to be executed: in NOZ, the language of the contract (§ 1811 of the new Czech Civil Code); in § 9 of the ZOS, only the Czech language).

### 6 Procedural Rights

In this respect, there were practically no changes for consumers in the Civil Czech Procedural Law after the enactment of NOZ. Law 99/1963 Coll. was amended widely with effect by 1.1.2014, but for other purposes. For example, there is still the problem of the limitation for the right of appeal – the current limit is 10,000 CZK (c. 350 EUR), and there is no possibility at all for a review of de minimis issues and not by higher courts (except the Constitutional Court) either. In the meantime, this has become a big problem for bank customers claiming back banking fees, as these claims were only up to 10,000 CZK (ca. 2,500 CZK per year; after four years, the claims are statue-barred.

The regulations on Private International Law are now contained in the new Law 91/2012 Coll., apart from the ROM I-regulation (593/2008/EU), which contains special rules on consumers in its Art. 6, and the ROM II-regulation (864/2007/EU), which deals with non-contractual matters.

Further, there are no changes to the procedural rights of consumer organisations, which are contained in § 25 and § 26 of the ZOS of 1992 (in this respect, the ZOS had been amended already in 2006). These organisations have the right to bring applications to courts in their own name, but they do not use this right very often.

## III Several Types of Consumer Rights

### 1 Withdrawal from Contracts – in § 1829 pp. NOZ

The main right for consumers is the right to withdrawal from business and distance selling contracts [*in extenso* regulated in § 1829 pp. NOZ, for sale contracts in § 2106 cl. 1 lit. *d)* NOZ (withdrawal) and § 2001 pp. NOZ – general rules for withdrawal from contracts in the general part of obligations]. The consumer has this right for 14 days after finalising the contract, if they were informed correctly about their right to withdraw from the contract. Otherwise, they have this right for a maximum of one year within 14 days after they were informed.

Further, the consumer has rights for information before and after the execution of the contracts; those rights are stipulated in § 1811, § 1820 NOZ. Forms for withdrawal from

consumer contracts (out of business and distance selling contracts), mentioned in § 1820 cl. 1 lit. *f,* cl. 2 and § 1830 NOZ, have been put into the regulation No. 363/2013 Coll. which is basically a translation from Annex I A and B of Directive 83/2011/EU). Further, this directive has direct effect for contracts executed after 13 June 2014.

One of the additional rights of a consumer are their possible actions because of culpa in contrahendo, i.e. the withdrawal from negotiations on contracts, cf. § 1728, § 1729 NOZ. This is a right not only for consumers, but for all legal subjects.

## 2 Rights of Consumers in E-business

Unfortunately, the NOZ is not completely harmonised, the following rights for consumers are missing in the current version of the NOZ:

– ban on excessive credit card fees (Art. 19 of the Directive)
– ban on excessive phone charges (Art. 21 of the Directive)
– ban of preselection of services (Art. 22 of the Directive).

Arts. 19, 21 and 22 are possibly harmonized by § 1817 NOZ: An entrepreneur is not entitled to ask from the consumer further payments, but only those which the consumer must pay on the basis of the main contractual duty, unless the consumer has given their explicit approval to these further payments.

Art. 19, 21 and 22 could be directly applicable after 13 June 2014 without transposition to national law - according to the principles of the ECJ which are mainly three reasons: the deadline for their transposition is over, the rules are self-executable and no further actions of the member states are necessary. Because of this reason, Art. 19, 21 and 22 are directly applicable after 13 June 2014.

A reaction to these shortcomings is the proposal of the Ministry of Justice, published in summer 2014, which contains several new rights of the consumers:

– § 1843 of this proposal: the 'professional' is not allowed to ask from the consumer higher costs for the use of the form of payment which he pays himself;
– § 1845 of this proposal: the 'professional' has to make sure that the consumer shall not pay excessive phone charges. However, the telephone operator can charge such phone calls, but the consumer is not obliged to pay them; they can ask the 'professional' to pay such bills for them.
– § 1846 and § 1847: these stipulations shall deal with the preselection of services. In this respect, preselection is not sufficient, as it is not regarded as an explicit agreement with the consumer. Such additional services shall not be paid for by the consumer.

Thus, by amending the NOZ in such a way as planned as in the proposal, the directive can be regarded as transposed into Czech law. However, for the time being, it is quite unsure whether the new chapter on consumer contracts (§ 1810 – 1867n NOZ) will come into force before 1.1.2016. This means that, in the meantime, Art. 19, 21 and 22 of the directive will be applicable directly.

## IV Resume

The harmonisation of the consumer legislation in the NOZ is in some respects still necessary, as the harmonisation of the NOZ with the Consumer Rights Directive is not complete. However, the new proposal of summer 2014 addresses some of the shortcoming of the current version of the NOZ.

Further, the central part of the contract of sale in the New Civil Code contains a confusing system of general rules, consumer related rules and rules for 'Sales in a shop', which refers to the 'weaker person' and not the consumer. Unfortunately, the proposal of summer 2014 will complicate this system further by introducing a fourth category of a 'professional' – in addition to the existing entrepreneur, consumer and the 'weaker person'.

The current rules on regulating the content of general clauses are not convincing; unfortunately, the proposal for amendments of the NOZ does not address this issue at all. For general application, there is an unconvincing differentiation between general rules and adhesive (formulary) contracts; regulation of the content is very rudimentary (in the current NOZ, these rules apply only to adhesive contracts, but this should be used *per analogiam* as well for general clauses). For consumers, the main elements of the directive 93/13/EC are contained in the NOZ.

Last but not least, a better interrelation between civil law and administrative law would be helpful, and a reform of the procedural law would be necessary to make the protection of consumers more effective in the application of the law before the courts.