

Commitment to the notifications in the stage prior to concluding the electronic consumption contract

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Abstract

Comparative legislation organized the electronic consumption contract and approved new legal guarantees to achieve a high level of consumer rights protection from the effects and risks of technological development, on the one hand, and on the other hand, it can achieve positive results for electronic commerce in general and for professionals in particular by encouraging the consumer to conclude consumer contracts via the Internet. Without hesitation or fear that the offered goods or service may not meet his needs, because he will overcome this hesitation if he knows that he will be provided with a set of information about the good or service and everything related to the contract, which is what he called the obligation to inform.

Keywords: electronic consumption, contract, consumer service.

Introduction

The protection of the electronic consumer is necessary because it is the weak party in the electronic consumer relationship, as it is often exposed to risks and damages through reconciliation by the professional, the strong and professional party, so it was necessary for the law to respond to economic and technological developments as a tool for progress and sophistication, so many legislations regulated the consumption contract Electronic because it is an independent contract from the classic contracts .

It must be said that the European legislator and the Arab singled out a special chapter for the provisions of the electronic consumption contract and the guarantees related to it in the Consumer Protection Law came under the names (remote contract) , (operations conducted by the professional remotely or at the consumer's place of residence) , (remote contracting) .

The European legislator issued several directives that laid the foundations for the electronic consumption contract in order to protect the consumer, the latest of which is Directive of the European Parliament and the Council of the European Union No. (83/2011) dated October 25, 2011 regarding the protection of consumer rights. It means any contract concluded between a professional and a consumer, within the framework of a system of organized sale or provision of a remote service, without the simultaneous physical presence of the professional and the consumer, by referring exclusively to one or more remote communication technologies , including the moment of concluding contract), and the European Directive excluded some contracts concluded via remote communication technologies - a request via mail, Internet, telephone or fax - from the scope of this definition under Article (3). We list some of them, contracts related to (financial services, establishment, acquisition or transfer Ownership or rights to real estate, constructing new buildings or making major alterations to existing buildings or renting out accommodation for residential purposes, supplying food, drink or other household goods for current consumption which are physically delivered by a professional during frequent and regular visits to the recipient's home perished, or his place of residence or work).

We will try to discuss this topic in two branches, the first of which is devoted to the parties to the electronic consumption contract, and the second is devoted to the legal concept of the obligation to inform in the stage prior to the conclusion of the electronic consumption contract.

The first section: the two parties to the electronic consumption contract

The issue of the legal definition of the parties to the electronic consumption contract is one of the necessary issues for this research, because it makes it possible to determine who will be indebted to the new guarantees (the professional), and who will be able to benefit from these guarantees, what we call the creditor (the consumer), and therefore we will address their legal definition in the legislation comparison, as follows:

First: - the legal definition of the consumer

Defining the concept of the consumer is important because it allows defining the scope of application of protection rules in terms of persons, and the benefit of those who meet this description from the protection provided by consumer protection laws.

Excluding others from this protection on the one hand and on the other hand, helps to facilitate the work of the relevant legal texts without difficulty in interpretation or application .

It is worth noting that the concept of the consumer has become a subject of questioning on the jurisprudential and legislative levels. The first keeps this concept open (broad trend), and the second limits it and makes it confined to a specific category (narrow or restricted trend) , and this is what led us to define the concept of the consumer in comparative legislation. Which developed legal and effective standards to define this concept, especially in light of technological transformations.

The European legislator took the narrow or restrictive approach to the concept of the consumer, so Article (1/2) of European Directive No. (83/2011) defines the term consumer as “any natural person who acts, in the contracts covered by this directive, for purposes that do not fall within the scope of his activity.” commercial, industrial, artisan, or freelancer) , the person meant by legal protection in this definition is the natural person who acts for purposes that do not fall within the field of his professional activity, and thus three persons are excluded from the scope of this definition, the first is the natural person who concludes one of the contracts excluded from this Directive, the second: a natural person acting for purposes within the scope of his professional activity, and the third is a legal person, however, within the scope of this definition is the natural person who enters into contracts with a dual purpose, that is, when the contract is concluded for purposes that fall only partially within the scope of the professional activity of the person concerned, and the professional purpose is limited to the extent that it does not prevail within the general framework of the contract .

As for the Iraqi legislator, he defined the term consumer in Article (1 / Clause V) of the Consumer Protection Law No. (1) for the year 2011. The consumer is (the natural or legal person who supplies a good or service with the intention of benefiting from it), it is noted that the Iraqi legislator has adopted the broad concept of defining The consumer in terms of the objective, scope and personal protection, so that every natural or legal person who acts for purposes that fall within or do not fall within the scope of his professional activity acquires the consumer’s character. For purposes that do not fall within the scope of his commercial, industrial, vocational, or free activity, because it is closer to the logic of legal protection originally established in favor of the weak party in the consumer relationship, who is often an ordinary natural person who does not have the capabilities and qualifications that the professional possesses, and it is suggested that the legislator amend the text in This trend.

It should be noted in this regard that most of the legislation dealt with the term consumer only by definition as we explained above, but the Algerian legislator dealt with the term "electronic consumer" by

defining it in Article (3/6) of the Algerian Electronic Commerce Law (in force) (every natural or legal person who acquires compensation or as a free commodity or service via electronic communications from the electronic resource for the purpose of final use), the Algerian legislator identifies the consumer through the means he uses during the contracting period, while comparative legislation defines the term consumer through the purpose he aims for, as the electronic nature It relates to the contract concluded by electronic means, while the consumer is the same person who concludes the traditional and electronic contract (remote contract).

Second: The legal definition of the professional

As for the second party in the traditional or electronic consumption contract, it is called by several designations in the comparative legislation (professional, supplier, supplier or professional), and the professional is defined in the scope of consumption contracts as: “every person who intervenes within the framework of his profession in the process of offering the product or service for consumption From the stage of initial creation to the final offer before acquisition by the consumer.” In general, this definition includes all professionals involved in the consumer relationship, whether it is related to displaying the product, such as the manufacturer, producer, importer, and distributor, or what is related to providing the service: such as tourist agencies, banks, lawyers, and notaries .

A professional in consumer contracts is distinguished by his presence in a strong economic center, with what he possesses of financial capabilities, with what he has of technical experience and information in the field in which he deals professionally, where he is able to know the different elements of his products and enjoys legal capacity based on his experience in this type of trade, He also enjoys the economic ability on the basis that some activities or areas are practically the subject of a legal or actual monopoly, and this party bears the civil liability once he has done that job or that work, whether as a producer, seller or service provider, and he does not ask for a certain degree or level of Qualification and achievement, the term professional is an objective and abstract term, in which the legal status in which the person resides is considered .

Article (2/2) of European Directive No. (83/2011) defines the term “professional” as “any natural or legal person, public or private, who acts, including through another person in his name or on his behalf, for purposes that fall within the scope of his activity.” Commercial, industrial, artisanal or free, and with regard to the contracts covered by this directive, it can be noted that the European legislator has taken the broad direction from the personal scope of the professional concept, as it is every natural or legal person, a public or private

person, whether he exercises his activity in his name or on behalf of others He also broadened the objective scope by mentioning all the activities that a professional person (commercial, industrial, artisanal, or freelance) practices.

Whereas, the Iraqi legislator called the second party in the consumer relationship the term (supplier) in Article (1/Sixth) of the Consumer Protection Law (in force) and defined it as “every natural or legal person who is a producer, importer, exporter, distributor, commodity seller, or service provider.” whether it is a principal, a mediator, or an agent.” After examining the above text, we were able to diagnose some observations, which are as follows:

1. The difference of the objective scope of the term “supplier” mentioned in the Consumer Protection Law from the objective scope of the term “supply” contained in Article (1/1) of the Public Contracts Law No. (78) of 2004 and the instructions for the implementation of government contracts No. (2) of 2014, where the scope involves The objective of the term “supplier” refers to (producing, importing, exporting, distributing, selling or providing services) while the objective scope of the term “supplier” is limited to (purchasing or leasing goods and services), so it was more appropriate for the legislator to use the term (professional) instead of (supplier). In the Consumer Protection Law, it is a general objective term that includes under its cover everyone who played his role in the production relationship from its first stage until the product is put for consumption or the service is provided by the consumer and includes all professions that can be practiced in commercial, industrial, craft or free activity, and for this we preferred to use The term "professional" is included in the research.

2. The legislator mentioned the activities exclusively practiced by the supplier, but there are many activities and professions practiced by the supplier as a natural or legal person in the context of commercial, industrial, craft or free activity such as marketing, trading or leasing..., he did not mention them, and to avoid gaps in the text we suggest adding A general and comprehensive phrase that denotes all current and future professions, which is (...and works within the framework of its commercial, industrial, craft or free activity in contracts that fall within this law), similar to the European legislator.

3. The Iraqi legislator expanded the personal scope of the concept of the provider, so that it includes every natural or legal person, whether original or agent, as is the case with European and Lebanese legislators.

The second section: - the legal concept of the obligation to inform in the stage prior to the conclusion of the electronic consumption contract

Most legislations introduced a new guarantee for consumer protection in the electronic consumption contract, obligating the professional to inform the consumer in the pre-contracting stage with a set of information and data that significantly exceeds the information and data that must be provided to the consumer in traditional consumption contracts due to the privacy of electronic consumption contracts, and in order to know the content of this obligation It is necessary to review the definition of the obligation to inform in the stage prior to concluding the electronic consumption contract in the first item, and then address the legal content of this obligation in the second item.

First: The jurisprudential definition of the obligation to communicate in the stage prior to concluding an electronic consumption contract

Comparative legislation did not provide a definition of this obligation, but rather stipulated its content, and this is what we will explain successively. Despite this, many jurists gave the subject great importance, so some jurists defined it as “giving the consumer all the necessary information to help him decide whether to contract or not, and it is an obligation.” It is the responsibility of the professional who provides the consumer with the necessary information to assist him in making his decision to contract positively or negatively .There are those who defined it as a positive obligation prior to the conclusion of the electronic contract, which obliges the debtor (the professional) to inform the consumer via the Internet of information and data related to the store. The contract, the personality of the product and the supplier, and any other consideration that may affect the consumer and push him to accept the contract , was also defined as the obligation of the provider to inform and enlighten the consumer with comprehensive information about everything related to the sale process via the Internet or any electronic means, so that the consumer is aware from his command so that he takes his decision that he deems appropriate in the light of his need and his goal in concluding the electronic contract.

Some define it as a legal obligation prior to the conclusion of the electronic contract, according to which one of the parties who possesses essential information regarding the contract to be concluded is committed to presenting it by electronic means in a timely and transparent manner . It also means informing the other contracting party of important and influential information in his willingness or reluctance to enter into a contract. It is an obligation that falls on the shoulders of the e-merchant according to which the

consumer becomes aware of the essential information related to the contract (whether the subject matter of the contract is a commodity or a service) and upon which the consumer takes - based on it - his decision to complete the contract or to leave .

Second: The legal content of the obligation to inform in the stage prior to concluding the electronic consumption contract

Most of the legislation , including comparative legislation, called for a determination of a commitment to inform in the stage prior to the conclusion of the electronic consumption contract, and that the most important justification for determining this commitment is to achieve equality in knowledge between the contracting parties in order to restore balance to the contract , and to develop methods for concluding commercial contracts as a result Industrial and technological developments in all areas of life and the impact of consumer will on electronic commercial advertisements .

The European professional legislator is obligated under Article (1/8) to provide the consumer with the information stipulated in Article (1/6) or to make this information available to him in a manner commensurate with the remote communication technology used, and we list the most important of them below:

- 1- The main characteristics of the good or service, to the extent appropriate to the means of communication used for the good or service in question;
- 2- The identity of the professional, for example his trade name, address, telephone and fax numbers and e-mail address, as well as the identity and address of the person acting on his behalf;
- 3- the total price of the Goods or Services including all taxes and/or any costs of carriage, delivery, postage and any other possible costs, and where such additional costs cannot be reasonably calculated in advance, stated as may be payable;
- 4- The terms of payment, delivery and performance, and the date on which the professional undertakes to deliver the goods or perform the services;
- 5- The cost of using remote communication technology to conclude the contract, and this cost is calculated on a basis other than the basic price.
- 6- Providing the consumer, in the event that there is a right to withdraw from the contract, with the conditions, time period, and procedures for exercising this right in accordance with Article (11/1), as well as the recourse form provided for in (Appendix I/B).

7- Reminding the consumer, if he exercises the right of recourse, that he will have to bear the costs of returning the goods if the goods, due to their nature, cannot be returned by post.

8- Inform the consumer to pay a reasonable fee to the professional in the event that the consumer exercises the right of recourse after submitting an express request for the performance of services;

9- Provide information about the fact that the consumer will not benefit from the right of recourse (if the contract is one of the contracts excluded from the application of the right of recourse in accordance with Article / 16), or about the circumstances in which the consumer loses his right of recourse if necessary.

10- Reminding the consumer of the existence of a legal guarantee of conformity of the goods;

11- Mention commercial guarantees, related conditions and mention after-sales service when applicable;

12- The term of the contract, if any, or the conditions for terminating the contract in the case of long-term or periodic contracts, and the minimum duration of the consumer's obligations under the contract, if applicable;

13- Functionality of digital content , including applicable technical protection measures, if applicable.

14- The possibility of resorting, when necessary, to procedures for complaint and compensation outside the jurisdiction to which the professional is subject, and the procedures for accessing them.

15- Any other financial guarantees to be paid or provided by the consumer at the request of the professional, as well as related conditions .

16- E-commerce sites must indicate clearly and legibly, no later than the beginning of the ordering process, the applicable delivery restrictions and the accepted payment methods .

The first condition: that the information be in a language that is clear, understandable, and readable to the consumer , to ensure that consumers can easily understand this information.

The second condition: it is provided on a permanent medium , a CD or a DVD, and that the aim is so that the consumer can read it carefully to find out all the information he needs regarding the contract before concluding it.

The European legislator also required that the information provided by the professional to the consumer be mandatory and should not be changed, however, the contracting parties must have the option to

expressly agree to amend the content of the contract concluded later, for example with regard to the terms of delivery .

The European legislator placed on the professional the burden of proving the implementation of his obligation to inform the consumer in the stage prior to the conclusion of the remote contract , and demanded the imposition of effective, proportionate and deterrent penalties for violating this obligation, as well as taking all necessary measures to implement it .

On the basis of the foregoing, the obligation to inform can be defined as the commitment of the professional to provide the consumer in the stage prior to concluding the electronic consumption contract with the data and information stipulated in the law in a clear, understandable and readable language for the consumer and to present it through a permanent mediator, including ensuring his right to withdraw from the contract, with the aim of finding Complete satisfaction of the consumer to make his decision to enter into the contract or abandon it.

The contract, imposing a criminal penalty in the event of breach of this obligation, and specifying that the burden of proving the implementation of the obligation by notification rests with the professional, as indicated in the texts of comparative legislation.

Conclusion:

A- The Iraqi legislator adopted a broader approach to the concept of the consumer in terms of the objective and personal scope of protection, so that every natural or legal person who acts for purposes that fall within the scope of his professional activity or does not fall within his professional activity acquires the consumer status, in contrast to the position of the European legislator, who took the narrow direction as the scope was limited. The protection is for the natural person who acts, for purposes that do not fall within the scope of his commercial, industrial, craft or free activity because it is closer to the logic of legal protection originally established in favor of the weak party in the consumer relationship, which is often an ordinary natural person who does not possess the capabilities and qualifications that the professional possesses.

B- The Iraqi legislator used the term supplier in the Consumer Protection Law, although this term does not include under its cover everyone who played his role in the production relationship from its first stage until the product is put for consumption or the service is provided to the consumer and does not include all professions that can be practiced in the activity Commercial, industrial, artisanal, or

freelance, as it is limited to selling and renting goods and services in accordance with Article (1/1) of the Public Contracts Law (in force) and its instructions.

C- The Iraqi legislator mentioned the activities of the supplier exclusively, although there are many activities and professions practiced by the supplier as a natural or legal person within the framework of commercial, industrial, handicraft or free activity such as marketing, trading or renting..., he did not mention them.

D- The professional must take into account the needs of some categories of consumers when executing his obligation to inform in the pre-contracting stage, given that they are more exposed to the risks of remote contracting due to mental, physical, or psychological disability, age, or naivety, by providing information in a reasonable manner.

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of the European Parliament and the Council of the European Union of 25 October 2011, on consumer rights, available on the French website: DIRECTIVE 2011/83/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL of 25 October 2011 It must be mentioned that the above-mentioned European directive is a directive that has been reviewed by the relevant bodies in the light of the experience gained, with the aim of simplifying and modernizing the applicable rules and eliminating unwanted contradictions and shortcomings, and this review showed that it should replace Council Directive 85/577 / EEC issued in 20 December 1985 on the protection of consumers in the case of contracts negotiated outside commercial enterprises and Directive 97/7 / EC of the European Parliament and of the Council of 20 May 1997 on consumer protection in distance contracts establishing a number of contractual rights for consumers in a single order. See for more details: Items One and Two (83/2011) mentioned above.

See: Many Arab countries organized contract", first of which was Tunisia under Law No. 83 of 2000 related to Tunisian electronic exchanges and commerce, and then Lebanon under the Lebanese Consumer Protection Law No. 659 of 2005, and then the Maghreb was organized under Law No. (31.08) of the year 2011 to define measures to protect the Moroccan consumer, and the State of Egypt organized "remote contracting" in the Egyptian Consumer Protection Law No. (181) of 2018.a

See: European Directive No. (83/2011), previous source

Chapter Ten of the Lebanese Consumer Protection Law No. 659 of 2005 amended by Law No. 265 of 2014.

Chapter Three of the Egyptian Consumer Protection Law No. (181) of 2018.

<https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32011L0083>

It includes remote communication technologies, for example (order via mail, Internet, telephone or fax). See: Clause (20) of European Directive No. (83/2011), previous source.

Dr . Hossam Tawakkol Moussa, The Consumer Relationship in the Egyptian Consumer Protection Law - A Study in Consumer Protection Law No. 67 of 2006, pp. 57-58. Publication: pdf/book-consumer-relationship-in-the-law-protection-the-Egyptian-consumer- <https://www.noor-book.com>

The jurisprudential definition of the consumer: Jurisprudence divided itself on the formulation of a comprehensive definition that prevents the consumer into a broad trend in the consumer concept and a narrow trend in the concept, and we explain them successively, as follows: A- The broad trend in defining the consumer concept: A group of jurists tends to expand in defining the consumer concept That it includes every person who concludes a legal act in order to use a commodity or service for his personal or professional purposes outside the scope of his specialization, but to serve his craft or production project, and this trend aims to extend the scope of legal protection for the consumer, to the professional who concludes legal acts outside the scope of his specialty, but dedicated to serving his profession, like a doctor who purchases medical equipment for his clinic. According to this trend, every person who contracts for the purpose of consumption is considered a consumer, because if a professional deals outside his specialization, he will find himself in a position of weakness, because he is in the rule of ignorant of matters. B- The narrow trend in defining the concept of the consumer: According to this trend, the consumer is every person who contracts with the aim of meeting and satisfying his personal and family needs and desires only. It qualifies him and enables him to confront those in his position See: Dr. Abeer Mezghish and Dr. Muhammad Adnan bin Dhaif, Protective Controls Corrected for Nodal Imbalance in Arbitrary Consumer Contracts, Seventeenth International Forum on: Legal Protection for the Consumer in Light of the Current Economic Transformations, held 10-11 April 2017, pp. 95-96. Also, for more details, see: Dr. Hossam Tawakkol Musa, previous source, pp. 58- 71. See also: Boulenouar Abdel Razek, The professional and the consumer are two contradictory parties in the consumer relationship, a study in the light of Algerian law and Al-Fransi, Notebooks of Politics and Law, University Center, Bashar, Issue 1 - January 2009, pp. 242-246

Original text in French:

«professionnel», toute personne physique ou morale, qu'elle soit publique ou private, qui agit, y compris par l'intermédiaire d'une autre personne agissant en son nom ou pour son compte, aux fins qui entrent dans le cadre de son activité commerciale, industrielle, artisanale ou liberale en ce qui concerne des contrats relevant de la présente directive; -

See: Article 17 of European Directive No. (83/2011), previous source.

See for more details: Boulenwar Abdel Razek, previous source, pp. 233-234.

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- See: the text of Article 25 of the Tunisian Exchange and Electronic Commerce Law No. 83 of 2000, the text of Article 52 of the Lebanese Consumer Protection Law No. 659 of 2005, the text of Article (38) of the Moroccan Consumer Protection Law No. (08.31) of 2011, the text of Article (37) of the Egyptian Consumer Protection Law No. (181) of 2018, the text of Article (11) of Law No. (05-18) of 2018 related to Algerian electronic commerce, Article (25) of the UAE Consumer Protection Law No. (15) of 2020.
- See for more details: Jarif Al-Zahra, previous source, pp. 717-718.
- See for more details: Khaduja Al-Dhahabi, Legal Mechanisms for Consumer Protection in Electronic Commerce Contracts, Master's Thesis in Law, Faculty of Law and Political Science, Adrar University, 2015, pp. 67-68.
- See: Article (8/1) of European Directive No. (83/2011), previous source.
- What is meant by digital content: means data produced and presented in digital form i.e. data that is produced and presented in digital form, such as computer programs, applications, games, music, video clips or text, whether such data is accessed by downloading or streaming, from intermediary or by any other means. Contracts for the supply of digital content must fall within the scope of this Directive. If the digital content is provided on a permanent medium, such as a CD or DVD. See: Article (19) of European Directive No. (83/2011), previous source.
- See: For more details, the text of Article (6/1) of European Directive No. (83/2011), previous source.
- See: the text of Article (8/3) of European Directive No. (83/2011), previous source.
- And permanent medium means "any device that allows the consumer or professional to store information addressed to him personally in a way that allows reference to it later for a period of time suitable for the purposes for which the information is intended and that allows identical reproduction of the stored information, such as a CD or DVD. See the text of Article (2/10) From European Directive No. (83/2011), previous source.
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See: Article (24) of European Directive No. (83/2011), previous source.