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Consumer Protection in Countries of Emerging Markets: The Example of Russia

ABSTRACT. The paper aims at a preliminary analysis of the RCPA (Russian Consumer Protection Act of 1992) and the ZoR (Act on Advertising of 1995). Russian consumer legislation develops dynamically. It is hybrid in so far as one certainly cannot neglect its transitory character in an economy of change. It is *part of the change and instrument for change* of the Russian society and economy in the interest of the consumer. Some solutions appear extremely specific and can only be understood as an attempt to deal with the problems of the day. Others are rather innovative, e.g., a positive approach to consumer protection by giving the consumer certain rights which can be enforced by an agency, consumer associations, or individual consumers; the recognition of the specificity of consumer law; a general information obligation of manufacturers, sellers, and suppliers; a detailed set of remedies in sales law which go beyond the legal traditions of most EC Member States as far as the extent and the persons responsible are concerned; strict liability for defective products and services; compensating the consumer for "moral harm"; the responsibility for consumer protection and advertising by a state authority with regional offices, namely the SCAP; a group action system tailored to the specific needs of consumer associations. On the other hand, there are certainly some deficits. Suggestions for reform include: The improvement of legislation to better protect the consumer in the pre-contractual phase; reshaping of the legal technique of the acts; creation of a specific liability of importers both in sales and in product liability legislation; elimination or modification of provisions which owe their origin to still existing seller's markets once the Russian economy becomes more competitive; development of specific rules to eliminate abuses in the financial services sector, e.g., rules on disclosure and deception.

PRELIMINARY REMARKS

Sources

The present paper is aimed at giving a first analysis of Russian legislation for protecting consumers' economic interests. The materials used by the author are as follows:

- The Russian Consumer Protection Act of 7 February 1992 with Amendments by the Act of 2 June 1993. The Act is available in an unofficial translation into English done by the Russian authorities (Bourgoignie, 1995, pp. 433–479); I have used this text (cited as *RCPA*) but have added some clarifications of my own.

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- Amendments to the Act proposed during the summer of 1994 by the Russian State Committee for Antimonopoly Policy and Support of New Economic Structures (SCAP). They are before the Russian Parliament. It is not expected that they will be adopted before the end of the term of the Duma in 1995.
- Postanovlenie (order) of the Plenum of the Supreme Court of the Russian Federation of 29 September 1994: "On the practical handling of matters relating to consumer protection by courts of law" (Bourgoignie, 1995, pp. 509–530); hereafter *Postanovlenie.*[1] Its legal nature resembles somewhat the judgments of the European Court of Justice made in preliminary proceedings according to Article 177 EC Treaty insofar as it gives the Court's binding opinion on the interpretation of matters of law which judges must apply in all individual decisions, even though the procedure can be initiated *ex officio* by the Supreme Court. Its legal basis can be found in Article 126 of the Russian Constitution of 12 December 1993 whereby the "Supreme Court is empowered to give clarifications (raz'jasnenija) on questions of judicial practice" (Kommentarii, 1994, p. 397).
- Razjasnenija (official clarification) of the SCAP of 15 August 1994: "On certain questions of the application of the RCPA."
- Doklad (official report) of the SCAP: "Consumer protection in the Russian Republic from 1992 to 1993." This report is hereafter cited as SCAP (1994). A new "Doklad" for 1994 has been published in 1995, and is here cited as SCAP (1995).
- The new Act on Advertising (Zakon o reclame, ZoR[2]) which contains provisions of relevance for consumer protection, especially rules prohibiting misleading advertising.

Codification of Civil Law

Osnovy. At the same time as adopting the RCPA, Russia is codifying its civil law to abolish the old "socialist civil law" (Reich, 1972). The "Osnovy graždanskogo zakondatel'stva" (Fundaments of civil legislation) were adopted by the former SSSR on 31 May 1991 and continue to be valid in the Russian Federation. They contain 170 articles, divided into 7 chapters, namely

- General provisions
- Property

- Law of obligations
- Copyright
- Patents, models, and the like
- Wills, successions
- Private international law

There are no specific provisions on consumer contracts or torts. Some contracts are of specific importance for consumers, e.g., sale and supply contracts (Arts. 74–84), house rental (Arts. 89–90), insurance (Arts. 106–108), deposit and credit (Art. 109–114). The technique of the RCPA consists in imposing special mandatory rules on some types of consumer contracts, especially sales and some service contracts.

New Civil Code. At the time of writing, codification of civil law is going on at high speed. "Book One" containing general provisions as well as sections on persons (including business and state organisations), property, and obligations (general provisions) was adopted by the State Duma on 21 October 1994 and put into effect (with some exceptions for property on land) by 1 January 1995 (Suchanov et al., 1995).

For consumer law, Section III: "General part of the law of obligations" (Arts. 307–453), not least Subsection 2: "General rules on contracts" (Arts. 420–451), are important, even though no distinctions with regard to the persons involved are made. The Code expressly recognizes freedom of contract (Art. 421) and freedom to negotiate prices (Art. 424), but allows exceptions by law (Art. 422). It contains special rules on public and pre-formulated contracts which will be looked into later. Transactions which are contrary to fundamental principles of law or ethics may not be concluded (Art. 169). Also important from a consumer policy point of view are rules on compensation for moral harm.

The second part of the Civil Code is already drafted (Ministerstvo justicii RF, 1995) and put before Parliament. Its structure is similar to the Swiss Code of Obligations because it includes commercial contracts as well. Albeit unsystematic and without any specific "protective spirit," it contains provisions on contracts which are important for consumers, namely:

- The general provisions of sales law will be applicable to all types of sales (Chap. 30, Art. 454). However, there are rather detailed

rules on retail sales (rosničnaja kupla-prodaža) which are concluded between a business seller and a buyer who normally uses the products for personal, family, domestic, or other non-professional purposes (Arts. 492–505). There are no provisions on doorstep or distance selling.
- Arts. 806–822 contain provisions on credit, but they are not tailored to cover specificities of consumer credit (e.g., information, withdrawal, default, interest ceilings, etc.). The only protective provision is that the contract must be in writing.
- Specific financial services with importance to consumers will be covered, like deposits (Arts. 833–843) and bank accounts (Arts. 844–859), payments (Arts. 860–884), insurance (Arts. 926–969).
- The rules on civil liability have a specific sub-chapter on liability for defective products and services (Arts. 1094–1097). Article 1094 makes it clear that liability does not depend on fault or prior existence of a contract. Liability exists only if products, services, or works are obtained for consumption purposes. There will be no development risk defense, as in the RCPA (cf. below).

GENERALITIES

Origins and Sources

A first consumer protection legislation in Russia had already been worked out and adopted during the times of the old Soviet Union.[3] It was never implemented due to the political events in the summer of 1991.

When the Soviet Union was dissolved and Russia became independent in 1991, the newly founded Russian Republic took over the spirit of consumer protection as spelled out in the United Nations Guidelines of 1985 (Harland, 1987). There was consensus that the difficult transition from a socialist-planned economy to a market economy (for different accounts, see Auzan, 1995; Kozminski, 1991; Nehf, 1993) could not successfully be accomplished without strong competition and consumer protection legislation and a special authority for enforcing it. On 7 February 1992 the Republic adopted the RCPA, which was put into force on the same day by an order of the Supreme Soviet of the Russian Federation. A State Committee of the Russian Federation for Antimonopoly Practices and New Economic Structures

(SCAP) was created in order to implement the legislation together with the Competition Act of 1991 as amended in 1995.[4]

Basic Objectives

The preamble of the RCPA states that it regulates the relationships which arise between consumers and entrepreneurs. It establishes the consumers' rights to

- obtain products (work, services) of appropriate quality
- security of life and health
- receive information about products, work, and services, and about producers, sellers, and suppliers
- access to consumer education
- protection of their interests by state and society
- to come together in consumer organizations.

It also determines the instruments for implementing these rights.

This opening paragraph makes it clear that the RCPA has been written in the spirit of the United Nations' declaration on consumer protection and consumer rights of 1985. These rights are transformed into binding legislation. They are paralleled by corresponding obligations of producers, sellers, and suppliers of services which are, however, not clearly and specifically formulated. The rights are protected by the State through the SCAP and other agencies, the authority of local administrations, individual court and conciliation procedures, and through certain types of collective and group actions by consumer and other associations.

The basic socio-economic reasons behind this approach has been spelt out in the Doklad (SCAP, 1994, pp. 21–22):

State protection of rights and freedoms of persons and citizens in the Russian Republic is guaranteed by Article 45 para 1 of the Constitution of the Russian Federation. Among the rights which are guaranteed by the State are also consumer rights. The guarantee of the realization of these rights exists in the framework of economic, legal and organizational institutions and instruments which are adopted by the State at different levels of regulation. Legislation on the protection of the consumer appears to be relatively new and a result of the 20th century. Its adoption has been caused by an enormous widening of products, works and services offered by manifold, complicated, and dynamic technological development, by the evolution of world-wide relations, by the manifold rise in the number of economic subjects. This development puts the citizen consumer in a non-equal position compared with his business partners, namely sellers, producers, and suppliers of services. This inequality can be found not only in the inadequate economic organization of consumers in comparison

with business, but also, as a rule, in his lack of specialized knowledge in the areas of economics, law, technology, and so on. This distortion of the balance of capacities favouring business and disfavouring consumers requires the adoption of measures to protect the latter, the most important of which appears to be the adoption of specialized legislation on consumer protection.

More thorough analysis of the RCPA will reveal that it has been adopted at a time when in Russia, due to the still ongoing changes in the economic structure, consumer protection has the special function of making possible *the transition from a planned economy* – which is characterized by want and scarcity – *to a market economy dominated (in theory) by consumer sovereignty and choice.* In economic terms this means a transition from a *seller's* to a *buyer's* market. However, it must be kept in mind that such buyer's markets are still the exception and not the rule in today's Russia. This has been elaborated in great detail by the Doklad (SCAP, 1994, pp. 7–13), in which the unequal development of privatization, the still existing distortion of competition, the shortage of products and services in many market areas, the low quality of products, and the inefficient structures of, in particular, the retail and wholesale markets, are criticized. As a summary, one can read (SCAP, 1994, p. 20):

As a whole, the development of competition in retail markets will to a greater extent determine the actual possibilities for realizing the rights and protected interests of consumers in the present time. The development of every-day supplies, including wholesale distribution, seems to be the weak part in the chain which prevents an effective implementation of state consumer policy.

This remark makes it clear how closely competition and consumer policy and law are interrelated in countries which are changing from planned to (somewhat chaotic) market economies.

A Positive Approach to Consumer Protection

It has been made very clear from the beginning that the RCPA is not merely a symbolic act stating in well phrased terms rights and obligations which are not enforced. This unfortunately has been the case with much consumer legislation over the last twenty years. The importance of consumer legislation can be seen by the way in which it is implemented. This author is convinced, from the many interviews carried out with government officials, consumer representatives, legal professionals, and other persons, that the RCPA is taken seriously. It is regarded as an instrument to complement government policy for creating efficient and competitive market structures, and for protecting

the Russian consumer effectively. Obviously even a vigorous enforcement cannot solve the fundamental problems of the economy. But it can send signals to business on how it has to behave on the (emerging) markets, thereby enforcing the interests of consumers which until then existed only on paper.

This positive attitude to consumer law is clearly proven by the above-mentioned legal documents, especially by the Postanovlenie of the Plenum of the Russian Supreme Court which tried to clarify more than twenty disputed questions arising out of the application of the RCPA. This clear pronouncement "pro consumatore" is quite unparalleled in European jurisdictions and can only be compared with the judgment of the European Court in the *GB-Inno* case where the EC consumer protection programmes were given an official recognition[5] when measuring Member State law against the Community principle of free movement. The same is true as far as the commitment of the SCAP towards consumer policy is concerned. It cannot be found only in the official Doklad, but also in the official clarification, in many of its implementing activities, in its involvement in the reform process by means of amending the RCPA, by creating an interministerial committee of consumer protection, and the like. In its Doklad, SCAP made the following proposals for amendments (1994, p. 79):

- clarification of definitions and dispositions of the Act
- improving safety regulation which is not dealt with in this paper due to its complexity
- regulation of dealings between consumers and business which are caused by inflation, especially with regard to abuses in the financial services sector (securities, investment)
- the widening of the powers of local administration institutions and consumer associations to protect the consumer
- specification of competences and powers of organs of state administration which implement consumer protection legislation in order to make it more effective and correspond more to practice.

These detailed amendments are now before Parliament.

Fairness in Contracting

A broad concept to define the position of the consumer on the market and to generalize the obligations of producers, sellers, and suppliers

has been the concept of "fairness." This concept stemming from general contract law did for the first time find recognition in the European Community through EC Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (Wilhelmsson, 1993; Willett, 1994).[6]

Consumer Protection Act. The RCPA does not contain a general fairness obligation for businesses dealing with consumers, but Article 14 is a first step in this direction. It declares contractual terms invalid that "restrict consumers' rights as compared with the rules established in legislation." There is a right to compensation if, "as a result of the application of contractual terms, a consumer incurs losses." It also prohibits unfair tying arrangements.

Civil Code. A still modest recognition of a *fairness* concept in consumer law can be found in Part I of the new Civil Code, even though it hardly contains consumer-specific provisions. It establishes general rules on obligations whose Article 428 regulates "contracts of adhesion (dogovor prisoedinija)" (Suchanov et al., 1995, pp. 397–399). Para 1 gives a general definition of contracts of adhesion which can be entered into only on a "take it or leave it"-basis. According to para 2, the person entering into such a contract can demand its annulment or modification

> if, even if not violating mandatory provisions of law or other regulations, it takes away rights from this person which are usually recognized in such contracts, if it excludes or limits responsibility of the other side for the fulfilment of its obligations, or if it contains burdening provisions to the person entering into the contract who would not have accepted if he/she could have freely negotiated the contract.

Para 3 insists that

> the demands of the person adhering to the contract to void or modify it will not be upheld if he/she knew or should have known that it was part of his/her business activity (predprinimatel'naja dejatelnost').

Obviously, activities in the field of *consumption* will not come under this exclusion, but will allow modification or annulment of the contract under the circumstances described in para 2. This amounts to an indirect recognition of the specificity of consumer-supplier relations. However, Article 428 can only be enforced in individual contract relations. It does not allow for a preventive approach against unfair contract terms, as foreseen by Article 7 of EC Directive 93/13.

Another rule giving consumer protection in contract relations can

be found in Article 426 on "public contracts." These are offers by retailers, banks, carriers, or energy and water suppliers, who by regulation or according to their bye-laws have an obligation to sell to or provide services for the public at large on consumer markets. The consumer has a right to non-discriminatory contract conclusion.

SPHERE OF APPLICATION

Specificity of Consumer Law

In its preamble, the RCPA makes it clear that it is applicable only to relationships between consumers and business. Thereby, "a consumer is a citizen who uses, acquires, orders, or has the intention to acquire or order products (works, services) for personal household needs."

The other party to the relationship is made up by producers (isgotovitel'), suppliers of services or work (ispolnitel'), or sellers of products (prodavec). Importers are not specifically listed.

These relationships may arise out of contracts, but may also be the result of negligence, violation of obligations of business vis-a-vis consumers.

In its Postanovlenie of 29 September 1994, the Supreme Court clarified the specificities of consumer law in the following directions:

a. The RCPA takes precedence over the (old) Civil Code: "The Civil Code and other codes will only be applied in so far as they do not contradict the RCPA." This is a very important principle for ensuring priority of specific remedies which the Act has created in favour of the consumer and which had not been recognized by former Russian civil law. Therefore, the Russian judge, in litigation between a consumer and a producer, seller, or supplier, is obliged to apply first the RCPA and only subsidiarily the Civil Code.

b. The Postanovlenie also made clear that the Act can only be applied to supplier-consumer relationships in the above-mentioned sense, not to relationships between citizens, even if one of them acquires products or services for personal use. It can also not be invoked for business relationships where one of the partners is a private citizen who does not acquire products or services for personal use but rather for business purposes. It is interesting to mention that

a similar narrow scheme of application of consumer law has been advocated by the European Court in its *Pinto* judgment of 14 March 1991,[7] while Member State courts usually have a much wider approach and also include relationships with small businesses in their ambit of protection.

c. The Razjasnenija of the SCAP of 15 August 1994 somewhat extended that definition because it insisted that also legal persons could be protected by the Act if they acquired products or services for their own needs. Services which are fulfilled in favour of a group of consumers while the order is paid by a third person also come under the Act.

It seems that there are some problems with the relatively narrow sphere of application of the RCPA which have not yet been clarified by court practice:

- There is some doubt whether relationships between consumers and co-operative suppliers which were quite frequent in the old Soviet Union and still exist to a great extent today, e.g., in the areas of house rental, holiday services, and transportation, come under the RCPA. It must be remembered that the definition of "supplier" includes not only enterprises, but also "organizations" and "institutions" (učreždenie) so that consumer cooperatives should be included. The new amendments will make clear that these relationships are also covered by the RCPA.
- In many cases it may be difficult to ascertain whether a person acted as a consumer or to the contrary concluded a contract as part of his/her business activity. This is particularly true with regard to investment services which may be used for saving purposes, but also for speculation.
- Cases on civil liability under tort law may not be clearly distinguishable with respect to whether the injured person acted as a consumer or as a worker. Compensation should not depend on the role the injured person held when acquiring a product or service.
- It is not clear who has to prove the intention to act as a consumer. The Order of the Plenum of the Supreme Court is unfortunately silent on this point.

Financial Services

There has been some debate among Russian authorities and courts whether and how far the RCPA is applicable to financial services. Due to the enormous rise in financial services and to the abuses it has brought about, e.g., through pyramid schemes (SCAP, 1995, p. 67), it is vital for Russia to develop an effective mechanism to protect consumers especially in markets for securities.

On the other hand, the RCPA is particularly deficient in this respect. Very few provisions are specifically tailored to fight unfairness or deception in rapidly developing financial markets, especially investment and securities (but to a lesser degree credit due to the high inflation rates). This lack of protective rules can be explained by the very origins of the Act because at that time the financial services offered on the market were quite unheard of in Russia. This has changed dramatically.

In its enforcement policy, the SCAP took the view that the RCPA is in general not applicable to financial services. The term "uslugi" (services) in the Act is usually applied in the traditional sense of a craftsman or a shop working on material which either has been supplied by the consumer or by himself. This type of contractual relationship obviously has nothing to do with modern financial services.

In its Postanovlenie of 29 September the Supreme Court gave a sweeping statement in so far as it included "*relationships originating out of contracts for financial services*" within the ambit of the RCPA, for instance

- granting of credit for personal household needs
- opening and management of accounts for citizens-clients
- effecting payments on their instructions
- deposit of citizens' securities and other valuables.

The Court, however, did not give any reason for its subsumption of financial services under the Act, nor did it specify how it would work. This is particularly problematic for information and transparency where the RCPA has some general provisions which however must be concretized in order for transparency of financial services to materialize. Furthermore, the Court did not settle the problem of how to define the "citizen-consumer" in this respect and how to distinguish him/her from the citizen acting in business.

INFORMATION

Consumers' Right to Information

Information is a prerequisite to any functioning market economy and to consumer protection. Most trade practices legislation uses a negative approach in so far as it forbids misleading advertising and other deceptive practices on the market. Specific information and transparency obligations are usually restricted to special products or services, such as guarantees, package holidays, financial services, and the like.

The Russian legislator, in Article 6 RCPA, opted for a positive approach in obliging the manufacturer, seller, or provider of services to provide consumers with the necessary and truthful (accurate) information concerning their enterprises, their products, works, or services offered by such enterprises, and their opening hours.

This information usually has to be given when contracts are concluded. It is therefore not sufficient to provide the information after conclusion of the contract. On the other hand, there is no general obligation to offer pre-contractual information by notices, prospectuses, and the like, which is found in many specific EC Directives. It should certainly be a point of concern for the Russian legislator to improve the mechanism of pre-contractual information and to allow specific regulations for certain types of contracts.

Concerning the language in which information is provided, point 12 of the Razjasnenija of 15 August 1994 makes it clear that information given in a foreign language is unacceptable. The consumer must be supplied with a Russian translation of the information regarding products, works, or services. The form this information is to take is spelt out in Article 8 (3), e.g., in the technical documentation accompanying the products, on a label, by marks, or by other means. This principle has been confirmed by the Postanovlenie of the Plenum of the Supreme Court:

> Information in a foreign language which is unaccompanied by a translation conforming to Article 8(3) of the RCPA, must be regarded as failure to comply with Article 10(1).

Extent of Obligation to Inform

Article 7 RCPA is concerned with information about the business place, Article 8 with information provided by the manufacturer, seller

or supplier, about products, works, or services offered on the market. The principles are quite detailed and important. The RCPA insists that the information be given in a timely fashion insofar as this is necessary for the consumer. It must be true and accurate in order to allow the consumer a well-informed choice. Article 8 para 2 lists some details of the information to be given, e.g., basic characteristics of products and services, price, guarantees, rules and conditions of effective and safe use, and, when needed, specific safety information.

Liability for Improper Information

In its quest for effectiveness, Article 10 RCPA contains rather innovative and interesting remedies in cases of improper information. It should be mentioned that under European trade practices legislation these issues usually come under advertising legislation, not contract legislation, while the Russian legislator is more concerned with contract law remedies. The problem with these remedies is that they usually can be applied only to individual contracts. They cannot clear the market of improper, especially misleading information. It is therefore important to co-ordinate the regulation of information through trade practices and contract law.

Para 3 of Article 10 makes it clear that the consumer is not to be seen as an expert but rather as a layman, and that therefore his or her information needs have to be defined from that perspective. The Postanovlenie has drawn attention to this principle.

In cases of inadequate or misleading information resulting in the acquisition of products, works, or services that do not possess qualities needed by the consumer, he or she shall have the right to cancel the contract and to demand compensation for losses caused. The consumer also has a right to demand additional information within a reasonably brief time period. Violation of the obligation to inform may also give rise to a claim under product liability law. Para 2 of Article 10 even allows the liquidation of enterprises which systematically violate their information obligations – a far-reaching consequence which seems excessive and disproportionate.

The proposed amendments to Article 10 are also intended to make implementation more effective by allowing an injunction of SCAP to suspend the sale or supply of products or services until adequate information is given.

SALES LAW

Consumers' Right to Quality

In order to make consumer rights effective on the market, Article 4 gives him or her an indirect right to quality, Article 5 a direct right to safety. These are rather general obligations which are specified by provisions on sales and product liability (to which I will turn later).

The *quality obligation* of the manufacturer, seller, or provider of services is defined in Article 4 by which products, works, or services must correspond in quality

- to the mandatory requirements of standards
- to the conditions of the contract
- to commonly held expectations
- to information given by producers, sellers, or providers of services.

If these broad criteria are not met, the products, works, or services will be defective according to the definitions given in the preamble. Defects of a product or a service will then bring about the specific remedies provided for in sales and services law, respectively.

Another important part of the consumer's right to quality has been written down in para 2 of Article 4 which is concerned with *after-sales-service*. The time-limit of this obligation is not specified by law but will be determined either by agreement between the parties or by unilateral decision of the manufacturer or supplier (which will usually be the case). If there is no specification, the period of service (srok službi) will be ten years. There is also an obligation to furnish after-sales-services after the product has been taken out of production.

The proposed amendments will provide for the drawing up of lists of service periods (srok službi) for products or services which deteriorate with time and need servicing. There will be incentives for the supplier to decide the time period; otherwise it will be 10 years. For hazardous products there will be mandatory periods of use or life (srok godnosti).

Remedies Against the Seller

The remedies available to the consumer in the case of the sale of a defective product are spelt out in Article 17. They are quite detailed and far-reaching, if compared to traditional sales legislation. The consumer has the option to demand

- elimination of defects without charge or compensation for expenses
- a proportional reduction of the purchase price
- replacement by a product of an analogous make
- replacement by a similar product of another make (model, type) with an appropriate recalculation of the purchase price
- cancellation of the contract and compensation for losses.

Special rules are established for second-hand products where repair and reduction of the purchase price are not possible without the seller's consent.

The obligations of the seller do not depend on negligence and are therefore in conformity with traditional sales legislation (even though departing from the Vienna Convention which, however, is not applicable to consumer sales).

The obligation is primarily directed against the seller. The consumer must present his or her claim to the seller within the guarantee time established by the manufacturer, or, if there is no guarantee, within a period of 6 months. Para 2 of Article 17 regulates the place where the claim must be presented, para 3 the costs to be borne by the seller, and para 5 the documents to be presented by the consumer.

The Act regulates in some detail the way and time period in which the seller must meet the demands of the consumer regarding the elimination of defects (Art. 19) and replacement of defective products (Art. 20). Article 21 aims at making the sellers' obligation effective by giving the consumer the right to obtain a penalty of 1% of the cost of the products for every day of delay. Article 22 encourages settlement with consumers in cases of defective products.

Guarantees and Remedies Against Manufacturers

Most important from a consumer point of view are guarantees or warranties offered by manufacturers when marketing their products. Guarantees are indirectly mentioned in Article 8 para 2 of the RCPA whereby the consumer has to be informed about the manufacturer's warranty obligations.

Article 17 para 5 is also interesting in this respect: "For products which have a warranty period the consumer must produce technical identification or another such document."

Point 21 of the Postanovlenie makes it clear that the absence of a receipt or some other document does not exclude the consumer from the guarantee rights. Since sales contracts with retailers are usually

concluded in oral form and the time of the conclusion of the contract coincides with its execution, the consumer is entitled to give proof of purchase by any means available which must then be evaluated by the judge in the context of the litigation. This order of the highest court of Russia will certainly help to strengthen the position of the consumer in cases of cash sales which are still the rule in Russia where credit sales rarely occur.

On the other hand, there is no general regulation on guarantees, and the absence of competition in a seller's market does not encourage manufacturers to grant guarantees voluntarily. The RCPA provides for a joint liability of the manufacturer with the seller under certain circumstances. First of all, both must inform consumers about repair facilities and both will be liable for incorrect or insufficient information according to Article 10. Following Article 17 para 3, the consumer may demand repair of a defective product from the manufacturer or has a right to return the product and get a refund with the guarantee time of at least 6 months.

An additional obligation is imposed upon the manufacturer, according to Article 18 para 6, after the expiry of the warranty or guarantee period insofar as he is still liable for "*substantial defects*," e.g., defects which, in the definition of the preamble, "make it impossible or inadmissible to use products in accordance with their target designation." The consumer may present his or her claims within the established time of use (srok godnosti) or, in the absence of such, within ten years.

Liability of Importers

The large amount of imported, frequently shoddy or dangerous products on the Russian market (SCAP, 1994, pp. 77–85; 1995, p. 52) makes it necessary but difficult, if not impossible, for Russian consumers to implement their rights under the RCPA against the foreign manufacturer. There is of course always the liability of the seller but this may not be sufficient, especially for getting the products repaired or exchanged, or in cases where the seller has gone bankrupt or is otherwise not available. Therefore, the liability of the importer may become paramount, provided that some sort of a distribution system for the foreign products exists.

The RCPA does not mention a specific liability of the importer. It uses the concept of "isgotovitel" to extend liability beyond the seller

having in mind, according to the preamble, "the enterprise, organisation, institution or citizen-businessman producing products for the realization (of consumer demands)."

This concept may be regarded as broader than the mere producer or manufacturer. It could include, if my interpretation is correct, any person that puts the product on the market for the first time. It could well be extended to include the importer who first places a product on the Russian market (Boguslavskij, 1994, pp. 252–254).

General Remarks

It is impossible here to enter deeply into the details of this rather complex and important part of consumer legislation. EC countries usually leave these aspects to contract law and provide for protection of the consumer in cases where the seller restricts his liability arising out of the sale of defective products in conflict with the principles of good faith enshrined in sales legislation, whether or not contained in general contract terms. This is the approach of EC Directive 93/13 which is also concerned with exemption clauses in preformulated contracts. Such legislation is more appropriate where conditions of a buyer's market exist. It has to be recognized, however, that the provisions of the RCPA have been adopted under conditions of still dominant seller's markets where the supplier must be forced by law, and not by competition, to ensure a speedy repair or the replacement of defective products. In markets where competition is the order of the day, the role of law will usually be limited to giving a legal framework banning exclusion clauses rather than imposing a lot of mandatory warranty obligations. If Russia's economy shifts from a seller's to a buyer's market, the rather strict and detailed rules on warranty, service, and use periods which to the outsider seem confusing could be made more flexible and more open to regulation by competition.

On the other hand, the recognition by the RCPA of a consumer's right to repair and refund in case of defective products not only against the seller but also against the *manufacturer* must be seen as progress which many EC countries have not yet attained. This is all the more true since modern marketing practices originate with the manufacturer who should therefore be primarily liable. The seller is frequently only an agent, even though under traditional sales legislation he bears the primary responsibility for defects of a product.

PRODUCT AND SERVICE LIABILITY

Right to Safety

Article 5 contains a general right of the consumer to the safety of products, works and services. Article 5 at the same time makes clear that this right is enforced by specific regulations and agencies like Gosstandart, the State Committee for Standardisation and Product Safety. The right of safety is also included in the right to information according to Article 10. This is particularly true with, for instance, warning obligations for the producer of hazardous products.

The RCPA says nothing about the debated question as to whether product safety can be better achieved through mandatory regulations on standards or through strict product liability rules. It seems, however, that the Russian legislator prefers standards, certification, and licensing systems to product liability rules. It is questionable whether such a system is really in line with a competition approach to product safety, at least apart from those products for which licensing or some other type of preventive control is needed in order to avoid safety and environmental tasks, such as is the case with medicines, medical devices, chemicals, and pesticides. EC law imposes a strict proportionality test on product licensing (Reich, 1996, pp. 90–92).

Civil Liability

Article 12 puts this right to safety into force in civil law relationships arising out of harm inflicted to life, health, or property of the consumer as a result of a defective product or service. Article 12 para 1 states a general product and service liability for a period of ten years after the placing of products or services on the market.

As defined in the preamble, the Act refers to defects which stem from design, manufacture, composition, and similar acts, including those arising out of incomplete or false information. This concept is somewhat different to EC Directive 85/374[8] where the defect is linked to the reasonable safety expectations of consumers. It seems however that basically the Russian legislator wanted to use the same approach, because Article 12 is concerned only with the protection of safety interests of the consumer.

Para 13 of the Postanovlenie of the Plenum of Supreme Court contains an important modification of the existing ten year limit for taking action before court. Since, in the reasoning of the Court, the

consumer has a right to safety according to Article 5 and a right to information according to Article 8, including information about potential risks of the products or services which may arise *after* the expiry of the prescription period, the consumer may still ask for compensation after that period, if he/she was not warned adequately.

Who Is Liable for What?

Article 12 is rather imprecise as to the definition of persons who must compensate for the damages. In the case of defective services, the supplier is obliged to provide compensation, but it is not stated who the supplier is and how far liability for third persons – agents and so on – is included. As far as damages arising out of defective products are concerned, the manufacturer and/or seller are liable. The seller is liable if the damage occurred within the warranty period. The manufacturer is liable for a period of ten years even after expiry of the warranty.

The development risk defence is excluded because, according to para 4 of Article 12, liability is independent of whether the level of scientific and technological knowledge made it possible to ascertain the particular properties of defective materials and tools necessary for the production of products, performance of works, or offering of services. On the other hand, the manufacturer or supplier shall be free from liability if he can prove that the harm arose as a result of "force majeure" (neopridelimaja sila) or a violation of the rules of use and storage by the consumer.

The Postanovlenie has made it clear that development risks cannot be subsumed under the concept of "force majeure" to liberate the manufacturer from his liability. Even if technological and scientific knowledge did not allow the defect to be discovered, the manufacturer cannot invoke "force majeure." This is because, according to point 13 of the Postanovlenie, product liability exists independently of contractual liability.

Unlike EC legislation, Article 12 of the RCPA is not concerned with the liability of (a) the importer, (b) any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer, or (c) the seller. Article 3 (1) of Directive 85/374 treats the person creating his own brand as a producer; a similar definition may be extended to the concept of "isgotovitel" according to the RCPA. Article 3 (2) makes the importer

into the EC liable as a producer; it is not clear whether the concept of "isgotovitel" can be extended to the importer into Russia. As to the seller, there is *no* subsidiary liability of the seller of the product in line with Article 3 (3) of the EC Directive (Howells, 1993, pp. 30–32). Such a rule might be very useful for Russia due to the large number of products of uncertain origin on the market. The seller will be more cautious in marketing products of doubtful origin if he himself is likely to incur liability.

Lacunae of the Rules on Product and Service Liability

For a European observer, as a fundamental rule on product liability Article 12 is rather short and imprecise, compared to EC and Member State legislation. It is apparent, however, that the Russian legislator wanted to enact provisions which to some extent were similar to the EC Directive. Therefore the starting point of liability is the concept of defect, not that of negligence. Defect is an objective concept and does not require negligence on part of the producer or performer of services, even if it is not specifically linked to the consumer's reasonable safety expectations as in EC law. Of course, special problems arise for service liability which are only mentioned, but not really settled, in Russian legislation or court practice. Causation is indirectly referred to and must be seen as part of product liability law. The RCPA is not concerned with the existence of several chains of responsible persons in the manufacturing process. Therefore, the definition of the manufacturer remains unclear. On the other hand, it seems obvious that exclusion clauses are not permitted and that non-material damage is included (see Art. 13 RCPA). Damage to property is not restricted by a certain threshold. Damage to products sold under a sales contract is not part of the product liability regime but rather of sales law.

The documents analyzed do not make it clear whether and from which date the new Russian product liability law has practical significance and whether actual litigation has taken place. Due to the number of hazardous products that, according to the Doklad, are on the Russian market, one could well imagine that by now it has been put into practice.

SERVICES

Monopolistic Markets and the Supply of Services

The most interesting and innovative provision on service contracts is contained in Article 26. It is similar to what under French law is called "refus de vente" but relates, in the Russian context, to "refus de service": A provider of services having a dominant position on the market is obliged to conclude a contract for performance of works or services with a consumer unless he proves that the provision is beyond his statutory obligations or performance capacities. In this respect the provider must organize his business activity in such a way that the needs of citizens are fulfilled in a suitable way and without delay. The provider is obliged to compensate the consumer for losses caused by the result of an unjustified refusal to conclude a contract for work or services.

The conflictual character of this provision can be seen by the fact that both the Plenum of Supreme Court in points 23 and 24 of its Postanovlenie and the SCAP in point 19 of its Razjasnenija have tried to make these criteria operative. The Supreme Court makes it clear that the concept of dominant position on the market must be determined according to Article 4 of the Russian Act on Competition of 21 March 1991 which gives the following definition:

Dominant position – exclusive position of an economic subject on the market of a specific product giving it the possibility to exercise decisive influence on competition, to make access to the market of other economic subjects difficult or to limit in any other manner the freedom of their economic activity. An economic subject will be regarded as having a dominant position when his market share of a certain product exceeds the limits which have been fixed every year by the Antimonopoly Committee of the Russian Republic, with the exception of those cases where the economic subject shows that in spite of its exceeding the market share limits, the position on the market is not a dominant one. A position on the market cannot be regarded as dominant if the market share of the economic subject of a specific product falls below 35%.

The Supreme Court makes two clarifications which are important for interpreting this provision in a consumer law context:

- the provision must be applied *ceteris paribus* to works and services
- a dominant position can also be held on local (mestnye) markets.

The trial court thereby is under an obligation to delimitate the relevant market by traditional criteria in order to determine whether there is a market dominating position. However, neither in the

Postanovlenie nor in the Razjasnenija is it clarified whether a broad or a narrow concept of the relevant market is to be used. This is particularly true with regard to specific services supplied on regional or even local markets. As far as the author could verify this from the practice of the Petersburg regional office, a *narrow* definition of the relevant market is used. Since Russia is not yet a single market of services, regional, or even local, markets will have to be examined in order to determine market dominance.

Even more difficult to determine in a legally precise sense is the defense of the supplier that he is under no obligation to provide his services to the consumer. Point 24 of the Postanovlenie and point 19 of the Razjasnenija insist on a rather narrow definition of the defences. The Court says:

> Defendant's references to the unavailability of the necessary quantity of raw materials, at the time when the consumer turned to him, deficits in the assortment of his working units, lack of spare parts and similar circumstances, show that the organization of the production process cannot serve as a basis for liberating him from his obligation to enter into a contract with the consumer. Article 26 RCPA obliges the provider who has a dominant position on the market, to organize his production and other economic activities in such a way that the needs of citizens can be fulfilled in a reasonable manner and without delay.
>
> As far as the statutory framework of this obligation is concerned, a service will be outside the obligation of the provider only in those cases where it is not part of the relevant documents of its activities nor has been imposed upon him by other regulations.

These explanations probably can be understood only against the background of a still existing seller's market. They show that there is an absence of competition which on a "theory of second best" must be compensated for by the legislator by a rule on "refus de service." However, practical experience shows that these remedies are not very effective because they do not reach the source of the evil which stems from inefficient competition. In a functioning market economy, the provider would be free to offer or not to offer his services to the consumer who in turn would be free to take or leave them. It would not be up to the judge to decide whether the provider has organized his business appropriately, whether a type of activity is within or beyond its statutory duties, and whether he must offer a service to the consumer or not. Certain exceptions would by statute be imposed on public utilities and the like, but not on all services.

As mentioned above, Article 426 of the new Civil Code has enacted a new important rule on "public contracts" which to some extent may make the still existing rule of Article 26 RCPA superfluous.

The Concept of Defect

The rules on the supply of services are quite detailed as to performance, timeliness, right to an estimate, and remedies in case of defects. Article 32 gives the consumer a right to cancel the contract at any time, paying the performer a remuneration for the portion of work performed and compensating him for direct losses incurred through cancellation of the contract. It is, however, very doubtful whether such a rule is able to offset the imbalance still existing in (Russian) service markets. Quite to the contrary, it shows the lack of competition which on the one hand is "compensated" for by a duty to supply of market dominating enterprises, and on the other hand paralleled by the complete freedom of the consumer to cancel the contract at any time and be compensated. Both rules are quite unknown to consumer law in EC countries because they endanger the principle of "pacta sunt servanda" as part of the freedom-of-contract-principle on which consumer law is based unless exceptions are stated by law, e.g., cooling-off-periods, cancellation in case of social "force majeure" (Wilhemsson, 1993, pp. 437–441).

DAMAGES AND COMPENSATION

The General Rule of Article 11

Full compensation. Article 11 contains some specific rules on how to determine the amount of compensation to be paid to the consumer in case of a violation of his or her rights.

The first paragraph states a general liability of the seller, manufacturer, or performer for violation of the rights of consumers laid down in the present law. It is not clear whether these rights arise directly out of Article 11 itself, or whether one must first turn to another clause.

It is the aim of Article 11 to provide the consumer with full compensation and not only with the payment of penalties which were used under socialist planned economy to ensure performance of contracts. Therefore, point 10 of the Postanovlenie makes it clear that the damages have to be calculated according to the actual and potential losses a consumer has incurred. This includes compensation for the value of the property lost, expenses which the consumer incurred in connection with damage to his property, as well as profits which could

not be realized because the obligations of the supplier were not fulfilled. The concept of damage is thereby linked to the existence of a market economy where everybody is entitled to buy and sell products and services freely and to get compensation if his rights are violated. It is, however, not quite clear why this right to compensation should include lost profits since consumer law, according to the definition given above by the Plenum of the Supreme Court, is concerned with the supply of products and services only for personal, not for business use. Therefore, the consumer should not be able, in my opinion, to invoke loss out of not having made a profit due to the supplier's violation of his obligations. In this case, the person seeking redress would not be a consumer; hence, Article 11 would not be applicable.

Calculation. Point 11 of the Postanovlenie makes it clear that the point in time for calculating the amount of damages due will not be the time of the sale or the time of the purchase of the product, but the point in time when the judge heard the case. This means that the considerable risks of inflation in Russia are put upon the supplier and not on the consumer.

Amendments. The proposed amendment of the RCPA is to introduce mandatory insurance for manufacturers, services providers, and suppliers of products to ensure compensation for consumers concerning their "liability for damages caused to consumer's life, health, property or environment, resulting from defects of products (works, services) which are subject to mandatory certification."

This amendment is before Parliament. It would make consumer remedies more effective but would probably increase prices and make enforcement difficult.

Moral Harm

Consumer Protection Act. Quite a radical new approach to consumer law appears in Article 13 of the RCPA which gives the consumer a right to compensation for moral harm:

> Moral harm caused to the consumer as a result of the violation of his rights by the manufacturer (provider, seller) . . . shall be subject to compensation by the person having caused it, provided he is at fault. The amount of compensation for the harm shall be determined by the court unless otherwise provided by law.

Point 25 of the Postanovlenie makes it clear that negligence (vina) is a prerequisite to compensation for moral harm. Its amount is determined not by the value of the product sold or the service furnished, but by the psychological and physical sufferings of the consumer because of the unlawful behaviour of the supplier. The Doklad gives some examples from important emerging Russian case law concerning moral harm whereby particularly bad behaviour and violence (grubost) by the supplier can give rise to a right to compensation for the consumer. The amount of compensation is determined not by objective but rather by subjective factors depending on the viewpoints, principles, and lifestyle of the consumer (SCAP, 1994, p. 48; 1995, p. 19).

A general rule on moral damages can be found in Article 131 of the "Fundaments of civil legislation" which read:

> Moral harm (physical or ethical sufferings), which was inflicted upon citizens through an illegal act, will be compensated for by the wrongdoer if he acted negligently. Compensation will take the form of money or any other material form to an extent which is determined by the judge, without regard to the actual compensation for property damage.

Government officials and consumer associations have reported cases where Russian courts have awarded considerable sums of money for moral harm suffered by consumers due to illegal and rude behaviour of sellers and suppliers. This is especially important when marketing practices are directed at many consumers, and where the damage is not so much to property but takes the form of moral harm. It is reported that Aeroflot has been condemned for overbooking, delays, bad service, etc.

Civil Code. A general rule on "Compensation for moral harm" is now included in Article 151 of the First Part of the Civil Code. It reads:

> If moral harm (physical or ethical sufferings) has been inflicted upon the citizen by acts which violate his personal non-material rights or violate other non-material properties, and also in other cases foreseen by law, the judge may impose upon the violator the duty to pay a monetary compensation for the damages caused.
>
> In determining the amount of compensation for moral harm the judge will take into account the extent of culpability of the violator and other accompanying circumstances. The judge also has to pay attention to the intensity of physical and ethical sufferings according to the individual specificities of the person to which harm has been inflicted.

Exemption Clauses

Article 14 makes it clear that exemption clauses in consumer contracts are void. The RCPA does not take into consideration whether these clauses are pre-formulated or not. It simply takes the provisions of the RCPA as mandatory law not to be waived. This state of the law has been repeated in point 14 of the Postanovlenie whereby contract clauses restricting liability are forbidden.

Evaluation

The new provisions of the RCPA are in line with most European legislation in so far as they allow for full compensation to the consumer for economic losses resulting from a violation of his or her rights and to some extent they go even further. It is only natural that no exclusion or restriction of liability will be allowed by contract clauses.

A radically new approach has been undertaken by the Russian legislator as far as compensation for moral harm is concerned. European legislation on this point is deficient, with the exception of package holidays. The EC Product Liability Directive even allows governments to exclude "non-moral damages" for pain and suffering in implementing legislation.

Compensation for moral harm may constitute a possibility for the consumer to strengthen her/his bargaining position on the market and to police illegal behaviour of the supplier. Its workability obviously depends on whether the law allows either government agencies or consumer associations to undertake representative actions which bundle claims of individuals.

ENFORCEMENT

Generalities

Enforcement is the core of any legislation and particularly of consumer legislation. Without effective enforcement the law will remain a dead letter.

It is therefore of the highest importance that the SCAP pays great attention to enforcement. It seems that the SCAP has acquired the know-how of an enforcement agency as reported in its Doklad. It

also mentions some of the deficits of the existing enforcement practice and has asked the Russian Parliament for amendments.

Authority of the SCAP

Article 39 makes it clear that the SCAP is the most important enforcement agency in the area of consumer protection. Article 39 spells out the following powers:

- exercise state control over observance of the legislation of the Russian Republic as regards protection of consumer rights
- eliminate monopolistic practices of business and unfair competition in the market for consumer products, works, and services
- issue orders to suppliers to stop violations of consumer rights
- take cases to courts when it is discovered that suppliers violate consumer rights.

The SCAP also has the power to engage in agreements, codes of conducts, and the like with suppliers. Finally, it may issue official clarifications (razjasnenja) regarding issues of application of legislation of the Russian Republic on the protection of consumer rights.

The powers of the SCAP can only be understood in the context of the principles of Russian administrative law. Administrative authorities have the power to issue orders against violations of legislative provisions by manufacturers, sellers, and suppliers. They may levy a fine if the behaviour is not corrected adequately and in due time. The amount of the fine has been limited to a ceiling of 1 million Rubel (at present approx. US$220) which, due to inflation, is not sufficient to have a real deterrent effect. Therefore, the amendments to the RCPA would allow fines to be calculated on the basis of the minimum wages established by legislation.

The order is directed against a specific behaviour of a supplier without ensuring that the products or services having been provided in violation of consumer rights are withdrawn or the information is corrected. Therefore, a proposed amendment to Article 39 would allow the SCAP to forbid or stop the placing on the market of products, works, or services which have not been certified, whose period of use has expired, or which are supplied with insufficient or false information.

Point 5 of the Postanovlenie of the Plenum of the Supreme Court also reminds us of the fact that the SCAP is also empowered to par-

ticipate *ex officio* in all proceedings which concern the violation of consumer rights.

Regional Offices of the SCAP

Article 39 gives the same rights to regional offices (territorialnye organy) of the State Committee as to its head office in Moscow. The Razjasnenija (point 20) reminds regional offices that they may also conclude agreements with suppliers. Thereby a certain decentralization of the enforcement of consumer policy is possible (SCAP, 1994, p. 27). The regional offices have the same powers of participation in court proceedings as the head office in Moscow.

The main burden of implementation is indeed borne by the regional offices of the SCAP. Their staffing and training remains inadequate, however, as has been confirmed several times in communications to this author. One of the reasons for this is low staff salaries, especially for lawyers who can find better remunerated jobs in private business.

Due to the number of violations of the RCPA, informal handling of complaints precedes the more formal and heavy infringement procedures. The regional office usually directs the trader who has violated the law to stop the violation and give a written undertaking to that effect. Only if an amical settlement is not possible will administrative proceedings be commenced.

Local Authorities

Article 42 specifically mentions local authorities as competent organs for the enforcement of consumer rights. It is envisaged that consumer protection centres will be set up in local authorities. According to the Doklad (SCAP, 1994, p. 43) this has so far been done in 40 per cent of all local administrations in Russia. Their training and staffing will be one of the most important tasks of consumer policy in Russia for the coming years.

The consumer centres within local authorities have as their main objective to examine consumer complaints and advise consumers with regard to questions of consumer law. The Doklad has some interesting figures showing the increase in the number of consumer complaints in Russia. The powers of the consumer centres to solve complaints are, however, limited. They cannot, as has been explained in point

22 of the Razjasnenija, impose fines on suppliers. Their main task is to collect and disseminate information. Additionally, they may take lawsuits to court on their own initiative, at the request of consumers (groups of consumers), or in the interest of an undefined group of consumers with a view to protecting consumer rights. It is not known how far this power has been used by local consumer centres. An amendment to Article 42 would increase the powers of local consumer centres in so far as they would register formal complaints about infringements of consumer law which would then be handled by the competent authorities. This would allow the centres to be involved in the policing of the market.

Consumer Associations

The rights and powers of consumer associations are given in Article 43 and 44. From a consumer law point of view, the most interesting provision is Article 44 which gives consumer associations *locus standi* to file a suit in courts in order to obtain a statement of the illegality of specific activities of suppliers, manufacturers, and performers vis-a-vis an indefinite number of consumers, and to ask for the cessation of these activities. Here, the concept is similar to the one used in European consumer legislations with regard to group or representative actions. It is, however, not so much directed at injunctive relief because this is usually left to government agencies. Due to the absence of Russian trade practices regulation, there is as yet no possibility of consumer associations being involved in combatting illegal marketing practices via injunctions.

Consumer associations can, however, play an important role in getting compensation for consumers whose rights have been violated, especially compensation for moral harm. The practice as it is described in Doklad (SCAP, 1994) has some resemblance to a U.S. class action procedure. However, the action is not taken with the immediate intent of obtaining damages or compensation but with achieving a legally binding statement from the court to show that a specific act or practice, e.g., putting shoddy or dangerous products on the market, distributing insufficient or misleading information, causing moral harm to consumers, etc., is illegal. This statement will then have binding force in later actions taken by individual consumers in order to get their losses individually compensated. The court, according to Point 30 of the Postanovlenie, will oblige the wrongdoer to communicate

its decision to consumers via the media. As foreseen by Article 44, the proceedings (which are also open to local consumer centres) undergo two steps which are certainly worth studying in more detail:

- a "class action" for an indefinite number of consumers, which aims at obtaining a statement of the illegality of an act or practice;
- "individual actions" taken by consumers to get compensation for their actual losses or moral harm arising out of the stated violation.

There is already some practice with regard to these actions and it seems that some questions are already settled, while others still need clarification. The Doklad insists that the "class action" is not directed at getting damages or fines from the supplier, but only at securing a statement of illegality. It is not clear who, in the case of a positive judgment, has to bear the costs. An amendment to Article 44 would allow the judge to allocate reimbursement of expenses and costs to the consumer association which prepared the case and took it to court.

So far, consumer associations do not play any role in preventing violations of Russian consumer legislation by asking for injunctive relief. This task is specifically entrusted to state bodies, especially the SCAP and its regional offices. Prevention could, however, be improved if consumer associations participated in law enforcement, as is the case in most (not all) EC jurisdictions. The law would have to give standing to consumer associations for getting injunctive relief against unfair or deceptive acts or practices in commerce or against unfair contract clauses.

Individual Consumers

The rights of individual consumers must be protected by courts of law, according to Article 16. This is seen, as the Supreme Court has reiterated in its Postanovlenie, as a very fundamental provision which in two aspects departs from ordinary civil procedure:

- There is no tax imposed upon the consumer who takes a case to court; the amendments extend this privilege also to government agencies and consumer associations acting for an indefinite number of persons.
- The consumer, as plaintiff, has the option of taking the case to the court of his/her residence, of the residence of the defendant,

or of the place where the harm was inflicted. In a huge country like Russia, the consumer will doubtless prefer to have the case heard at the court of his place of residence even if the defective product was bought in some other part of the country.

These rules are also applicable to financial services insofar as they come under the RCPA.

On the other hand, there are a number of practical problems which make individual enforcement difficult, as is mentioned in the Doklad (SCAP, 1994, pp. 46–50; 1995, pp. 20–21):

- the length of ordinary proceedings
- the absence of injunctions by courts allowing interim relief or compensation
- the difficulty for the consumer to enforce a positive judgment, especially in the case of bankruptcy of the supplier
- the inadequacy of transportation and communication systems in such a vast country as Russia.

ACT ON ADVERTISING OF 1995

Generalities

The new Act on Advertising (Zakon o reklame – ZoR) is a complex piece of legislation. It will be essential for the development of future Russian consumer legislation that the RCPA and the ZoR exist in harmony. There is a good chance that this is possible since the enforcement mechanisms are compatible. The SCAP has, after protracted discussion in the Parliament, primary jurisdiction to enforce the ZoR, allowing to a limited extent for self-regulation and enforcement by self-regulatory bodies. Unfortunately, consumer associations, unlike in the RCPA, are not able to participate in its implementation.

The Standards Imposed on Advertising by the ZoR

The ZoR imposes the following general standards on advertising:

Article 5 – General requirements of advertising. This article contains some general rules, e.g., that advertising must be recognised as such and that it must be distributed in the Russian language, or in the

local languages of the republics. Advertising is forbidden if advertisers do not have a licence for their business activity when this is required, and for products which may not be produced or marketed in Russia. Advertising of products subject to mandatory certification must mention this fact.

Point 6 reads:

> Advertising may not induce citizens to resort to violence and aggression, may not arouse panic, and may not provoke dangerous activities harmful to personal health or safety.

Article 6 – Fairness of advertising (nedobrosovestnaja reklama). Advertising is unfair which

- discredits legal and natural persons who do not use the advertised products
- contains incorrect comparisons of the advertised product with products of other legal or natural persons, including advertising with expressions or pictures that denigrate the honour, reputation, and business activity of competitors
- deceives the consumer with regard to the advertised products by the use of imitations.

Unfair advertising is prohibited.

Article 7 – Misleading advertising. Advertising is misleading when it contains statements which do not correspond to reality with regard to:

- characteristics of the product such as nature, composition, method, and date of production, designation, consumer proprieties, conditions of use, certification and conformity marks, quantity, origin
- value (price) of the product at the moment of the dissemination of the advertising; additional terms of payment
- guarantee obligations, periods of use and fitness
- statistical data (which may not be presented in a way which exaggerates their soundness)
- reference to terms of excellence like "best," "only," etc., if not verifiable by documentation.

Misleading advertising is forbidden.

Article 9 contains a special provision which bans intentionally

deceptive advertising. This is the case where the advertiser, the advertising agency, or the distributor of advertising wilfully deceives consumers.

Article 8 – Unethical advertising. A first draft had the intention of banning advertisements of *pornographic* character. A similar ban was proposed for "advertisements having an *erotic* (or sensual) character." These bans were not problem-free, owing to the indeterminacy of the concepts used and the possible arbitrary exercise of powers by the implementing agency, e.g., SCAP. They have been eliminated from the final text of the ZoR.

The ZoR bans advertising which offends persons or groups with regard to race, nationality, and sex – an important rule which can also be found, albeit with a more limited application – in the EC Television Directive 89/552/EEC.[9] The proposal makes explicit reference to the "generally recognized norms of humanity and morals."

Surrepetitious advertising will be banned according to Article 10.

Article 13 – Telemarketing. Article 13 takes up a problem which recently has led to a considerable debate in the EC and its Member States. Of great importance is that the article postulates the principle of *consent* for telephone and similar advertising techniques, and not only for automatised techniques as in the EC Common Position on distance selling.

Financial services. Article 17 contains a special provision on advertising for financial services (including banking, insurance, investment, and securities). Banned are:

- the use of generic information which has no direct relationship to the advertised services or to securities;
- a guarantee of the extent of dividends for ordinary shares;
- the advertisement of securities before registration of the emission prospectus;
- the statement of any type of guarantee, information, or proposal about future profits, including declarations on the development of the market value of the security;
- the suppression of any clause of contract conditions if the advertising makes reference to these conditions.

Specific bans. There are other specific provisions and bans on certain types of advertising, such as alcohol, tobacco, medicines, and advertising aimed at children, which will not be considered in detail here.

The Concept of Deceptive Advertising

It is probably too early to analyse the importance of the ZoR for consumer decision making, especially in the pre-contractual phase, but some comments can be made already now, especially when comparing it with the EC Advertising Directive 84/450/EEC[10] (Kendall, 1994, pp. 163–168; Reich, 1996, pp. 265–270).

The EC and Russian approaches. There is general agreement that rules against deception are very important for sound consumer decision making *and* for effective competition on the market. Each advertising legislation must give its foremost attention to the effective combat of *misleading* advertising. Hence EC Directive 84/450 is primarily concerned with misleading advertising which is given a broad formulation. The same is to some extent true of the ZoR with regard to its Article 7. Both pieces of legislation agree that the concept of deception does not depend on negligence on the part of the advertiser or the agency. There is strict liability for deceptive and misleading advertising, at least insofar as the SCAP and its territorial organs may order the advertiser to stop it regardless of any fault on his part (Art. 26 ZoR).

Article 6 of the ZoR on unfair advertising and Article 9 on intentionally deceptive advertising are, in reality, only special cases of misleading advertising. Article 9, transgressions of which constitute a criminal offence, will probably not play a great role because it will be hard to prove intent.

The special provisions on financial services and securities in Article 17 which combat some obvious abuses on the Russian financial markets refer to statements which are typically deceptive, even if it may be problematic to prove deception in the individual case.

Services. Modern advertising legislation is concerned with products and services alike. While the starting point of all advertising legislation has been to forbid deceptive statements about products, the development of a competitive service industry in such different areas as repair, recreation, telecommunication or financial services, just to

name a few, has led to an extension of advertising legislation to all services. This has been done by EC Directive 85/450 which is concerned with both products and services and even includes immovable property.

The same broad approach has not been used by the Russian legislator, at least not directly. Article 6 is at first sight restricted to products. Most prescriptions in Article 7 concern products and do not relate to the specificities of services. It is a question of interpretation how far they can be extended to cover also services. Advertising (reklama) is defined in Article 2 as

> dissemination of information in whatever form, with the help of whatever means, about natural or legal persons, products, ideas, or projects (advertising information) directed at an indefinite group of persons and intended to generate or maintain an interest in such natural or legal persons, products, ideas, and projects in order to promote the marketing of products, ideas, and projects.

The opening Article 1 tries to solve this problem by giving the following definition of advertising regulation:

> This Act regulates relationships which arise out of producing, placing and disseminating advertisements on markets for products, works, and services (in the following: products) of Russia, including markets of banking, insurance, and other services which are linked to the use of funds by citizens and legal persons, including securities.

The references made in Article 7 relate however mostly to products, e.g., to quality and quantity and to price. It is a question of interpretation to what extent deceptive promises as to the quality of holiday services, returns from investment funds, interest for credit, or costs of banking services are included. As far as financial services are concerned, the prohibitions of Article 17 will in most cases not be applicable because they are formulated in a very formal and narrow way and may easily be circumvented by advertisers.

Proof of deception. The concept of deception has been subject to much debate in the EC lately. Two tests may be used:

- a *subjective* test defines deception from the point of view of the persons to which the advertising is directed
- an *objective* test measuring the advertising message by means of a clearly defined yardstick, such as the opinion of an expert or a government standard.

The Russian legislator seems to take as a starting point an *objective* test by referring to the non-conformity of the advertising message

with "reality" (dejstvitel'nost'). Article 2 Nr. 2 of the EC Directive 84/450 is more flexible by using the following definition:

> "misleading advertising" means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to effect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

EC law uses an *objective* test because it refers to deception brought about "in any way," for example by information not matching reality. But it also allows for a *subjective* test, especially in cases where the advertising message is manifestly "true" from a scientific point of view but in reality deceives a (substantial) group of consumers to whom it is addressed. This is particularly true of advertising messages using half-truths, incomplete information, or omission of information important to the group of consumers to which it is addressed. EC law therefore catches the more subtle forms of modern deception, while the Russian standard may have difficulties in meeting this challenge. The importance of such subjective criteria founded not in objective reality but in the reactions of the group of consumers to which the advertising message is directed can again be shown in the marketing of services, like holiday, recreational, and financial services where promises about performance are hard to compare with reality but may still deceive consumers by omitting, e.g., additional costs or inconveniences. There are many examples of modern marketing where subtle, not easily discernable deception techniques are used. It is of course important that these "half-deceptions" are adequately regulated.

The concept of advertising. A fourth and final point concerns the very concept of advertising. The EC legislator uses the term "representation" which is broad enough to cover any type of message, including those which occur by implication, e.g., by the omission of information. The Russian legislator, in the definition of advertising, uses the term "information" which is somewhat narrower and does not necessarily cover an *omission* of information. Article 7 ZoR on deceptive advertising uses the term "statement" (svedenie) which comes closer to the EC term "representation." It is again a question of interpretation how these concepts are construed by SCAP and courts of law in order to avoid circumventions of the legislation.

Enforcement

Effective enforcement of the ban on deceptive advertising is extremely important to the efficient functioning of markets and for consumer protection, and the ZoR therefore pays considerable attention to implementation. Here, we will be concerned only with deception as the most important case of illegal advertising, not with the other detailed provisions.

Powers of SCAP. The agency to enforce the ZoR is, after a protracted battle in Parliament, the SCAP. This gives the agency an important new task which it will have to live up to over the next years. Article 26 is shaped in a similar way as Article 39 of the RCPA, but includes some specific points:

- Collection and distribution of information on illegal advertising is expressly foreseen as one of its tasks.
- The SCAP has power to issue orders to advertisers, agencies, and disseminators to stop illegal advertising. There is no express power to take or ask for interlocutory injunctions, but it will certainly use the informal procedure for sending "warning letters" to advertisers who do not comply with the Act.

Corrective advertising. The SCAP may order corrective advertising (kontrreklama) according to Article 29. A two-step procedure is foreseen. The first concerns the case where the advertiser complies voluntarily with the order, the second where he refuses to do so. Point 3 is concerned with the way an order for corrective advertising is implemented:

> Corrective advertising is accomplished by using the same dissemination facilities, duration, space, place and order of communication as has been used by the illegal advertising. The content of the corrective advertising message is agreed upon with the SCAP or its territorial organs which established the violation and issued the order to correct it.

Court action. The SCAP may also, in the interest of an indetermined number of consumers, take action against advertisers, agencies, and distributors before courts of law or arbitrage, and may demand to have transactions linked to illegal advertising rendered void. This is a new remedy; it is not clear from the text whether it includes damages, e.g., due to moral harm. The SCAP has a similar "parens

patriae" function as the U.S. State Attorney General; its powers are larger than those of the U.K. Office of Fair Trading and the Scandinavian Ombudsmen because the latter can only get or order cessation of the advertising, but not confer damages and certainly not interfere in individual transactions.

Self-Regulation

Self-control is regulated by Article 28. The organs of self-regulation do not yet exist and must be set up by the relevant professional organisations. Consumer associations will not participate. Self-regulation bodies will participate in rule making and give expert opinions on questions of advertising, e.g., with regard to deception or in cases where social values are invoked. They support the SCAP in the control of advertising and may raise complaints with the Attorney General in case of violations of advertising legislation. According to point 2:

> The institutions of self-regulation of advertising are entitled to take action before courts of law and arbitrage in the interest of the clients of advertising, including an undetermined number of clients, in case their rights protected by Russian advertising legislation are violated.

An order can be made to publish the judgment in the media.

This remedy is not so much directed at protecting consumers in the ordinary sense but clients of advertising agencies or disseminators, as defined in Article 2. It is not quite clear why these people cannot protect themselves; support by self-regulating bodies will usually not be needed, unlike in those cases where ordinary consumers are involved.

The ZoR contains some rights which are specifically protected, e.g. Article 8 point 2 which deals with cases of violation of business reputation. Article 31 point 1 para 2 gives persons whose rights or interests are violated by illegal advertising an action in damages before courts of law or arbitrage, including compensation of moral harm.

Consumer rights are not specifically protected. Therefore, Article 31 is not applicable to them. The article refers exclusively to the rights of clients of advertising, even though in Russian the term "potrebitel" is used for both consumers and (business) clients.

Liability for Illegal Advertising

Persons liable. In Article 30, the ZoR establishes a system of differentiated liability of advertisers, agencies, and disseminators:

- the advertiser is responsible for the contents of the advertising unless he can prove that the violation is due to the fault of the agency or the distributor
- the agency is responsible for violations with regard to the formulation, production, and preparation of the advertising
- the disseminator (in most cases print or electronic media) is responsible with regard to time and place of the advertisement, thus excluding responsibility for its contents.

Types of liability. Article 31 is concerned with the imposition of different types of liability. Civil liability is imposed on business entities (legal or individual persons) who act as advertisers, agencies, or disseminators. There are special rules for administrative sanctions against "normal" violations, and for criminal sanctions against intentional violations.

The Russian legislator tries to impose a rather complex and differentiated system of responsibilities for and remedies against illegal advertising. Most important is the recognition of an objective liability of the advertiser for illegal advertising not depending on fault, and the establishment of a system of state control, combined with self-regulation. Such a system is also foreseen in Articles 4 and 5 of EC Directive 84/450 which explicitly allows for self-regulation. Directive 84/450 imposes some kind of public control of advertising, be it by a state agency or by consumer associations. EC law does not force Member States to allow actions of cessation or damages by consumer associations. Therefore, in implementing the Advertising Directive, Member States have come to quite different results with respect to the enforcement mechanisms employed.

Interim measures. There is however one important difference between Russian and EC law. Article 4 (2) of Directive 84/450 states explicitly that

> Member States shall also make possible for the measures referred to in the first subparagraph (namely to order cessation of the advertising) to be taken under an accelerated procedure:

- either with interim effect, or
- with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Russian law has yet to develop a system of remedies under an "accelerated procedure."

ADDENDUM

After finalizing the paper on Russian consumer protection, the author received a copy of the new RCPA which was adopted by the Duma on 5 December 1995 and signed into law by President El'cin on 9 January, 1996; the Act has not yet been published in the Zobranie. The new Act takes up some of the proposals mentioned in my paper, but renumbers the relevant articles and makes some interesting changes which can be mentioned only very briefly here.

1. Article 1 now makes clear that consumer protection relations are governed by the (new) Civil Code and by the RCPA. This implicitly means that the special enforcement mechanisms for consumer law in Russia are not limited to the (new) RCPA but include the Civil Code.

2. Article 3 gives the consumer the right to education. This will involve establishing general education standards and programmes and organizing information systems. However, this right is very unspecific and has no direct effect.

3. Article 5 establishes rules on service periods (srok sluzbi), periods of use (srok godnosti), and guarantees. The producer (supplier) must establish service periods for goods which may, after a certain period of time, become dangerous to life, health, or the environment. For foodstuffs, cosmetics, medicines, and household chemicals periods of use must be given. In both cases, government has the power to determine which goods fall under this obligation. The producer may also set up guarantee periods. According to a new Article 6, the producer must provide after-sales service facilities so that products may be used throughout the service period.

4. The right to safety has been put into Article 7 instead of Article 5. A regulation for imported products is now found in Article 7 para 4 (2) because there must be information about mandatory certification.

5. Product and service liability is now to be found in a new regulation in Article 14 with some amendments stemming from the rules on service and use periods.

6. Article 26 on monopolistic services, which was criticized in my paper, has been completely eliminated in the new Act.

7. With regard to compensation, moral harm is now covered by Article 15 but no additional criteria for determining it are given. The new Act makes it clear that the amount of compensation does not depend on actual loss, thus confirming the Postanovlenie of the Plenum of the Supreme Court.

8. The provisions on enforcement have strengthened the role of SCAP. Article 39 has become Article 40. It may take actions to court in the interest of an undetermined group of consumers and will not have to pay a special tax in order to do so.

The new provisions will enter into force with their publication in the Official Gazette, with the exception of the rules on service periods, periods of use, and mandatory certification. It is still too early to evaluate them.

NOTES

[1] The final version was published in Rossijskaja Gazeta (RG) on 26 November 1994; earlier versions differed in some respects, e.g., with regard to the sphere of application.
[2] RG of 25 July 1995.
[3] Isvestija of 6 June 1991.
[4] Zobranie zakonodatel'stva Rossiskoj Federacii, 1995, No. 22, st. 1977.
[5] Judgment of 7.3.1990, Case C-362/88, (1990) European Court Report (ECR) I-667.
[6] Official Journal of the EC (OJ), L 95/29 of 21 April 1993.
[7] Case C-361/89, (1991) ECR I-1189.
[8] OJ 210/29 of 7 August, 1985.
[9] OJ 298/23 of 17 October, 1989.
[10] OJ 250/17 of 20 September, 1984.

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ZUSAMMENFASSUNG

Verbraucherschutz in Ländern mit sich entwickelnder Marktwirtschaft: Das Beispiel Rußland. Die Arbeit versucht eine erste Analyse des russischen Verbraucherschutzgesetzes von 1992 (RCPA) sowie des Werbegesetzes von 1995 (ZoR). Das russische Verbraucherrecht entwickelt sich dynamisch. Es ist hybrid angelegt, weil man seine Übergangscharakter in einer sich veränderenden ökonomischen Struktur beachten muß. Es ist Teil und Instrument der Veränderung der russischen Gesellschaft und Wirtschaft im Interesse des Verbrauchers.

Einige Lösungen des russischen Verbraucherrechts erscheinen sehr speziell und können nur als Reaktion auf Tagesprobleme angesehen werden. Andere sind durchaus innovativ, etwa ein positiver Beitrag zum Verbraucherschutz durch Schaffung von Verbraucherrechten, die durch eine zentrale Behörde (das Anti-Monopolkommitee – SCAP) mit ihren Regionalverwaltungen, durch lokale Beratungs- und Beschwerdestellen, durch Verbraucherorganisationen und individuelle Verbraucher durchgesetzt werden können. Weiterhin erscheint bemerkenswert: die Anerkennung der Besonderheiten des Verbraucherrechts; eine allgemeine vertragliche Informationsverpflichtung der Anbieter; eine Reihe detaillierte Rechtsbehelfe bei Verletzung von Verbraucherrechten; die verschuldensunabhängige Haftung für fehlerhafte Produkte und Dienstleistungen ohne den Entlastungsbeweis für Entwicklungsfehler;

Entschädigung auch für "moralische (d.h. nichtwirtschaftliche) Schäden"; die Einführung eine Art Verbandsklage bei Kollektivschäden.

Auf der anderen Seite gibt es sicherlich eine Reihe von Defiziten in der Gesetzgebung. Reformvorschläge betreffen u.a.: die Verbesserung des Verbraucherschutzes bei der Vertragsanbahnung, da das Werbegesetz im Bereich irreführender Werbung insoweit noch unvollständig ist; die Einführung einer besonderen Haftung von Importeuren sowohl im Kauf- wie im Produkthaftungsrecht; Streichung von Vorschriften aus der Zeit der Existenz der Planwirtschaft mit "Verkäufermärkten"; Schaffung besonderer Regeln zum Schutz bei Finanzdienstleistungen, insbesondere über Angabepflichten und Täuschungsverbote.

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