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CONSUMER PROTECTION ISSUES IN CROWDFUNDING

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ABSTRACT

Being an emerging alternative financing model which relies upon raising money from a large number of sources, crowdfunding may take many forms. They range from crowd sponsoring, based on collecting funds from donators in return for either gratification of a project owner, or a symbolic reward such as the possibility of appearing in a crowdfunded movie, to crowd investing and crowd lending which enable investors and lenders to gain financial profit. An important role in crowdfunding is played by various internet platforms which enable the project owners to advertise their project and allow potential contributors to inform themselves on the project and contribute money. While the advantage of this financing model is unquestionable due to the fact that a number of projects in Europe would not have a necessary source of financing without it, there are a number of issues connected to it. As a consequence of the various existing financing models which are further evolving and different parties who take part in crowdfunding, the legal framework for crowdfunding in the European Union and its Member States is not clear at this stage. One of the distinct concerns is the applicability of the EU consumer protection acquis, particularly to contracts concluded at a distance, unfair contract terms, unfair commercial practices and consumer credit. The aim of this paper is to identify the crowdfunding models which may be subject to mentioned consumer protection legislation. While assumption that some contributors could be characterised as consumers appears to be rather straightforward, such characterisation in regard to project owners is unexpected. Additional controversy is related to whether in crowd investing model, investors may enjoy protection as consumers. The analysis of legal sources will include relevant EU directives and where necessary comparative outline of Member States laws through which the directives were implemented into national legislation.

Keywords: *alternative funding, consumer protection, crowdfunding, European Union law*

1. INTRODUCTION

We live in a mass consumer society for many decades (Kaelble, 2004, p. 288) and the consumer protection legislation has been developed as a response to this socio-economic development. Crowdfunding (hereinafter: CF) as means of securing capital for the purpose of financing projects which can be of various types, ranging from private to professional, from start-up to local community action, is yet another business model which has been facilitated by the information technology developments. Motives to support such projects may vary, but it is reasonable to assume that in many cases, especially within the more sophisticated CF models, they are linked to the expectation of securing financial benefit. The purpose of this article is to study the area where consumer protection and CF practices interconnect by analysing the applicability of the European Union consumer protection legislation over the individual relationships within the CF structure. With that in mind, the next section contains the overview of the pertinent EU consumer protection

legal instruments. Further section provides an account of the notion of ‘consumer’ as reduced to its core constituting elements. Final section is intended for discussing the particular roles which are played by parties to the tripartite CF structure in their bilateral relationships (Kunda, 2016, p. 254) in order to identify potential consumers.

2. SETTING THE SCENE – RELEVANT EU CONSUMER PROTECTION *ACQUIS*

The necessity of protecting consumer rights to ensure proper functioning of the internal market was recognised early on by the European legislator. Thus, the enactment of the legal instruments aimed at consumer protection commenced prior to being formally declared a regulatory competence of the EU in 1993, as a result of entry into force of the Treaty of Maastricht on the European Union (OJ C 191, 29.7.1992, pp. 1-110). The Treaty of Maastricht introduced into the then Treaty establishing the European Community the provision of Art. 129a according to which the task of the European Community was to contribute to the attainment of a high level of consumer protection (Weatherhill, 2005, pp. 1-19). Up until now, this task evolved into the obligation of the EU to afford a high level of protection to consumer rights (see for instance EU Consumer Policy Strategy for 2007-2013). Consumer protection is one of the shared competences of the EU and Member States pursuant to Art. 4 of the Consolidated version of the Treaty on the Functioning of the European Union. The EU *acquis* encompasses large number of legal instruments which afford substantive law protection to consumers, the following being of particular relevance for the regulation of CF-related activities:

- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ L 304, 22.11.2011, pp. 64-88, hereinafter: the Consumer Rights Directive). This Directive sets the information requirements for distance and off-premises contracts, including information about the functionality and interoperability of digital content. It regulates the right of withdrawal in terms of length, standard form, procedure and effects. In addition, it lays down rules on delivery and passing of risk applicable to contracts for the sale of goods as well as certain rules applicable to all types of consumer contracts, such as rules prohibiting the use of pre-ticked boxes on websites for charging extra payments in addition to the remuneration for the trader's main contractual obligation;
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, pp. 29-34, hereinafter: the Unfair Contract Terms Directive), amended by the EU Consumer Rights Directive. The Directive offers protection to consumers against unfair contract terms which has not been individually negotiated (such as in pre-formulated standard contracts) and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The Directive also requires traders to draft contract terms in plain and intelligible language, whereas ambiguities are to be interpreted *in favorem consumatoris*;
- Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (OJ L 133, 22.5.2008, pp. 66-92, hereinafter: the Consumer Credit Directive). Under this Directive, creditors are obliged to provide to consumers two essential information: a comprehensible set of information in a standardised form and sufficiently ahead of the conclusion of the contract and also as part of the credit agreement, and the Annual Percentage Rate of Charge in a single figure, harmonised at EU level, representing the total cost of the credit. Additionally, the Directive grants two important rights to consumers: the right to withdraw from the credit agreement without

giving any reason within a period of 14 days after the conclusion of the contract, and the right to repay the credit early at any time;

- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 49, 11.6.2005, pp. 22-39, hereinafter: the Unfair Commercial Practices Directive). Thanks to this directive it is possible to curb a broad range of online and offline unfair business practices, such as providing untruthful information to consumers or using aggressive marketing techniques to influence their choices;
- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, pp. 16–24; hereinafter: the Distance Marketing of Financial Services Directive). Two most important consumer rights under this Directive are: the right to obtain pre-contractual information listed in therein and the right of withdrawal from a ‘distance contract’ within 14 days without justification;
- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (OJ L 165, 18.6.2013, pp. 63–79; hereinafter: the Directive on consumer ADR). Under this Directive obligations are placed upon traders to inform consumers about an ADR entity which covers the trader where the trader has committed or is obliged to use the ADR entity to resolve disputes with consumers; and
- Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (OJ L 165, 18.6.2013, p. 1–12; hereinafter: the Regulation on consumer ODR). Under this Regulation traders established in EU are obliged to inform consumers of their e-mail address and of the ODR platform by means an electronic link on their website. Furthermore, traders established in EU, which are engaged in online sales or service contracts and committed or obliged to use an ADR entity to resolve disputes with consumers, are obliged to provide to consumers: an electronic link to the ODR platform in an email, if a commercial offer is made to a consumer via e-mail; and general information about the ODR platform along with conditions applicable to online sales and service contracts.

Apart from these substantive law instruments, consumers are guaranteed protection under the EU private international law instruments which contain provisions the aim of which is to level the playing field by granting a more favourable procedural position to the consumer (Tomljenović, 2005; Lazić, 2014):

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, pp. 1-32, hereinafter: the Brussels I bis Regulation). The Regulation assures that the trader may sue consumer only before the place of the consumer’s domicile, while the consumer may sue the trader before the courts of either the trader’s or the consumer’s domicile. There is also a limited option of prorogation of jurisdiction; and

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, pp. 6-16, hereinafter: the Rome I Regulation). This Regulation is intended to assure the application of the law of the consumer’s habitual residence, whenever there is no parties’ choice of law. If parties have chosen the applicable law that law will apply to the extent it does not deprive the consumer of the protection afforded to it under the law of its habitual residence.

The EU consumer legislation generally applies in contractual relationships, the exception among the abovementioned directives being the Unfair Commercial Practices Directive (see Art. 3(1)). For this reason, it is important to highlight that the below discussion is limited to contractual relationships between parties to the tripartite CF structure (Kunda, 2016, p. 256).

3. THE NOTION OF ‘CONSUMER’ IN EU PRIVATE LAW

Establishing the notion of ‘consumer’ in EU law is not a straightforward task, given that lack of a single definition and the variations in the wording employed in different legal instruments. Pursuant to Art. 2(1)(b) of the Unfair Contract Terms Directive, Art. 3(1)(1) of the Consumer Credit Directive and Art. 2(d) of the Distance Marketing of Financial Services Directive, consumer is a natural person who acts for purposes which are outside his or her trade, business or profession. The wording slightly differs in Art. 2(1) of the Consumer Rights Directive, Art. 2(1)(a) of the Unfair Commercial Practices Directive, Rec. 18 of the Directive on consumer ADR and Rec. 13 of the Regulation on consumer ODR in which, besides trade, business or profession, the consumer must act outside of his or her craft, as well. In sources of the EU private international law, namely Art. 17(1) of the Brussels I bis Regulation and Art. 6(1) the Rome I Regulation, the consumer is defined as the natural person acting for a purpose which can be regarded as being outside his or her trade or profession.

Regardless of the differences in defining the consumer, consumer *acquis* contains a common core according to which two elements must be satisfied for a person to fall into the ambit of that corpus or rules. First, only natural persons are entitled to consumer protection, and, second, they must act outside of their economic activity (Kingisepp, Väriv, 2011, p. 45).

3.1. Natural person

Under EU law, legal persons cannot be considered as consumers. The requirement that the consumer is the natural person is based on the understanding that only a natural person may be in a position of a weaker party due to his or her weaker economic or social position when compared to that of the trader (Mišćenić, 2016, p. 149). The CJEU case law repeatedly confirms this, one of the earliest example being *Bertrand* (judgment of 21 June 1978, *Bertrand*, C-150/77, EU:C:1978:137), the case which interpreted the provisions of the Brussels Convention of 27 September 1968

on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version OJ C 27, 26.1.1998, pp. 1-27, hereinafter: the Brussels Convention), a legal predecessor to the Brussels I bis Regulation. The CJEU held that Brussels I provisions protecting consumers are not applicable in the case of a sale of goods between businesses.

This standing was later confirmed in *Di Pinto* (judgment of 14 March 1991, *Di Pinto*, C-361/89, EU:C:1991:118). The case concerned the interpretation of the Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, pp. 31-33, hereinafter: the Directive on Contracts Negotiated outside Business Premises) which has been repealed in 2014 when the Consumer Rights Directive

entered into force. The criminal proceedings were instituted against Mr. Di Pinto because his representatives were canvassing business owners who expressed the intention of selling their business. In the course of proceedings, Mr. Di Pinto argued that business owners cannot invoke national legislation by which the Directive on Contracts Negotiated outside Business Premises was implemented. The CJEU emphasised the importance of narrow interpretation of the term ‘consumer’ by explaining that a normally well-informed trader is aware of the value of his or her business and does not act impulsively. By doing so, it departed from the proposition of the Advocate General Mischo who advocated extension of the consumer protection to businesses when they enter into contracts unrelated to their trade or profession (opinion of Advocate General Mischo delivered on 12 December 1990, in *Di Pinto*, C-361/89, EU:C:1990:462). However, the CJEU further explained that in case of minimum harmonisation directives, such as the Directive on Contracts Negotiated outside Business Premises, the national legislator may extend the protection afforded to consumers even to traders when implementing the directive into national legislation. It must be noted that several Member States did so (Ebers, 2008, pp. 721-726). In another case (Judgment of 21 November 2001, *Cape and Idealservice MN RE*, C-541/99, EU:C:2001:625), the CJEU further clarified the notion of the consumer while interpreting the Unfair Contract Terms Directive. The CJEU held that companies which concluded contracts for the supply of automatic drink dispensers, which were intended to be used by the companies’ staff, were not covered by the term ‘consumer’, even though the contracts were unconnected to the companies’ trade or business.

3.2 Private purpose

Natural persons may sometimes be denied legal remedies envisaged for consumer. This will be the case when a natural person acts for the purposes of his or her trade or professional activity (judgment of 19 January 1993, *Shearson Lehman Hutton v TVB*, C-89/91, EU:C:1993:15). The restrictive interpretation of the notion ‘consumer’ goes to the extent that even natural person who, acting outside of his trade or profession, guarantees repayment of the debt of another person acting as a part of his trade or profession cannot be afforded consumer protection (judgment of 17 March 1998, *Bayerische Hypotheken- und Wechselbank v Dietzinger*, C-45/96, EU:C:1998:111).

The concept of ‘private purpose’ as one of the elements of the consumer contract was discussed before the CJEU for the purposes of the Brussels Convention on several occasions. In one such case, the CJEU established a principle that strict understanding of the concept of consumer requires that even the natural person who enters into contract with the aim of pursuing a trade or business in the future, cannot be regarded as a consumer, despite the fact that he or she may not pursue a professional activity at the present time (judgment of 3 July 1997, *Benincasa v Dentalkit*, C-269/95, EU:C:1997:337).

In determining whether the natural person qualifies as a consumer, contracts concluded for a dual purpose raised particular concern. In these contracts a natural person acts partly for the purposes of his or her trade or profession and partly for his or her private purposes. The CJEU had a chance to clarify the legal nature of such contracts in *Gruber* (judgment of 20 January 2005, *Gruber*, C-464/01, EU:C:2005:32), the case decided under the Brussels Convention. The CJEU established a principle pursuant to which it is not sufficient that private purpose is predominant in order for the contract to be considered a consumer contract; rather the trade or professional purpose has to be so limited as to be negligible in the overall context of the contract. The same principle was included in the Rec. 17 of the Consumer Rights Directive, Rec. 18 of the Directive on consumer ADR and Rec. 13 of the Regulation on consumer ODR.

4. WHO CAN BE CONSIDERED AS A CONSUMER IN CROWDFUNDING?

The characterisation of a certain party as the consumer depends both on the party's particular characteristics and circumstances in which that party acts and on the CF model. This having been said, it has to be observed that irrespective of the CF model the CFP will never act as a consumer (Kunda, 2016, p. 259). CFP is an online platform which receives applications from the project owners. If it accepts to market the project, it will act as intermediary between the project owner and the funders, its main task being collecting money from funders in favour of the project owner. The CFP relies on its knowledge, knowhow and previous experience while connecting the project owner and funders (Danmayr, 2014, pp. 26-28). Even if the CFP is operated by a natural person, the second condition would not be fulfilled.

4.1. Crowd donations, crowd sponsoring and crowd-preselling

Turning to the CF models (for a taxonomy see Hemer, 2011, 11-13), the crowd donations, crowd sponsoring and crowd-preselling show certain similarities. Funders contribute money via CFP to a project owner. The project owner either provides a reward, a promotional item or an early version of a product to funders in return for their money. The position of funders may be observed in relationship to the project owner and the CFP. Funders, who are natural persons and who act outside of their trade or profession are considered consumers in their relationship with the project owner, provided that the project owner is a natural or legal person and acts for the purposes of his or her trade or profession. Such relationship is often referred to as a business-to-consumer (B2C) transaction. If the project owner is a natural person acting for his or her private purposes, the contract at issue is a consumer-to-consumer (C2C) transaction and as such not covered by the EU consumer *acquis* (Hondius, 2016, p. 95). However, in majority of cases the project owner, who collects money for his or her project, does so in the context of his or her trade or profession (Kunda, 2016, p. 259). Because CFPs act as traders or professionals, in the relationship between them and funders the latter are considered consumers, provided they are natural persons acting for private purposes.

In the relationships between funders and project owners, the project owners cannot be regarded as consumers. The reason for this is the fact that consumer-to-business (C2B) transactions are not protected under the applicable consumer *acquis*. C2B transactions are the ones in which the consumer sells goods or provides services and the trader is the one buying or receiving them. The Unfair Commercial Practices Directive excludes C2B transactions from its ambit (see the full title of the Unfair Commercial Practices Directive and its Art. 2(1)(d)). In the Consumer Rights Directive the exclusion of the C2B contracts derives from the definition of the sales and service contracts according to which the consumer has to be the buyer or the recipient of the services (Art. 2(1)(5) and (6) of the Consumer Rights Directive). Likewise, in the preamble of the Unfair Contract Terms Directive the specific wording is used identifying the contracts concluded between the seller of goods or supplier of services on one hand, and the consumer on the other. Therefore, in the unlikely case of a project owner who is a natural person, acting for his or her private purposes, the project owner will not be protected by the rights specifically designed for consumers. The Regulation on consumer ODR is applicable to contractual obligations stemming from online sales or service contracts between a consumer resident in the EU and a trader established in the EU where the ADR proceedings have been initiated by the consumer against the trader, whereas the situations in which they are initiated by a trader against a consumer, the Regulation applies in

so far as the legislation of the Member State where the consumer is habitually resident allows for such disputes to be resolved through the intervention of an ADR entity (Art. 2(1) and (2)). The Directive on consumer ADR applies to contractual obligations stemming from sales contracts or service contracts between a trader established in the EU and a consumer resident in the EU, but only to the proceedings initiated by a consumer against a trader (Art. 1(1) and (2)(g)).

4.2. Crowd lending

In the context of crowd lending, an essential issue is whether the Consumer Rights Directive is applicable. In answering this question, the relationship between the project owner and the funder has to be analysed. In Art. 3(1)(c) of the Consumer Rights Directive a credit agreement is defined as an agreement in which “a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation” whereas the creditor is a natural or a legal person granting credit in the course of his or her trade, business or profession (Art. 3(1)(b)). It follows that the project owner may be characterised as a consumer for the purposes of the Consumer Rights Directive in limited number of cases: if he or she is a natural person acting for private purposes and the funder is acting for the purposes within his or her trade or profession, regardless of the fact whether the latter is a natural or a legal person.

The funder will never be considered as the consumer for the purposes of the Consumer Credit Directive because the consumer has to be the party to whom the credit is granted. The applicability of the Consumer Credit Directive is further limited by Art. 2(2)(h) according to which this Directive does not apply if an investment firm or credit institution lends funds to a consumer for the purposes of investing in a financial instrument regulated by Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1, hereinafter: the MiFID), where the company providing the credit would be involved in that transaction. Therefore, if the CFP were authorised under the MiFID and provided credit to funders so that they could invest in the project marketed by that CFP, the Consumer Credit Directive would not apply (ESMA, 2014, pp. 38-39).

It seems that there is no limitation for application of the Distance Marketing of Financial Services Directive, which needs to be observed especially by the CFP which might be involved, in capacity of a supplier or intermediary, in the conclusion of a ‘distance contract’ with a consumer (Crowdfunding in the EU Capital Markets Union, 2016, p. 27).

A final note on the crowd lending concerns the applicability of the Regulation on consumer ODR and the Directive on consumer ADR under the same conditions are in the previously discussed CF models.

4.3. Crowd investing

The last CF model, crowd investing, generally has to be authorised. This particularly refers to CFPs. There are 4 models of authorisation which are not mutually exclusive and may be combined in certain Member States: 1) authorisation under the MiFID; 2) authorisation under domestic regime under the Art. 3 of the MiFID exemption; 3) authorisation for non-MiFID financial instruments; and 4) authorisation outside the MiFID framework (Crowdfunding in the EU Capital Markets Union, 2016, pp. 19-20). The authorisation model comes along with a more detailed legal regime for the CFPs, thus different capital requirements, conduct of business rules, conflict of interest rules and organisation requirements may apply. Likewise, the investor protection measures

may vary accordingly and may include obligation to carry out a suitability test or an appropriateness test, provide information requirements and risk warnings, carry out due diligence, abide by maximum investable amounts etc. In addition, the issuers of transferable securities as defined in MiFID are subject to prospectus requirements under the Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, pp. 64-89) involving approval by regulatory authority and publication.

Besides these special legal regimes deriving from either EU or national law, it is essential to verify whether certain instruments making part of the EU consumer protection *acquis* are applicable. Financial services are excluded from the scope of application of the Consumer Rights Directive (Art. 3(3)(d)). In contrast, the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive do not contain equivalent exclusions. Arguably, the Unfair Commercial Practices Directive might apply if the funders are natural persons acting outside of their trade or profession (ESMA, 2014, p. 37; Crowdfunding in the EU Capital Markets Union, 2016, pp. 19-20). The debate whether this part of consumer protection *acquis* in which there is no explicit exclusion of the matter applies to crowd investing comes down to a single issue – whether an investor may be considered as a consumer. Even though traditionally this is a controversial matter (Čulinović-Herc, 2005), modern tendencies favour extending the consumer protection to retail investors (Cherednychenko, 2010). In the aftermath of the most recent economic crisis, the ‘consumerisation’ of the retail investor, based on interventionist and precautionary approach, is supported by viewing the retail investors as buyers of essential-for-welfare financial services and investment products, rather than risk-takers, asset accumulators and utility maximisers (Moloney, 2012). It seems that the situation in which the MiFID in particular severely neglects private enforcement mechanisms placing the accent on the public enforcement of investor protection rules (Cherednychenko, 2010, p. 423), leaves the door opened for the consumer protective rules to step in.

Moreover, similarly to the situation in the lending-based crowdfunding, the Distance Marketing of Financial Services Directive may also apply whenever a CFP, acting as a supplier or intermediary, is involved in the conclusion of a ‘distance contract’ for a financial services product and engages in ‘business-to-consumer commercial practices’ (Crowdfunding in the EU Capital Markets Union, 2016, pp. 18-23). Again, the Regulation on consumer ODR and the Directive on consumer ADR are applicable in the investment-based crowdfunding under the same conditions as in the previously discussed CF models.

5. CONCLUSION

Although a general conclusion on whether consumer protection legislation applies in the context of CF is difficult to make, the study of roles which the parties to bilateral relationships in various CF models play offer sufficient basis for ascertaining that in the simplest forms of crowd donations, crowd sponsoring and crowd-preselling a funder who is a natural person and acts outside his or her trade or profession may be characterised as a consumer. In the context of crowd lending, a project owner may be considered as a consumer under the Consumer Rights Directive but only if he or she is a natural person acting for private purposes and the funder is acting for the purposes within his or her trade or profession. However, the funder may never be considered as the consumer within the meaning of the Consumer Credit Directive because the consumer has to be the party to whom the credit is granted. Furthermore, if the CFP were authorised under the MiFID and provided

credit to funders so that they could invest in the project marketed by that CFP, the Consumer Credit Directive would not apply. While the Consumer Rights Directive does not apply to the investment-based crowdfunding, the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive as well as the Regulation on consumer ODR and the Directive on consumer ADR seem to be applicable, but the end result will eventually depend on the resolution of the doubt whether a retail investor may be considered as consumer. It is submitted that, in the absence of a specific exclusion, the doubt should be resolved in favour of the application of the consumer protection legislation.

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