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Prof. Dr. Mehmet C. AKAD

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Assoc. Prof. Dr. Sci. Neda ZDRAVEVA^(*)

Abstract:

Regardless of the marketplace, being physical or online one, the position of the consumer remains the same - it is the weaker party to the contract due to their lesser bargaining powers and the lack of knowledge, as established by the case-law of the Court of Justice of the European Union. The rules of the market should provide that the disproportionality of the information that the trader and consumer have is balanced by protection rules that provide the consumer adequate remedies in particular in the digital market shaped by the fast technological developments. In 2019 the consumer law of the European Union has been significantly changed by three new directives that set (new) rules on the protection of consumers in contracts for supply of goods and services including digital content and digital services. The article examines the scope of these directives and the legislative approach as well as the specific novelties they introduce with regard to the protection of consumers in consumer contracts.

Keywords:

Sale of Goods, Digital Content, Digital Services, Lack of Conformity, Remedies.

Öz:

Fiziki ya da çevrimiçi olsun, pazar yerinden bağımsız olarak tüketicinin konumu aynıdır; Avrupa Birliği Adalet Divanı içtihadınca da ortaya konduğu üzere, pazarlık gücünün zayıflığı ve bilgi eksikliği dolayısıyla sözleşmenin zayıf tarafıdır. Piyasa kuralları, özellikle hızlı teknolojik gelişmelerle şekillenen dijital pazarda, sağlayıcı/satıcı ile tüketici arasındaki bilgi orantısızlığını dengeleyen nitelikte tüketiciye hukuki koruma sunan kuralları sağlamalıdır. Dijital içerik ve dijital hizmetleri de kapsayan mal ve hizmetlerin sağlanmasını konu edinen sözleşmelerde tüketicinin korunmasına dair (yeni) kurallar koyan üç yeni yönerge ile Avrupa Birliği tüketici hukuku, 2019'da önemli ölçüde değişmiştir. Bu çalışma, söz konusu yönergelerin kapsamını, yasama yaklaşımını ve tüketici sözleşmelerinde tüketicinin korunması konusunda getirdiği özellikli yenilikleri incelemektedir.

Anahtar Kelimeler:

Malların Satışı, Dijital İçerik, Dijital Hizmetler, Uygunluğun Bulunmaması, Hukuki Korumalar.

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1. The Marketplace and the Legislative Approach

The CoViD-19 global crisis accelerated the process of changes in the market. The supermarkets' racks have been replaced by pixels, shopping charts by icons and money by data. The 'goods' available on the market change - the digital become the new consumers' demand. The behaviour of the consumers may have changed but their need to be protected remains the same, if not arises. The information disbalance between the trader and the consumer increases, as the technological advancements do not always mean a level of technological literacy that supports the process. The consumer protection legislation reacts to these changes. The law does not develop so fast as to 'predict' them. Regardless of the marketplace, being physical or online, the position of the consumer remains the same - it is the weaker party to the contract due to their lesser bargaining powers and the lack of knowledge, as established by the case-law of the Court of Justice of the European Union.¹ The rules of the market should provide that the disproportionality of the information that the trader and consumer have is balanced by protection rules that provide the consumer adequate remedies in particular in the digital market shaped by the fast technological developments. It is considered that many problems can be solved by shaping the interpretation and application of the existing European and national rules according to the new needs of the 'digital world'. However, when the developments are so ground-breaking that it is no longer possible to adapt existing legal rules to new circumstances it is necessary to reshape them. In doing so, the legislator should draw up new rules having adequately weighing all the relevant elements of the new market relationships, having in mind that rules that are too stringent and limiting

¹ *OPR-Finance s. r.c o.v. GK*, ECLI:EU:C:2020:167, para. 19; *Ernst Georg Radlinger and Helena Radlingerová v Finway a.s* ECLI:EU:C:2016:283, para. 63; *ERSTE Bank Hungary Zrt v Attila Sugár*, ECLI:EU:C:2015:637, para. 39; *Monika Kušionová v SMART Capital, a.s.*, ECLI:EU:C:2014:2189, para. 48.

may have a disruptive effect on technological progress and on economic developments.²

The year of 2021 is the year when a new set of rules in consumer protection will become applicable. In 2019, three new directives have been enacted so as to enable legal environment for proper function of the single market that is becoming more and more digital.

Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services,³ provides rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or digital services, in particular, rules on: - the conformity of digital content or a digital service with the contract, - remedies in the event of a lack of such conformity or a failure to supply, and the modalities for the exercise of those remedies, and - the modification of digital content or a digital service. Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC⁴ puts forward new rules on the consumer sales and related guarantees (regulated by Directive 1999/44/EC) in particular having in mind the digitalization of the market. Both directives are maximum harmonization directives that provide an option for application of own rules of the states only in the core issues of the contract law. Both of the directives are to be transposed in the national legislation by June 2021 and to be applicable starting January 2022. Directive

² DE FRANCESCHI, Alberto, "European Contract Law and the Digital Single Market: Current Issues and New Perspectives", in DE FRANCESCHI, Alberto (ed.) *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution*, Intersentia, Cambridge - Antwerp - Portland, 2016, p. 4.

³ *OJ L 136*, 22.5.2019; Hereinafter: Digital Content and Digital Services Directive or Directive (EU) 2019/770 or DCD.

⁴ *OJ L 136*, 22.5.2019; Hereinafter: Sale of Goods Directive or Directive (EU) 2019/771 or SGD.

(EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules⁵ significantly changes the *Consumers' Acquis*. The directive modifies and amends the existing rules on unfair contract terms (Directive 93/13/EEC),⁶ unfair commercial practices (Directive 2005/29/EC),⁷ price indications (Directive 98/6/EC)⁸ and consumer rights (Directive 2011/83/EU).⁹ The objective of the directive is better enforcement and modernization of consumer protection law, dealing with the issues of price indication, rights of consumers in particular in distance sales and unfair business-to-consumer commercial practices in the internal market. The Directive explicitly recognizes that these objectives 'cannot be sufficiently achieved by the Member States but can rather, by reason of the Union-wide character of the problem, be better achieved at Union level', so it adopts the specific measures. Again, the leverage of the states to provide for their own rules is rather low.

⁵ *OJ L 328, 18.12.2019*; Hereinafter: Enforcement and Modernization Directive or Directive (EU) 2019/2161 or EMD.

⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L 95*.

⁷ 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 149*.

⁸ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, *OJ L 80*.

⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ L 304*; Hereinafter: Consumer Rights Directive of Directive 2011/83/EU or CRD.

The DCD and the SGD came as a result of the efforts of the European Union to develop harmonised rules aimed to enable the potentials of the digital single market in the EU to be realized to full extent. In 2015 the European Commission proposed a directive on contracts for the supply of digital content the proposals for the directives¹⁰ were part of the Commission's Digital Single Market Strategy, aiming to "reduce barriers and offer more opportunities for consumers and businesses to contract across European Union borders in a legal, safe, secure and affordable way."¹¹ The proposals were also consistent with the Commission's 2018 New Deal for Consumers strategy,¹² where the importance of these proposals "to provide consumers with clear and effective rights when accessing digital content and to ensure that both consumers and businesses can rely on uniform and effective rules across Europe" was emphasised and both proposals were expressly acknowledged as "a central element of the Digital Single Market strategy aiming to modernise consumer contract rules". Both of the proposals, aiming for maximum harmonisation, sought to ensure that traders in the Internal Market are not deterred from cross-border trading by differences in mandatory national contract laws, while providing consumers with a higher level of protection. In addition to this, there were discussions

¹⁰ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content; COM/2015/0634 final - 2015/0287 (COD); hereinafter: proposal Digital Content Directive; Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods; COM/2015/0635 final - 2015/0288 (COD); hereinafter: proposal Directive on Online Sale of Goods.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM (2015) 192 final.

¹² Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee: A New Deal for Consumers, Brussels, 11.4.2018 COM (2018) 183 final.

that the main reason for the directives was in fact “the stimulation of the EU economy, while the creation of consumer trust in the internal market is being used as a means to achieve growth.”¹³ The deliberation on the directives took almost four years. The regulation of the matters covered by the DCD was a novelty, while the proposal on the Sale of Goods Directive intervened by improving the rules on a matter already regulated in the consumer contract law of the EU and the member states.¹⁴ The fact that the scope of the proposal Directive on Online Sale of Goods included only on the distance sales contracts made the whole system seem unworkable, so it was argued that “the Member States will only agree to adopt the proposal Directive on Online Sale of Goods if its scope is enlarged to include also on- and off-premises contracts”.¹⁵ Finally, in January 2019, the Council and Parliament agreed on “an ambitious yet balanced compromise between guaranteeing rights for European consumers while creating new business opportunities for EU companies. Consumers will now be better protected when they buy a shirt in a shop, a smart fridge online or download music. Companies will be able to cut red tape when they want to expand and start selling across the Union.”¹⁶ In May 2019 both of the directives were adopted.

The Directive (EU) 2019/2161 is a result of the efforts of the European Commission to improve EU consumer law through its Regulatory Fitness and Performance Programme (REFIT). Within the REFIT, consumer and marketing law assessment was carried out by the Commission in 2016 and 2017, that concluded that ‘the effectiveness of Union consumer protection law is compromised by a lack of awareness among both traders and consumers and that existing means of redress could be taken advantage of more often’.¹⁷ The MED most significantly affects the rules on unfair commercial practices. The aim is to ensure that there is a clear framework for individual remedies that could provide for private enforcement as well. In addition, the Enforcement and Modernization Directive provides access to compensation for damage and, where relevant, a price reduction or termination of the contract, in a proportionate and effective manner.¹⁸ Further the directive broadens the notion of product, that now includes not only goods and services, but also digital service and digital content,¹⁹ adequate to the needs of the digital market and to the rules introduced by the Digital Content and Digital Services Directive and the Sale of Goods Directive. The purpose of the directive to provide better enforcement and modernisation of consumer law. This is seen through “First, the Directive aims to strengthen and

¹³ LEHMANN, Matthias, “A Question of Coherence: The Proposals on EU Contract Law Rules on Digital Content and Online Sales”, *Maastricht Journal of European and Comparative Law*, vol. 23, no. 5, 2016, p. 755-756.

¹⁴ The rules established by the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12. (hereinafter: Consumer Sales Directive or Directive 1999/44/EC).

¹⁵ LOOS, Marco, *European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content*, Amsterdam Law School Research Paper No. 2016-27, Centre for the Study of European Contract Law Working Paper Series No. 2016-08, p. 2 Available at SSRN: <https://ssrn.com/abstract=2789398> or <http://dx.doi.org/10.2139/ssrn.2789398>.

¹⁶ TOADER, Tudorel, Minister of Justice of Romania, Press Release of the Council of the EU, ‘Council and Parliament agree on new rules for contracts for

the sale of goods and digital content’ 29 January 2019, [<https://www.consilium.europa.eu/en/press/press-releases/2019/01/29/council-and-parliament-agree-on-new-rules-for-contracts-for-the-sales-of-goods-and-digital-content/>] Accessed 1 April 2021.

¹⁷ Recital 2, EMD; See further: Study for the Fitness Check of EU consumer and marketing law Final report. Part 1, main report <https://op.europa.eu/s/pbw0> [last visit 01.05.2020], Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council COM(2017) 259 final.

¹⁸ Article 3(1)(5) of EMD introducing Article 11a in CRD.

¹⁹ Article 3(1)(a), EMD.

further develop the existing common European enforcement mechanism of consumer law, which had previously demonstrated a number of shortcomings. Second, the Directive adapts the existing legislative framework to adequately address the challenges to consumer law brought about by new technologies, such as the development of online platforms or trader's increasing engagement in new forms of unfair commercial practices, typical for the digital market."²⁰

The three directives are maximum harmonisation directives. This approach is significantly different to the ones existing in the legislation that is affected by all of them. While only in the Directive 2011/83/EU had the targeted harmonisation approach - maximum harmonisation only where necessary for the objectives of the directive, the others were minimum harmonisation directives allowing the member states to introduce or maintain more stringent provisions for the purpose of the consumer protection. This, in course of the years, resulted with differences in the legislative framework that were hindering the efforts of the internal market. Thus, maximum harmonisation was provided as a principal rule. Still, there are certain exceptions to this. The DCD and the SGD do not interfere with the core national rules related to the formation and validity of the contract as well as the right to compensation for damage as a remedy for lack of conformity²¹ including time limits for liability for lack of conformity²² and notification requirement.²³ The EMD is a maximum harmonisation directive, but when it comes to the liability for unfair commercial practices it provides for the possibility the member states to maintain or introduce rights to other remedies such as repair or replacement for consumers harmed by unfair commercial practices in order to

ensure full removal of the effects of such practices. Member States are also not prevented from determining conditions for the application and effects of remedies for consumers.²⁴

2. The New General Rules on Contracts

2.1. Where the Contracts may be Concluded - Rules on Online Marketplace

The online marketplace is defined as a 'service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers.'²⁵ The definition is made in a similar manner as in Regulation (EU) No 524/2013²⁶ and Directive (EU) 2016/1148²⁷ but updated and rendered more technologically neutral in order to cover new technologies.²⁸ The definition of 'online marketplace' is relevant in reference to the unfair commercial practices and the consumer rights, for the information consumers using online marketplaces should receive, whether they enter into a contract with a trader or a non-trader, such as another consumer. Such information is of essence for the consumer so as to be able to establish if they enter in B2C contract or C2C contract as the consumer protection legislation of the EU does not provide protection mechanisms for the later and they will rely in the national contract law. The confirmation of the status of the trader is not an obligation of the providers, defined as 'any trader which

²⁰ ĐUROVIĆ, Mateja. "Adaptation of Consumer Law to the Digital Age: EU Directive 2019/2161 on Modernisation and Better/ Enforcement of Consumer Law." *Annals of the Faculty of Law in Belgrade - International Edition*, vol. 2020, no. 2, 2020, p. 64.

²¹ Recitals (12), (34), (40) and Article 3(10), DCD.

²² Article 10 (3) and (5), SGD.

²³ Article 12, SGD.

²⁴ Recital 16, EMD.

²⁵ Article 3(1)(b), EMD.

²⁶ Article 4(1)(1)(f) of 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 (Regulation on consumer ODR), *OJ L 165*.

²⁷ Article 4 (1)(1)(17) of Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, *OJ L 194*.

²⁸ Recital 25, EMD.

provides an online marketplace to consumers'.²⁹ They are obliged to inform consumers whether the third party offering goods, services or digital content is a trader or non-trader, however based on the declaration made to them by the third party.³⁰ When the third party declares its status to be that of a non-trader, providers of online marketplaces should by means of a short statement inform the consumers that the consumer rights as provided in the EU protection law do not apply to the particular contract concluded between the non-trader and the consumer. In doing so, the providers are not required to list the (non-)applicable rights. In addition, the consumers should be informed on the relation between the third party (trader or not-trader) and the provider i.e., how obligations related to the contract are shared between them. Such information should be provided in a clear and comprehensible manner, and provision of the standard terms and conditions or similar contractual documents are not considered to be sufficient for this requirement to be met. The information requirements for providers of online marketplaces should be proportionate, so as to provide for an adequate balance between a high level of consumer protection and the competitiveness of providers of online marketplaces. Still, the consumer information requirements provided for in Directive 2011/83/EU (in particular in Article 6(1)) being a cornerstone of the concept for strengthening the consumers' position, are not affected. The provider of the online marketplace could indicate that a third-party trader is solely responsible for ensuring consumer rights, or describe its own specific responsibilities where that provider assumes responsibility for certain aspects of the contract.

2.2. Contractual Parties

In defining the trader³¹ there are no new developments in the exiting EU consumer law int-

²⁹ Article 4 (1)(e), EMD.

³⁰ Article 3(1)(4), EMD.

³¹ 'trader' means any natural or legal person, irrespective of whether privately or publicly owned, that is

reduced by the directives. However, the Directive (EU) 2019/770 and Directive (EU) 2019/771 introduces the possibility the digital platform providers to be considered traders if they act for purposes relating to their own business and as the direct contractual partner of the consumer for the supply of digital content or a digital service, stipulating that "Member States should remain free to extend the application of this Directive to platform providers that do not fulfil the requirements for being considered a trader".³²

Directive (EU) 2019/770, Directive (EU) 2019/771 and Directive (EU) 2019/2161 do not introduce novelties when it comes to the definition of 'consumer' in the EU Law. The notion of 'consumer' includes "any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession".³³ However, the directives provide that the national legislation may extend the protection afforded by the directives to other persons who are not qualified as consumers according to the definition, such as non-governmental organisations, start-ups or SMEs.³⁴ When it comes to dual-purpose contacts and the established criterion on predominant use.³⁵ The directives provide that "*Member States ... [are] free to determine, ... where the contract is concluded for purposes that are partly within and partly outside the person's trade, and where the trade purpose is so limited as not to be predominant in the overall context of the contract, whether and under which conditions that person should also be considered a consumer*".³⁶ Compared to

acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft, or profession, in relation to contracts covered by this Directive, Article 2(1)(5), DCD; Defined as seller in Article 2(1)(3) SGD and provided in Recital 23.

³² Recital 18, DCD; See also Recital 23, SGD.

³³ Article 2(6), DCD; See also Article 2(2), SGD.

³⁴ Recital 16, DCD, Recital 23, SGD.

³⁵ *Johann Gruber v Bay Wa AG*, ECLI:EU:C:2004:529, para. 39.

³⁶ Recital 17, DCD, Recital 22, SGD.

this, Directive 2011/83/EU always considers these persons as consumers.³⁷ This position of the DCD and SGD regarding the dual-purpose contracts, opens the possibility to different approaches and cases where a same person has different position in different Members States.

2.3. Definition of the Contracts

The Sale of Goods Directive and amendments of the Consumer Rights Directive include definitions of the sales contract and the service contract that are not new *per se* but that have one specificity that we will point out.

The Consumer Sales Directive from 1999 did not have any definition of a sale contract. Directive (EU) 2019/771 replacing this directive defines the ‘sales contract’ as any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof.³⁸ The ‘service contract’ is not defined in the Consumer Sales Directive, nor in the Directive (EU) 2019/771 which is understandable having in mind their specific scope. The existing Consumer Rights Directive defines the ‘sales contract’ in a similar manner as CSD, providing that ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services.³⁹ As per CRD ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof.⁴⁰ These definitions provided by the CDR are amended by Directive (EU) 2019/2161 that defines ‘sales contract’ as any contract under which the trader transfers or undertakes to transfer ownership of goods to the consumer, including

any contract having as its object both goods and services;⁴¹ and the ‘service contract’ to mean any contract other than a sales contract under which the trader supplies or undertakes to supply a service, including a digital service, to the consumer.⁴² Both as definitions omits the obligation of the consumer to ‘pay or undertake to pay the price’. The reason for provision of the definition as such is so as to extend the application of the specific consumer rights to provision of digital content and digital services in exchange for personal data, having in mind the similarities and the interchangeability of the paid (for price).⁴³ Thus, the consumer rights provided in Directive 2011/83/EU as extended by Directive (EU) 2019/2161 are to be applied whenever the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service, and the trader does not process those data for any other purpose.⁴⁴

When it comes to the supply of digital content and digital services, Directive (EU) 2019/770 defines the contract as any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price”.⁴⁵ As we will see further the ‘price’ here includes the personal data as form of payment.

2.4. Object of the Contract(s) and Counter-Performance

The important novelty of the new consumer protection legislation in the EU is the regulation of the ‘trade’ with digital content and digital services and the definitions of these notions. As per DGD, ‘digital content’ means data which are produced and supplied in digital form, while ‘digital service’ means: (a) a service that allows

³⁷ Recital 17 of Directive 2011/83/EU.

³⁸ Article 2(1)(1), SGD.

³⁹ Article 2(1)(5), CRD.

⁴⁰ Article 2(1)(5), CRD.

⁴¹ Article 4(1)(1)(c), EMD.

⁴² Article 4(1)(1)(c), EMD.

⁴³ Recital 31, EMD.

⁴⁴ Recital 33, EMD.

⁴⁵ Article 3(1), DCD.

the consumer to create, process, store or access data in digital form; or (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service.⁴⁶ Adequately, the definition of 'goods' in terms of Sale of Goods Directive reflects the existence of the digital elements in goods and the definition of the goods is extended to also include 'tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions ('goods with digital elements').⁴⁷ The definition has been 'modernized' by Directive (EU) 2019/2161 as well. In terms of Directive 2005/29/EC, 'product' means any good or service including immovable property, digital service and digital content, as well as rights and obligations;⁴⁸ while relevant for the consumer rights the definition of goods refers to the one provided in in point (5) of Article 2 of Directive (EU) 2019/771.⁴⁹

When it comes to the price⁵⁰ to be paid, the DCD, beside payments in money, foresees as a method of payment the digital representations of value (electronic vouchers or e-coupons) to be considered as well. The 'digital representations of value' also include virtual currencies, to the extent that they are recognised by national law.⁵¹ Beside these novelties related to the price payment, the Directive introduces one more very important novelty in the consumer law - the personal data of the consumer is considered as 'currency' for payment of the price. Namely, the DCD provides that the for the supply or undertaking to supply digital content or a digital service by the trader, the consumer to provide

or undertake to provide personal data to the trader.⁵² By the introduction of this payment mode, the DCD makes the digital content not only the object of the contractual performance, but also a counter-performance.⁵³ Considering the fact that such business models - provision of digital service for personal data - are used in different forms in a considerable part of the market, the DCD ensures that consumers are, in the context of such business models, entitled to contractual remedies, while fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity.⁵⁴ This novelty of the DCD does not go without criticisms, that are based on the fundamental right nature of the personal data and their protection. It is argued that the compatibility of this regime with the General Data Protection Regulation⁵⁵ is questionable and that it provides legitimisation of a business model hostile to data protection principles.⁵⁶ It is to be noted in this regard, that DCD allows the Member States to determine whether the requirements for the formation, existence and validity of a contract where personal data is used as a commodity, under national law are fulfilled.⁵⁷

⁵² Article 3(1), DCD.

⁵³ See further GRUNDMANN, S. / HACKER, P., *Digital Technology as a Challenge to European Contract Law - From the Existing to the Future Architecture* (July 17, 2017). 13 *European Review of Contract Law* 255-293, Available at SSRN: <https://ssrn.com/abstract=3003885>.

⁵⁴ Recital 24, DCD.

⁵⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 (hereinafter: GDPR).

⁵⁶ DRECHSLER, L., *Data as Counter-Performance: A New Way Forward or a Step Back for the Fundamental Right of Data Protection?*, in: *Datenschutz & LegalTech/ Data Protection & LegalTech: Digitale Ausgabe zum Tagungsband des 21. Internationalen Rechtsinformatik Symposions IRIS2018* (February ed.), pp. 35-43.

⁵⁷ Recital 24, DCD.

⁴⁶ Article 2(1)(2) and (3), DCD.

⁴⁷ Article 2(1)(5)(b), SGD.

⁴⁸ Article 3(1)(1)(a), EMD.

⁴⁹ Article 4(1)(1)(a), EMD.

⁵⁰ Price in terms of the Directive means money or a digital representation of value that is due in exchange for the supply of digital content or a digital service (Article 2(1)(7), DCD).

⁵¹ Recital 23, DCD.

3. (Re)defining the Conformity of Goods and Services

Setting rules on conformity of the goods goes back to the Directive 1999/44/EC that provides for the obligation of the trader to deliver goods that are in conformity with the contract and for presumptions of conformity.⁵⁸ As such reequipments remain valid even more so today, the new Directives go step further in specifying the conformity requirements. The Directive (EU) 2019/770 introduces them for the purpose of the digital content and digital services assessment of the conformity, but both DCD and Directive (EU) 2019/771 have one important novelty - they explicitly separate the conformity assessment criteria in subjective and objective. The conformity assessment criteria themselves are not particular novelty, but both directives add to the existing ones the functionality, compatibility and interoperability requirements for digital content and services and for goods with digital elements. While the subjective conformity requirements refer to elements resulting directly from the specific relationship between the consumer and the trader, the objective conformity requirements refer to what could normally be expected for the type of digital content or digital service.

3.1. Subjective Requirements for Conformity

The DCD and the SGD set four subjective conformity requirements⁵⁹ to be used as assessment criteria where applicable. Thus, the goods, including the digital content or digital service and goods with digital elements, are in conformity with the contract when they are: (a) of the description, type (relevant for the goods) quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the contract; or (b) fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader and the trader accepted it (at the latest at the time of the conclusion of the contract); or (c)

it is supplied/delivered with all accessories, instructions, including oninstallation, and customer assistance as required by the contract; or (d) it is updated as stipulated by the contract.⁶⁰

3.2. Objective Requirements for Conformity

The objective requirements for conformity⁶¹ are in addition to complying with any of the subjective requirements. The goods i.e. the digital content and the digital service will be considered that meet the objective assessment criteria when they are: (a) fit for the purposes for which goods i.e., digital content or digital services of the same type would normally be used;⁶² (b) of the quantity and possess the qualities and performance features the consumer may reasonably expect⁶³ i.e. be of the quality and correspond to the description of a sample or model that the seller made available to the consumer before the conclusion of the contract when it comes to goods; (c) supplied along with any accessories and instructions which the consumer may reasonably expect to receive, where applicable; and (d) in comply with any trial version or preview of the digital content or digital service, made available by the trader before the conclusion of the contract i.e.

⁶⁰ Same subjective conformity requirements exist for the goods with digital elements as per Article 6, DCD.

⁶¹ Article 8, DCD and Article 7 of SGD.

⁶² In the assessment of this any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct, where applicable, should be taken into account.

⁶³ This includes the qualities and performance features in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which, given the nature of the digital content or digital service and the public statements made by or on behalf of the trader, or other persons in the chain of transactions, particularly in advertising or on labelling. Exceptions exist when the trader shows that it was not, and could not reasonably have been, aware of the public statement in question; or that the public statement had been corrected in the same or a comparable way by the time of conclusion of the contract; or the decision of the consumer to acquire the digital content or digital service could not have been influenced by the public statement.

⁵⁸ Article 2, CSD.

⁵⁹ Article 7, DCD and Article 6, SGD.

when it comes to goods (d) be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling. In the cases when the supply of digital content or digital service is continuous over a period of time, they are to be in conformity throughout the duration of that period⁶⁴

Having in mind that the digital content and the digital service change very fast and very often, the DCD and the SGD provide that the trader is obliged to ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity in course of the performance of the contract.⁶⁵

The failure of the trader to ensure that the goods i.e., digital content or digital service meets the conformity requirements will, in principle, lead to its liability for lack of conformity. Exceptions exist when the reason for the lack of conformity lies with the consumer. Thus, when it comes to updates, the trader will not be liable for any lack of conformity if the consumer failed to install, within a reasonable time, the updates supplied by the trader, provided that the consumer was properly informed by the trader that: (a) updates are available and what are the consequences of the failure to install it; and (b) how the update should be to installed.⁶⁶ In addition, where the consumer was informed before the conclusion of the contract and agreed, expressly and separately, accepted that a particular characteristic of the digital content or digital service deviates from the objective requirements for conformity, the trader will not be liable for that lack of conformity.⁶⁷

⁶⁴ Article 8(4), DCD.

⁶⁵ Article 8(2), DCD; Article 7(3), SGD.

⁶⁶ Article 8(3), DCD.

⁶⁷ Article 8(5), DCD; Article 7(4), SGD.

3.3. Legal Defects as lack of Conformity

The DCD and SGD include the legal defects in the concept of lack of conformity. Both directives⁶⁸ provide the right to remedies for lack of conformity where the use of the goods i.e., the digital content or digital service is restricted (limited or prevented) because rights of a third party, in particular intellectual property rights, have been violated, that will result in the consumer being prevented or limited to use the goods, in particular goods with digital elements and the digital content or digital service. When this is the case, in accordance with the subjective and objective requirements for conformity, the consumer is entitled to the remedies for the lack of conformity.

4. The (new) Remedies for Lack of Conformity

The DCD and SGD provide for remedies for the for the lack of conformity.⁶⁹ In principle, the consumer seeks the remedies from the trader. However, in the cases of chain of transactions there might be an act or omission by a person in previous links of that chain that may lead to failure to supply the digital content or digital service, or lack of conformity. In this case the trader has a right of redress - is entitled pursue remedies against the person or persons liable in the chain of commercial transactions.^{70,71}

In the case of a lack of conformity, the consumer is entitled: (1) to have the goods i.e., the digital content or digital service brought into conformity, (2) to receive a proportionate reduction in the price, or (3) to terminate the contract, under defined conditions.⁷²

The foreseen remedies are not novelty in the EU consumer law. The rules that (currently) exist provide

⁶⁸ Article 10, DCD; Article 9, SGD.

⁶⁹ Article 14, DCD; Article 13 SGD.

⁷⁰ Article 20, DCD; Article 18, SGD.

⁷¹ The person against whom the trader may pursue remedies, and the relevant actions and conditions of exercise, are to be determined by national law.

⁷² Article 14 (1), DCD; Article 13(1), SGD.

for the same remedies⁷³ and give priority to bringing the goods in conformity, while the price reduction and termination fall in a second line. It is to be noted, however, that the two-stage hierarchy that exists in the current EU legislation was not mandatory for the Member States, as the Directive 1999/44/EEC was a minimum harmonization directive and there are national legislations where the consumers may choose between remedies in a different manner than the one provided in the Consumer Sales Directive. The Directive (EU) 2019/770 and Directive (EU) 2019/771, change this position and require such hierarchy, which in practice could mean reduction of rights in the jurisdictions where free choice of remedies exists.⁷⁴

4.1. Bringing into Conformity

The right to have the goods/ digital content or digital service brought into conformity,⁷⁵ maybe exercised unless this would be impossible or would impose costs on the trader that would be disproportionate. In the assessment of the possibility/the costs all the circumstances of the case are to be taken into account. This includes (a) the value that the goods/ digital content or digital service would have if there were no lack of conformity; (b) the significance of the lack of conformity and when it comes to goods (c) whether the alternative remedy could be provided without significant inconvenience to the consumer. As specified in the SGD, the goods may be brought into conformity (upon choice of the consumer) by repair or replacement.

The trader is obliged to bring the goods/ digital content or digital service into conformity within a reasonable time from the time of receiving the information from the consumer, and this should be carried out free of charge and without any significant inconvenience to the consumer.⁷⁶

⁷³ Article 3 (2) of Directive 1999/44.

⁷⁴ For the specificities of transposition of Article 3 in the Member States see further SCHULTE-NÖLKE, Hans / TWIGG-FLESNER, Christian / EBERS, Martin (Eds.), EC Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States, Sellier, 2008, p. 427.

⁷⁵ Article 14(1), DCD; Article 13(1), SGD.

⁷⁶ Article 14(3), DCD; Article 13(3), SGD.

4.2. Price Reduction or Termination of the Contract

The consumer may have the price paid for the goods i.e., the digital content or digital service, when they were supplied in exchange for a payment of a price, reduced or have the contract terminated, in any of the following cases:⁷⁷ (1) when to bring the digital content and the digital service into conformity would be impossible or disproportionate; (2) if the trader has not brought the digital content and the digital service into conformity i.e. has not completed repair or replacement of the goods; (3) if, despite the trader's attempt to bring into conformity, a lack of conformity (still) appears; (4) the nature of the lack of conformity is such as to justify an immediate price reduction or termination of the contract; or (5) if the trader has declared, or it is clear from the circumstances, that they will not be brought into conformity within a reasonable time, or without significant inconvenience for the consumer.

As to the method for calculation of the reduction, the both directives foresee to be proportionate to the decrease in the value of the goods i.e., the digital content or digital service supplied, compared to value that it would have had if it were in conformity.⁷⁸ For the digital content or digital service that is supplied over a period of time, the reduction in price applies to the period of time during which the digital content or digital service was not in conformity.⁷⁹

The Directive (EU) 2019/770 provides that the contract for supply of digital content or digital service in exchange for the payment of a price, may be terminated only if the lack of conformity is not minor. The same rule is applicable to the supply of goods as provided in Directive (EU) 2019/770. The burden of proof with regard to whether the lack of conformity is minor is on the trader.⁸⁰ The consumer terminates the contract by providing a statement to the trader.⁸¹ In addition, the DCD and SGD define the

⁷⁷ Article 14(4), DCD; Article 13(4), SGD.

⁷⁸ Article 14(5), DCD; Article 15, SGD.

⁷⁹ Article 14(5), second sentence, DCD.

⁸⁰ Article 14(6), DCD; Article 13(5), SGD.

⁸¹ Article 15, DCD; Rules as to the form of the statement are not provided by DCD.

specific obligations of the parties in case of termination of the contract.⁸² Specificities exist in regard to the obligations of the parties to digital content and digital services contracts and particular difference is made when they were made in exchange for payment of price and in exchange for personal data.

5. Concluding Remarks

The new EU consumer protection legislation introduced in 2019 have brought substantial changes in the consumer contract law. These changes will significantly affect the national legislation having in mind the mandatory nature of the rules and the maximum harmonization effect that is to be achieved. The major novelty is in the very fact that the 'digital' issues have been regulated in the EU consumer protection legislation, something that was long waited for. In addition, the 'payment' in personal data has been regulated. It is therefore clearly established that the contracts where data is provided are not gratuitous contracts. The conformity of the goods (including digital content and digital services) and the liability for lack of conformity remains the cornerstone of the consumer protection in consumer contract law. The requirements are categorised as subjective and objective conformity requirements. The rules on liability for lack of conformity rules introduce the two-level hierarchy between the remedies and this will affect in particular the legislations where such did not exist before. The damage as choice remedy will remain to be regulated in the national legislation.

How the national legislators will deal with the issues at stake is yet to be seen. The Digital Content Directive and the Sale of Goods Directive are to be transposed in the national legislations by July 1st 2021. The application of the new rules will start on January 1st, 2022. The amendments of the existing legislation brought by Enforcement and Modernization Directive should be completed by November 28th, 2021 and their application is to start by June 28th, 2022. Once the processes of transposition are completed and the application begins the practical value of the new rules will be assessed.

⁸² Article 16, DCD; Article 16, SGD.

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