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ЕУРОПАЛЫҚ ОДАҚҚА ҚАТЫСУШЫ ЕЛДЕРГЕ ЦИФРЛЫҚ КОНТЕНТТЕРДІ САТУ ЖӘНЕ ЖЕТКІЗУ ТУРАЛЫ ЕУРОПАЛЫҚ ДЕРЕКТИВАЛАРДЫ ИМПЛЕМЕНТАЦИЯЛАУ ЖӘНЕ ҮЙЛЕСТІРУ ТУРАЛЫ

Аннотация. Мақалада автор Еуропалық одаққа мүше елдерге қызметті, цифрлық контенттерді сату және жеткізу туралы жаңа Директиваларды үйлестіру мен имплементациялау мәселелерін қарастырған. Соның ішінде, автормен жаңа Директиваның Германия мен Польша заңнамаларына қатынасы зерделенген. Аталған екі елдің заң шығарушылары да 44/99 сату туралы жаңа Директиваны ұлттық құқық жүйесіне имплементациялау шешімін қабылдады.

Автордың ойы бойынша үйлестіруді толық талап ету, қосымша білікті келісім алған жағдайда да «кері келісімнің» заңдылығын тексеруге кедергі жасамауы керек. Бірақ, бұл мәселе Сотпен ғана нақты шешілетін болуы мүмкін деген болжамда.

Толық үйлестіру мәселесі оның диапазонына қатысты біркелкілік еместікті тудырады, бұл осы «кері келісім» болатын шеңбердің алдын-ала анықталмайтындығының тағы бір мысалы болып табылады.

Түйінді сөз: толық үйлестіру, максималды үйлестіру, минималды үйлестіру, сату туралы директива, директива 2019/771, цифрлық контенттерді және қызметті жеткізу туралы директива, кері келісім.

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ОБ ИМПЛЕМЕНТАЦИИ И ГАРМОНИЗАЦИИ ЕВРОПЕЙСКОЙ ДИРЕКТИВЫ О ПРОДАЖАХ И ПОСТАВКАХ ЦИФРОВОГО КОНТЕНТА В СТРАНАХ УЧАСТНИКАХ ЕВРОПЕЙСКОГО СОЮЗА

Аннотация. В статье автором рассмотрены вопросы имплементации и гармонизации новых Директив о продажах и поставках цифрового контента и услуг в странах участниках Европейского союза. В частности, автором рассмотрено соотношение новых Директив с законодательством Германии и Польши. В обеих странах законодателями было решено имплементировать Директиву о продажах 44/99 в национальную правовую систему. По мнению автора, требование полной гармонизации не должно препятствовать проверке законности «отрицательного соглашения», даже если было получено дополнительное квалифицированное согласие. Однако весьма вероятно, что именно эта проблема будет окончательно решена Судом. Полная гармонизация вызовет неоднозначность в отношении его диапазона, и это один из примеров того, что рамки допустимости «отрицательного соглашения» не могут быть определены заранее.

Ключевые слова: полная гармонизация, максимальная гармонизация, минимальная гармонизация, директива о продажах, директива 2019/771, директива о поставках цифрового контента и услуг, отрицательное соглашение.

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ON THE IMPLEMENTATION AND HARMONIZATION OF THE EUROPEAN DIRECTIVE ON THE SALE AND SUPPLY OF DIGITAL CONTENT IN EU MEMBER STATES

Abstract. In the article, the author considers the issues of implementation and harmonization of the new Directives on the sales and deliveries of digital content and services in the countries of the European Union. In both countries the national legislators decided to integrate the consumer sales directive 44/99 into the codified systems. In author's opinion the full harmonization requirement should not prevent a verification of the legality of the «negative agreement», even if the additional qualified consent has been accomplished. It is, however, very likely that this very particular problem will be finally

decided by the Court of Justice. The full harmonization will cause ambiguity concerning its range and it is one of the examples that the scope of the admissibility of the «negative agreement» cannot be determined in advance.

Key words: full harmonization, maximum harmonization, minimum harmonization, sales directive, directive 2019/771, Directive on the Supply of Digital Content and Services, negative agreement.

1. The New Directives and the Full Harmonization

In the year 2019 two important directives were adopted: the new directive on sales[1] and the directive on supply of digital content and services[2]. These two directives belong to the core of the European private law. The first one has replaced the consumer sales directive from the year 1999[3]. The second marks the expansion of the European law towards the area of the new technologies. The both directives contain the well-known system of the remedies in case of the lack of conformity, and the new directive on the supply on digital content and services governs also the matter of the complete failure of performance. The new sales directive is similar to its predecessor, only more detailed and drafted with the consideration of the experiences with the old sales directive. Several provisions have been designed to reflect the Court of Justice's judgements, but – like in case of the absolute lack of proportionality of the chosen remedies – the new sales directive takes different approach, revising partially the findings of the Court of Justice. The approach of the new sales directive towards the concept of the lack of conformity also differs slightly. These are not revolutionary changes. The directive on the supply of digital content and services generally follows the scheme of the sales directive. It contains quite revolutionary rules on delivery of personal data as counterperformance[4] and on the obligation to pay by the means of the «digital value representation» which means predominantly the cryptocurrencies[5]. The potential impact of the digital content and services directive on the Member States' private law is not easy to assess, since the new directive tackles numerous legal relationships. There is no such type of contract as «supply of digital content» or «digital services» contract– the directives apply to various types of contracts, even pertaining to different classes of contract's types[5].

The most challenging feature of the both directives is the requirement of the full harmonisation, addressed to the Member States. The requirement of the full harmonisation serves strengthening the internal market[6]. It means that the Members State in the process of the implementation must reach a minimum standard of the directive, but at the same time must not exceed the maximum standard of the consumer protection determined by the directive[8]. For a long time the directives have only required the minimum harmonization, meaning that the Member States could still maintain and provide more protective measures that the level of the directive[7]. This technic of harmonisation has a lot of advantages[8]. It was a less intrusive from the perspective of the Member States, since it leaves the possibility to continue autonomous national policy on the consumer protection. It was also a technic giving much more flexibility – allowing for various ways of the implementation of the consumer directives in

1 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/EC, OJ 2019, L 136, p. 28–50.

2 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, OJ 2019 L 136, p. 1–27.

3 Directive (EU) 1999/44 of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171, p. 12–16.

4 Article 3(1) directive 2019/771. 5 Recital 23 directive 2019/771.

5 K. Osajda, E. Łętowska [in:] Prawo zobowiązań – część ogólna, K. Osajda (ed), System Prawa Prywatnego, 3rd ed., 2020, p. 58-59.

6 G. G. Howells, R. Schulze, Overview of the proposed Consumer Rights Directive [in:] G. G. Howells, R. Schulze (eds), Modernising and Harmonising Consumer Contract Law, Sellier. European Law Publ., 2009, p.6; H.-W. Micklitz, The Targeted Fulll Harmonisation Approach, [in:] G. G. Howells, R. Schulze (eds), Modernising and Harmonising Consumer Contract Law, Sellier. European Law Publ., 2009, p. 53.

7 B. Gnela, Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym, Wolters Kluwer, 2013, p. 79; M. Ebers, German consumer law 15 years after „recodification" [in:] M. Garmunt Fombuena, C. E. Florensa i Tomàs (eds), Codificación y reequilibrio de la asimetría negocial, Dykinson: Madrid: 2017, p. 164-164.

8 M. Ebers, German…, p. 164.

the national law. This flexibility was needed, when the law maker was seeking to implement the directive in the coherent way into the national law. The directives are usually done in a frame of the «problem approach» method[9]. They contain quite complex set of rules addressing quite narrowly defined scope («e.g. package travels»)[10]. In the codified system the typical approach of the lawmaker is different. It uses «case approach», classifying certain legal categories like «non-performance», «delay», «impossibility» etc. and provides specific rules applicable to these narrowly defined cases. The European lawmaker, while issuing a directive, is less concerned with the coherence of the entire system. It tries to provide a workable solution for the identified problem, which must be solved to support the development of the internal market of the European Union. While the minimum harmonisation method was (predominantly) used by the European lawmaker, the tensions between the «problem approach» and «case approach» could be overcome, even it was not easy. The national lawmaker was able to implement the directive into the codified system, adopting the directive's «problem approach» to the realm of concepts existing in the national, codified law. There was enough space to link the European-originated law with other matters regulated by the code. Even under these circumstances the process of the implementation and the necessary conversion from the «problem approach» to the «case approach» was troublesome. It can be well seen in the German example: the case law of the Court of Justice has disintegrated the original German concept of the implementation of the law in sales[11]. The German lawmaker intended to use the frame of the sales directive 44/99 for the general, instead of only consumer, sales law. The excessively consumer friendly approach in the judgements Quelle and Weber/Putz has led to the further split of the originally homogenous set of rules into more and more specific consumer sales law. The Polish lawmaker has reimplemented the consumer sales directive. Originally, the consumer sales directive has been implemented primarily as s separated statute[12]. Then, the Polish lawmaker decided to integrate the consumer sales directive again into the civil code[13]. It has used, however, the German experience and the consumer and non-consumer sales law has been more distinctively separated from each other, although not in separated sections, but within the general text of rules on sales law (and, also the contract of work). The Polish lawmaker remained, to certain extend, more buyer-friendly, at least on the level of the wording of the provisions on sales. It has it sources in the generally buyer-friendly approach[14] of the Polish civil code from the year of 1964. The Polish lawmaker did not want to reach a kind of paradox-solution, by decreasing the level of the buyer protection by implementing the European consumer sales law[15]. After the first attempt of the implementation of the European law this paradox could have been observed: in some configurations the Polish non-consumer law was more protective for the buyer than the consumer law[16]. It was one the reasons for the re-implementation of the consumer sales directive and its integration into the civil code.

8 N. Jansen, R. Zimmermann, *Commentaries on European Contract Laws*, Oxford University Press, 2018, p. 477; R. Schulze, F. Zoll, *European Contract Law*, C.H. Beck, Hart, Nomos, 2018, p. 16-18.

9 H. Schulte-Nölke, F. Zoll, Structure and Values of the Acquis Principles: New features and their possible use for political purposes [in:] Acquis Group, Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services, Sellier. European Law Publ., 2009, p. XXV-XXVI.

10 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ 2015 L 326, p. 1– 33.

11 Several provisions of BGB were changed in order to align with norms stemming from European Court judgements: § 312e BGB (after Judgement of ECJ of 3 September 2009, Pia Messner v Firma Stefan Krüger, C489/07.); § 355 BGB (after Judgement of ECJ of 13 December 2001, Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG, C-481/99); § 439 no 3 BGB (after Judgment of the CJEU of 16 June 2011 in joined cases Gebr. Weber GmbH v Jürgen Wittmer C-65/09 and Ingrid Putz v Medianess Electronics GmbH C-87/09); § 474 BGB (Judgment of CJEU of 17 April 2008, Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände, case C-404/06).

12 Act on specific conditions of consumer sale and amendment to the Civil Code of 27 July 2002 (Journal of Laws No. 141, item 1176).

13 Act on consumer rights of May 30, 2014 (Journal of Laws 2019, item 134).

14 Cz. Żuławska, Zabezpieczenie jakości świadczenia, «Studia Cywilistyczne» 1978/29, p. 29

15 F. Zoll, Das dubiose Ergebnis der Umsetzung der Richtlinie über Verbrauchergüterkauf in die Polnische Rechtsordnung [in:] J. Stelmach, R. Schmidt (eds.), Krakauer-Augsburger Rechtsstudien. Probleme der Angleichung des Europäischen Rechts, Wolters Kluwer 2004, p. 249.

16 E.g. consumers had to claim repair or replacement of the good before price reduction (Art. 8.4 of the Act on specific conditions of consumer sale and amendment to the Civil Code), which was not necessary in the nonconsumer relations (Article 560 § 1 sentence 1 of the Polish Civil Code in its previous wording).

The technic of the minimum harmonisation, despite of its immanent flexibility, has essential disadvantages from the perspective of the Union. A study run in the first decade of this century, known as Consumer Law Compendium, has shown the enormous differences among the Member States in the harmonisation of the consumer law directive[17]. These differences were essentially an impediment to the functioning of internal market. The minimum harmonisation standard could not prevent differentiation of the ways of implementation, so practically the effect of the approximation of the legal systems could not be achieved, at least to reach the satisfactory level from the perspective of the business. A trader, organizing a cross-border business activity within the European Union, was not able to rely on similar standards in other Member State. This flaw could not be remedied even by the choice of law, since the Article 6 Sec. 2 of the Rome I Regulation[18] states that the level of the consumer protection of the consumer's place of residence law must not be diminished by the choice of law. So, the choice of law launches often a complicated process of joined application the rules of the applicable law and the law of the consumer's place of residence. It is not only the problem from the perspective of the costs, which the trader must bear to comply with the law, but also it brings certain risks for the consumer (possibility of being involved in a process with the high risk of costs resulting from the determining of the applicable law).

The full harmonization has been developed as remedy against these impediments to the development of the internal market[19]. It is, however, a difficult technic, 22 since it is not easily possible to determine its scope of the prohibition to regulate by the Member State[20]. Namely, it means that it is not clear, what the maximum harmonized directive prohibits, if it regulates a legal institution like e.g. burden of proof. In my paper I will show some of the difficulties, resulting from such approach in the process of the implementation of the directives. I am going to analyse the interaction of the implemented rules with the remaining codified law and kinds of effects such interaction produces. In this paper I am going to look on Polish and German law. I have chosen these two systems not only because of my familiarity with this regimes but also because in both cases the national legislators decided to integrate the consumer sales directive 44/99 into the codified systems. Now they are facing a similar challenge: to implement the new directives into their codified systems. The drafts of the implementation are not ready yet or at least unknown to the public. In this paper I want to focus on selected issues, related mostly to the interplay between the general rules of the law on obligations and the rules on sales, assessed from the perspective of the new two directives. Finally, I would like to answer the question, whether an implementation within the civil code is a reasonable approach.

II. The lack of conformity

The directive 44/99 has defined the conformity with the contract in the Article 2. It was the source of the defining the lack of conformity as relation between the goods and the content of the contract. The language of the Article 2 of the Directive reflects the genetic relativeness between the Vienna Sales Convention from the year 1980. It was a well-considered choice of the language to refer to the conformity and lack of conformity and to not use the notion of the «defect». The lack of conformity has been therefore integrated into the general notion of the non-performance, forming a part of the unified concept of it. The German lawmaker decided at the beginning of this century to reshape the whole system of the law of obligations. One of the aims of this reform was to build up a coherent system with the model of the directive. Hence, the German lawmaker decided to adopt the general concept of the «violation of the obligation» (Pflichtverletzung) . This radical step was moderated by leaving the qualified cases of the delay and impossibility (including also the

17 H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers, EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States, Sellier. European Law Publishers, 2009, p. 407.

18 Not implemented into Polish law.

19 Recital 10 to the Directive 2019/771.

20 H.-W. Micklitz, The Targeted Full Harmonisation Approach [in:] G. G. Howells, R. Schulze (eds), Modernising and Harmonising Consumer Contract Law, Sellier. European Law Publ., 2009, p. 57-59. On the risks of full harmonisation see: F. Zoll, The Remedies for Non-Performance in the Proposed Consumer Rights Directive and the Europeisation of Private Law [in:] G. G. Howells, R. Schulze (eds), Modernising and Harmonising Consumer Contract Law, Sellier. European Law Publishers, 2009, p. 285-286.

initial impossibility) and finally the liability for the lack of conformity (attached to the specific parts of contracts). The Consumer Sales Directive was used as a point of reference for the entire system of the law of obligation.

The Polish lawmaker has not decided to use the Consumer Sales Directive to fully reshape the system. As mentioned before, the first attempt to implement the Consumer Sales Directive to the Polish was done in a separated statute. After the adoption of the Consumer Rights Directive a deeper implementation process was needed, and the Polish lawmaker used this opportunity to reimplement also the Consumer Sales Directive into the Polish civil code. By doing so, it did not dare to fundamentally reorganise the civil code, but introduced some minor changes instead – it modified the relevant provisions on sales and contract of work. It means that the fundamental framework of the liability for the lack of conformity differs between the systems. In German law, the system of liability is embedded into the general rules on liability with some specific sales remedies like the right to repair and replacement and the price reduction (§ 437 BGB). It refers to the general rules on the termination of contract and damages, linking the system also with the specific provisions on initial and subsequent impossibility of the performance. In the Polish model, the liability for the lack of conformity (both systems – the German and the Polish law uses the equivalent of the oldfashioned notion of "defect" instead of the lack of conformity – respectively Mangel and wada) is more self-standing without references to the general part of the law of obligations. There is one important exception, concerning the remedy of damages. The lawmaker uses here a reference to the general law on damages, causing ambiguity concerning the relation of this remedy and the liability regime for the lack of conformity.

Both systems put the notion of the lack of conformity into the pivotal place of the contract of sales. However, the way of defining it differs. The German law goes through the structured path and builds up a gradual test. Firstly, to determine the conformity of the goods with the contract it must be verified: whether the required features of the goods have been agreed between the parties; further, if the purpose of the goods have been determined by them and, finally, what the purpose of the goods of this same kind is. The language of the statute (§ 434 I BGB) indicates that it is necessary to apply a three steps analysis. If the parties have not agreed upon the features of the goods, the agreed purpose shall prevail. If such purpose has been not agreed, the typical purpose of the goods becomes decisive. The Polish law has mixed up these different categories, since the language of the respective Polish provision (Article 5561 of the Polish Civil Code) was following closer the wording of the directive's 44/99 Article 2. There is no hierarchy of the categories, but Article 5561 § 1 is only providing indicators, helping to asses whether the goods are defective, which means that they infringe the contract. In the German doctrine this concept of describing a defect of goods is called subjectively-objective. This phrase indicates already certain ambiguity of the concept. This ambiguity is also visible in the wording of § 434 I BGB. The phrase «subjective-objective concept of the defect» is misleading, because in all cases it is about the content of the contract . Even the «objective» concept of the defect concerns the analysis of the content of the contract, since the provision of the § 434 I BGB is a rule on the interpretation of the contract. In this sense all criteria of the § 434 I BGB are «subjective». The rigid formulation of the § 434 I BGB is often disregarded in practice. The doctrine claims that the assessment whether the goods are defective should be based on the evaluation of all criteria which are spelled out in this provision. It means that even if the parties agreed upon certain feature of the thing, the objective purpose of it still matters. Similarly, if the parties agreed upon certain feature and purpose of the goods, both must be taken into consideration. Therefore, there is no essential difference between the Polish and German law in this respect.

In the German doctrine and case law the fact that the parties have agreed upon the certain feature of the goods (in the sense of the § 434 I first sentence) has further consequences. E.g. it is not possible to consider the non-performance as minor in sense of the § 323 V second sentence BGB, even if objectively the defect of the goods is

unessential. Principally, if the parties have agreed upon certain feature, a clause restricting or excluding the liability for the defect does not cover the agreed feature (in the consumer law is such exclusion or restriction not allowed at all, despite the remedy of damages). In the Polish law, which does not contain this strict distinction between features agreed by the parties and objectively resulting from the purpose of the sold goods, such consequences are only exceptionally discussed in the doctrine and there is not a case law reflecting this discussion.

The new sales directive provides in Articles 7 and 8 new definitions of the conformity with the contract. Surprisingly the new directive provides a sharp distinction between the objective and subjective requirements for conformity. This wording is then closer to the language of the German civil code then to the respective Polish provision. It is an interesting question whether this new wording of the directive requires also a new formulation of the provisions of the national law. One of the reasons, why the directive has reformulated the description of the «conformity» is so called the «negative agreement upon the features of the goods» (negative Beschaffenheitsvereinbarung). Such negative agreement means the agreement on the worse standard of the sold goods than it would be expected, considering the normal expectation concerning the examined goods. The problem of the «negative agreement» was not easy to approach, since it must be generally allowed to determine the object of the sales, also of the lower qualities. It opens, however, a path to circumvent the prohibition to waive the rights resulting from the liability for lack of conformity . In the German doctrine such approach was required. It needed to be verified, whether there was not a case of the circumvention of the consumer protection system (§ 476 I BGB) or whether it was not an unfair term. In the Polish law the discussion on the «negative agreement» was only sporadically raised36 and there is no case law on this matter. The new sales directive has addressed the matter of the negative agreement in explicit way (Article 7 Sec. 5). It requires an additional qualified consent. The same system has been adopted in the directive on supply of digital content and services (Article 8 Sec. 5). It means that, if the consumer has been duly informed about the lower features of the goods, he has to explicitly accept them. It raises a problem, whether in case in which such qualified acceptance of the consumer has been provided, it is possible to challenge this consent as a violation of the mandatory law or fairness standard. This example shows the problem of the full harmonization's range. It is not clear, whether the provision of the directives requires from the Member States to accept in any case the «negative agreement», if the informed qualified consent, as stipulated by the directive has been, observed. If the requirements of the qualified consent to the negative agreement are observed, it does not mean yet that this consent has been negotiated and it does not mean that this agreement does not circumvent the mandatory nature of the provisions on consumer liability. The reasonable solution would be the conclusion that even if the qualified consent requirements have been accomplished, it is still possible to verify such agreement from the point of the infringement the mandatory law. In such case however the broad array of the approaches to the «negative agreements» in the Member States of the EU would not be achieved and it was probably the intention of the European lawmaker to achieve the most possible harmony among the national legal systems. In such case however it will be quite easy to deprive the consumer of any protection. In the reality of the on-line commerce it is easy to get even the «qualified» consent of the consumer.

In my opinion, the full harmonization requirement should not prevent a verification of the legality of the «negative agreement», even if the additional qualified consent has been accomplished. It is, however, very likely that this very particular problem will be finally decided by the Court of Justice. The full harmonization will cause ambiguity concerning its range and it is one of the examples that the scope of the admissibility of the «negative agreement» cannot be determined in advance.

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