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LEGAL REGULATION FOR SALE OF GOODS AND SUPPLY DIGITAL CONTENT IN EU – ANALYSIS OF NOVELTIES OF NEW EU DIRECTIVES[1]

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Poperechna H., Savanets L. Legal regulation for sale of goods and supply digital content in EU – analysis of novelties of new EU directives

This article is devoted to the study of new legislative instruments of the European Union in the field of unification of European contract law, namely: Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods and Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services of 20 May 2019.

Considerable attention is paid to the study of the novelties of these legal acts, including: determining the compliance of goods, digital content and digital services with the terms of the contract, researching and establishing the criteria for such compliance, and identifying additional information obligations of the seller and supplier of digital content, digital services and goods with digital elements.

Particular attention is focused on the seller's (supplier's) obligations to periodically update the buyer's (recipient's) software in order to ensure the functioning of digital content (goods with digital elements) throughout the entire term of the contract, in accordance with its terms.

The authors analyze the presumption of non-compliance of goods with the terms of the contract and prove that the burden of proof of compliance of the transferred goods with the terms of the contract rests with the seller (supplier).

The article pays special attention to the issues of personal data protection, monetization of personal data of the buyer (recipient) of digital content and digital services.

The authors analyze the ways of protecting the violated rights of the buyer (recipient), and study the environmental friendliness of the legal provisions of the new directives in the field of restoration of the violated rights of the buyer in case of failure to transfer goods, goods with digital elements, digital content, or transfer of goods that do not comply with the terms of the contract.

The authors conclude that, given the problems and prospects for the development of the circular economy, and with a view to determining the disproportionality of the remedy chosen by the buyer, it is advisable to enshrine in the legislation on sale and purchase the requirement to take into account the impact of this remedy on the environment.

Key words: digital content, sale of goods, supply of digital content, conformity of goods, environmental friendliness of legislation.

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Поперечна Г.М., Саванець Л.М. Законодавчі інструменти регулювання договорів купівлі-продажу та постачання цифрового контенту європейського союзу: новели нових директив ЄС.

Дана стаття пересвячена дослідженню нових законодавчих інструментів Європейського Союзу у сфері уніфікації європейського договірного права, а саме: Директиви Європейського Парламенту і Ради 2019/771 про деякі аспекти договорів купівлі-продажу товарів від 20.05.2019 р. та Директиви Європейського Парламенту і Ради 2019/770 про деякі аспекти договорів постачання цифрового контенту та цифрових послуг від 20.05.2019 р.

Значна увага приділяється дослідженню новел вказаних нормативно-правових актів, серед яких: визначення відповідності товарів, цифрового контенту та цифрових послуг умовам договору, дослідження та встановлення критеріїв такої відповідності, виокремлення додаткових інформаційних обов'язків продавця та постачальника цифрового контенту, цифрових послуг та товарів з цифровими елементами.

Окрема увага зосереджена на розгляді зобов'язань продавця (постачальника) щодо періодичного оновлення програмного забезпечення покупця (одержувача) з метою забезпечення функціонування цифрового контенту (товарів із цифровими елементами) протягом усього строку дії договору, у відповідності з його умовами.

Авторами проаналізовано презумпцію невідповідності товару умовам договору, та доведено, що тягар доказування відповідності переданих товарів умовам договору спочиває на продавцю (постачальнику).

У роботі окрема увага відводиться проблематиці захисту персональних даних, монетизації персональних даних покупця (одержувача) цифрового контенту, цифрових послуг.

Автори аналізують способи захисту порушених прав покупця (одержувача), здійснюють дослідження екологічності правових положень нових директив у сфері відновлення порушених прав покупця, у випадку непередання йому товарів, товарів із цифровими елементами, цифрового контенту, або передачі товарів, що не відповідають умовам договору.

Автори доходять до висновку, що враховуючи проблеми та перспективи розвитку кругової економіки, а також з метою визначення непропорційності обраного покупцем способу правового захисту доцільним є закріплення в законодавстві про купівлю-продаж вимоги обов'язкового врахування впливу цього способу на навколишнє природне середовище.

Ключові слова: цифровий контент, купівля-продаж, постачання цифрового контенту, відповідність товарів, екологічність законодавства.

Formulation of the problem. On May 20, 2019, two long-awaited pieces of European Union (EU) legislation were adopted: Directive 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter – Directive 2019/770) and Directive 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods (hereinafter – Directive 2019/771). The European legislator managed to harmonize a significant part of civil law in the form of a regulatory instrument in the context of the formation a single digital market. Although the need to adopt both Directives was determined by the Digital Single Market Strategy of 2015. The characteristic features of Directive 2019/770 and Directive 2019/771 are fundamentally new provisions on the sale of goods and the supply of digital content, based on a maximum level of harmonization. However, some problems related to the practical implementation of these provisions, in our opinion, remain debatable.

Analysis of resent research and publications. In the article authors are taking into account the works of Busch C., Loos M., Schulte-Nölke H., Schulze R., Wendehorst Ch., Zoll F. and others.

The purpose of the article is to analyze the novelties of the new legislative instruments of the European Union in the field of sale of goods and supply of digital content (digital services), to determine the environmental effectiveness of these provisions for the development of private EU law.

Presentation of the main research material. In both Directives under review, considerable attention is paid to the issue of conformity as one of the key issues in modern contract law. The provisions of the Directives impose on the seller (supplier) the obligation to transfer to the consumer goods or digital content or provide a digital service that meets the conformity requirements. The novelty of both Directives is the clear division of the conformity criteria into subjective and objective criteria. The norms of Directive 1999/44/EC, as well as the Vienna Convention of 1980, did not provide for the division of the criteria of conformity of goods into objective and subjective and regulated this issue on a subjective basis, i.e. based on the agreement

of the parties as the basis for determining the conformity of goods. This concept originates from the principle of freedom of contract, which, among other things, also allows the parties to freely determine the subject matter of the contract of sale. Analyzing the provisions of the draft of the Common European Sales Law on conformity of goods (Articles 99-100), we can conclude that for the first time the objective criterion was defined in it. The drafters of the draft, according to F. Zoll, departed from the subjective concept of non-conformity of goods to the contract, trying to «strengthen» the features of the goods and complicate the definition of deviations from the accepted standard [14, c. 251].

A new criterion for the conformity of goods - durability - is contained in Directive 2019/771 and defines the rational necessity of the functionality of the goods during normal use. The statutory definition of this criterion is driven by the modern concept of circular economy and the rationale for the durable use of a good. The durability (durability) of a good is determined on the basis of normal use, including the need for maintenance of the good.

Another important novelty of the European contract law is the enshrinement in both Directives of the obligation of the supplier (seller) to inform the consumer about the updating of digital content (goods with digital elements) and the possibility of its realization in order to maintain the conformity of digital content (goods with digital elements) for a certain period of time. In the case of a single or several related acts of delivery (transfer) of digital content (goods with digital elements), the supplier (seller) is obliged to update the software for a period during which the consumer can reasonably expect the said update, taking into account the type and purpose of the digital content (goods with digital elements), the particular circumstances and the particularities of the contract [6, c. 53].

According to Article 8(6) of Directive 2019/770, the digital content or digital service shall be provided in the latest version existing at the time of the conclusion of the contract, unless the parties have agreed otherwise. Directive 2019/771 does not contain such a provision. We consider it quite acceptable to apply by analogy the above provision of Directive 2019/770 to contracts for the sale of goods with digital elements. The situation of purchasing goods without digital elements under a contract of sale looks problematic. There is a logical question about the possibility of applying by analogy the above norm to this type of relationship or the need to fix a similar rule in Directive 2019/771 [4, c. 180].

Directive 2019/771 increases the period of presumption of non-conformity from six months to one year from the date of transfer of the goods. A similar rule is set out in Article 12(2) of Directive 2019/770. Directive 2019/771 allows to increase this period up to two years (part 2 of Art. 11) and not significantly reduce the existing level of consumer protection in the EU Member States. Directive 2019/770 does not provide for this possibility, so the period of presumption of non-compliance of digital content or digital service is only one year. The consumer bears the burden of proving the lack of conformity of the goods purchased. The burden of proving the non-conformity of the digital content or digital service depends on the specifics of the fulfillment of the contractual obligations. The burden is on the consumer if the contract is fulfilled by a single individual act or a set of individual acts of delivery. If the parties have contractually stipulated systematic deliveries over time, the burden of proof of non-compliance lies with the seller [5, c. 758].

One of the most important problems is the monetization of personal data - it has been repeatedly pointed out by the European Commission, it has been the subject of numerous scientific discussions and Directive 2019/770 tried to solve it. Directive 2019/770 is the first legislative instrument that defines a new vector of adaptation of private law to the requirements of the digital economy and regulates the possibility of fulfillment of a counter obligation by the consumer both in monetary form and in the form of providing personal data. The latter type of relations will be one of the main problems of contract law in general and consumer law in particular in the coming years. The concept of price enshrined in Directive 2019/770 is broad and includes digital analogs of value, such as electronic vouchers or e-coupons, and virtual currency (recital 23 of the motives of Directive 2019/770). In our opinion, it is advisable to consolidate the said approach in Directive 2019/771 as well. The introduction of the studied novelty in the legal regulation is due to the needs of practice [2, c. 195].

Both Directives establish the obligations of the seller to bring the goods, digital content into conformity within a reasonable period of time, free of charge and without significant inconvenience to the consumer (Article 14(3) of Directive 2019/770, Article 14(1) of Directive 2019/771).

Among the remedies for consumer rights infringed due to non-conformity of the goods, digital content, the Directives include bringing them into conformity, proportional reduction of the price and withdrawal from the contract. The main difference between the two Directives on remedies for infringement is that Directive 2019/770 does not define repair and replacement as a way of bringing digital content or a digital

service into conformity. This rule is based on the idea that repair and replacement as remedies can only be applied to goods and is quite controversial [10, c. 141].

Both Directives provide for a hierarchy of remedies; as a general rule, the consumer is first entitled to demand conformity of the goods, digital content and only then a proportional reduction of the price or termination of the contract. Given the maximum level of harmonization of both Directives, we note that EU Member States that do not currently enshrine a hierarchy of remedies will provide a lower level of consumer protection once the Directives are implemented. The only possibility of the EU Member States to provide consumers with the right to choose a particular remedy in contractual sales relationships is the situation of detection of non-conformity of goods within a period not exceeding 30 days after the transfer of goods (part 7 of Article 3 of Directive 2019/771). Thus, EU Member States may enshrine in national law the right of the consumer to demand immediate termination of the contract if the lack of conformity of the goods becomes apparent within the first 30 days after handover [9].

Other remedies established by the Directives in the event of non-conformity of the goods or digital content include the right of the buyer to refuse payment for the unpaid part of the goods (Article 13(6) of Directive 2019/771) and damages (recital 73 of the motives of Directive 2019/770, Article 3(6) of Directive 2019/771).

Consistent enforcement of remedies for defective digital content (e.g. improper reproduction of a film) may be problematic. In order to find a more reliable supplier more quickly, a right of rescission should be guaranteed in the interest of the recipient of the digital content. If the digital content has individually defined features and was developed with specific requirements of the consumer, it would be more justified to grant the right to require the supplier to remedy defects [4, c. 180].

According to the provisions laid down in Article 16(3) of Directive 2019/771, withdrawal from the contract as one of the legal remedies in the event of non-conformity of the goods results in bilateral restitution on the obligation: the disappointed consumer must first return the goods, and only the seller refunds the full price of the goods paid for. The above sequence of actions is somewhat unfair [13, c. 169].

The situation becomes more complex in the case of withdrawal from a contract for the supply of digital content. The consumer is obliged to stop using the digital content (digital service) and providing access to it to a third party on demand, and to return its material carrier at the supplier's expense (Article 17(1-2) of Directive 2019/770). The provider may also deprive the consumer of access to that digital content (Article 16(5) of Directive 2019/770). However, the provider must refund the consumer for the supply of the digital content. In the case of continuous supply of digital content, the supplier shall not refund for digital content supplied without defects (Article 16(1) of Directive 2019/770) [11, c. 138].

A novelty of Directive 2019/771 is the granting of the right to the seller to refuse to satisfy a consumer's claim for the rectification of defects or the replacement of non-conforming goods if it is impossible to carry them out or entails disproportionate costs. The introduction of relevant changes in the legal regulation is linked to the jurisprudence of the Court of Justice of the EU, in particular the Weber case. Adhering to the principles expressed by the EU Court of Justice in that case, the consumer is entitled to offer to cover the seller's excessive costs of bringing the goods into conformity. If the seller does not consider the offer to be consistent with the principle of reasonableness, the consumer has the right to demand a reduction in price or termination of the contract [8, c. 192].

According to Article 14(2) of Directive 2019/771, the consumer must give the seller access to the goods of inadequate quality in order to bring them into conformity. At the same time, paragraph 56 of the reasons of Directive 2019/771 notes that it does not regulate the determination of the place of performance of repair or replacement. Thus, in order to determine the place of repair or replacement of goods, it is necessary to apply the provisions of national legislation, taking into account Article 6 of the Rome I Regulation, the requirements of part 1 of Article 14 of Directive 2019/771 and the jurisprudence of the Court of Justice of the EU. Thus, according to the legal position of the Court of Justice of the EU as stated in the Fülla case, the relevant criteria for determining the place of fulfillment of the consumer's own obligation depend on the characteristics of the defective goods [1, c. 79].

Regarding the costs associated with the fulfillment of the seller's obligation to bring the goods into conformity, para. 2 of Article 14 of Directive 2019/771 establishes the seller's obligation to return the replaced goods at its own expense. At the same time, the Directive does not contain norms on the costs of delivery of goods of defective quality in order to repair them - one of the ways of legal protection of the buyer in case of purchase of goods of defective quality agreed by the parties. In making comparative studies, it is necessary to point to Article 112 of the Common European Sales Law, which laid down the same rule and has often been criticized by scholars for being too restrictive, as it did not provide for a similar rule in the case

of repair of goods. Despite the fact that Art. 2 of Art. 14 of Directive 2019/771 does not impose on the seller the obligation to bear the costs of delivery of goods of defective quality that are subject to repair, the analysis of Part 1 of Art. 14 of Directive 2019/771 allows us to conclude that all remedies of the buyer are free of charge. Otherwise, the consumer may refuse to protect the violated rights by repairing the goods of improper quality. Based on the above, the legal provision of Article 14(2) of Directive 2019/771 on the obligation of the seller to bear the costs of delivery of goods of defective quality in connection with its replacement should be interpreted from the position of the seller's obligation to pay the costs of waste removal and recycling of goods. In part 2 of Article 13 of Directive 2019/771, the European legislator enshrines the right of the consumer in case of non-compliance of the sold goods to choose one of the ways of protection: repair or replacement of the goods, and their hierarchy is not established. In light of the current trend towards the development of various business models, including the circular economy model, aimed at the long-term use of goods and materials and the reduction of waste and pollution, this issue becomes problematic. Although recital 48 of the reasons for Directive 2019/771 states that allowing consumers to request repairs should encourage sustainable consumption and could contribute to greater durability of goods, it does not prioritize repair over replacement [14, c. 2].

In practice, in most cases consumers prefer replacement to repair. This is due to many factors: economic (the ratio of costs associated with the repair and the cost of replacement), time (waiting for repair and transportation), technological (loss of attractiveness of the product due to the appearance of a new product on the market with the latest design features), – as well as consumer uncertainty in the quality of the repair.

Taking into account the fact that repair contributes to reducing waste, extending the life of goods, reducing the cost of energy and water resources, materials, transportation costs to return the goods to operation, it is more efficient than recycling [7, c. 134].

In addition, speaking about the superiority of repair over replacement of goods, it should be pointed out that in most EU member states there is no market for used goods. In modern conditions, in order to determine the «disproportionality» of the method of legal protection chosen by the consumer, it is necessary to fix in the legislation on consumer purchase and sale the requirement to take into account the impact of such a method on the environment. At the EU level, there are no special measures to encourage the repair of goods, including ensuring the availability of spare parts and technical manuals [3, c. 15].

Conclusion. European private law is undergoing dynamic transformations, certainly concerning one of its main institutions - the law of contract, in which the key role is given to the rules of sale and purchase. One of the key novelties of European contract law were the provisions of the Directives enshrining the concept of conformity of a good, digital content, digital service, as well as subjective and objective criteria for determining the conformity of a good. Despite the positive effect of maximum harmonization, which can lead to the same legal regulation of contractual relations in the sale and purchase of goods and facilitate cross-border transactions, increasing their number, one of its negative consequences is a decrease in the level of consumer protection in many EU member states. In particular, national legal systems will no longer be able to grant the consumer the right to terminate the contract immediately (except for the first 30 days after delivery).

References:

1. Busch Ch. Does the Amazon Dash Button violate EU consumer law? Balancing consumer protection and technological innovation in the Internet of things. *Journal of European Consumer and Market Law* 2018.2. P. 78–80.
2. Carvalho J.M. Sale of goods and supply of digital content and digital services — overview of Directives 2019/770 and 2019/771. *Journal of European Consumer and Market Law* 2019. 8 (5). P. 194–201.
3. Kalamees P., Sein K. Connected consumer goods: who is liable for defects in the ancillary digital service? *Journal of European Consumer and Market Law* 2019. 1. P. 13–22.
4. Kruisinga S.A. What do consumer and commercial sales law have in common? A comparison of EC Directive on consumer sales law and the UN Convention on contracts for the international sale of goods. *European Review of Private Law* 2001. 9 (2-3). P. 178–188.
5. Lehmann M. A question of coherence. The Proposals on EU contract rules on digital content and online sales. *Maastricht Journal of European and Comparative Law* 2016. 23 (5). P. 752–774.
6. Loos M. Full Harmonization as a regulatory concept and its consequences for the national legal orders. The example of the consumer rights Directive. *Vollharmonisierung im Europdischen Verbraucherrecht*, ed. by Michael Stürner, P. 2012. P. 47–98.

7. Luzak J. Digital age: time to say goodbye to traditional concepts. *Journal of European Consumer and Market Law* 2018.4. P. 133–135.
8. McCollough J. Consumer discount rates and the decision to repair or replace a durable product: a sustainable consumption issue. *Journal of Economic Issues* 2010. 44 (1). P. 183–204.
9. Savin A. Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context. *Copenhagen Business School Law Research Paper Series.* 2019. P. 19–35. Available at: https://ssrn.com/abstract=3474289.
10. Schulze R. The new shape of European contract law. *Journal of European Consumer and Market Law.* 2015. 4 (4). P. 139–144.
11. Tjong Tjin Tai E. Data ownership and consumer protection. *Journal of European Consumer and Market Law* 2018. 4. P. 136–140.
12. Wendehorst Ch. Consumers and the data economy. *Journal of European Consumer and Market Law* 2017. 1. P. 1-2.
13. Zoll F. Problem negatywnego uzgodnienia cech rzeczy sprzedanej – w oczekiwaniu na wspólne europejskie prawo sprzedaży. *Transformacje Prawa Prywatnego.* 2012. 2. P. 167–174.
14. Zoll F. The remedies in the Proposals of the online sales Directive and the Directive on the supply of digital content. *Journal of European Consumer and Market Law* 2016. 5 (6). P. 250–254.