

Impact of the implementation of Directive 2019/771 (SDG) on the consistency of civil law regulations regarding seller's liability towards consumers and other buyers for the defectiveness of goods

Wpływ implementacji dyrektywy 2019/771 (SDG) na spójność regulacji prawa cywilnego dotyczących odpowiedzialności sprzedawcy w stosunku do konsumenta i innych kupujących za wady rzeczy

Влияние имплементации Директивы 2019/771 (SDG) на согласованность норм гражданского права в отношении ответственности продавца перед потребителем и иными покупателями за недостатки товара

Вплив імплементації Директиви 2019/771 (SDG) на узгодженість положень цивільного права щодо відповідальності продавця перед споживачами та іншими покупцями за недоліки товару

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Summary: The paper analyzes the method of implementation of Directive 2019/771 with regard to the non-conformity of goods with the contract to the Polish legal order and assesses the impact of this implementation on the consistency of national law regulations. The article focuses on the relationships between the current regulations of the Act on Consumer Rights on the non-conformity of goods with the contract and the corresponding regulations of the Civil Code on warranty. The analysis is carried out using the formal-dogmatic method and legal-comparative method. The author comes to the conclusion that the amendment leads to the disruption of the internal consistency of civil law. Despite the implementation of Directive 2019/771 in the Act on Consumer Rights, the regulations of the Civil Code have not been correctly adjusted in order to maintain consistency within the protection granted by Polish law to the various categories of consumers (consumers purchasing movable goods and consumers purchasing real estate). Moreover, the principle of a higher level of consumer protection compared to bilateral professional trade (B2B) and general trade (C2C) has been disrupted.

Key words: consumer protection, Civil Code, Act on consumer rights, Directive 2019/771

Streszczenie: W artykule przeprowadzono analizę sposobu implementacji dyrektywy 2019/771 w zakresie niezgodności towaru z umową do polskiego porządku prawnego oraz dokonano oceny wpływu tej implementacji na spójność regulacji prawa wewnętrznego. Skoncentrowano się na relacjach pomiędzy obowiązującymi obecnie regulacjami ustawy o prawach konsumenta dotyczącymi niezgodności towaru z umową oraz odpowiadającymi im regulacjami Kodeksu cywilnego dotyczącymi rękojmi. Na podstawie przeprowadzonej analizy autor dochodzi do wniosku, że wprowadzona nowelizacja prowadzi do dekompozycji i zaburzenia wewnętrznej spójności prawa cywilnego. Pomimo implementacji dyrektywy 2019/771 do ustawy o prawach konsumenta, nie wprowadzono odpowiednich nowelizacji w Kodeksie cywilnym, które umożliwiłyby zachowanie spójności w ramach ochrony przyznanej przez polskie prawo poszczególnym kategoriom konsumentów (konsumenty nabywający rzeczy ruchome i konsumenty nabywający nieruchomości). Ponadto doprowadzono

do zaburzenia zasady wyższego poziomu ochrony konsumentów w porównaniu z obrotem dwustronnie profesjonalnym (B2B) i obrotem powszechnym (C2C).

Слова ключовые: ochrona konsumentów, Kodeks cywilny, ustawa o prawach konsumenta, dyrektywa 2019/771

Резюме: В статье анализируется, каким образом Директива 2019/771 о несоответствии товара договору была имплементирована в польскую правовую систему, и оценивается влияние этой имплементации на согласованность норм внутреннего права. Основное внимание было уделено соотношению действующих норм Закона о правах потребителей, касающихся несоответствия товара договору, и соответствующих норм Гражданского кодекса, касающихся законной гарантии. На основе проведенного анализа автор приходит к выводу, что внесенная поправка приводит к декомпозиции и нарушению внутренней согласованности норм гражданского права. Несмотря на имплементацию Директивы 2019/771 в Закон о правах потребителей, в Гражданский кодекс не были внесены соответствующие изменения, которые позволили бы обеспечить согласованность в рамках защиты, предоставляемой польским законодательством отдельным категориям потребителей (потребителям, приобретающим движимое имущество, и потребителям, приобретающим недвижимое имущество). Кроме того, нарушен принцип более высокого уровня защиты прав потребителей по сравнению с двусторонней профессиональной (B2B) и общей коммерческой (C2C) торговлей.

Ключевые слова: защита прав потребителей, Гражданский кодекс, Закон о правах потребителей, Директива 2019/771

Резюме: У статті проаналізовано спосіб імплементації Директиви 2019/771 до польського законодавства в плані невідповідності товару договору та оцінено вплив цієї імплементації на узгодженість внутрішньодержавного правового регулювання. Основна увага приділяється взаємозв'язку між чинними положеннями Закону про права споживачів щодо невідповідності товару договору та відповідними положеннями Цивільного кодексу щодо гарантійних зобов'язань. На основі проведеного аналізу автор доходить висновку, що запроваджена зміна призводить до декомпозиції та порушення внутрішньої узгодженості цивільного права. Незважаючи на імплементацію Директиви 2019/771 в Законі про права споживачів, до Цивільного кодексу не було внесено відповідних змін, які б забезпечили узгодженість захисту, що надається польським законодавством окремим категоріям споживачів (споживачам, які купують рухомі товари, і споживачам, які купують нерухомість). Крім того, було порушено принцип вищого рівня захисту прав споживачів порівняно з двосторонньою професійною торгівлею (B2B) та загальною торгівлею (C2C).

Ключові слова: захист прав споживачів, Цивільний кодекс, Закон про права споживачів, Директива 2019/771

Introduction

Consumer protection law has undergone far-reaching changes in recent years, both at the level of EU law and, consequently, within the national laws of EU countries. An important part of the regulations on consumer protection are the norms relating to liability of the seller for defectiveness of goods. This issue has long been the subject of doctrinal interest, and the discussion has intensified in connection with the implementation of the SDG Directive¹ into the Polish legal order. The peak pe-

¹ Directive (EU) 2019/771 of the European Parliament and of the Council of 20.05.2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and

riod of interest in this area occurred before the entry into force of the Act amending the Act on Consumer Rights,² when many critical comments were expressed with regard to the manner of implementation of the SDG Directive.³ In the end, the remarks made by the scholars did not significantly change the proposed regulations, which came into force in a wording that corresponded in principle to the original draft. For this reason, the comments postulated by the scholars prior to entry into force of the act remain valid.

Despite this, there are some areas that have not yet been analysed. In connection with the adoption of a dualistic system of liability for defectiveness of goods, the question of the relationship between the regulations of the ACR⁴ and the Civil Code⁵ arises. Therefore, the purpose of this paper is to answer the question of whether, in connection with the parallel functioning of the provisions of the ACR and the Civil Code, the implementation made preserves the consistency of domestic law. In order to address this issue, it is first necessary to provide a brief historical outline of the regulations in question. It will allow to determine main motives that formed the basis for the introduction of the consumer protection instruments, and which are important in assessing their suitability for achieving their intended purposes. This will be followed by an analysis of how the directive has been implemented into Polish legal system and a comparison of the current regulations of the ACR with the Civil Code regulations. On this basis, a final position will be formulated on the impact of the amendment on

Directive 2009/22/EC, and repealing Directive 1994/44/EC (hereinafter: SDG).

² Act of 1 December 2022 on amendments to the Act on Consumer Rights and certain other laws, Journal of Laws [Dziennik Ustaw] of 2022 item 2581.

³ M. Namysłowska, A. Jabłonowska, F. Wiaderek, *Implementation of the Digital Content Directive in Poland: A Fast Ride on a Tandem Bike Against the Traffic*, Journal of Intellectual Property, Information Technology and E-Commerce Law 2021, vol. 12, no. 2, pp. 2021–2022; B. Gnela, *Problem systemowej regulacji umów konsumenckich w polskim prawie*, in: *Prawo prywatne wobec wyzwań współczesności. Księga pamiątkowa dedykowana Profesorowi Leszkowi Ogiegłe*, eds. M. Fras, P. Ślęzak, Warszawa 2017; M. Radwański, *Implementacja Dyrektywy 2019/771 do polskiego porządku prawnego – wybrane problemy*, in: *Reklamacje, mediacje i inne postępowania w sprawach konsumenckich*, eds. Z. Długosz, K. Podgórski, E. Sługocka-Krupa, Warszawa 2021, passim; A. Wiewiórowska, F. Zoll, *Akademicki Projekt Kodeksu Cywilnego. Ocena założeń projektu implementacji dyrektywy Parlamentu Europejskiego i Rady UE 2019/771 z dnia 20 maja 2019 w sprawie niektórych aspektów umów sprzedaży towarów*, https://www.projektkc.uj.edu.pl/dokumenty/Ocena_projektu_r_2019_771_Wiewiorowska_Zoll.pdf [access: 21.07.2023], p. 2; A. Wiewiórowska, F. Zoll, K. Południak-Gierz, W. Bańczyk, *Transpozycja Dyrektywy Parlamentu Europejskiego i Rady UE 2019/771 z dnia 20 maja 2019 r. w sprawie niektórych aspektów umów sprzedaży towarów*, *Kwartalnik Prawa Prywatnego* 2021, vol. 30, no. 4, pp. 917–920.

⁴ Act of 30 May 2014 on consumer rights, consolidated text: Journal of Laws of 2020 item 287, as amended by the act invoked in footnote no. 2 (hereinafter: ACR).

⁵ Act of 23 April 1964 – Civil Code, consolidated text: Journal of Laws of 2022 item 1360, as amended by the act invoked in footnote no. 2 (hereinafter: Civil Code).

the consistency of internal law regulations from the perspective of the effects of differentiating the situation of various buyers, including primarily consumers purchasing movable and immovable property, but also non-consumers.

1. Historical background

For the first time, the implementation of EU regulations regarding liability for goods in the Polish legal system took place before Poland's accession to the European Union, when Directive 1999/44/EC⁶ was transposed. At that time, consumer protection was seen as an objective in itself. The regulations in force provided for the principle of minimum harmonisation, allowing member states to deviate in favor of more far-reaching consumer protection. Among the Directive's most important assumptions, it is important to note the sequential nature of consumer rights, under which consumers were given two levels of rights (first level – replacement or repaid of goods, second two – withdrawal from the contract or reduction of the price). The Polish implementation of these regulations was carried out the Act on Special Terms of Consumer Sales,⁷ which existed in parallel to the warranty provisions of the Civil Code.⁸ This decision was met with criticism of the doctrine, which pointed out, among other things, the violation of the consistency of regulations and the central role of the Civil Code in the system of civil law.⁹

Due to criticism of the adopted way of implementing Directive 1999/44/EC, the previous approach was abandoned during the implementation of the subsequent Directive 2011/83/EU.¹⁰ In 2014 the national legislator decided to transfer all of

⁶ 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.

⁷ Act of 27 July 2002 on the special conditions of consumer sales and amendments to the Civil Code, Journal of Laws 2022 no. 141, item 1176 (no longer in force).

⁸ On the relationship between the concept of non-conformity of goods with the contract and the concept of defects cf. A. Wiewiórowska-Domagalska, *Refleksje na tle orzecznictwa sądów powszechnych w zakresie sprzedaży konsumenckiej*, Prawo w Działaniu. Sprawy Cywilne 2014, no. 20, pp. 247–254.

⁹ M. Namysłowska, A. Jabłonowska, F. Wiaderek, *Implementation of the Digital Content...*, p. 243; M. Koszowski, *Ocena rozwiązań prawnych zawartych w ustawie o szczególnych warunkach sprzedaży konsumenckiej oraz zmianie Kodeksu cywilnego implementującej dyrektywę Parlamentu Europejskiego i Rady nr 1999/44/WE*, Przegląd Sądowy, no. 6, 2013, p. 10; M. Pecyna, *Ustawa o sprzedaży konsumenckiej. Komentarz*, Kraków 2004, pp. 14–23; J. Pisuliński, *Sprzedaż konsumencka*, in: *System Prawa Prywatnego*, vol. 7. *Prawo zobowiązań – część szczegółowa*, ed. J. Rajski, Warszawa 2018, p. 214.

¹⁰ 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

the regulations to the Civil Code, thus introducing a uniform system of protection, applicable both in consumer and non-consumer trade, with certain deviations in relation to consumers.¹¹ At the same time, within the framework of the regulation of national law, in accordance with the Directive, the sequentiality of consumer rights was abandoned.¹²

The further evolution of EU law assumed maximum harmonization.¹³ This was due to the fact that consumer protection was no longer the sole objective. This goal began to co-evolve with other EU policy objectives, which included the formation of a single EU market¹⁴ and environmental protection, as well as the related pursuit of developing a circular economy.¹⁵ At the same time, however, the EU legislator changed the approach to basic consumer rights. The sequentiality of rights was re-introduced, which had the effect of lowering the level of consumer protection to

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.

¹¹ However, a significant part of the consumer regulations provided for in Directive 2011/83/EU has been implemented in the new ACR, such as the provisions on the possibility of withdrawing from a distance contract. See also: W. Dybka, *Odpowiedzialność sprzedawcy z tytułu rękojmi w świetle Dyrektywy Parlamentu Europejskiego i Rady 2019/771 w sprawie niektórych aspektów umowy sprzedaży*, Internetowy Przegląd Prawniczy TBSP UJ 2019, no. 3, p. 7; F. Zoll, *Rekojmia. Odpowiedzialność sprzedawcy*, Warszawa 2018, pp. 363–365.

¹² Nevertheless, some remnants of the previous regulations are still in force (Article 560 § 2 of the Civil Code).

¹³ Article 4 SDG. See also: *Projekt ustawy o zmianie ustawy o prawach konsumenta i kodeksu cywilnego*, *Kwartalnik Prawa Prywatnego* 2021, vol. 30, no. 1, p. 148.

¹⁴ G. Howells, C. Twigg-Flesner, T. Wilhelmsson, *Rethinking EU Consumer Law*, London–New York 2018, pp. 168–169.

¹⁵ Cf. F. Zoll, *Ekologiczne prawo sprzedaży – bardzo wstępne uwagi*, in: *Wykonanie zobowiązań. Księga jubileuszowa dedykowana Profesorowi Adamowi Brzozowskiemu*, eds. K. Bilewska, W.J. Kocot, D. Krekora-Zajac, Warszawa 2021, pp. 639–646; F. Zoll, K. Południak-Gierz, W. Bańczyk, *Sustainable Consumption and Circular Economy in the Directive 2019/771*, *Pravovedenie* 2020, no. 64 (4), pp. 527–530; A. De Franceschi, *Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of Sustainable Economy*, *Journal of European Consumer and Market Law* 2018, vol. 7, no. 6, pp. 217–221. It was also pointed out that the proper functioning of the internal market takes precedence over consumer protection (A. Kołodziej, *Wpływ zastosowania metody harmonizacji pełnej w zakresie uprawnień konsumenta w Dyrektywie 2019/771 na przyszłą zmianę kodeksowego poziomu ochrony konsumenta z rękojmi (część I)*, *Acta Universitatis Wratislaviensis* no. 4072, *Przegląd Prawa i Administracji* 2021, no. 127, p. 215); D. Dąbrowski, *Prawo umów jako instrument wspierający ochronę środowiska. Zarys problemu*, *Przegląd Ustawodawstwa Gospodarczego* 2023, no. 6, pp. 27–29; *Zielona księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, ed. Z. Radwański, Warszawa 2006, pp. 94–95. On the changing status of the consumer, see: M. Jagielska, *Od konsumenta do użytkownika (o istotnej zmianie współczesnego prawa konsumenckiego)*, *Państwo i Prawo* 2021, no. 11, pp. 31–46.

some extent.¹⁶ The return to the concepts of the past was also apparent at the level of Polish legal order. The national legislator again decided to establish two separate regimes of buyer protection, one of which, concerning consumers purchasing goods (defined as movable property¹⁷), was regulated in the ACR, and the other was left in the Civil Code. Due to the scope of application of the ACR, the latter system applies to remaining consumer relations (acquisition of real estate), but also to professional trade (B2B) and general trade (C2C). Thus, the adopted regulation led to a return to the dualistic system already existing before 2014.

2. Comparison of the regulations of the ACR and the Civil Code on the background of the SDG Directive – general remarks

At the outset of comments on the relationship between buyer protection under the ACR and the Civil Code, it should be noted that regardless of the change of the level of consumer protection as a result of the introduction of the SDG Directive, in its implementation into national law, the legislator should maintain the principle that the protection granted to consumers shall be more far-reaching than the protection granted to buyers under other legal relationships (e.g. B2B).¹⁸ In addition, in the case of differentiation of the level of consumer protection in particular cases, such as in the case of the purchase of movable and immovable property, the regulations of national law should be consistent,¹⁹ and any differentiation should be justified axiologically. A comparison of current regulations under the ACR and the Civil

¹⁶ See also: A. Kołodziej, *Wpływ zastosowania metody...*, p. 215; K. Południak-Gierz, *Wpływ regulacji dyrektyw 2019/770 oraz 2019/771 z zakresu rękojmi na poziom ochrony polskich konsumentów względem rozwiązań w tym zakresie obowiązujących w Kodeksie cywilnym. Implementacja do polskiego porządku prawnego dyrektyw konsumenckich na przykładzie dyrektyw 2019/770 i 2019/771*, Warszawa 2022, https://iws.gov.pl/wp-content/uploads/2022/10/IWS_Południak-Gierz-K.-_Wplyw-regulacji-dyrektyw-2019.770-oraz-dyrektywy-2019.771-z-zakresu-rekojmi-na-poziom-ochrony-polskich-konsumentow.pdf [access: 21.07.2023], p. 13.

¹⁷ Article 2 (4a) ACR.

¹⁸ A. Kołodziej, *Harmonizacja pełna uprawnień konsumenta w razie niezgodności towaru z umową w Dyrektywie 2019/771 o sprzedaży towarów – część II*, Acta Universitatis Wratislaviensis no. 4116. *Przegląd Prawa i Administracji* 2022, no. 128, p. 227; see also: M. Koszowski, *Ocena rozwiązań...*, pp. 17–18.

¹⁹ Cf. *Akademicki projekt zmiany Kodeksu cywilnego*, *Kwartalnik Prawa Prywatnego* 2021, vol. 30, no. 2, p. 330; A. Wiewiórowska, F. Zoll, K. Południak-Gierz, W. Bańczyk, *Transpozycja Dyrektywy Parlamentu Europejskiego...*, pp. 920–921, 926.

Code, however, shows that the way the provisions of the SDG Directive are implemented does not fully accomplish these objectives.

3. The concept of non-conformity of goods with the contract

The first of the regulations added to the ACR and requiring discussion is the concept of non-conformity of goods with the contract, introduced in Article 43b (1) and (2) ACR. This regulation was intended to reflect Articles 6 and 7 of the SDG Directive, defining subjective and objective requirements for conformity with the contract, respectively. While comparing the regulations of the ACR to the regulations provided for in the Civil Code, it should be noted that the concept of non-conformity of goods with the contract under ACR has a broader scope than the concept of defect in Article 556¹ of the Civil Code, particularly due to the addition of objective criteria in Article 43(2) ACR.²⁰ This has the effect of raising the level of protection for consumers purchasing movable goods. Therefore, the legislator's decision can be evaluated positively, as being in line with the general assumption of higher consumer protection. However, it should be underlined that in view of the preservation in the Civil Code of the seller's liability to a consumer purchasing real estate, the adopted regulation results in an unjustified lowering of the protection of this group of consumers in comparison to consumers purchasing movable property.

4. Exemption of the entrepreneur from liability

Another significant change has been provided for in Article 43b (4) ACR, introducing an exemption from the entrepreneur's liability for the lack of conformity of the goods with the contract with respect to objective requirements, if the consumer was specifically informed of this and expressly and separately accepted that deviation.²¹ Such a method of regulation puts the entrepreneur under the ACR in a worse position than a seller under the Civil Code, which requires for exemption from liability

²⁰ Cf. *Projekt ustawy o zmianie ustawy...*, p. 151; M. Pecyna, *Implementacja dyrektywy o umowach o dostarczanie treści cyfrowych lub usługi cyfrowej – wyzwania dla ustawodawcy krajowego*, *Kwartalnik Prawa Prywatnego* 2021, vol. 30, no. 3, p. 615.

²¹ This regulation is a transposition of Article 7 (5) SDG.

that the buyer knew of the defect (Article 557 § 1 of Civil Code). Significantly, the Civil Code provision refers to an objective state of affairs, and knowledge of the defect does not necessarily have to be obtained from the seller.

While the solution adopted in the ACR is in line with the Directive and indeed raises the level of consumer protection,²² a comparison of the regulations of the ACR and Civil Code regulations leads to the conclusion that the principle of a higher level of consumer protection has also been implemented, but not fully. Since the Civil Code regulations cover consumers acquiring real estate, such buyers are once again placed in a worse position than consumers acquiring movable property. With respect to consumers purchasing real estate, it can be argued that, given the typical value of the subject matter of the contract, a higher level of protection should all the more be provided. In this regard, there were no obstacles for amending the Civil Code accordingly to the changes of the ACR and to grant consumers buying real estate the same level of protection as consumers purchasing movable property.

5. Period of protection

As a result of the implementation of the SDG Directive, the timeframe for buyer protection has also been changed. Pursuant to Article 10 (1) SDG, Article 43c (1) of the ACR provides that protection is granted if the nonconformity of the goods becomes apparent within a 2-year period, counted from the delivery of the goods. This regulation is the counterpart of Article 568 § 1 of the Civil Code, establishing 5-year protection period for the sale of immovable property, however, under the new ACR regulations, no specific period of limitation for claims has been provided. Thus, this is a significantly different regulation than the previous Civil Code solution, which provides for a short, 1-year period of limitation counted from the date of discovery of the defect, with the reservation that if the buyer is a consumer, the period of limitation cannot end before the expiration of the warranty period (Article 568 § 2 of the Civil Code). Although the provisions of the SDG do not exclude the possibility of a specific regulation of the period of limitation of claims under national law (Article 10 (4) SDG), Polish legislator did not opt for such a solution. This means

²² W. Dybka, *Odpowiedzialność sprzedawcy...*, p. 19; K. Południak-Gierz, *Wpływ dyrektyw 2019/770 oraz 2019/771 na poziom ochrony konsumenta w ramach reżimu rękojmi w prawie polskim*, Prawo w Działaniu. Sprawy Cywilne 2023, no. 54, p. 185.

that under ACR, claims for nonconformity of goods will be time-barred under the general rules, in accordance with Article 118 of the Civil Code. In principle, the regulations of the ACR are therefore more favourable for consumers than the Civil Code regulations,²³ since the general period of limitation under Article 118 of the Civil Code is longer than the period of limitation under Article 568 § 2 Civil Code.

This results in a further disadvantage for a consumer purchasing real estate. In this situation the time frame of protection covers 5 years from the release of the item, with the claim becoming time-barred within 1 year from the date of discovery of the defect, but not earlier than 5 years from the release of the item (Article 568 § 1–2 of the Civil Code). This means that in some cases, the claim will become time-barred after almost 6 years from the date of delivery, but not earlier than 5 years. Meanwhile, under the provisions of the ACR, the effective period of protection is longer. If a defect is discovered at the end of the 2-year protection period, the claim will become time-barred after 6 years from that moment, and with effect at the end of the calendar year (Article 118 sentence 2 of the Civil Code). In some cases, it can amount to almost 9 years. This means that for real estate, which usually represents a higher value than movable property, less favorable regulations are provided for the consumer than for movable property, which may have negligible value.

In addition, as part of the implementation of the SDG Directive, the Polish legislator decided to extend the basic 1-year deadline for the presumption of nonconformity of goods up to 2 years (Article 43c (1) sentence 2 of the ACR, Article 11 (1) and (2) SDG).²⁴ While such a solution is permissible in the light of the Directive, on the grounds of Polish regulations it leads to another violation of consistency with the Civil Code regulations, which in a similar situation with respect to consumer sales provide for a 1-year term (Article 556² of the Civil Code).²⁵ The goal of the national legislator was undoubtedly to increase the level of consumer protection on the grounds of the ACR, but nevertheless the lack of any modification of the Civil Code regulation results in the fact that the consumer purchasing movable property is again protected to a higher degree than in the case of the purchase of real estate without any apparent reason.

²³ Page 7 of justification of the draft of the act invoked in footnote no. 2.

²⁴ On the assessment of such a possibility under EU law see: E. Van Gool, A. Michel, *The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis, Draft version, submitted to the Journal of European Consumer and Market Law (EuCML)*, <https://ssrn.com/abstract=3732976> [access: 24.07.2023], p. 9.

²⁵ Cf. W. Dybka, *Odpowiedzialność sprzedawcy...*, p. 22.

6. Bringing the goods into conformity with the contract

One of the most significant changes regarding non-conformity of goods is the restoration of sequentiality of consumer rights.²⁶ Under SDG Directive, the rights granted in the first place are collectively called “bringing the goods into conformity with the contract” and include the right to demand repair or replacement of the goods (Articles 13 (1) and (2) SDG).²⁷ Under the ACR, the consumer is given a choice between these rights, but in certain situations the entrepreneur may decide to provide the second of the performances (Article 43d § 2 sentence 1 ACR). In addition, if repair or replacement is impossible or would require disproportionate costs for the entrepreneur, the entrepreneur may refuse to bring the goods into conformity with the contract altogether. Such a regulation is in line with the Directive (Article 13 (2) and (3) SDG), but once again leads to inconsistencies when juxtaposed with the Civil Code.

The counterpart of the regulation in question on the grounds of the Civil Code is Article 561 § 3, which shapes the position of the seller in a more rigorous way.²⁸ This is because the seller may refuse to satisfy the buyer’s request only if bringing the defective goods into conformity with the contract in the manner chosen by the buyer is impossible or, compared with the other possible way of bringing it into conformity with the contract, would require excessive costs. This suggests that the seller can completely refuse to repair or replace the goods only if it is impossible to fulfill the request of the buyer. The wording of the second condition suggests that if the request made causes excessive costs compared to the second possible request, the seller may only choose to fulfill the second of the performances.²⁹ This means that in case of excessive costs one of the demands must be fulfilled, and due to the nature of real estate as thing defined as to its identity, only repair will be possible.³⁰ Meanwhile, under the regulations of the ACR, if excessive costs arise, the entrepreneur can always refuse to repair or replace the thing (Article 43d (2) *in fine* ACR). Such differentiation is another manifestation of the inconsistency between the code regulations and the ACR. This time, however, it has the effect of worsening the

²⁶ Cf. *Projekt ustawy o zmianie ustawy...*, p. 152.

²⁷ See also: F. Zoll, K. Południak-Gierz, W. Bańczyk, *Sustainable Consumption...*, pp. 541–542.

²⁸ However, it should be borne in mind that before the amendment, an even more similar regulation was provided for in Article 560 § 2 of the Civil Code.

²⁹ However, the wording of the Article 3 (3) of the Directive 1999/44/WE is slightly different. Cf. A. Kołodziej, *Harmonizacja pełna uprawnień...*, p. 161. On the grounds of previous regulations: M. Koszowski, *Ocena rozwiązań...*, p. 13.

³⁰ Cf. J. Pisuliński, *Sprzedaż...*, p. 229.

situation of consumers under the ACR compared to the situation of consumers and other entities under the Civil Code regulations.

7. Obligation to dismantle and reassemble

In addition, as part of the right to bring the goods into conformity with the contract, under ACR there is an unconditional obligation for the entrepreneur to dismantle the goods and reassemble them (Article 43d (6) ACR). This is another regulation that is in line with the Directive (Article 14 (3) SDG), but which differs from the Civil Code norms applicable in similar situations. Under the Civil Code, the seller may refuse disassembly and reassembly if the cost of these activities exceeds the price of the goods sold (Article 561¹ § 2 of the Civil Code). It allows the seller to be protected from excessive costs, in particular in the case of sale of an item of a small value. At the same time, such protection is not granted under the ACR, which favors the consumer, granting the right to demand disassembly and reassembly also in case of sale of an item of a small, even token value.³¹ Thus, the adopted measure once again puts the consumers purchasing immovable property in worse position.³²

Moreover, this inconsistency is further deepened because of the final part of Article 561¹ § 1 of the Civil Code, granting the right to have the disassembly and assembly performed by the buyer at the seller's expense and risk in the event of the seller's failure to perform this duty. Under ACR there is no analogous right. In order to take advantage of substitute performance, a consumer buying a movable thing would have to resort to the general provisions, which will most often involve the need to obtain court approval (Article 480 § 1 and 3 of the Civil Code). Thus, from this perspective the buyer is protected to a wider extent by the regulations of Civil Code than ACR. While such a measure can be justified in the case of consumers purchasing real estate (the need to ensure that a defect can be removed efficiently is particularly important in the case of real estate, especially used for residential purposes), the simultaneous extension of higher protection to entities other than consumers is difficult to defend.

³¹ This is certainly beneficial to the consumer, but it may raise questions about the imposition of excessive obligations on entrepreneurs. The view was also expressed that the current regulations are less clear than those of the Civil Code, K. Południak-Gierz, *Wpływ dyrektyw...*, p. 193.

³² Although in the case of defects in real estate, sometimes disassembly and assembly will not be possible at all, but some defects may require it (for example, defect in the heating, plumbing or electrical system).

8. Rights of the second level

Under SDG Directive, rights of the second level include the ability to terminate a contract or reduce the price. These rights are conditioned by the occurrence of certain circumstances, which are enumerated in Article 15 (4) SDG and, after certain editorial adjustments, transposed into Article 43e (1) ACR. In light of the lack of sequentiality under the Civil Code regulations, this leads to a worsening of the situation of the consumer under the ACR, since the buyer under the Civil Code has incomparably greater freedom in shaping his legal situation.³³ In this regard, one may ask whether, in the context of the application of warranty regulations to a consumer purchasing real estate and to non-consumer legal relations, such differentiation is justified. In case of a consumer acquiring real estate, due to the difficulties associated with withdrawal from the contract for the sale of real estate, preference should be given to rights that lead to bringing the property to a suitable condition,³⁴ which would support sequentiality. In the case of non-consumer relations, on the other hand, one can again refer to the general principle that consumer protection should go further, and the lack of sequentiality of rights under the Civil Code is a solution that contradicts this assumption to the furthest extent.³⁵ While the regulations of ACR are once again in line with the EU law, under domestic law it leads to an unjustified preference for buyers other than consumers purchasing movable property.

9. Withholding the payment

In addition, the strengthening of the position of the consumer purchasing movable goods is affected by the right to “withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller’s obligations under this Directive” (Article 13 (6) SDG). The implementation of this regulation was carried out by the introduction of Article 43 (f) ACR. An analogous regulation is not provided for under Civil Code. This has the effect of privileging, on the basis of the provisions of the ACR, the consumer acquiring movable goods, who has been equipped with a far-reaching right, allowing to force the entrepreneur to fulfill the

³³ A. Kołodziej, *Harmonizacja pełna uprawnień...*, passim; K. Południak-Gierz, *Wpływ regulacji...*, p. 21.

³⁴ Also sustainable consumption and the circular economy speak in favor of that position (F. Zoll, K. Południak-Gierz, W. Bańczyk, *Sustainable Consumption...*, pp. 539–540).

³⁵ Cf. on the grounds of previous regulations: J. Pisuliński, *Sprzedaż...*, p. 214.

obligations related to the non-conformity of the goods. However, this measure raises doubts about imposing excessive burden on the entrepreneur. The payment of the price is a reciprocal performance, fulfilled in connection with the performance of a bilateral contract, under which the entrepreneur transfers ownership of the goods. If the goods are found to be defective, the equivalence of performances is disturbed, and the rights granted under the provisions in question are aimed at restoring it.³⁶ A regulation empowering the consumer to withhold payment of the price is fully justified in situations where the defect is so significant that the goods are not at all suitable for their intended use. In such a case, it would be unreasonable to expect the consumer to pay the full price. However, one can imagine many situations in which the defect is of an insignificant nature, not precluding the possibility of using the goods as intended, and at the same time, in the context of the value of the goods, it is a completely minor defect (e.g., the purchase of a new automobile in which the trunk light was not installed by mistake). In such a case, granting the consumer right to withhold payment of the entire amount due seems to go too far.

Doubts in this regard are exacerbated by the fact that on the basis of Civil Code an analogous right is not granted at all. It does not arise either under the provisions on warranty or under the provisions of the general part of the Civil Code, because Article 488 or 490 of the Civil Code refer to mutual performance, which under the contract of sale is the transfer of ownership of the goods and their delivery, but not the performance of warranty obligations.³⁷ Therefore, in terms on consumer relations, regardless of whether the identified defect in the real estate is insignificant (e.g., seller's failure to properly adjust the door) or significant (e.g., lack of a functioning plumbing system), the consumer is obliged to pay the price in accordance with the contract, and the identification of any defect does not modify this obligation. Such a solution contrasts with the situation of the consumer under ACR, who, in the case of the purchase of a movable item, can always withhold payment, even if the value of the item is very high and the nature of the non-conformity with the contract is minor. It is important to note that in the EU legislator allowed the possibility for member states to determine the conditions and rules for exercising the

³⁶ A.M. Juranek, K. Kryla-Cudna, M. Tulibacka, *Komentarz do art. 556 kodeksu cywilnego*, in: *Kodeks cywilny. Komentarz*, ed. K. Osajda, Warszawa 2023, § 5; J. Jezioro, *Komentarz do art. 556 kodeksu cywilnego*, in: *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, Warszawa 2019, § 1; E. Habryn-Chojnacka, *Komentarz do art. 556 kodeksu cywilnego*, in: *Kodeks cywilny*, vol. 2. *Komentarz. Art. 353–626*, ed. M. Gutowski, Warszawa 2019, § II.3.

³⁷ A. Kołodziej, *Harmonizacja pełna uprawnień...*, p. 172; K. Południak-Gierz, *Wpływ regulacji...*, p. 26. However, cf. F. Zoll, *Rękojmia...*, pp. 212–214.

discussed right to withhold payment of the price,³⁸ but the Polish legislator did not use this possibility. In the context of maintaining two separate regimes of liability for the sold goods in the Polish legal system, it can be said that in order to bring them closer together, it has been necessary to introduce additional restrictions in Article 43 (f) ACR. Right to withhold the payment could, for example, have been excluded in the case of immaterial defects. This would make the dissonance between the consumer's rights in the case of the purchase of movable and immovable property significantly reduced. In order to ensure more complete and uniform consumer protection, consideration could be also given to granting the consumer an analogous right to withhold the payment under the Civil Code.

Conclusions

The comments presented above lead to the conclusion that the course of action adopted by the Polish legislator during the implementation of the SDG Directive does not take into account the context of the Polish private law system and the existing legislation. The introduced amendment has led to a disruption of consistency of national law,³⁹ even if from the perspective of the implementation of the Directive it is an action that has been correct in principle. Manifestations of violations of the consistency of domestic law can be seen at various levels. Despite the implementation of the general idea of granting a higher level of protection to consumers, in some cases deviations from this principle occur, for which it is difficult to find justification. This is because the current regulations sometimes have the effect of granting more far-reaching protection to buyers other than consumers (for example, the lack of sequentiality of rights under Civil Code).

Moreover, within the framework of the consumer protection system, the position of consumers in particular situations is unjustifiably differentiated. While the restoration of the sequentiality of the rights of the consumer purchasing movable goods is enforced by the EU regulations, it is not clear why the legislator introduced such a far-reaching differentiation of the position of the consumer depending on whether they are purchasing movable or immovable property. Although the SDG Directive regulates only the sale of movable property and, in recital 12, grants

³⁸ Article 13 (6) *in fine* SDG.

³⁹ Despite the fact that page 16 of justification of the draft of the act invoked in footnote no. 2 the legislator recognizes the need to ensure regulatory consistency of internal law.

member states the freedom to regulate contracts of sale of real estate, this does not mean that the national legislator is exempt from the obligation to take care of the internal consistency of the law.⁴⁰ The adopted approach does not create the impression of a well-thought-out measure, but rather a literal implementation of the directive, while ignoring the effects it has on legal relations not covered by the regulations of the ACR, including primarily consumer contracts for the acquisition of real estate, but also contracts in B2B and C2C relationships.

Although some adjustments were made to the Civil Code along with the adopted amendment, important issues were nevertheless overlooked, arising indirectly from the amendment. These effects could be eliminated by properly adjusting the provisions of the Civil Code. Despite the current regulatory dualism it would still be possible to adjust the Civil Code in such a way that the regulations provided therein are consistent and axiologically justified when juxtaposed with the regulations of ACR. This also does not exclude differentiation on the basis of the Civil Code of the situation of consumers and other entities, because, after all, this method of regulation was already present before the amendment of the Civil Code.

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⁴⁰ See also: K. Południak-Gierz, *Wpływ dyrektyw 2019/770 oraz 2019/771...*, p. 181.

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