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UNCLEAR STATUS OF DIGITAL CONTENT IN POLISH CONSUMER RIGHTS REGULATION

by

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This paper aims to focus on the influence of the new Consumer Rights Directive (2011/83/UE) on Polish law. There hasn't been in Polish law system any regulation on electronic commerce, which would deal with digital content, although music, movie and book retail sale constitutes mostly digital downloads.¹ With regards to Polish Civil Code and other relevant acts, it has never been defined what the digital content is; it has never been resolved whether it is the product or the service.

KEY WORDS

International Consumer Contracts, E-commerce, Digital Content, Polish Consumer Rights

1. NEW REGULATIONS

On 13th June 2014, new regulations – the European Directive no 2011/83 on Consumer Rights came into force governing consumer contracts for sale of goods, services and digital content made available online or contracts made at a "distance". The national regulations, which were supposed to be coherent with the Directive, should have been released till the 13th of June 2014. Unfortunately Polish legislator was late and new Polish Act on Consumer Rights was adopted on the 17th of June 2014 and finally came into force on the 25th of December 2014. It was also the issue of some

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¹ Bezakova, D. (2013) *The Consumer Rights Directive and its Implications for consumer protection regarding intangible digital content*, Masaryk University Journal of Law and Technology, Nr 2, p. 177.

discussions, whether Poland was in danger of paying the fine for improper, as well as late adoption of the European Directive.

Until recently, on the traditional commercial market, the issue of the protection of consumer rights referred to goods and services. However, with the development of technology, a new category of goods has appeared, which comprises digital goods, including movies, music, applications, computer programs.

2. A NEW KIND OF GOODS AND CONTRACTS

The Directive on Consumer Rights has established the legal definition of digital content and connected with this new kinds of contracts e.g. new obligation of e-traders.

From the legal point of view, digital content is a very interesting topic, which lies within the thematic scope of a few branches of law, like contract law, consumer law, intellectual property law or international private law. With respect to the digital content and its position in consumer rights Act, the aspects of copyright law must not be ignored.²

The contracts on supply of digital contents are mostly concluded by electronic means – by the exchange of emails, on eCommerce websites or through a peer-to-peer marketplace. Contract duties of the supplier (mostly the provision of digital services) can be performed online (download, Software-as-a-Service, etc.) or offline (e.g. the CD sent by traditional mail).

3. DIGITAL CONTENT

Despite the widespread presence of digital content, it has not been yet defined in any legal act. Perhaps this was because of an unresolved problem of whether digital content should be classified as goods or services, or as a hybrid of both, or whether it should be considered as neither of the above.³

The words “goods” or “services” are not defined by any Polish legal acts, which deal with civil law (the same situation is in criminal law).

² Jacquemin, H. (2010) *Digital Content and Consumer Protection within European Law, The 8th international workshop for technical, economic and legal aspects of business models for virtual goods : incorporating the 6th international ODRL workshop*, September 30th-October 1st 2010 Namur, Belgium . Namur: Presses Universitaires de Namur, p. 46-47.

³ Bezakova, D. (2013) *The consumer rights directive and its implications for consumer protection regarding intangible digital content*, Masaryk University Journal of Law and Technology, Nr 2, p. 182-183.

However, they are explained in the Directive on Consumer Rights, where “goods” means any tangible movable item and “sales contract” is any contract for the sale of goods and services, and “service contract” is considered as any contract other than sales contract whereby service is provided by the trader to the consumer. Neither in Polish Civil Code nor in any other act on consumer rights can we find the definition of those above mentioned issues. Especially, there is no legal distinction between digital content in itself (such as movie, music, software, game) and the way it is provided to the recipient – such as downloading, streaming, on the physical medium, in the context of cloud computing.

While the downloaded files (text, audio, visual), by analogy, could be treated as goods, the provision of digital products in the cloud can not be qualified as goods. It can be only considered as service contracts.

Directive on Consumer Rights no 2011/83/EU was the first to introduce the concept of legal definition of “digital content”. In accordance with its article 2 and as well with the Polish Consumer Regulation, digital content is the data produced and supplied in digital form. In the preamble to Directive 2011/83/EU examples of digital content were enumerated. This directory includes computer programs, applications, games (excluding gambling), music, videos or texts, irrespective of whether access to them is achieved through downloading or streaming data reception, on tangible medium or using any other means. It can therefore be assumed that the digital content could be equivalent to existing products in the real world (the book in electronic form, recorded music in digital form), or it could be a completely new product which does not have an equivalent in the real form and which exists and functions normally in electronic form on the web, without the opportunity to be saved on local disk (using cloud computing), including data, its content and functionality.

Goods, as items of sale, are usually understood as the goods that can physically be taken in possession. The EU Court of Justice judgment in Case C-128/11 *UsedSoft* deserves attention at this point.⁴ The Court characterized the transaction involving the downloading from the Internet of a computer program as a sale. This judgment was criticized in the legal literature. First of all, it was pointed out that the way of that analysis is, that there has been no transfer of ownership, which is a mandatory part of the sales contract.

⁴ Judgement of European Court of Justice from 3.7.2012 r. in case C-128/11 *UsedSoft GmbH v. Oracle International Corp.*, pkt 48, 84, ECLI:EU:C:2012:407.

In addition, using the computer program arises from the license, upon which there is no possibility of transfer of ownership.⁵

4. CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

European legislator, recognizing the autonomy and specificity of the digital content, has taken the view that it justifies the introduction of a new classification for consumer benefits. The contracts on the supply of digital content on tangible medium, such as DVDs or CDs should be treated as contracts of sale within the meaning of Directive 2011/83/EU. On the other hand, the contract for the supply of digital content which is not supplied on a tangible medium should be classified neither as sales contracts nor as service contracts. It seems that there was no consequence in the legislation, while e-mail is considered as a durable medium, digital content is treated as a ware, only in cases when it is embodied in the moment of delivery and is material stuff.

Contracts for the supply of digital content have not been comprehensively dealt with neither in Directive 2011/83/EU, nor in the Polish Act on Consumer Rights. However, the appearing of a new category of contracts demanded the new rules on important issues, in particular, the definition of digital content, the introduction of information obligation, especially about the functionality and interoperability of digital content, as well as the particular situation of losing the right to withdraw from the contract.

5. PROBLEMS WITH OWNERSHIP RIGHT

Not all ownership rights appointed by the traditional Roman triad such as *ius possidendi* (right of ownership), *ius utendi, fruendi, abutendi* (the right to use and derive profit, consumption goods) and *ius disponendi* (right of disposal) can be applied to digital content.⁶ The buyer does not have the same position as the owner. It is often said that digital content should be

⁵ Jacquemin, H. (2010) *Digital Content and Consumer Protection within European Law, The 8th international workshop for technical, economic and legal aspects of business models for virtual goods: incorporating the 6th international ODRL workshop*, September 30th-October 1st 2010 Namur, Belgium . Namur: Presses Universitaires de Namur, p. 41-57.

⁶ Jacquemin, H. (2010) *Digital Content and Consumer Protection within European Law, The 8th international workshop for technical, economic and legal aspects of business models for virtual goods: incorporating the 6th international ODRL workshop*, September 30th-October 1st 2010 Namur, Belgium . Namur: Presses Universitaires de Namur, p. 46.

the object of copyright. Such an approach, in the era of the development of instruments for the protection of consumers, should be treated critically. The provisions of license agreements for the buyers are unclear, little transparent, include many legal issues, and therefore are seldom read in their entirety, and if so, usually without understanding. Besides law essentially protects the copyright of the copyright holder, and not authorized by license. Therefore, it must be pointed out that the market of digital content should be coherent, in the first place, with the law of the consumer.

6. ADVANTAGES OF LEGAL DEFINITION

Since the new consumer rights have been adopted, it has been clarified what exactly digital content means. In the directive there is a very simple, but on the other hand very useful, definition of digital content. More or less the same definition has been transposed to the Polish new Consumer Act, where, to be precise, digital content is noted (just in plural).

It was a great first step to deliver new institution to Polish law, but unfortunately the Polish legislator has stopped at this point. In the Polish new Consumer Rights Act there is no distinction between digital content and the product and as well the service in the context of contracts. In the proposal of Polish new consumer rights there was a suggestion to use digital content in the context of the regulation of selling the tangible products. Probably because of its misunderstanding this article has been lost. In consequence, we do have a definition of digital content, which is coherent with the definition from the Consumer Right Directive, but beside this, the whole regulation of the digital content market is beyond the scope of regulation. As it has been written in the doctrine, it is hard to imagine for example the warranty which would be connected with digital content. The Polish legislator, instead of the adoption of the new measure, has dropped it out, presently without any consequences. Especially the two categories of digital content and the distinction of them have not been described. According to the European consumer rules there are tangible and intangible digital content.

Both of definitions – European and Polish – of digital content are laconic, concise, but undisputedly it is the advantage, because it gives the opportunity for the implementation of the rules in accordance with the principle of technological neutrality. The Polish legislator,

by implementing the European rules to the Polish regulations, has properly given the meaning of digital content. The Polish definition is a copy of the European one, with a slight stylistic difference, which concerns the adoption of a single "digital content", but with no bearing on the interpretation of the term. In Polish definition, the word „form” has been replaced by the word „postać”. In translation to English both words mean form, but in Polish "forma" is clearly associated with the method of submission (the revelation of fixation) a declaration of intent and "postać" is usually defined as an external, perceptible by the senses shape of something.

7. DATA AND DIGITAL FORM

Definition of digital content indicates that they include the data. Digital data is the quantities, characters, or symbols on which operations are performed by a computer, stored and recorded on the medium, and transmitted in the form of electrical signals. Through using the appropriate software and hardware information may be obtained after processing digital data. For recognition data as a digital content within the meaning of Art. 2 paragraph 5 of Consumer Rights Act, it is necessary that they are created as well as delivered in digital form.⁷ Creation of digital content is also transforming paper documents into a digital form by digitization (scanning). On the contrary, the reverse action, which consists of printing digital documents (e. g. e-book), will result in the loss of digital content feature.

8. LACK OF REGULATION

Polish legislator decided not to explicitly determine whether an agreement for the supply of digital content is a contract of sale or contract for services. In the draft law on consumer rights there was also a provision amending Article 555 of the Polish Civil Code according to which, regardless of whether the contract for supply of digital content would involve the transfer of a durable medium or in any other way, it had to include the provisions of the contract of sale. At last that provision did not exist in that shape. Polish legislator, therefore, in this respect has not implemented Directive 2011/83/EU in accordance with its purpose and guidelines. We

⁷ B. Kaczmarek-Templin, D. Szostek [in:] B. Kaczmarek-Templin, D. Szostek, P. Stec (ed.), (2014) *Ustawa o prawach konsumenta. Kodeks cywilny (wyciąg)*, Warszawa C. H. Beck, p. 24.

may therefore ask the question whether in the Polish law the contract for the supply of digital content will be a sales contract, contract for services or a completely separate agreement *sui generis*. In the absence of the implementation of the Directive into national law, it causes that the court will have the duty to settle the solution. Thus realizing the objectives of the Directive 2011/83/EU its rules relating to contracts for the supply of digital content at the level of the Polish law should be adopted.

In many legal disputes there is a tendency to integrate the distribution of benefits solely on the contract of sale and service contract. It seems, however, that in an era of rapid development of new technology, the existence of this dichotomy, involving the mutual exclusion of these agreements and on an exhaustive breakdown is not relevant. Among the contracts for the delivery of digital content there are also a hybrid contract (PDF file with Adobe Reader) and the contracts that are entirely separate (e.g. contracts for provision of software).

9. SPECIFIC REGULATIONS

Contracts for the supply of digital content have neither been comprehensively described in Directive 2011/83/EU, nor in the Polish Act on consumer rights. However, the important issues were established in the Act, what allowed to extract a new category of contracts. These issues include especially the definition of digital content, the introduction of an obligation to inform consumers about the functionality and interoperability of digital content, as well as the particular situation of loss of the right of withdrawal.

The specific scope of the contracts for the delivery of digital content means that they must contain some additional special elements, that is, those which relate primarily to the reporting obligations of the trader and the right of withdrawal.

The trader should give consumers clear and comprehensive information before the consumer is bound by a contract at a distance or by an off-premises contract, a contract other than a distance contract or a contract concluded away from business premises or any offer in this area. In providing that information, the trader should take into account the special needs of vulnerable consumers, because of their mental, physical or mental, age or credulity, in a way that should have been, reasonably expected, predicted. Conditions of age and credulity have the particular

importance in the case of digital content and do not accidentally appear in this calculation. This is a consequence of the fact that there is a large number of children under 18 years who are leading activities on the network, blogs, social networking sites. It often happens that they acquire a variety of digital products ranging from ring tones for mobile phones, online games, including the so-called service games clouds, music or ending with the movies.

Consumer Rights Act introduces two types of information obligations, which is pre-contract and contract information. In the case of contracts for the supply of digital content, information on the functionality and interoperability are of particular importance. Other issues recognize the equality of all contracts concluded with consumers, regardless of whether they are distance contracts or whether they are concluded in the traditional way.

Digital content like other goods or benefits may be defective, for example interactive book for children doesn't supply all of the functions it should have had, the DVD of the film, which cannot be played due to the file corruption, software in the cloud, which is not functioning properly, music mp3, which jams during playback. Due to the complex nature of the contracts for the supply of digital content and the lack of comprehensive regulation, it would be desirable to draw reference to the effects of irregularities in the functioning of the content and establish rights and obligations of the parties of the contract. To date in the Polish law there has been no regulation, and still the binding judgement is expected.

10. CONCLUSION

A contract concerning the use of digital data, which are not transmitted to the consumer (e. g. Services provided directly on the website without transfers) remains outside the scope of agreements for the supply of digital content, referred to in the Act on Consumer Rights. This is mainly due to the definition of the same digital content, which has such an immanent feature that the content is produced and delivered as digital.

Undoubtedly, noticing by the legislator that new goods emerged on the market, I mean digital goods, deserves the praise. Even residual regulation of contracts for the supply of digital content is a step in the right direction. Probably, however, in many respects there is a need for a binding

interpretation of the rights of the consumer and this cannot be done without the interference of national courts and the Court of Justice of the EU.

In the light of those remarks it seems to be necessary to use the directive as well as Polish national acts to regulate the digital content market and consumers right, because only both these laws can completely deal with this issue.

As the conclusion it must be said, probably the status of contracts of digital contract according to the Polish law will remain unclear, until such time when we obtain the proper interpretation made by the court.

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