Sustainable consumption and circular economy in the Directive 2019/771*

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One of the aims behind issuing a new directive on consumer sales contracts (directive 2019/771) was to adjust this part of contract law so that it can contribute to sustainable development. The Rec. 32 of the directive explicitly states that one of its objectives is to achieve more sustainable consumption patterns and a circular economy. This article analyses whether and to what extent this motive is reflected in the black letter rules of the directive (the previous directive on consumer sales contracts constitutes a point of reference). The work begins with a general assessment of the interplay between the values the directive is meant to protect. The impact that the values at hand may have on the interpretation of the directive's provisions is diagnosed (with a focus on the influence of the choice of the method of harmonization on the interpretation process). The study covers ecology-related issues emerging in the context of durability requirements, objective conformity requirements stemming from various quality standards, reparability of the good, consumers rights under the directive and the interplay between the general private law rules and the directive's norms. Based on the analysis, the first conclusions regarding the ecological effectiveness of the directive are made. Although directive 2019/711 announces striving for the achievement of sustainable consumption and a circular economy as one of its aims, within its black letter provisions no significant changes are introduced in comparison to its predecessor. The EU legislature has correctly diagnosed some (but not all) areas where modifications should be made to ensure sustainable consumption within the consumer market. Nevertheless, no significant changes in their regard were introduced. As a result, the interpretation of the directive's provisions through the prism of the ecology-related values should be applied to ensure that this regulatory intervention brings about the intended change to the consumer sales law.

Keywords: sales of goods, sales contract, ecology, sustainable consumption, ecological effectiveness, maximum harmonization, full harmonization.

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The main reason for directive 2019/771[1] to replace directive 1999/44[2] was the need to adjust the legal framework to address the challenges posed by technological changes[3], affecting equally the functioning internal market and the situation of individual consumers. It was issued together with complementary[4] directive 2019/770[5], providing for a full harmonisation regarding the consumer sales law rules on the conformity of goods, digital content and services with the contract as well as remedies in the case of lack of conformity and the manners of exercising the latter[6]. Because the method of maximum harmonisation was chosen[7], the Member States are obliged to adjust their legal systems to grant the level of protection determined by the directive (the Member States cannot introduce standards diverging any way from the directive).

However, it was not only the emergence of a technology-driven economy that needed to be addressed — the other focal issue was sustainable development[8]. Only one of these two consumer sales directives — namely directive 2019/771 — explicitly refers to this incentive, providing, e. g. in its recital 32 that it aims at *achieving more sustainable consumption patterns and a circular economy*. Nevertheless, this presupposition seems to only slightly influence the text of the directive itself[9]. The new directive, to a great extent, accords with the previous one, which did not mention such a rationale. This manner of designing the regulatory framework is deemed to give rise to doubts as directive's recitals can constitute merely an interpretation guideline of limited importance[10] and the black letter rules seem to not provide for mechanisms created to reduce especially environmental costs.

Thus, the key question of the research was to determine whether and to what extent directive 2019/771 implements the promotion of sustainable consumption and a circular economy. The explicit wording, its possible interpretation and the impact of the choice of the maximum harmonisation level are examined.

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[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 L 136, 22.05.2019. P. 28–50.

[2] 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 // OJ L 171, 07.07.1999. P. 12–16.

[3] Rec. 1 dir. 2019/771.

[4] Rec. 13 dir. 2019/771, rec. 20 dir. 2019/770.

[5] 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 (Text with EEA relevance) // OJ L 136, 22.05.2019. P. 1–27.

[6] *Morais Carvalho J.* 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. Vol. 8, iss. 5. P. 194.

[7] In some instances, the member states were granted freedom to broaden the scope of the application of the directives (Ibid. P. 195).

[8] Closing the loop — An EU action plan for the Circular Economy // European Commission. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0614 (accessed: 01.12.2021); Circular economy action plan // European Commission. Available at: https://ec.europa.eu/environment/circular-economy/index_en.htm (accessed: 01.12.2021).

[9] *Wiewiórowska-Domagalska A., Zoll F., Południak-Gierz K., Bańczyk W.* 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. No. 4. P. 931–932.

[10] Recitals of the directive do not form part of the normative body of the directive. They have no binding power and cannot be invoked to set aside the norms of the directive or to interpret them against their explicit wording (*Kunkiel-Kryńska A.* Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich. Warszawa: Wolters Kluwer, 2013. P. 81).

1. Sustainable consumption as a value protected under directive 2019/771

1.1. Sustainable consumption in the context of sustainable development

Currently, there is an over-arching tendency in favour of the realisation of the sustainable development concept followed by numerous national entities and international organisations. In particular, the obligation to *ensure sustainable consumption and production patterns* is listed as the 12th United Nations Sustainable Development Goal[11]. In particular, it refers to the obligation of the States to *substantially reduce waste generation through prevention, reduction, recycling and reuse*[12]. In addition, *relevant information and awareness for sustainable development and lifestyles in harmony with nature* should be ensured[13]. Altogether, this means that the States should undertake measures to support reuse and to reduce waste as well as to raise people's awareness of this problem. This especially calls for coherence in varied legislations that should all be oriented towards ensuring sustainable consumption.

At the same time, the main aim of the Agenda is the eradication of poverty[14]. Thus, even ecological obligations are viewed from the perspective of the social and economic well-being of humanity, i.e. by showing *that social and economic development depends on the sustainable management of the planet's resources,* e. g. through the reduction of disaster risk[15]. This changes the initial understanding of the aim to achieve sustainable development, which suggested its purely ecological dimension. In the well-known contribution of E. B. Weiss, it was even proven that poverty should be eradicated because only then would it be possible to fulfil the obligations of preserving the planet's resources and reversing ecological degradation[16].

Taking this perspective into consideration, it should still be observed that *economic, social and environmental* dimensions should be understood in a *balanced and integrated manner*[17]; however, it should not be overlooked that the Agenda seems to be rather human-oriented, and even planet-care supports human well-being. This does not mean that the adoption of the sustainability concept in private law (if any) could benefit the weaker party. The notion of "human" should be understood as encompassing humanity as a whole, which reinforces the significance of ecological concerns understood as being set forth to benefit current and future generations (sustainable development not being the final aim, *per se*). This is an important perspective that often may suggest the proper direction when balancing economic, social and environmental values.

From the perspective of private law, the key question is whether and how this Agenda and its postulates may influence the interpretation of law and thus the content of particular legal norms; however, a resolution of the United Nations General Assembly is not formally binding as a source of international law due to its peculiar influence on the actual activities

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[11] Resolution adopted by the United Nations General Assembly on 25 September 2015, A/RES/70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Agenda 2030).

[12] Article 12.6 of the Agenda 2030.

[13] Article 12.8 of the Agenda 2030.

[14] Preamble to the Agenda 2030. Alike also in the context of sustainable development, e. g.: *Barral, V.* Sustainable development in international law: Nature and operation of an evolutive legal norm // The European Journal of International Law. 2012. Vol. 23, no. 2. P. 392.

[15] Introduction to the Agenda 2030, para 33.

[16] *Weiss E. B.* In fairness to future generations and sustainable development // American University International Law Review. 1992. Vol. 8, no. 1. P. 20–22.

[17] Introduction to the Agenda 2030, para 2.

undertaken by the states. It may become a binding customary international law[18]. Particularly in the context of sustainable development, it has also been regarded as a prism through which other applicable norms should be interpreted[19].

The European Union institutions also proved their general inclination towards sustainability. Among many actions and declarations on varied levels, the direct intent to promote sustainable growth by *building a resource efficient, sustainable and competitive economy*, e. g. *through assisting consumers to value resource efficiency*[20], can be observed.

The examples above prove that responsibilities aimed at implementing the sustainability principle are rarely based on hard law — e. g. soft law mechanisms prove more effective[21] in this regard (their flexibility corresponds with the complex and not yet fully clarified nature of the principle)[22]. However, this does not preclude the states from promoting sustainable development in their national hard law. At the same time, the meaning of hard law should not be underestimated in the context of promoting sustainability as it allows for further-reaching public control and the transparency of undertaken actions[23].

1.2. Value assessment of directive 2019/771

Directive 2019/771 underlines the value of development of cross-border e-commerce[24], which falls under a broader objective of promoting competitiveness[25] both within the European Union and outside it. This traditional axiology of consumer law is supplemented with a value that was typically disregarded by contract law — namely, the ecological effectiveness[26]. The maximum character of harmonisation is set forth by Article 4 of the directive. This level of harmonisation is justified, i.e. because the differentiated system of remedies[27] forces businesses (especially small and medium) to incur additional costs when broadening the territorial scope of their activities. Consequently, this manner of harmonisation is chosen for directive 2019/771 to minimise *exposure to costs and risks*

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[18] Generally, about such meaning of the UN General Assembly resolutions: *Shaw M.* Prawo międzynarodowe. Warszawa: Książka i Wiedza, 2006. P. 96. — According to the Article 38.1.b of the Statute of the International Court of Justice (which is an attachment to the United Nations Charter according to its Article 92): *The Court shall apply: international custom, as evidence of a general practice accepted as law*.

[19] *Barral V.* Sustainable development in international law. P. 398.

[20] Communication of the European Commission from 3 March 2010. *Europe 2020. A strategy for smart, sustainable and inclusive growth*. P. 12. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52010DC2020 (accessed: 01.12.2021).

[21] *Bańczyk W.* "Miękkie prawo, ale prawo", czyli o obowiązku przestrzegania soft law // Internetowy Przegląd Prawniczy TBSP UJ [Towarzystwo Biblioteki Słuchaczów Prawa Uniwersytetu Jagiellońskiego]. 2016. No. 1. S. 70–71.

[22] *Szwedo P., Peltz-Steele R., Tamada D.* Introduction // Law and Development. Balancing Principles and Values / eds P. Szwedo, R. Peltz-Steele, D. Tamada. Singapore: Springer, 2019. P. viii.

[23] *Szafrański A., Szwedo P., Klein M.* Comparative perspectives of adult content filtering: Legal challenges and implications // Catholic University Law Review. 2019, Vol. 68, iss. 1. P. 161.

[24] Rec. 1 dir. 2019/771.

[25] Rec. 2 dir. 2019/771.

[26] *Bach I., Wöbbeking M.* Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit? // Neue Juristische Wochenschrift. 2020. S. 2672; *Franceschi A. de.* Planned obsolescence challenging the effectiveness of consumer law and the achievement of a sustainable economy // Journal of European Consumer and Market Law. 2018. Iss. 6. P. 221; *Zoll F.* Ekologiczne prawo sprzedaży — bardzo wstępne uwagi // Księga jubileuszowa Prof., Dr. hab. Adama Brzozowskiego. Warszawa: C. H. Beck, 2021. P. 639–646.

[27] *Zoll F.* On the Implementation and Harmonization of the European Directive on the Sale and Supply of Digital Content in EU Member States // Құқық Қорғау Органдары Академиясының Жаршысы 'Ғылыми Журналы [The Bulletin of the Academy of Law Enforcement Agencies]. 2019. No. 4. P. 89.

associated with cross-border trade[28]*.* Consumer protection is consequently given a lower priority.

At the same time, directive 1999/44, with its minimal character, emphasised the value of a high level of consumer protection to a far greater extent[29]. e. g. strengthening consumer confidence and enabling them to *make the most of the internal market*[30]*.* Although a high level of consumer protection is also explicitly referred to as the aim of directive 2019/771[31], it is the abandoned minimum harmonisation model that prioritises the principle of consumer protection (as it did in directive 1999/44) over striving to unify the legal situations of the parties across EU member states[32]. This "inconsistency" between the directive 2019/771's aim and the chosen method of harmonisation becomes especially evident in cases where the new directive opts for minimum harmonisation, justifying this choice by the need to achieve a higher level of consumer protection[33].

Recital 2 makes it clear that the value of consumer protection should be balanced against the promotion of competitiveness. At the same time, the perspective of the creation of the internal market that is globally competitive seems to be prioritised[34]. Also, directive 1999/44 in its recital 4 underlined the value of the protection of the internal market, aiming to allow consumers to benefit from the entire internal market.

Finally, the aim to achieve sustainable consumption and to ensure a circular economy is mentioned twice in the directive 2019/771. First, it is referred to in the context of durability being an objective requirement of conformity with the contract[35]. Second, it justifies enabling consumers to require repair[36]. The meaning of these values in the context of the directive are more thoroughly examined in the subsequent parts of this paper.

Before moving to the analysis of specific issues that arise in the aforementioned context, one general question must be addressed, namely: does the legislature's choice as to the level of harmonisation affect the interpretation of the directive?

In principle, maximum harmonisation means that the implementation of the directive cannot diverge from the standard defined in the latter. In the context of the consumer sales directive, the idea behind this is twofold. First, it establishes the required consumer protection level, which in principle should safeguard the interests of the weaker party[37]. The design of the maximum harmonisation also benefits the entrepreneurs. Because the national legislature is prohibited from introducing rules establishing higher protective standards, there is no need to, e. g. adjust terms and conditions to different national rules on consumer sales law implementing the directive (there will be no discrepancy to be found between them).

However, the directive not only balances two opposing interests (the consumer's against the business' interests), but there is also a third interest that needs to be taken

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[28] Rec. 7 dir. 2019/771.

[29] Rec. 1 dir. 1999/44.

[30] Rec. 5 dir. 1999/44.

[31] Rec. 2. dir. 2019/771.

[32] About advantages and challenges as well as the changing tendency of the EU legislation in the field of either minimal or maximal harmonisation, e. g.: *Zoll F.* The Problems Associated with the Implementation of Directives into National Legal Systems: a Few Examples from the Codified Legal Traditions // Research Handbook on EU Consumer and Contract Law / ed. by Ch. Twigg-Flesner. Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publ, 2016. P. 72–74.

[33] Rec. 41, 46 dir. 2019/771.

[34] Rec. 1 dir. 2019/771.

[35] Rec.32 dir. 2019/771.

[36] Rec. 48 dir. 2019/771.

[37] However, in principle, the minimal harmonisation directives are better for the consumers: if the minimal harmonisation is chosen by the EU legislature, then the national legislature may introduce higher consumer protection standards than these stemming from the EU law.

into account, namely ecological efficiency. The latter, if taken seriously, may disrupt the traditional manner of designing private law mechanisms. For instance, the full harmonisation, effective when applied to balance interests of the parties to business-to-consumer contracts, is in principle ill-suited for the implementation of the prerequisite of ecological efficiency. It impedes national legislatures from creating designs that may be more ecologically efficient than the one set forth in the directive despite the fact that at first glance, there is no other interest against which the ecological efficiency should be balanced. Thus, in this regard, the level of maximum harmonisation becomes an obstacle when implementing environmentally friendly policies by national legislatures.

As a result, the maximum character of the directive may hinder the implementation of mechanisms that could contribute to reaching this new aim. This occurs without any axiological justification. The solution could be to allow for a far-reaching, value-oriented interpretation of the directive. Having said this, there are two issues that must be addressed.

Currently, the German doctrine leans[38] towards the jurisprudence of values (*Wertungsjurisprudenz*)[39], which underlines the importance of considering the values during the interpretation of legal norms. The question is whether this theory, developed on the national level in the context of national law, can be a point of reference during the interpretation of the EU law[40]. If this is the case, the understanding of provisions introduced to the national legal systems as an implementation of EU law — in this case directive 2019/771 — should incorporate values and objectives formulated by the EU legislature, including those that can be found within the Agenda (the general framework of the sustainable development design).

The question is whether the value-oriented interpretation is allowed when the EU legislature chooses the full harmonisation method to regulate a certain matter. Here, the argumentation can go in two opposite directions. It can be claimed that the maximum harmonisation impedes this kind of interpretation as it may lead to a discrepancy between the understanding of the directive's norms across the Member States. As a result, the desired level of the unification of the national legal framework within the scope of the directive would not be met, and the main objective behind introducing a full harmonization instrument would not be achieved.

On the other hand, a manner of the interpretation of the directive's norms does not, *per se*, impede unification between the Member States. As long as the value-oriented interpretation is anchored in the values set forth by the EU legislature (especially in the directive itself), the direction in which the national interpretations shall go is pre-determined. Moreover, the interpretation process should not be mistaken with granting freedom to diverge from the EU standard — the outcome of this process should be the same regardless of the national context. The correctness of national interferences would be verified, and subsequently, the common EU understanding would be coined by the Court of Justice of the European Union (hereinafter CJEU)[41]. Therefore, the choice of the method of harmonisation alone should not be viewed as precluding a value-oriented interpretation.

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[38] *Larenz K.* Methodenlehre der Rechtswissenschaft. Berlin; Heidelberg: Springer-Verlag, 1983. S. 117–118.

[39] Translated also as jurisprudence of principles. Jurisprudence, which emphasises the values underlying the law, should be taken into account during the interpretation of legal norms (main criteria considered during legal interpretation being the main idea behind the norm [*Rechtsidee*], current meaning and objective of the norm, principles of the given legal system together with justice and reasonableness).

[40] In favour of the general application of the Wertungsjurisprudenz (not as a national method of interpretation) in the context of EU law, e. g.: *Neuner J.* Die Rechtsfortbildung // Europäische Methodenlehre / Hrsg. K. Riesenhuber. Berlin: De Gruyter, 2010. S. 392.

[41] Article 267 of the Treaty on the Functioning of the European Union (TFEU).

A separate issue is that the interpretation implementing ecological concerns can bend the directive's standard in two manners: it can either work to the benefit of consumers (especially when it means a better quality of the product — i.e. enhanced durability) or against them (if the ecological impossibility of repair or replacement will enable the seller to refuse to bring the good into conformity)[42]. Thus, it is highly recommended to proceed carefully during the environment-focused interpretation as it may lead to a clash with the other protected values[43].

1.3. Functions of the seller's liability and possibility to implement public interests in private law

Primarily, the function of the seller's liability for the lack of conformity is to reintroduce the equivalence of performance (private law perspective). This manner of understanding the function of this institution is justified by the need to protect the buyer's trust in that the item sold is an equivalent of the paid price[44]. Hence, the rules on seller's liability become an instrument for granting that the values exchanged by the parties remain equivalent.

However, in light of the standardisation of the content of the sales contract (objective requirements of conformity present in directive 2019/771 as well as its predecessor), the individual consensus of the parties and the subjective expectations of the buyer cease to be the main factor determining the content of the contract. The standard features of the good begin to matter, and with them, the elements foreign to the declarations of will exchanged by the parties to the agreement[45]. Moreover, the standards tend not to be set only by private actors but also by the national and supranational ones[46]. Clear examples here are refrigerators[47] and cars[48]. Thus, the public interest becomes incorporated into the sales law from within by imposing certain characteristics of the goods purchased by the consumer.

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[42] In both of these situations, the maximum harmonisation level would be maintained — as from the point of this unification mechanism it is irrelevant what the content of the norms implementing the directive is as long as it is the same across the Member States.

[43] On the need to re-design consumer law so that it corresponds with the sustainability principle, see: *Micklitz H.-W.* Squaring the circle? Reconciling consumer law and the circular economy // Journal European Consumer and Market Law. 2019. Vol. 6. P. 230; *Zoll F.* Ekologiczne prawo sprzedaży. P. 639–646.

[44] E. g. in the Polish context: *Skąpski J.* Rękojmia za wady // System prawa cywilnego. Prawo zobowiązań część szczegółowa / ed. S. Grzybowski: in IV vols. Vol. III, part 2. Wrocław; Warszawa; Kraków; Gdańsk: Ossolineum, 1976. P. 116.

[45] *Zoll F.* Rękojmia: odpowiedzialność sprzedawcy. Waszawa: C. H. Beck, 2018. Chapter II, § 1.II–III; *Południak-Gierz K.* Defects of Consent in Consumer E-Commerce from the Polish Law Perspective. Göttingen: V&R Unipress, 2021. P. 37.

[46] *Zoll F.* Die Normung im Bereich der Dienstleistungen als Zeichen des Versagens moderner Gesetzgeber? Auf dem Weg in ein modernes Mittelalter // Krakauer-Augsburger Rechtsstudien. Normschaffung / Hrsg. J. Stelmach, R. Schmidt, P. Hellwege, M. Soniewicka. Warszawa: Wolters Kluwer, 2017. S. 89. — In the context of online platforms see: *Busch Ch.* Self-Regulation and Regulatory Intermediation in the Platform Economy // The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes / eds M. C. Gamito, H.-W. Micklitz. Cheltenham: Edward Elgar, 2019. P. 3–6. Available at: https://www.researchgate.net/publication/330508886_Self-Regulation_and_Regulatory_Intermediation_in_the_Platform_Economy (accessed: 18.09.2020).

[47] See e. g. provisions aimed at reducing the emission of fluorinated greenhouse gases: Regulation (EU) no. 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) no. 842/2006 // OJ L 150, 20.05.2014. P. 195–230.

[48] For instance, standards as to CO_2 emissions from passenger cars: Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) no. 443/2009 and (EU) no. 510/2011 // OJ L 111, 25.04.2019. P. 13–53.

The idea that aiming to increase the quality of production can itself constitute a justification for the implementation of specific rules on seller's liability is not revolutionary. For instance, in the times of the People's Republic of Poland, the rules on seller's liability were deemed to improve the overall quality of production and to raise awareness of the turnover, which explicitly went beyond the individual parties' interests[49]. As a result, the rules on seller's liability became a tool for promoting and safeguarding the common interests.

Similarly, the protection of environment, e. g. by assuring that particular types of goods are free from toxic substances or that the production process is ecologically optimised, can, *per se*, constitute a value protected by the seller's liability[50]. The question is whether setting the goal of a private law institution beyond or even against the interests of the parties to the contract should be acceptable[51].

2. Sustainable consumption in particular provisions of directive 2019/771

2.1. Longer durability of products

Recently, one of the key issues in consumer turnover has been the phenomenon of planned obsolescence[52]. As it was not explicitly sanctioned under directive 1999/44[53], the national courts struggled[54] to argue that goods losing functionality sooner than could be reasonably expected by the consumer were not in conformity with the contract under Article 2.1 of directive 1999/44[55].

This matter was referred to in the directive 2019/771, which explicitly provides in its Recital 32 that one of the means to achieve sustainable consumption and a circular economy is to impose durability standards in regard to the items sold. In principle, the durability should be viewed as the criterion of objective conformity with the contract — the durability of the item at hand should be compared with the durability of other existing goods of

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[49] *Skąpski J.* Rękojmia za wady. P. 118–119.

[50] *Mattei U., Quarta A.* The Turning Point in Private Law. Ecology, Technology and the Commons. Cheltenham: Edward Elgar, 2018. P. 115 (on ecological concerns and the *causa* of contract).

[51] It is a much further-reaching problem of possible public aim of private law (mostly but not only by invoking general clauses). It can be viewed from many perspectives — not only ecological. In the political context, see e. g.: *Hedemann J. W.* Die Flucht in die Generalklauseln. Eine Gefahr für Recht und Staat. Tübingen: Mohr Siebeck, 1933; *Rüthers B.* Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus. Tübingen: Mohr Siebeck, 2017; *Zoll F.* Does a Nation Have "Personality Rights"? On the Abuse of Civil Law by Involving It in the Political Struggle // Ad hoc Legislation in Private Law / ed. by K. Csach. Praha: Leges, 2020. P. 119–123. — In the ecological context see e. g.: *Bańczyk W.* Economic and Social Development in the Republic of South Africa's New Model of Mineral Rights. P. 215; *Szpotakowski I.* The New Chinese Civil Code and Its Contribution to Sustainable Development // Transformacje Prawa Prywatnego 2020. No. 3. P. 231–237; *Wereśniak-Masri I.* Prawo do czystego środowiska i prawo do czystego powietrza jako dobra osobiste // Monitor Prawniczy. 2018. No. 17. P. 942–944.

[52] A policy based on planning or designing products with an artificially limited useful life (after a certain period of time, they lose their functionality and become impossible or excessively expensive to repair): *Park I.-U., Grout P. A.* Competitive planned obsolescence // RAND Journal of Economics. 2000. Vol. 36, no. 2. P. 1–19. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=480666 (accessed: 01.12.2021). — On legal issues, instead of many see: *Wrbka S., DiMatteo L. A.* Comparative warranty law: Case of planned obsolescence // University of Pennsylvania Journal of Business Law. 2019. Vol. 21, no. 4. P. 908.

[53] Rec. 48 dir. 2019/771.

[54] As an example, see in Austria: Oberster Gerichtshof, 23 April 2015, 1 Ob 71/15.

[55] *Franceschi A. de.* Planned obsolescence challenging the effectiveness of consumer law and the achievement of a sustainable economy. P. 219.

the same type[56]. However, the development of the legitimate expectations standard[57] in consumer law on one hand and the normalisation of the goods on the other results in the following: the directive, when referring to the conformity of the good with a contract, no longer points to the actual common standard of the good (e. g. the Diesel-powered car that due to technological limitations can have the minimal exhaust emission X) but rather to the desired standard of that same item (e. g. the Diesel-powered car that despite the aforementioned technological limitations has the minimal exhaust emission X-100). Therefore, during the assessment of conformity with the contract, not only the durability of the comparable existing goods should be considered but also the potential durability of a good of this kind in the current technological reality. This desired characteristic of the potential good should be considered pivotal.

The durability is understood, according to Article 2.13 of the directive, as *the ability of the goods to maintain their required functions and performance through the period of normal use*. The rule is that the good should be in accordance with the contract not only at the time of the contract conclusion or the item's delivery but also afterwards — it should maintain its functionality throughout a designated period of time. On some occasions, the latter may be agreed upon by the parties directly or through labelling (e. g. on food). In other situations, in accordance with the doctrinal recommendations, the point of reference when determining the requested durability is the standard of the type of item in question[58]. Nevertheless, this standard should remain flexible; the determination of the period of time during which the item should remain functional should be carried out in the context of the individual circumstances of the case. Between these, the individually negotiated elements of the contract (e. g. price) in particular ought to be taken into account as well as the intensity or frequency of the use and the actions taken by the buyer to grant the reasonable maintenance of the goods, such as the regular inspection or changing of parts (e. g. filters) in a car[59]. The examination of the durability of the item at hand is not fully objectified. The legitimate expectations of the consumer that arose based on e. g. specific durability information indicated in pre-contractual statements should also be verified.

It has been argued that in practice, this change may not influence the situation of the consumer as deeply as it might initially seem. It is claimed[60] that the standardised minimal requirement of durability was, though not explicitly stated, already present in directive 1999/44, according to which *unless proven otherwise any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery*[61]. According to the view at hand, the European legislature ensures that the durability period lasts for at least one or two years based on the Member State's decision (as in Article 11.1 of directive 2019/771) or for the minimum period of six months (as in Article 5.3 of directive 1999/44). This means that when the lack of conformity becomes apparent within a given time frame, it is presumed that a

[56] The relativeness of such assessment is underlined by: *Canavan R.* Contracts of Sale // Research Handbook on EU Consumer and Contract Law / ed. by Ch. Twigg-Flesner. P. 275.

[57] The good should have characteristics that a consumer may reasonably expect given the nature of the goods (Article 7.1.d of the directive 2019/771 alike to Article 2.2.d of directive 1999/44): *Południak-Gierz K.* Personalization of Consumer Contracts — Should We Personalize Interpretation Rules? // Legal Challenges in the New Digital Age / eds A. Lopez Rodriguez, M. Green, M. Kubica. Leiden; Boston: Brill, 2021. P. 264, 266–267.

[58] *Franceschi A. de.* Planned obsolescence challenging the effectiveness of consumer law and the achievement of a sustainable economy. P. 220; *Bach I., Wöbbeking M.* Das Haltbarkeitserfordernis der Warenkauf-RL als neuer Hebel für mehr Nachhaltigkeit? S. 2674.

[59] Rec. 32.

[60] *Bach I., Wöbbeking M.* Das Haltbarkeitserfordernis der Warenkauf-RL… S. 2673.

[61] Art. 5.3 dir. 1999/44.

lack of conformity existed at the moment of delivery. After the lapse of such period, and within the seller's liability period, the buyer would have to prove that the lack of conformity existed at the moment of delivery. This reversal of proof means that although there is no requirement for the good to maintain its functionality after the moment of passing of risk, the deterioration of the product or limited functionality during this such period enables consumers to execute their rights under the directive. This could be blocked only if the trader proved that the good was in conformity with the contract at the time of delivery. The latter is hardly a viable option in practice[62], mostly due to the related costs of the examination of goods, etc.

In this manner, the doctrine argued that the durability requirement is connected with the reversal of the burden of proof of the lack of conformity, and the period in which this burden is reversed is in fact the durability guarantee[63].

However, the function of the reversed burden of proof is different. It does not constitute a requirement as to the durability of the product but allows for the factual, efficient execution of consumer rights resulting from any inconformity in the sold goods with the contract (this inconformity may but does not have to result from a lack of durability). This mechanism is justified by the fact that, as a rule, the seller has more detailed information on the goods (and in particular their state at the moment on delivery) than the consumer[64]. It would also be easier for the seller to demonstrate a lack of non-conformity at the moment of delivery or that the non-conformity resulted from an act or omission that took place after delivery[65], such as due to a consumer's improper handling[66]. As a rule, the consumer is not well-informed about the product and its characteristics and should not be required to demonstrate non-conformity. It is also more reasonable to expect the seller to incur costs to verify whether the good was in conformity at the time of passing of the risk as the seller can distribute them as a part of the business costs[67].

As a result, despite the fact that the reversed burden of proof might, in practice, constitute an incentive for the seller to assure the durability of the product, it should not be viewed as being particularly connected with the obligation to ensure the durability of the sold goods. It should be associated with the general seller's obligation to provide goods in conformity with the contract (all the conformity criteria apply, not only the durability one).

When analysing the interplay between the reversed burden of proof mechanism of both directives (1999/44 and 2019/771) and the explicit durability requirement of directive 2019/771, the difference is the axiology behind them[68]. The reversed burden of proof as such serves the consumer and is aimed at limiting the imbalance between the parties in regards to court-related actions. The fact that it could contribute to entrepreneurs being held liable for the lack of conformity of items that lose their functionality or other features too quickly is the side effect of the norm. In contrast, the requirement of durability in the

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[62] *Bach I., Wöbbeking M.* Das Haltbarkeitserfordernis der Warenkauf-RL… S. 2673.

[63] Ibid. S. 2673–2675.

[64] Opinion of E. Sharpston, Court of Justice of the European Union (Court), case C-497/13, *Froukje Faber v. Autobedrijf Hazet Ochten BV*, para 88.

[65] Court of Justice of the European Union (Court), case C-497/13, *Froukje Faber v. Autobedrijf Hazet Ochten BV* of 4 June 2015, para 72.

[66] Explanatory Memorandum to the proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM(95) 520 final, 13, as per para 54.

[67] *Podszun R.* Procedural autonomy and effective consumer protection in sale of goods liability: Easing the burden for consumers (even if they aren't consumers). Comment on Case C-497/13 Froukje Faber v. Autobedrijf Hazet Ochten BV, Judgment of the Court of Justice (First Chamber) of 4 June 2015 // Journal of European Consumer and Market Law. 2015. Vol. 4. P. 152.

[68] *Staudenmayer D.* The directives on digital contracts: First steps towards the private law of the digital economy // European Review of Private Law. 2019. Vol. 28. P. 238–239.

new directive is linked to a new axiology — it is no longer designed only to contribute to restoring contractual balance or to safeguarding the interests of the weaker party but also to incorporate common interests into the equation, namely sustainable development[69].

2.2. Duty to provide spare parts

When examining consumers' entitlements in the case of an inconformity of the good with the content of the contract, consumers should have a choice between repair or replacement, as availability of repair *should encourage sustainable consumption and could contribute to greater durability of products*[70]. Provided that the good should maintain its functionality for a certain period of time, the question arises whether this characteristic could be interpreted as meaning that there must be spare parts available during this period, enabling the consumer to repair the good on one's own or to demand repair of the item at hand from the seller; however, directive 2019/771 does not impose on the trader the duty to provide spare parts without impeding the national legislature to do so[71]. In addition, provided that the spare parts are available, it is not specified whether they should be compatible between the generations of a certain type of item so that the good can be upgraded (similarly to the goods with digital content incorporated, which can be updated so that they correspond with the higher standards).

The right to repair can be limited if it is legally or factually impossible or would impose disproportionate costs on the seller. Thus, exercising the right to repair granted by directive 2019/771 can be relatively easily blocked in case of the big players who have influence over the process of the item and the spare parts production (e. g. Samsung, Apple). If at the production level the item or the business process is designed in a manner that limits the production of spare parts (which may be economically justified, as it increases the need to purchase new products), the possibility of repair (which is, in principle, ecological) will be factually excluded due to a lack of original spare elements.

On the other hand, imposing an obligation to provide spare parts on the seller would be clearly disproportionate in the context of smaller entrepreneurs. A case of a local shop with small home appliances could be a powerful example in this regard. The seller in this scenario does not even have enough space to store all the spare parts for the items sold, not to mention that usually, the seller will not have the infrastructure to change the element of an item which is not in conformity with the contract. However, it also needs to be noted that sometimes the seller is in the position to obtain spare parts that are inaccessible for the consumer (e. g. they are available in the wholesale only).

It should also be examined whether an obligation to provide spare parts during a certain period of time could be derived from Recital 28 of directive 2019/771, which mentions a duty to provide updates. First, Recital 28 specifies that the duty to provide updates emerges only if agreed upon in the contract (in this regard, legitimate consumer expectations play a pivotal role when determining whether such an obligation actually arose in a given case). The Recital expressly states that the failure to supply these as well as supplying non-conforming or incomplete updates should be considered a lack of conformity of the good; however, this norm should not be understood as giving rise to the obligation to provide spare parts; this matter is regulated separately. As a result, it is not admissible to derive the obligation to provide spare parts from the rule on the provision of updates in the case of goods with digital content.

[69] Rec. 32 dir. 2019/771.
[70] Rec. 48 dir. 2019/771.
[71] Rec. 33 dir. 2019/771.

This begs the question whether e. g. the unavailability of the spare parts or a peculiar design of the item resulting in the impossibility of repair can by itself constitute a lack of conformity within the meaning of the directive. Such interpretation of the directive would mean that instead of the obligation to provide spare parts, a different obligation arises. It is imposed on actors not explicitly mentioned in the directive, e. g. producers would be forced to assure that the goods they produce are reparable. As a result, this understanding of the inconformity should be rejected. However, a change of law in this context may be recommended.

2.3. Accordance of goods with technical standards

The content of the contract is shaped by different standards, also these imposed by law (e. g. exhaust emission standards[72], norms on use of fluorinated greenhouse gases[73], etc.). The question is how these rules influence the existence of the contract, provided that the parties explicitly diverged from the established standard. Different solutions for this issue can be proposed depending on the effect one wants to achieve. The first issue that needs to be addressed is what impact these rules should have on the content of the contract. In this regard, the national provisions enabling the assessment of the validity of the contract in light of the EU legal framework should be considered[74].

Depending on the kind of secondary EU law the standard at hand stems from, its influence when verifying the validity of the contract may differ[75]. From the perspective of this article, situations in which contradictions between the wording of the contract and the EU regulations appear are the most interesting. As a rule, a contract contrary to the standard provided for in the EU regulation could be claimed to be contrary to the statutory law and thus invalid[76]. The same result would stem from an act contrary to the national law implementing the directive.

Although directive 2019/771 in principle *should not affect national law to the extent that the matters concerned are not regulated by this directive, in particular with regard to the <...> general contract law aspects such as <...> validity, nullity or effects of contracts*[77], this outcome may not be acceptable under EU law. Here, the following scenario should be considered: a consumer buys a refrigerator that is for some reason incompliant with the EU norm being a technical standard. If the contract is invalid, as a rule, the buyer will be obliged to return the good and will be entitled to be refunded, possibly also compensated if the buyer suffered any damage in the process. The buyer cannot demand repair or replacement of the good even if he would like to have the refrigerator fixed be-

[72] Regulation (EU) 2019/631.

[73] The EU F-Gas Regulation (517/2014).

[74] E. g. in case of Polish law Art. 58 of the Polish Civil Code states that an act in law that is inconsistent with statutory law or is designed to circumvent it shall be null and void unless the appropriate provision envisages a different effect.

[75] *Gutowski M. Nieważność czynności prawnej.* Warszawa: C. H. Beck 2017. Edn 4, Chapter IV, § 2. III. — E. g. from the perspective of Polish law, a juridical act inconsistent with an act without general binding power, such as a recommendation or an opinion, cannot be considered invalid for this reason alone. In case of directives that produce only a vertical direct effect (which is a rule), a juridical act contrary to the norm of the directive cannot be considered invalid (except from the activities in which one of the parties is the state, a state organisation or an organisation subject to or controlled by the state). In contrast, provisions of regulations that fulfil the general conditions of direct effect (they are sufficiently precise and unconditional) can be invoked directly when examining the validity of the contract under national rules.

[76] However, against the invalidity of the car sale contract due to the incompatibility of the Diesel engine with the norms — e. g. OLG Karlsruhe Urteil vom 18.07.2019, 17 U 160/18, para 37–40, which justifies its statement so that only part of the car did not fulfil the norms and that this should not affect the contract over the car as a whole. It was also argued that such invalidity would not adequately protect the consumer.

[77] Rec. 18, Art. 3.6 dir. 2019/771.

cause he can no longer benefit from the protection granted under directive 2019/771 as its application is excluded once the contract is declared null and void under national law. In this manner, the application of national general contract law rules impedes the consumer from benefitting from the protection granted under the directive. As a result, the main aim of the directive cannot be achieved. Therefore, the national provisions on the validity of a contract should be interpreted narrowly so that they do not increase the possibility to circumvent the consumer's rights conferred by directive 2019/771.

Another issue is that the application of this model may indeed infringe the interests of the weaker party as the performance of the contract may nevertheless be in the best interest of the consumer[78].

Consequently, a contract contrary to the standard of the EU regulation should not in principle be invalid as being contrary to the statutory law. A different interpretation would, on the one hand, hinder the implementation of the consumer protection provided for by the directive, and on the other, contradict the values protected by directive 2019/771. Thus, the contract should be considered valid even if its provisions contradict the eco-benchmark provided for by mandatory EU law.

Alternatively, a solution similar to the one adopted in German law in the case of consumer contracts where parties intended to avoid paying taxes can be introduced: despite the fact that the contract is invalid, the consumer could keep the contractual entitlements related to the lack of conformity of a good (e. g. reduce the price)[79]. Thus, it is not excluded that the national law provides for the sanction of the invalidity of the contract, which is contrary to the law but allows the buyer to exercise contractual rights conferred under the rules on a seller's liability. Such a solution seems especially justified in situations when the sale of this type of good is not forbidden.

In theory, the standards could be regarded as dispositive, and thus it would be possible for the parties to set them aside by an individual consensus. In this scenario, if going below the eco-standard could be viewed as a case of a negative description of the good at hand[80], the rules aimed at diminishing the negative effects of the phenomenon of a negative description of a product could be applied. Lowering the ecological standard would then be admissible in the contract if individually negotiated and thus consistent with the subjective aim of the consumer. As a result, the liability of the seller in the case of inconformity with the chosen eco-norm would be excluded. This outcome may be challenged, especially in cases where the qualified consensus was imposed on the weaker party because it was a premise for concluding the contract. In these instances, the agreement of the parties will not exclude the verification of whether the seller can be held liable for a lack of conformity with the objective standard.

However, it should be noted that the durability or other features contributing to the ecological effectiveness of a good are not only required in the consumer's interests but also because of the underlying value. The durability requirement is aimed at safeguarding public interests, namely for the sake of the protection of the environment, and consequently, of striving for sustainable development. Provided that it is not the parties themselves that are aimed to be protected by the standard, then diverging from it should not be

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[78] See the argumentation presented during the discussion on the consequences of the unfair terms in mortgage loans indexed to a foreign currency. Instead of many, see: *Wojciechowicz-Karasek I.* Wpływ niedozwolonego charakteru klauzuli na związanie stron umową // Transformacje Prawa Prywatnego. 2018. No. 2. P. 63; CJEU, judgement C-26/13 Kásler, points 80–84.

[79] BGH, Urteil vom 24.04.2008 — VII ZR 42/07, para 20.

[80] On the negative description of the good sold, see: *Zoll F.*: 1) Problem negatywnego uzgodnienia cech rzeczy sprzedanej — w oczekiwaniu na wspólne europejskie prawo sprzedaży // Transformacje Prawa Prywatnego. 2012. No. 2. P. 169; 2) Rękojmia. Chapter II, §1.III; *Schulze R., Zoll F.* European Contract Law. München; Oxford; Baden-Baden: C. H. Beck, Hart, Nomos, 2018. P. 44–45.

at their disposal. The individually negotiated agreement of the parties cannot change the fact that an item is characterised by the required ecological effectiveness or standard set forth by the regulatory entity. As a result, the regulatory framework preventing a negative description of goods, though theoretically applicable, is designed to address a different type of issue. Consequently, it should not allow deviating from the ecological efficiency standard provided for by the directive — it is mandatory in nature and should be observed by the parties even if it is against their will or individual interests (e. g. producing a good that does not meet the eco-standard can be cheaper, and thus its price can be lower). In this manner, private law forces its subjects not to infringe upon common interest.

It could be also argued that either the rules on objective conformity of the contract always prevail over the subjective conformity requirements or that they take precedence in instances where the contract interpreted in accordance with the subjective aim of the parties shall be invalid or unenforceable. Thus, the contract would adjust itself to what was either in accordance with the consumer legitimate expectations standard[81] or what was required by law. The main disadvantage of this approach is that this *ex lege* effect can be easily exploited by a disloyal party — the qualities not matching the normative standard may be agreed upon by the parties because of the e. g. lower price. As going under this standard becomes impossible according to this approach, the buyer would have the right to demand the good meeting the aforementioned standard without being obliged to pay an equivalent price. Depending on which interest the legislature would view as dominant, this outcome can be either seen as undesirable (if the contractual balance is given priority and protection against the disloyal behaviour of the other party is considered more important than the implementation of a quality standard) or well-designed (if the non-contractual interest is prioritised and the common implementation of the standard sets aside the individual interest).

Thus, when deciding on the legal consequences of going below the standard against a direct legal obligation or prohibition, the opposing values and interests should be balanced.

Finally, another issue is whether the good should be regarded as not being in conformity with the contract if it meets the technical standards but does not function properly. In the Polish doctrine, such product is considered not in conformity with the contract[82]. Hence, if a vacuum cleaner due to the regulation on power-consumption is not more powerful than X, and as a result, it cannot be used for a purpose specified in the contract, then it should be considered not in conformity with the contract. In this case, the existence of the standards as to the power-consumption may make it impossible to provide the good in conformity with the contract.

2.4. Consumer's right to have the goods brought to conformity by repair or replacement

The buyer's right to demand that the good is brought to conformity by repair or replacement provided already in the previous directive[83] has not been changed as to its es-

[81] *Schulze R., Zoll F.* European Contract Law. P. 42.

[82] Judgement of the Supreme Court 17.04.2013, I CSK 457/12, published in LEX no. 1341648; Judgement of the Supreme Court 05.03.2010, IV CNP 76/09, published in LEX no. 852575; Judgement of the Supreme Court 02.04.2003, I CKN 244/01, published in LEX no. 78815; Judgement of the Supreme Court 28.11.1997, II CKN 459/97, publ. LEX no. 32598; Judgement of the Supreme Court 30.12.1988, III CZP 48/88, publ. LEX no. 3429: *Łętowska E.* Prawo umów konsumenckich. Warszawa: C. H. Beck, 2002. P. 396; *Żuławska Cz., Trzaskowski R.* Art. 556 // Kodeks cywilny. Komentarz. Zobowiązania / ed. J. Gudowski. T. III, cz. 2. Warszawa: C. H. Beck, 2013. § 9.

[83] Art. 3 dir. 1999/44.

sence[84]. The novelty is that the right to repair has been directly correlated with sustainable consumption and the circular economy[85].

When discussing repair or replacement from the ecological perspective, one should in particular consider the admissibility to use regenerated spare parts for such repair or to provide a regenerated good as a replacement. The EU case law excludes providing a regenerated good as a replacement: the replacement should mean receiving *new goods to replace the goods not in conformity*[86]. This conclusion should not be challenged. However, given the ecological context of the right to repair in directive 2019/771, the use of regenerated parts for the repair should be allowed provided that it does not affect the functioning of the repaired goods.

A significant ecological issue in the context of right to repair is self-repair. The latter is frequently the most desirable solution from the point of view of cost allocation (especially if ecological externalities are taken into consideration)[87]. Often, consumer can easily perform self-repair; it saves transportation costs and allows for the use of regenerated spare parts. At the same time, self-repair may be proceeded carelessly as to environment. Also, it has not been explicitly allowed, mostly as being contradictory to the seller's right to cure (the EU legislature prioritises the consumer's rights of repair or replacement).

Another issue is the factual concurrency of two regimes within which the buyer may seek protection; the buyer can formulate claims based on the seller's liability or demand compensation based on general rules on contractual liability[88]. The question is whether the possibility of claiming compensation outside the legal regime unified by the directive would be an incentive for buyers to seek monetary compensation rather than demanding e. g. repair. Hence, the claimant would be able to be compensated, e. g., for the self-repair performed, blocking the seller's right to bring the good into conformity with the contract.

Moreover, directive 2019/771 does not provide sufficient grounds to build argumentation against the admissibility of such practice. However, the main difficulty in this regard is related to the fact that the opposing aims must be reconciled when deciding on the matter and the current system turns out to be inconsistent.

First, provided that the directive's aim was to grant the consumer several entitlements by the seller's liability in addition to the traditional national protection tools, the protected entity should not be restricted in the choice of remedies. However, there are two factors that speak against this manner of reasoning. The seller's situation is different depending on the consumer's choice: if the latter decides to exercise his rights to price reduction or to terminate the contract under the seller's liability regime, then the seller is able to block his actions by bringing the item in conformity with the contract. Once the compensation regime is chosen, the seller is deprived of this possibility. Second, the ecological context should be considered as well. It is assumed that the repair of an item not in conformity with the contract should encourage sustainable consumption and also contribute to increasing

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[84] In the proposal of directive 2019/771 (COM(2015) 635 final 2015/0288(COD). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015PC0635), the seller was not explicitly entitled *to refuse to bring the goods into conformity if repair and replacement are impossible or would impose costs on the seller that would be disproportionate*. The provision on the matter was introduced into the final text of the directive in Art.13.3. dir. 20199/771. On the absolute disproportionality (namely, disproportionality observed irrespective the costs of the second manner of bringing the good into conformity with the contract) see: *Zoll F.* Rękojmia. Chapter VII, § 5.I.

[85] Rec. 48 dir. 2019/771.

[86] CJEU, Case C-404/06, Quelle AG, para 41.

[87] *Terryn E.* A right to repair? Towards sustainable remedies in consumer law // European Review of Private Law. 2019. Vol. 27, iss. 4. P. 853–854.

[88] Rec. 61 dir. 2019/771.

of the durability of products[89]. Giving the consumer unrestricted freedom means that his autonomy is given priority over ecological concerns. This also contradicts the consumer vs. seller balance of interests provided for in directive 2019/771.

2.5. Seller's right to refuse repair or replacement and sustainability

The consumer's choice between requesting repair or replacement can be limited only *where the option chosen would be legally or factually impossible or would impose costs on the seller that would be disproportionate, compared to the other option available*[90]. In these situations, the seller may bring the good into conformity in a manner that was not chosen by the consumer. If neither repair nor replacement is possible, the seller might refuse to bring the good into conformity with the contract[91].

First, it is unclear from whose perspective the impossibility must be assessed: either a subjective (this seller is unable to bring the good into conformity)[92] or an objective impossibility (no one can do that)[93] could be requested. In light of the purpose of the norm (namely, releasing the seller from an obligation that despite his good will, he would not be able to perform or which would burned him disproportionately), subjective impossibility should suffice. However, in this regard, it should be assessed whether the seller could have used third persons to perform it[94]. If so, the requirement of impossibility shall not be viewed as fulfilled. Another issue emerges when the reasons behind the impossibility are examined. The understanding of a legal and a factual impossibility does not pose difficulties as they are broadly discussed in the literature[95]. Slightly more challenging is the assessment when the economic impossibility entitles the seller to refrain from bringing the good into conformity (something that is possible but upon enormous and disproportionate cost)[96]. The key question in light of the changes as to the axiology behind directive 2019/771 is whether an ecological impossibility influences the obligations of the seller. In this context, it should also be examined whether the ecological impossibility causes a certain legal effect *ex lege* or should be raised by one of the parties. Both these questions demand in-depth analyses and therefore are not be dealt with in this article.

According to Article 13.2 of directive 2019/771, a disproportionate character of costs must be established by a far-reaching balance test, during which, i.e. the features of the

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[89] Though it might not always be the case — e. g. sometimes repair may produce disproportionate environmental externalities.

[90] Rec. 48 dir. 2019/771.

[91] Rec. 49, Art. 13.3 dir. 2019/771.

[92] *Zoll F.* Skutki niewykonania lub nienależytego wykonania zobowiązań // System prawa prywatnego: in 21 vols. Vol. 6: Prawo zobowiązań — część ogólna / ed. A. Olejniczak. Warszawa: C. H. Beck, 2018. P. 1188; *Kruczalak K.* Skutki niemożliwości świadczenia według prawa cywilnego. Warszawa: Wydawn. Prawnicze, 1983. P. 18.

[93] *Czachórski W., Brzozowski A., Safjan M., Skowrońska-Bocian E.* Zobowiązania. Zarys wykładu. Warszawa: Wolters Kluwer, 2009. P. 64; *Karasek-Wojciechowicz I.* Roszczenie o wykonanie zobowiązania z umowy zgodnie z jego treścią. Warszawa: LexisNexis, 2014. P. 398–399.

[94] *Bańczyk W.* Alokacja ryzyka zmiany okoliczności podczas wykonywania długoterminowej umowy o dzieło i o roboty budowlane. W kierunku umowy rozwijającej się. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2017. P. 138.

[95] *Schulze R., Zoll F.* European Contract Law. P. 262–263.

[96] This issue has been discussed in Polish law, where economic impossibility has been agreed on as an exception from *pacta sunt servanda*. See: *Kruczalak K.* Skutki niemożliwości świadczenia według prawa cywilnego. P. 53; B. Lewaszkiewicz-Petrykowska: Niemożliwość świadczenia następcza // Studia Prawno-Ekonomiczne. 1970. Vol. 4. P. 81; *Robaczyński W.* Z problematyki gospodarczej niemożliwości świadczenia // Kwartalnik Prawa Prywatnego. 1993. No. 2. P. 152; *Tropaczyński A.* Gospodarcza niemożliwość świadczenia // Przegląd Sądowy. 2004. No. 3. P. 56. — Also: *Bańczyk W.* Alokacja ryzyka zmiany okoliczności… P. 140–141.

good (especially the value it would have had if it was in conformity with the contract), the significance of the lack of conformity, alternative remedies and the consumer's expectations should be taken into account.

To illustrate the disproportionate character of the costs for the seller related to the chosen method of bringing the good to conformity (repair or replacement), directive 2019/771 provides the following examples: *replacement of goods because of a minor scratch* can be viewed as disproportionate when *such replacement would create significant costs and the scratch could easily be repaired*[97] and *if goods are located in a place that is different from where they were originally delivered, the costs of postage and carriage could become disproportionate for the seller*[98]. In addition, when examining whether alternative remedies are feasible, the time needed for the repair or replacement should be determined and the adequacy of such waiting-period assessed[99]. These examples suggest that the impossibility should be assessed from the economic perspective only, disregarding ecological externalities.

2.6. Consumer's right to refuse second repair

There is no fixed rule as to the consumer's right to refuse a second repair. Directive 2019/771 provides only for interpreting guidelines in this regard in Recital 52, according to which all the *circumstances of the case* should be taken into account with a special focus on the type and the value of the goods, the nature, the significance of the lack of conformity and the consumer's expectations as to the reparability[100] of the item at hand. It also suggests that as a rule, subsequent attempts to remedy the lack of conformity should be allowed in the case of expensive or complex goods. Moreover, a severe nature of the lack of conformity will usually speak against the admissibility of the second repair attempt.

Thus, the wording of the recital indicates that the existence of the consumer's right to refuse a subsequent repair is strongly connected with the economic aspects of the transaction on the one hand and with the trust factor on the other. In principle, there is thus no place for ecological concerns apart from perhaps situations in which the following attempts to repair the good cause substantial ecological externalities. Consequently, an ecological impossibility may appear.

2.7. Price reduction

Directive 2019/771, similar to its predecessor, entitles the consumer to reduce the price provided that the good was not brought into conformity[101]. This reduction, according to Article 15 of directive 2019/771, should be *proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity*[102].

In general, this remedy seems best suited to implement ecological effectiveness. The price reduction allows the parties to avoid ecological externalities: those related to the transportation (e. g. delivery of the item that needs to be repaired or of the replacement), repair (non-conforming elements are disposed of; the repair process itself might require substantial resources, e. g. energy expenditures) or the management of the item not in

[97] Rec. 48 dir. 2019/771.
[98] Rec. 49 dir. 2019/771.
[99] Rec. 55 dir. 2019/771.
[100] That is — has the seller already intended to repair this particular lack of conformity.
[101] Art. 13.3 dir. 2019/771; Art. 3.2 dir. 1999/44.
[102] This was not clear under directive 1999/44: Canavan R. Contracts of Sale. P. 279.

conformity with the contract (being either repair and/or re-packaging, delivery to the future buyer, etc.).

Price reduction does not mean that the item shall remain not in conformity with the contract; its repair might be done by the buyer himself (self-repair), which in principle, as mentioned, should be the solution generating the smallest ecological externalities. In practice, the consumer may reduce the price instead of lodging a compensation claim to get back the money he invested (or intended to invest) when repairing the item on one's own without being obliged to prove the fulfilment of premises typical for the damages regime (e. g. damage, lack of or improper performance, causal link between the damage and the lack of or improper performance). However, the price reduction does not automatically equal the repair cost[103]. At the same time, the latter should be a factor (sometimes the crucial one) taken into account when calculating the value of the defective good.

However, there is also a risk of over-simplification. Though price reduction will usually be the most ecologically effective solution as, *per se*, it generates no externalities, in some situations, it might bring about significant ecological costs. This would be the case of an item which lack of conformity is caused by not meeting eco-standards: a car that does not meet European emission standards or a vacuum cleaner with excessive power consumption. The product, if used normally, might generate disproportionately higher ecological costs than its disposal. Therefore, leaving it on the market will be ecologically inefficient. Price reduction may also mean that a complimentary good may need to be purchased (a washer/dryer lacks the drying function, so the consumer buys a separate dryer).

As a result, in some instances, it would be recommended to block the consumer's right to reduce the price due to the ecological inefficiency of this remedy. In these scenarios, the consumer should have the right to repair or replace the good (once these requests are met, the good on the market should no longer be defective), and from the second group of entitlements, solely to terminate from the contract. Under the provisions of directive 2019/771, it could be argued that if exercising a right causes disproportionate environmental costs and thus contradicts the principle of ecological effectiveness, in this specific situation, exercising this right could be viewed as abusive[104]. However, in the directive, the disproportionality of a cost assessment is directly mentioned only in regard to repair and replacement, which makes this manner of argumentation (complex due to the dubious nature of taking into consideration the environmental costs alike, e. g. environmental impossibility) even more problematic[105].

2.8. Termination from the contract

The main novelty related to the termination from the contract is the introduction of the partial termination of the contract, namely: *where the lack of conformity relates to only some of the goods <...> the consumer may terminate the sales contract only in relation to*

[103] It is not precluded by the Polish legislature to reduce the price of the non-conforming good based on the value of work needed to bring this good back to conformity, see: Judgement of the Court of Appeal in Kraków 28.03.2018, I ACa 1073/17; Judgement of the Supreme Court 16.12.1998, III CKN 74/98; Judgement of the full civil and administrative chambers of the Supreme Administrative 30.12.1988, III CZP 48/88.

[104] The starting point for the argumentation could be the Messner judgement, where the CJEU explicitly stated that provisions of the second sentence of Article 6 (1) and Article 6 (2) of Directive 97/7 *do not prevent the consumer who withdrew from the contract from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment*. Judgment of the CJEU 03.09.2009, Pia Messner v. Firma Stefan Krüger, C-489/07, ECLI:EU:C:2009:502, point 29; *Baranowska-Zając W.* Glosa do wyroku Trybunału Sprawiedliwości z dnia 3 września 2009 r. w sprawie Pia Messner. Wynagrodzenie za korzystanie z rzeczy do chwili odstąpienia przez konsumenta od umowy zawartej na odległość // Transformacje Prawa Prywatnego. 2010. No. 3. P. 23.

[105] Rec. 48 and 49 Dir. 2019/771.

those goods[106]. In contrast, under directive 1999/44, the admissibility of the partial termination of a contract was governed by national law[107].

When examining the right to terminate the contract from the perspective of ecological efficiency, this solution seems reasonable. If the consumer keeps the functional items and returns only the ones which are not in conformity with the contract, it may possibly diminish the environmental costs associated with the disposal of the returned good, provided that the trader automatically disposes of the returns regardless of the lack of conformity of the particular item (which is often the case)[108].

As in the previous directive, for the contract termination, the lack of conformity should not be minor[109]. The other manner of limiting the right to terminate the contract in the case of a lack of conformity when the item was not brought to conformity with the contract (repair or replacement) would be to claim that the ecological impact of the termination should be examined. Provided that they are disproportionate in light of the ecological externalities they cause, it could be argued that exercising the right to terminate the contract is abusive and should not be permitted.

The main issue, however, is whether the consumer's attempt to exercise this right can be assessed from the perspective of ecological effectiveness and, subsequently, blocked due to ecological impossibility in these situations where it would lead to disproportionate ecological costs. The latter could be related i.e. to the obligatory disposal of the good which was used, if the good retains its core functionality and the price reduction would be incomparably more ecologically effective.

2.9. Specific rules regarding used goods

According to Art. 10.6 directive 2019/771, the Member States may allow the parties to shorten the liability period in the case of second-hand goods up to one year. This stays in line with the principle of freedom of contracts[110] and supports circularity. Thus, many sellers may prefer to dispose of used goods of small value rather than to sell them, risking seller's liability. The Member States are also free to exclude "second-hand goods sold at public auction" from the scope of the directive[111].

However, with certain types of used goods, it may, at the same time, lead to the factual limitations of the seller's liability at the expense of the consumer when his legitimate expectations as to the durability of the used item contradict the content of the contract (e. g. purchase of a two-year-old premium car of a top brand or a flagship mobile of the previous year). To some extent, it is discussed in German case law in the context of the broader notion: "new"[112]. Still, it does not resolve the issue of goods as above, which are

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[106] Art. 16.2 dir. 2019/771.

[107] See e. g.: *Zoll F.* Rękojmia. Chapter IV, § 2.I.

[108] On return policies in general see: https://www.bbcearth.com/blog/%3Farticle%3Dyour-brand-new-returns-end-up-in-landfill; https://money.cnn.com/2017/12/26/news/retail-returns-landfill/index.html; https://www.forbes.com/sites/andrewbusby/2019/11/22/returns-an-epidemic-which-the-fashion-industry-is-choosing-to-ignore (accessed: 01.12.2021). However, with the growing ecological awareness, opposite trends in this regard can also be observed: https://corporate.zalando.com/en/newsroom/en/news-stories/ahead-curve-returns-management-zalando (accessed: 01.12.2021).

[109] Compare Art. 3.6 dir 1999/44 with rec. 15 and Art. 13.5 dir. 2019/771; however, the new directive specifies that *the burden of proof with regard to whether the lack of conformity is minor shall be on the seller*, which in practice might make it easier to terminate the contract.

[110] Rec. 43 dir. 2019/771.

[111] Art. 3.5 a. dir. 2019/771.

[112] See e. g. the judgment favourable to the classification of the car as new even when it was for a longer time used by the dealer to some aims other than further sale — Urteil BGH 05.03.2015 — I ZR 164/13, para 18–19.

used but of such a character that their initial durability should not be influenced by the use at hand.

Granting Member States freedom to introduce flexible mechanisms adjusted to the national market or customs may contribute to the growth of the circular economy. At the same time, it must be noted that sometimes, the disposal of old and inefficient goods may be more ecologically efficient. In these instances, the regulation that enables the parties to shorten the seller's liability period or to conclude a sales contract not governed by directive 2019/771 may inhibit the implementation of the ecological concerns on the sales market. However, it should be noted that not all products become ecologically ineffective as they grow old (e. g. a wardrobe), and thus a differentiation of the norm in question would be recommended.

2.10. General rules that may support sustainability

Directive 2019/771, in contrast to its predecessor, explicitly states that it *should not affect national law to the extent that the matters concerned are not regulated by this Directive, in particular with regard to the legality of the goods, damages and general contract law aspects such as the formation, validity, nullity or effects of contracts*[113]. This means that the rights granted to the consumer under directive 2019/771 should not exclude the entitlements he already has under the national law if the latter stem from the rules outside the scope of the directive. Thus, it could be argued that the consumer who can either exercise his rights within the directive framework or seek protection under national provisions should not be restricted anyhow in his choice.

This is especially meaningful in the case where the premises of exercising one's right under the implementation of the directive and the requirements of claiming protection under the national regulation of error and fraud are fulfilled. Until now, it was disputable whether the consumer should have a choice between these two protective regimes[114] because often[115], they tend to solve the same problem: the person was mistaken as to the good being in conformity with the contract. Although as a rule it was concluded that the consumer should be entitled to choose between these protective regimes, the several challenges caused by this approach were diagnosed. For instance, there is a tension between a consumer's entitlements and a seller's right to cure. Once the consumer decides to void the contract under the regulation on defects of consent, the seller loses the possibility to bring the good into conformity with the contract[116]. On the other hand, the non-conformity is sometimes caused by the disloyal behaviour of the seller, and thus the consumer does not want to remain in the contractual relationship with that party even if the good was brought into conformity. Due to the disloyal actions of the seller, it is reasonable to grant the other party the right to terminate the contract immediately under the regulation of fraud[117].

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[113] Rec. 18 dir. 2019/771.

[114] As an example of the national dispute on the interplay between the rules on the seller's liability and the regulation of error and fraud, see: *Grzybowski S.* Zbieg norm // System prawa cywilnego: in 4 vols. Vol. 1: Część ogólna / ed. S. Grzybowski. Wrocław; Warszawa; Kraków; Gdańsk: Ossolineum, 1974. P. 126; *Gutowski M.* Glosa. Zbieg uprawnień na podstawie rękojmi oraz na podstawie przepisów o wadach oświadczenia woli // Monitor Prawniczy. 2013. No. 2. P. 104–108; *Zoll F.* Rękojmia. Chapter III, § 6; *Grochowski M.* Zbieg norm w zakresie rękojmi za wady rzeczy sprzedanej oraz błędu i podstępu // Monitor Prawniczy. 2012. No. 19. P. 1048–1050; *Południak-Gierz K.* Defects of Consent… P. 192. — As to the case law see: Judgement of the Supreme Court 26.01.2012, III CZP 90/11.

[115] It is not always so; the scope of situations where the rules on fraud or mistake and cases in which the buyer is protected under the regulation on seller's liability overlaps.

[116] *Zoll F.* Rękojmia. Chapter III, § 6; *Południak-Gierz K.* Defects of Consent… P. 195–196.

[117] *Zoll F.* Rękojmia. Chapter III, § 6; *Południak-Gierz K.* Defects of Consent… P. 197.

As in the case of the rules on the validity of the contract, it should also be noted that the application of the national law should not make it impossible to achieve the directive's goal. Thus, although the rules on the vice of consent are outside the scope of the directive, their application should not deprive the buyer or the seller of their rights granted under the directive. In contrast to the previous one, the maximally harmonised directive 2019/771 does not allow Member States to abstain from setting a hierarchy of the remedies. As a result, in principle, the seller should always be entitled to bring the good into conformity. The consumer becomes entitled to terminate the contract only if this effect was not achieved or is unlikely to be achieved[118].

This leads one to the conclusion that although the consumer should have a choice between benefitting from the protection granted under directive 2019/771 and by the national provisions on the defect of consent, his choice should not inhibit the seller's right to cure.

Conclusions

Directive 2019/711 announces striving for the achievement of sustainable consumption and a circular economy as its aims, but within its black letter provisions, no significant changes are introduced in comparison to its predecessor. The maximum harmonisation does not allow for implementing the directive in a manner allowing for the introduction of mechanisms that would create an operational ecological effectiveness criterion. The EU legislature seems to have correctly diagnosed some (but not all) areas in which the modifications should be made to assure sustainable consumption within the consumer market. However, these areas were only pinpointed, and no material changes in their regard were introduced.

The durability criterion of conformity with the contract was for the first time explicitly referred to in the directive. Although the link between the durability, ecological effectiveness and the right to repair was underlined, no obligation to provide spare parts was imposed on the seller.

The Member States are free to exclude the contracts for the sale of second-hand goods sold at public auctions[119], which in principle can be viewed as ecologically effective as it encourages individuals to sell used items instead of disposing of them. However, the ecological effectiveness of the transaction should be assessed *ad casu*. Depending on the characteristics of the good at the auction, it might be ecologically justified to extend the time this item is used (goods for which daily use does not generate externalities such as a wardrobe) or to remove it from the market (an old, power-inefficient washing machine). However, this norm was not aimed at promoting a circular economy but was a response to already existing national customs.

Also, the importance of quality standards is growing. The contracts where the good is described as not meeting the benchmark should not be considered invalid, but rather the consumer's legitimate expectation standard, with the ecological effectiveness criterion incorporated, should be applied. Thus, the protective regime provided for by the directive is not circumvented, and on the other hand, the principle of ecological effectiveness can be implemented.

As to the right to repair, the invocation to sustainability did not change much. Nevertheless, if the concept of ecological impossibility is adopted (there are grounds for this in directive 2019/771), it has the potential to reshape the remedies so that they align with

[118] Art. 13.4 a and d dir. 2019/771, as well as Art. 13.4 b and c dir. 2019/771.

[119] Art. 3.5 a dir. 2019/771.

the new eco-policy of the EU. In this regard, the crucial role will be played by the jurisprudence.

The ecological impact of the obligation of the national legislature to introduce a two-fold structure of remedies is unclear. On the one hand, the consumer cannot reduce the price (as a rule, the most ecologically-friendly remedy) without giving the other party the possibility to bring the good into conformity (e. g. by replacement which tends to be sub-optimal from the ecological perspective), but on the other hand, he is not entitled to terminate from the contract (the remedy, which in principle generates most externalities from the perspective of the environment) without respecting the other's right to cure.

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Устойчивое потребление и экономика замкнутого цикла в Директиве 2019/771*

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Одной из целей издания новой директивы о договорах купли-продажи потребительских товаров (Директива 2019/771) была корректировка этой части договорного права, с тем чтобы данная часть могла способствовать устойчивому развитию. В рекомендации 32 директивы прямо говорится, что одной из ее целей является достижение более устойчивых моделей потребления и экономики замкнутого цикла. В статье анализируется, отражен ли (и если да, то в какой степени) этот мотив в правилах названной директивы (точкой

* Статья является частью исследования в рамках проекта «Homo consumens, Homo ecologicus — проверка экологической эффективности новой директивы по некоторым аспектам договоров купли-продажи товаров», финансируемого Национальным научным центром (Narodowe Centrum Nauki, NCN) в Кракове, Польша, № 2019/34/A/HS5/00124.

отсчета выступает предыдущая директива о договорах купли-продажи с участием потребителей). Статья начинается с общей оценки взаимодействия ценностей, которые должна защищать директива. Диагностируется влияние, которое ценности могут оказать на толкование положений директивы (внимание акцентируется на влиянии выбора метода гармонизации на процесс толкования). Исследование охватывает вопросы, связанные с экологией, возникающие в контексте требований к долговечности товаров, объективных требований соответствия, вытекающих из различных стандартов качества, исправимости товара, прав потребителей в соответствии с директивой и взаимодействия между общими нормами частного права и нормами директивы. На основе проведенного анализа сделаны предварительные выводы относительно экологической эффективности директивы. Хотя Директива 2019/711 провозглашает стремление к достижению устойчивого потребления и экономики замкнутого цикла в качестве одной из своих целей, в ее положения не внесены никакие существенные изменения по сравнению с предыдущей директивой. Законодательство ЕС правильно диагностировало отдельные (но не все) области, которые необходимо трансформировать для обеспечения устойчивого потребления на потребительском рынке. Тем не менее никаких существенных изменений внесено не было. В результате интерпретация положений директивы через призму ценностей, связанных с экологией, должна применяться, чтобы это регулирующее вмешательство привело к запланированной эволюции законодательства о потребительских продажах.

Ключевые слова: купля-продажа товаров, договор купли-продажи, экология, устойчивое потребление, экологическая эффективность, максимальная гармонизация, полная гармонизация.

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