

PRIVATE LAW ASPECTS OF CONSUMER PROTECTION LAW.

CONSUMER CONTRACT LAW.

ONLINE TRADING.

EU CONSUMER PROTECTION LAW

DR. KITTI BAKOS-KOVÁCS PHD.

This teaching material has been made at the University of Szeged, and supported by the European Union by the project nr. EFOP-3.6.2-16-2017-00007, titled Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

SZÉCHENYI 2020





HUNGARIAN
GOVERNMENT

European Union
European Social
Fund



INVESTING IN YOUR FUTURE

| | | |
|---|---|--|
|  | <p style="text-align: center;">PRIVATE LAW ASPECTS OF CONSUMER CONTRACT LAW. CONSUMER CONTRACT LAW. ONLINE TRADING.</p> <p style="text-align: center;">•</p> <p style="text-align: center;">READING LESSON</p> <p style="text-align: center;"> 40 MINUTES</p> | <p style="text-align: center;"><i>Dr. Kitti Bakos-Kovács PhD. assistant professor</i></p> <p style="text-align: center;">University of Szeged Faculty of Law and Political Sciences Institute of Civilistic Sciences</p> |
|---|---|--|

1. Application of directive on consumer rights.
2. New directives on certain aspects concerning contracts for the sale of goods and for the supply of digital content and digital services.
3. Directive on certain legal aspects of information society services, in particular electronic commerce.
4. Connection with rules of specific sectors.

Some directives regulate certain legal aspects of consumer contract law. The European Union re-formulated and adopted new legal acts on the field of consumer contract law during the year of 2019. Directive (EU) 2019/771 contains rules *for contract performance, lack of conformity and the modification of contracts by sales of goods*. Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, which is composing the common base of lack of conformity and other guarantees by sales of goods for consumers at present, is repealed with effect from 1 January 2022.

Otherwise, new regulation was established for contracts that aim to sell or supply digital content or digital services for consumers in Directive (EU) 2019/770. *Object of the contract is relevant* in the scope of regarding directive, where *the trader supplies digital content or a digital service to the consumer*. Application of this directive is **independent** in which way the parties concluded the contract for supplying digital content or services (for example the contract is qualified as an offline contract, concluded personal by the parties, or as a distance contract, possibly it was concluded in the framework of electronic commerce). Provisions for *contract performance, lack of conformity and modification of contracts* were also harmonised in this legal act.

Member States are obligated to implement rules of new directives on the ground of principle of maximum harmonisation into national law until 1 January 2022. **After imposing the common regulation of directives citizens and undertakings of each state have to apply and follow the obligations of national acts.** *Interpretation of each norm of directives* can be called during judicial procedures and national court can refer questions for courts of the European Union.

1. Application of directive on consumer rights.

Directive 2011/83/EU on consumer rights gives general framework for fundamental principles of consumer rights if trader and consumer concluded contracts. Some special rules are expressly regulated for certain types of contracts, namely for distance contract and off-premises contract.

This directive has general scope and applied for all type of contract concluded by traders and consumers. That means **provisions of directive on consumer rights have to be also applied for the sale of goods or by supplying digital content or services for consumers**. It can be stated that *scope of directive* on consumer rights and new directives on sales of goods or supplying digital content or services for consumers are *different*: the first directive grounds the general consumer rights, especially how to inform consumers by concluding the contract with him or her, but new directives aim to establish common rules for contract performance and lack of conformity distinguished between object of contracts. *Rights if withdrawal regulated in directive on consumer rights cannot be qualified as legal remedies and consequences of lack of conformity*.

2. New directives on certain aspects concerning contracts for the sale of goods and for the supply of digital content and digital services.

The European Union lays down new approach and a comprehensive framework by adopting regarding directives in order to foster the initiation and development of common market and digital single market. Protection of interests of consumers and reduction of transaction costs were treated as protective pillars by legislation at union level. Rules of sales of goods and legal framework for supplying digital content or digital service were harmonised on uniformed grounds. *New regulation contains articulated conditions for conformity of contract performance and lack of conformity and give possibility to Member States to establish detailed domestic rules inside the framework prescribed in directives*.

Structure and fundamental provisions of new directives are summarized in this table. Presentation of relevant foundation-stones of new legal acts is diagrammatic; details you can find in texts of each directive.

| | DIRECTIVE (EU) 2019/771 | DIRECTIVE (EU) 2019/770 |
|---|---|---|
| Scope – Type and object of contracts | <p>Sales of goods Object of contracts is goods.</p> <p><i>That means: the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof.</i></p> <p>Only for onerous contracts is applied.</p> | <p>Object of contracts is supplying digital content or digital services for consumers.</p> <p><i>That means: the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price.</i></p> <p>If consumer provides personal data for traders, directive is also applied for free of charge contracts.</p> |
| Subject of contracts | seller – consumer | trader – consumer |
| Excluded from the scope of regarding directive | <ul style="list-style-type: none"> ▪ any tangible medium which serves exclusively as a carrier for digital content; ▪ any goods sold by way of execution or otherwise by authority of law; ▪ <i>Member States can decide about application of rules lied down in the directive in the following cases:</i> <ul style="list-style-type: none"> – second-hand goods sold at public auction; – living animals. | <ul style="list-style-type: none"> ▪ services that can be qualified other than digital services; ▪ electronic communications services; ▪ healthcare services; ▪ gambling services; ▪ financial services; ▪ software offered by the trader under a free and open-source licence; ▪ digital cinematographic projections; ▪ digital content provided by public sector bodies of the Member States. |

Requirements for contract performance

Directive regulates conditions that trader has to fulfil in order to perform the contract allowably.

Trader must satisfy the following requirements to qualify the contract performance as complied:

- the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose;
- the digital service is made accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose.

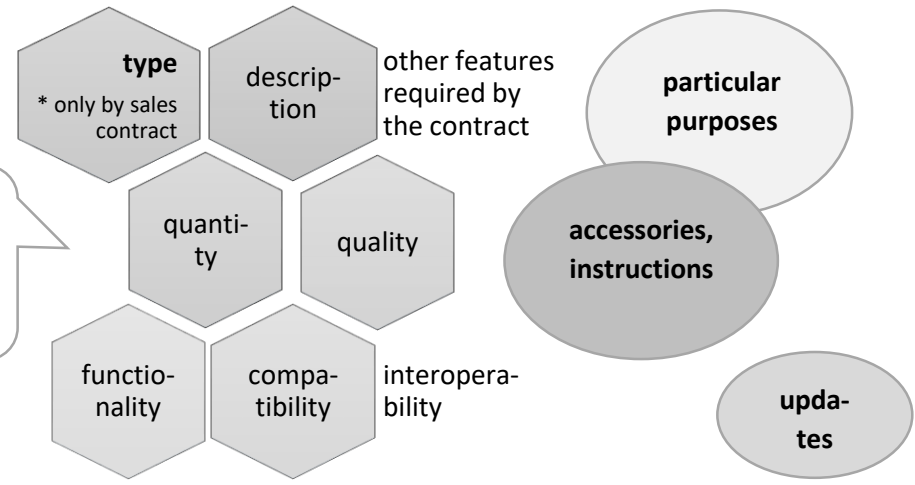
Means of conformity

Contract performance provided by the seller or the trader shall be jointly suited for

- (1) subjective requirements of conformity,
- (2) objective requirements of conformity,
- (3) installation of goods or integration of digital contents or digital services has to be correct,
- (4) contract performance cannot prejudice rights of third parties.

If contract performance is not suitable jointly to these abovementioned requirements, rules of lack of conformity shall be applied.

Subjective requirements of conformity



Please read in details Article 6 of Directive (EU) 2019/771.
Please read in details Article 7 of Directive (EU) 2019/770.

Objective requirements of conformity

Purposes – same type – normally be used

– be fit for the purposes for which goods/digital content/digital services of the same type would normally be used;

– be of the quantity and possess the qualities and performance features, that are normal for goods/digital content/digital services of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller or the producer, particularly in advertising or on labelling. (Some exceptions are regulated in case of public statement.);

Quantity, quality, other features – same type – reasonably expect – nature of goods or public statement

Accessories,
instructions
– reasonably
expect

Sample, model or
trial version, preview

- be delivered or be supplied along with such accessories and instructions, as the consumer may reasonably expect to receive;
- comply with the quality and the description of a sample or model of goods/ trial version or preview of the digital content or digital service that the seller/trader made available to the consumer before the conclusion of the contract.

** By supplying digital content or services trader shall ensure that the consumer is informed with updates.*

If the consumer was specifically informed that a particular characteristic of the goods/digital content or digital services was deviating from the objective requirements for conformity, lack of conformity cannot be engaged when the consumer expressly and separately accepted this deviation by concluding the contract.

Installation and integration

Conditions of incorrect installation of goods and integration of digital services or digital content are laid down in the directives. **Legal consequence of incorrect installation or integration of object of contract are remedies for lack of conformity.**

Remedies for lack of conformity is used if installation or integration was prepared by the seller/trader or under the responsibility of the seller/trader. By sales of goods it is also required that installation is prescribed as part of contract performance.

Otherwise, rules of lack of conformity can also be called up if installation or integration is made by the consumer incorrect because of shortcomings in the integration instructions provided by the seller/trader.

General rules of lack of conformity

Seller or trader is liable for lack of conformity which exists at the time of delivering of goods or supplying digital content or digital services.

Duration of responsibility of seller/trader is – as a general rule – **at least two years.**

Directives offer detailed possibilities for Member States how to regulate time limits in national law to exercise remedies.

The **burden of proof** with regard to whether the contract performance fulfils conformity prescriptions **is on the seller/trader within a period of one year** from delivering of goods or supplying of digital content or digital services. In the first year it is presumed that the cause of lack of conformity existed in the time of delivering of goods or supplying of digital content or digital services.

** Please note, some further detailed rules are regulated in directives by burden of proof.*

Legal consequences of lack of conformity

Consumer is entitled to exercise following remedies from the trader:

1. Bringing the goods/digital content or digital service into conformity.

Seller/trader is obligated to satisfy this remedy. Consumer is entitled to exercise this remedy at first steps.

Consumer can choose between repair or replacement by sales of goods in the framework exercising the right to request for bringing goods into conformity.

Consumer cannot exercise this remedy and seller/trader has right to refuse the request by existence of one of in the directives prescribed circumstances, if

1. Bringing into
conformity

2. Price reduction or termination of contract

fulfilment of chosen remedy is impossible or causes disproportionate costs for the seller.

Repair and replacement is executed free of charge, within a reasonable period of time and without any significant inconvenience to the consumer.

2. Proportionate reduction in the price or termination the contract

This remedy can be exercised only in that cases if one of following conditions is fulfilled:

- bringing the goods/digital content or digital service into conformity is not possible by causes that are prescribed in directives, namely:

By sales of goods the seller didn't repair or replace the goods, or the repair or replacement cannot be accepted, or seller refused the fulfilment of repair or replacement of goods.

By contracts for supplying digital content or digital services consumer can demand reduction of price or termination of contract if bringing the contract performance into conformity is impossible or disproportionate or the trader has not brought the digital content or digital service into conformity;

- lack of conformity appears again;
- serious nature of lack of conformity causes the reduction of price or termination of contract;
- the seller/trader will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer.

Further special provisions

For the time of repair and replacement the consumer shall make goods available for the seller.

In case of termination of contract trader is obligated to reimburse the consumer for all sums paid under the contract.

The consumer is not liable to pay for normal use of the replaced goods during the period prior to their replacement.

Personal data of consumers shall be handled according to the regarding regulation of the European Union.

In case of termination of contract consumer returns the goods to the seller. Seller is obligated to pay the costs of returning in case of lack of conformity. After receiving the returned goods or an evidence about sending back the goods, seller reimburses the price and delivering costs for the consumer.

After the termination of the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.

Producers can provide commercial guarantees for consumers. It is necessary to distinguish between commercial guarantees and remedies of lack of conformity. Seller gives commercial guarantees statement for consumers.

Consumer has to return the tangible medium on which the digital content or digital service was supplied for him or her. For the period of time during which the digital content or digital service was not in conformity, consumer is not obligated to pay for the supplying.

Time limit is regulated for reimbursing price and other costs for consumers: trader has to reimburse payments without undue delay, but within 14 days of the date on which the trader is informed of the consumer's decision about exercising remedies of lack of conformity.

| | |
|--|---|
| <p>Seller has right of redress against the person liable in the prior chain of transactions.</p> | <p>Directive contains special rules for modification of contract for supplying digital content or digital service.</p> <p>Trader has right of redress.</p> <p>Where the trader has failed to supply the digital content or digital service, the consumer calls upon the trader to supply the contract. If the trader fails again to supply the digital content or digital service, the consumer is entitled to terminate the contract.</p> |
|--|---|

3. Directive on certain legal aspects of information society services, in particular electronic commerce.

E-commerce is a key factor for growth within the internal market and multiple challenges are posed by an increasingly technology-driven economy. Role of electronic commerce is significant by cross-border transactions. It is necessary to increase the level of consumer confidence into online trading. The European Union adopted the Directive 2000/31/EC on certain legal aspects of information society services in order to avoid and reduce divergences between national rules, including also harmonization of provisions for electronic commerce. In this directive not only contractual aspects are approximated for online trading, but also excluding of prior authorization, common bases of commercial communications and advertisements were laid down.

If **trader and consumer conclude a contract on electronic way, (1) at first** it is necessary to take into consideration the rules of **directive on consumer rights**, because contracts of online trading can be qualified as **distance contract** in the meaning and interpretation of provisions of this directive. **(2) After this, the object of contract has to be analysed:** if the trader sells goods for consumers via online platforms or websites, *directive on sale of goods* has to be applied. If trader is obligated to supply digital content or digital services for consumers because of an online concluded contract, *directive on certain aspects concerning contracts for the supply of digital content and digital services* is also normative. **(3) On the ground of electronic commerce, rules of directive on information society services complements the information requirements provided by electronic commercial communications.**

4. Connection with rules of specific sectors.

Directive (EU) 2019/771 on sales of goods doesn't concern other specific sectors of consumer protection law, because this type of contracts aims to transfer ownership of goods.

For electronic communications services, rules of special directive are applicable except the number-independent interpersonal communications services. Financial services are determined legally by sectorial legal act. These sectorial provisions cover digital content or digital services relating to financial services and are therefore covered by the protection of financial services law at union level. Contracts relating to digital content or digital services that constitute a financial service should therefore be excluded from the scope of the new directive on supplying digital content or digital service.

EXERCISE

* *This exercise is voluntary.*

1. Search in the new directives which rules are applied for goods with digital elements. Please note down some examples for goods with digital elements according to Preambles of regarding directives. Both new directives shall be examined.
2. Find some examples for digital content and digital services in Preambles of regarding directive.
3. Make a foldout about examples of goods with digital elements and digital contents or digital services.

QUESTIONS

- Who is the seller and the trader according to the regarding directives? Please read Definitions in each directive.
- What does goods mean in the meaning of directive?
- How can digital content and digital services be defined in the regarding legal act?
- Which conditions shall be jointly fulfilled to qualify the contract performance as conform?
- Please give details what are the subjective requirements of conformity.
- Please give details what are the objective requirements of conformity.
- What are the general rules of conformity or liability for conformity?
- Please introduce systematically the legal consequences of lack of conformity. What are the differences between sales of goods and contracts for supplying digital content or digital service for consumers by exercising remedies of lack of conformity?

FURTHER RECOMMENDED LITERATURE

"New Directives regulating sales to European consumers" available at <https://www.cms-lawnow.com/ealerts/2019/07/new-directives-regulating-sales-to-european-consumers> (2021.03.31.)

Alberto De Franceschi (ed.) *"European contract law and the digital single market"* (intersentia; online publication date: 2017.)

Ignace Claeys – Evelyne Terryn (ed.) *"Digital Content & Distance Sales"* (intersentia; online publication date: 2018.)

Reiner Schulze – Dirk Staudenmayer - Sebastian Lohsse *"Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps"* (Nomos/Hart; 2017.)

Zeng Sophia Tang *"Electronic Consumer Contracts in the Conflict of Law"* (Hart; Oxford and Portland, Oregon; 2015.)