https://doi.org/10.22364/jull.14.04

The Place of Contract for Digital Thing in Latvian Contract Law Within the Context of the Consumer Sale Directives 2019

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The article aims to explore the place of contract for digital thing (i.e., a good with digital elements; digital content; and digital service) from the point of view of Latvian contract law considering the recently adopted Consumer Sale Directives 2019 (Directives 2019/770 and 2019/771). The topicality of the article's theme is rooted in transposition of these directives into Latvian national law. On the one hand, it is necessary to find a proper place for classification of contract for a digital good considering approaches and contents of Latvian contract law for the appropriate understanding of this contract within Latvian contract law and, speaking broadly, Latvian civil law. On the other, the transposition of these directives would mean that digital goods for non-consumers will remain without explicit regulation because these directives are intended to be transposed into consumer rights protection law being as *lex specialis* without introducing any amendments into general contract law. At the beginning, the present article provides an overview of the place of contract for a digital thing before transposition of the Consumer Sale Directives 2019 into Latvian consumer rights protection law, i.e., in the current regulation of Latvian contract law. The article continues with analysis of the expected place of contract for a digital thing after the currently intended transposition of these directives. Afterwards the article addresses the consequences of that transposition. The article concludes with summary following the discussion contained therein.

Keywords: digital thing (digital good), supply of digital service, digital content, consumer sale, contract law, Latvia, Directive 2019/770, Directive 2019/771.

Contents

Introduction

The contracts whose object is a digital thing[1] are considered as a type of modern contracts increasingly gaining importance in recent years due to rapid technological progress and evolving digital environment. These contracts are usually considered as *sui generis* contracts and, therefore, they are traditionally subject to the need for a special regulation in contract law. However, as it is admitted in European consumer rights protection literature, "rules on the supply of digital content [and digital services – the authors' remark] are generally absent in European private law systems"[2] with a few exceptions.[3] The situation in Latvia is not an exception. The Latvian situation for regulation of contracts whose object is a digital thing is, therefore, difficult due to several significant aspects.

One the one hand, the Civil Law[4] (a Latvian civil law codification which, *inter alia*, deals with general contract law) does not explicitly recognise digital content as a contract object. This is true both regarding sale (purchase) and supply – contracts traditionally distinguished by the Civil Law[5] which in this situation continues the approach of its predecessor, Part III of BLVK[6]. Likewise, the Civil Law does not recognise a contract for supply of service but instead regulates a contract for work-performance following the Roman tradition. As it is explicitly indicated in Latvian legal literature, Latvian law does not recognize services as a separate subject matter of contracts.[7] Therefore, the contract for supply of service cannot be considered as a typical (nominate) contract and is, therefore, left without any special regulation in the Civil Law.[8] It means that the regulation of contract for work-performance

[1] This concept is understood within the meaning of the new consumer sale directives adopted in 2019 dealt further and covers three different consumer sale objects: a good with digital elements; digital content; and digital service.

[2] *Giliker, P.* Adopting a Smart Approach to EU Legislation: Why Has it Proven so Difficult to Introduce a Directive on Contracts for the Supply of Digital Content? In: *Synodinou, T., Jougleux, P., Markou, C., Prastitou-Merdi, T.* (eds.). EU Internet Law in the Digital Era: Regulation and Enforcement. Cham: Springer, 2020, p. 300.

[3] Ibid., pp. 300–301.

[4] Civil Law of the Republic of Latvia (1937). Official translation into English available on the webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/The%20Civil%20Law.doc [last viewed: 06.09.2021].

[5] This distinction is based on different regulation (though similar) for both types of contracts: contract of sale is regulated in Articles 2002–2090 of the Civil Law, while supply contract – in Articles 2107–2111 of the Civil Law. Consequently, Latvian legal literature traditionally treats both these types of contracts as different contracts.

[6] Part III of the Baltic Local Laws Collection 'Civil Laws' (*Baltijas vietējo likumu kopojuma III daļa 'Civillikumi'* in Latvian). For its brief overview from the perspective of contract law, see *Torgāns, K., Kārkliņš, J., Mantrov, V., Rasnačs, L.* Contract Law in Latvia. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 25–26.

[7] *Torgāns, K., Kārkliņš, J., Mantrov, V., Rasnačs, L.* Contract Law in Latvia, p. 215.

[8] Except the amendments to the Civil Law introduced in recent years such as a special set of rules included in the Civil Law by transposing the Late Payment Directive (Directive 2011/7/EU of

included in the Civil Law cannot be applied to the contract for supply of digital service.

On the other hand, the contract whose object is a digital thing is explicitly regulated within the Consumer Rights Protection Law[9] already since the transposition of the Consumer Rights Directive 2011[10], as discussed further in this article. This regulation included in the Consumer Rights Protection Law is considered as *sui generis* and, therefore, treats this contract as an independent contract in the same meaning which is attributed to this contract by the above Directive.

In this situation, the Latvian legislator is concerned with the transposition of the recent Consumer Sale Directives adopted in 2019, which specifically deal with contracts for digital thing. In addition to requiring a systematic approach, this transposition process presents a systematic challenge of transposing these directives into Latvian national law considering the attitude of the Civil Law towards this type of a contract.

Therefore, the aim of the present article is to examine the issues arising in relation to the transposition of the recent Consumer Sale Directives adopted in 2019 into Latvian law. In order to achieve this aim, at the outset the article considers the situation before and after the transposition of the Consumer Sale Directives 2019 if the transposition would follow the currently considered approach. Afterwards, the expected transposition is critically considered from a systematic point of view of Latvian civil law concerning its consequences, if the intended transposition approach would be maintained. This leads to elaboration of legislative suggestions to the Latvian legislator for improvement of the transposition of the Consumer Sale Directives 2019 into Latvian law.

1. Situation Before the Transposition of Consumer Sale Directives 2019

1.1. Regulation of Contract for a Digital Thing Within the Civil Law Relationship B2C

Before the transposition of the Consumer Sale Directives of 2019, a contract between a seller and a consumer, whose object is digital thing was explicitly regulated in Latvian national legislation – only in the Consumer Rights Protection Law. Taking into account the necessity to transpose the obligations set out in the Consumer Rights Directive of 2011, the term 'digital' first appeared in the Consumer Rights Protection Law in 2014.[11] Thus, the Consumer Rights Protection Law began to recognise two types of digital things: 1) a good with digital content,

the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. *OJ*, L 48, 23.02.2011, pp. 1–10), i.e., Articles 1668^{1}–1668^{11} Civil Law in conjuncture with Article 1765(2) Civil Law in relation to the amount of interest.

[9] Consumer Rights Protection Law. Official translation into English available on the official webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/Consumer%20Rights%20Protection%20Law.docx [last viewed: 06.09.2021].

[10] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. *OJ*, L 304, 22.11.2011, pp. 64–88.

[11] Law "Amendments to the Consumer Rights Protection Law" adopted on 24 April 2014, entered into force 28 May 2014. No official English translation is available.

which was included in the definition of 'goods' as 'digital content together with a material medium (CD, DVD or similar material medium)'[12]; 2) digital content, which was defined as 'data which are produced and supplied in digital form'.[13]

While digital content supplied on a tangible medium was considered as goods, and therefore could be an object of sales contract, the contracts for digital content which is not supplied on a tangible medium were classified neither as sales contracts nor as service contracts, nor any other specific type of contract following the approach of the Consumer Rights Directive 2011. In order to avoid uncertainties regarding the requirements applicable to such contracts[14], Article 4.[1](7) of the Consumer Rights Protection Law provided that rules of this law governing provision of services shall apply to digital content which is not supplied on a tangible medium unless otherwise provided by special norms regulating the protection of consumer rights. Therefore, contracts concerning such digital content were protected as a *sui generis* contract by the Consumer Rights Protection Law.[15]

It must be noted that the Consumer Rights Protection Law does not define any types of contracts, including contracts for digital things except references to either a purchase contract[16] or a supply contract[17] (and, frequently, confusing[18] both types of contracts[19]). Moreover, it does not generally regulate the rules on the formation, validity, nullity of contracts, the rules for the interpretation of the will of parties, or the legality of digital content as an object of an agreement or transfer of the author's economic rights.[20] Among other things, it merely indicates additional rules which the parties must comply with before[21] and after concluding contracts, the object of which is a digital thing, as well as lays down certain obligations as to the content of contracts. Thus, for such issues, general contract law as *lex generalis* law envisaged by the Civil Law still applies.[22]

Some of these *lex generalis* provisions can generally be applied to all types of contracts. For example, for a contract to be considered as concluded, the following obligatory elements are required to be established: complete agreement between the parties, particular form, intention to mutually bind (Article 1533 of the Civil Law).[23] However, it is important to understand that different types of contracts

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[12] Point 6 Article 1 Consumer Rights Protection Law.

[13] Point 8 Article 1 Consumer Rights Protection Law.

[14] See Likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" anotācija [Annotation of the draft law "Amendments to the Consumer Rights Protection Law"] (24.04.2014). Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/WEBRespDocumByNum?OpenView&restricttocategory=724/Lp11|2483 [last viewed: 06.09.2021].

[15] Certain provisions regarding digital content were also transposed in the regulations of the Cabinet of Ministers issued on the basis of the Consumer Rights Protection Law.

[16] For instance, Point 5, Article 3 Consumer Rights Protection Law.

[17] For instance, Paragraphs 6–7, Article 12 Consumer Rights Protection Law.

[18] For instance, obviously in Point 5, Paragraph 3, Article 6 or Article 30[1] Consumer Rights Protection Law.

[19] It should be noted that Latvia is one of rare jurisdictions where a purchase contract is differentiated from a supply contract (*Torgāns, K.* Saistību tiesības [Law of Obligations]. 2nd revised edition. Rīga: Tiesu namu aģentūra, 2018, pp. 286, 288). See Article 2002 *et seq* and Article 2107 *et seq* Civil Law.

[20] Article 2[1] (2) Consumer Rights Protection Law.

[21] For example, a requirement to provide information to the consumer.

[22] I.e., Chapters 2–8 of the Law of Obligations Part of the Civil Law. For a useful summary of this topic from the point of view of Latvian contract law in English, see *Torgāns, K., Kārkliņš, J.* Contract Law and Non-Contractual Obligations. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* (eds.). The Law of the Baltic States. Cham: Springer, 2017, pp. 291–298.

[23] *Torgāns, K.* Saistību tiesības [Law of Obligations], p. 42.

have their own essential elements, without which a contract cannot be considered as concluded (Articles 1470 and 1533 of the Civil Law), as well as their own specific rules. Therefore, it is important to indicate which contract type (types) also covers contracts for digital things.

1.2. Regulation of Contract for a Digital Thing Outside the Civil Law Relationship B2C

If a contract for a digital thing within the civil law relationship B2C is regulated by the Consumer Rights Protection Law, this contract outside this relationship, i.e., within B2B and C2C, is regulated on the basis of general and special contract law included in the Civil Law. According to the Civil Law, the type of contract depends on whether the object of the contract is digital content or a good with digital elements.

If a seller sells goods with digital elements to a consumer (the object of a contract is sale of goods with digital elements), the concluded contract will generally be a purchase (sales) contract of a movable. In such a situation, regulation on purchase (sales) contract envisaged in the Civil Law applies.[24]

However, if a seller sells digital content,[25] which is not supplied on a tangible medium, then a specific contract type cannot be identified as such on the basis of the Civil Law. Namely, no legal provision that currently regulates alienation contracts[26] could in the same way be applicable to contracts, the object of which is digital content. All alienation contracts share a common characteristic – their conclusion or execution results in the transfer of the right of property. As indicated in Article 927 of the Civil Law, the right of property can be exercised only over a thing (both tangible and intangible).[27] Given the fact that digital content is not a tangible thing (because it lacks spatial characteristic), nor it is an intangible thing (because intangible things in the legal system of Latvia are only rights), it has to be concluded, that one cannot execute right of property over digital content, and because of that one cannot pass these rights on to someone else. For this reason, no legal provisions applicable to alienation contracts may be directly applied to contracts, the object of which is digital content.

Similar conclusions can be found in other jurisdictions (including member states of the European Union). For example in the Comparative Study on cloud computing contracts prepared for the European Union Commission, it was stated that "In many jurisdictions (e.g. Belgium, England & Wales, France, Ireland, Lithuania, Luxembourg, Malta, Sweden, Slovenia, the Netherlands and also the United States), the application of the regulations on sales of goods are deemed inapplicable, as goods are likely defined as tangible movable items, which generally does not apply to a cloud computing context".[28] At the same time, as stated in the above comparative study, if specific rules exist in relation to services contracts, these rules will likely

[24] Articles 2002–2090 of Civil Law.

[25] Latvian law does not currently separate digital content from digital services.

[26] The Civil Law perceives purchase (sales), supply, exchange, and maintenance contracts as alienation contracts as they are regulated in a special chapter called 'Claims from alienation contracts' (Article 2002 Civil Law *et seq.*).

[27] For a useful discussion of this topic from the point of view of Latvian property law in English, see *Rozenfelds, J.* Property Law. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* The Law of the Baltic States, 2017, p. 280.

[28] DLA Piper UK LLP. Comparative Study on cloud computing contracts. Final Report. Luxembourg: Publications Office of the European Union, 2015, p. 28. Available: https://op.europa.eu/en/publication-detail/-/publication/40148ba1-1784-4d1a-bb64-334ac3df22c7 [last viewed: 06.09.2021].

apply to a cloud computing context which is the case of several EU Member States.[29] As noted above, this is not a case in Latvia, as the Civil Law does not recognise a contract of services.

However, this does not mean that contracts whose object is a digital thing cannot be concluded. It just means that these kinds of contracts in Latvian civil law are to be recognised as *sui generis* (i.e., ones which lack regulation by law). A legislator is entitled to stipulate that the provisions regulating other specific types of contracts are also applied to specific *sui generis* contracts. As mentioned above, Latvia has taken a cautious approach in this regard, stating that the Consumer Rights Protection Law rules governing provision of services generally apply to contracts object of which is digital content, at the same time indicating that these (*sui generis*) contracts cannot themselves be classified neither as sales contracts nor as service contracts within the civil law relationship B2C.

For the sake of truth, it should be mentioned that the contracts whose object is a digital thing may be subject to regulation of other sub-branches of law. Although this article is not aimed to view these other sub-branches of law in relation to a contract whose object is a digital thing, in this regard, it is sufficient to outline the perspective of intellectual property law. Depending on whether the subject-matter of the contract is either a right of use or an ownership right over a digital content, intellectual property law distinguishes two types of contracts, namely, licence contract and assignment contract. As indicated in Latvian legal literature, features of lease or rent contract may be established in the former situation, but in the latter situation – purchase (sales) contract.[30] However, regulation of these contracts within intellectual property law would be applicable as far as they concern intellectual property objects and their exploitation. As it is justly observed in this regard in the literature dedicated to European consumer rights protection law, "[i]n difference to normal sales contracts of movables, where the buyer acquires full rights of use and sale of the good, digital content contracts [as well as other types of contracts whose object is a digital thing – authors' remark] usually contain use restrictions on the consumer-buyer in general contract terms".[31]

1.3. Conclusion from the discussion in previous two sub-chapters

Consequently, the regulation of a contract whose object is goods with digital elements is provided in both the Civil Law and the Consumer Rights Protection Law: if the former regulation applies to civil law relationships such as C2C and B2B, the latter applies to B2C only; the former is based on general regulation of purchase contract, whereas the latter – on conformity of a thing to the contract which is generally more favourable to a consumer as a buyer (purchaser) than regulation of purchase (sales) contract included in the Civil Law to a buyer (purchaser). In such a way, it must be emphasized that the existing provisions regulating digital things

[29] DLA Piper UK LLP. Comparative Study on cloud computing contracts. Final Report. Luxembourg: Publications Office of the European Union, 2015, p. 28. Available: https://op.europa.eu/en/publication-detail/-/publication/40148ba1-1784-4d1a-bb64-334ac3df22c7 [last viewed: 06.09.2021].

[30] *Mantrovs, V.* Intelektuālā īpašuma līgumu regulējuma modernizācija Latvijas Republikas Civillikumā [Modernisation of Regulation for Intellectual Property Contracts in the Civil Law of the Republic of Latvia]. *Journal of the University of Latvia. Law*, No. 2, 2011, pp. 115–128. Available: https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No2/V_Mantrovs.pdf [last viewed: 06.09.2021].

[31] *Micklitz, H.-W., Reich, N.* Chapter 4. Sale of Consumer Goods. In: *Micklitz, H.-W., Reich, N., Rott, P.* EU Consumer Law. 2nd edition. Antwerpen, Portland, Oregon: Intersentia, 2014, p. 193.

on the basis of purchase regulation on the basis of Civil Law can by no means be called sufficient, as there still is no clear answer on many questions when it comes to delivery of digital thing. Until the transposition of the Consumer Sale Directives, there is no regulation on digital thing specific problems such as updates, compatibility, functionality, interoperability, integration, concept (definition) of "digital services". Transposition of the Consumer Sale Directives will also have notable changes on other, more general aspects regulating digital things, such as process of the delivery, conformity, etc.

2. Expected Situation After the Transposition of Consumer Sale Directives of 2019

Like other EU Member States, Latvia currently fulfils its obligations by taking steps in order to transpose the new consumer sale directives into national law. These steps are considered within the current chapter.

At the outset, it should be noted that the Consumer Digital Sale Directive[32] provides that classification of a contract for supply of digital content and digital service is considered as a non-harmonised issue and, therefore, falls within national competence of EU Member States. Indeed, the Consumer Digital Sale Directive itself provides that

> *[t]his Directive should also not determine the legal nature of contracts for the supply of digital content or a digital service, and the question of whether such contracts constitute, for instance, a sales, service, rental or sui generis contract, should be left to national law.*[33]

As one may observe from this quote from the Directive, national civil law of EU Member States, including Latvia, is free to determine the legal nature of a contract for supply of digital content and digital service.

At the same time, it should be considered that the Consumer Rights Directive of 2011 dealing also with digital content treats the supply for a digital content controversially. If digital content is supplied on a tangible medium, this Directive treated such goods as movables[34] similarly to the Consumer Sale Directive of 1999[35], noting that such objects should be considered as goods within the meaning of this Directive. However, if a digital content is not supplied on a tangible medium, this contract was considered by this Directive "neither as sales contracts nor as service contracts", and equalised to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating.[36] However, such approach, as it may be observed from these Directive's provisions, is limited to the Consumer Rights Directive of 2011 and, therefore, is not extended to other directives, including both Consumer Sale Directive of 2019, i.e. the Consumer Digital Sale Directive mentioned above and the Consumer Sale Directive of 2019.[37]

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[32] 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. *OJ*, L 136, 22.05.2019, pp. 1–27.

[33] Consumer Digital Sale Directive, preamble, para. 12.

[34] Consumer Rights Directive 1999, preamble, para. 19.

[35] 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, pp. 12–16.

[36] Consumer Rights Directive 1999, preamble, para. 19.

[37] 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

As it was concluded in the previous chapter, Latvian contract law treats a contract for a digital thing, i.e., supply of a digital content or digital service, depending on the civil law relationship. In the case of B2B and C2C, the Civil Law applies, regulating this contract based on general contract law as *lex generalis*. However, if B2C applies, Latvia has taken a cautious approach in this regard, stating that the Consumer Rights Protection Law rules governing provision of services generally apply to contracts, the object of which is digital content, at the same time indicating that these (*sui generis*) contracts cannot themselves be classified either as sales contracts or as service contracts within the civil law relationship B2C.

The **draft law**[38] is already prepared in order to introduce the amendments into the Consumer Rights Protection Law, which would allow to transpose the Consumer Sale Directives adopted in 2019 into Latvian national law. This draft law defines the understanding for a digital thing regulated by the new consumer sale directives.

The draft law is based on an assumption that the thing with digital elements (goods with digital elements in the terminology of the new consumer sale directives and the draft law) should be considered as a good.[39] Therefore, depending on the character of a contractual relationship, a contract for a good with digital elements would correspond to purchase contract or supply contract envisaged by the Civil Law and subject to special regulation included in the Consumer Rights Protection Law.

At the same time, digital content[40] and digital service[41] would be considered as *sui generis* contracts. This conclusion is based on the contents of the draft law. As one may observe from amendments to be introduced by the draft law to the legal definitions of the term 'consumer'[42] and liability of a seller and a service provider[43], these amendments aim to equalize obligations for digital content and digital service with those for good and service. Such approach was considered appropriate and desirable already in the relevant European Union Commission Staff Working Document in 2015, which in this regard provides, as follows:

> [..] *any rules on digital content should be as far as possible based on the rules on the sales of goods, deviations being justified only to take account of the specificity of digital content. Indeed this approach is appropriate and has been followed. To ensure such a consistent approach also during the legislative process, both sets of rules should be discussed as far as possible in parallel.*[44]

Directive 2009/22/EC, and repealing Directive 1999/44/EC. *OJ*, L 136, 22.05.2019, pp. 28–50.

38 Likumprojekts "Grozījumi Patērētāju tiesību aizsardzības likumā" [Draft Law "Amendments to the Consumer Rights Protection Law"]. Available: http://tap.mk.gov.lv/lv/mk/tap/?pid=40495464 [last viewed: 06.09.2021].

39 Article 1 draft Law introducing amendments to the Point 6 of Article 1 envisaging the legal definition of the term 'good'.

40 This term is defined in Point 8 of Article 1 of the Consumer Rights Protection Law which transposes a respective norm of the Consumer Rights Directive of 2011.

41 This term will be defined in Article 1 of that Law following amendments envisaged by the draft Law.

42 Article 1 draft Law introducing amendments to the Point 3 of Article 1 envisaging the legal definition of the term 'consumer'.

43 Article 17 draft Law introducing amendments to Article 33(4) of Consumer Rights Protection Law.

44 See European Union Commission Staff Working Document. Impact Assessment. Accompanying the document – Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods (SWD/2015/0274 final/2 – 2015/0287 (COD)). Brussels, 17 December 2015. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1450432347519&uri=SWD:2015:274:REV1 [last viewed: 06.09.2021].

3. Consequences of the Transposition of Consumer Sale Directives 2019

The transposition of the new consumer sale directives in the way intended by the current draft law would lead to several consequences examined separately in this chapter of the article by analysing weaknesses and providing respective suggestions.

Firstly, the understanding of the contract for a digital content and digital service would be regulated only on the basis of Consumer Rights Protection Law as a *sui generis* contract in conjuncture with general contract law included in the Civil Law. An obvious weakness of such approach is related to the fact that this regulation is fragmentary, as it focuses on conformity of a thing to the contract and remedies. Likewise, such an approach leaves regulation of a contract for a digital content and digital service within B2B and C2C solely to contractual parties (but general contract law still applies as explained above).

The negative outcome is related to the issue that this contract is left without appropriate regulation and, therefore, imbalances in bargaining power would allow one party to include contractual terms that are not in line with fair business practice (for detriment of the other contractual party). On the one hand, unlike consumers who are often in a structurally imbalanced position compared with the trader, in B2B relationships imbalances in bargaining power are due to the respective market situations (which will differ on a case-by-case basis). Therefore, the risk of a seller or a supplier exploiting its bargaining power in B2B relationships is significantly lower than in B2C relationships. On the other hand, extending the provisions of the Consumer Sale Directives (or a part of them) to contracts concluded within the B2B relationship would help solve the imbalances in contracts between large businesses and SMEs. Regarding specific types of digital content and digital services, it has been noted in the relevant European Union Commission Staff Working Document, that SMEs are often the weak part in cloud computing contracts and face contract law-related problems in B2B transactions (for example, issues regarding service providers' liability and accountability, conformity of the digital content, etc.).[45]

Secondly, the systematic problem leads to the artificial separation of regulation intended for a digital good depending on a civil law relationship. This approach is old-fashioned, as a modern European approach is different: it envisages general regulation for a contract of sale for all civil law relationships which is accompanied by a set of special rules mostly for the B2C, as it is governed by EU directives.[46]

However, even taking into account the aforementioned issues, the choice to extend the provisions of Consumer Sale Directives (or a part of them) to contracts between B2B and C2C is a legislative policy related decision which could be only adopted by the legislator, i.e., the Latvian parliament. This decision may be influenced by various socio-political factors. As it can be seen from the relevant European Union Commission Staff Working Document, by collecting stakeholder views in 2014 and 2015, business associations (with the exception of the main

[45] See European Union Commission Staff Working Document. Impact Assessment.

[46] This issue is already raised in Latvian legal literature (see Mantrovs, V. Jaunā patērētāja pirkuma Direktīva (Direktīva 2019/771): izaicinājumi un iespējas Latvijas likumdevējam [New Consumer Sales Directive (Directive 2019/771): Challenges and Possibilities for Latvian Legislator]. In: Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās: Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums [Application of the International and European Union law in the national courts. Collection of research papers of the 78th International Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2020, pp. 319–329).

SMEs association) argued that the proposals for directives concerning contracts for the supply of digital content should only cover B2C contracts, while half of the respondents from legal professions suggested that the new contract rules could apply to SMEs as well, but at a lower level of protection than for consumers. Similar to business associations, the Member States (with the exception of one Member State) also preferred the inclusion of only B2C contracts. Regarding tangible goods (including goods with digital elements), businesses were practically unanimous in supporting the inclusion of only B2C contracts, while majority of legal professions' associations considered that the same regime could apply to both B2C and B2B, except some rules on standard terms in the latter case. Similar to business associations, most Member States (with the exception of a couple of Member States) supported the inclusion of only B2C contracts.[47] The main reason why business organizations are reluctant to apply the same measures from directives to both B2C to B2B contracts, is the significance of freedom of contract as an overarching principle in B2B contracts, be it in terms of the freedom to choose the law that will apply to the contract or the freedom to adapt B2B contract law default rules which would in many cases pre-empt potential problems regarding contractual issues.[48]

Therefore, one of the possible solutions to reduce fragmentation, and at the same time respect the principle of freedom of contract, would be for the Latvian legislator to apply the provisions (or part of the provisions) transposed from the Consumer Sale Directives to B2B contracts as natural elements of the contract[49], meaning that obligations transposed from the directives would be binding in B2B contracts. This suggestion does not require drafting a separate legal act. It would be sufficient to supplement Article 4^1 of the Consumer Rights Protection Law with a respective provision. This Article is an appropriate place for such a provision, because it already contains different adapting provisions including a provision which extends certain rules of this law to B2B contracts[50]. The Latvian legislator may also decide whether it is allowed for the parties to the B2B contract to agree otherwise than would be envisaged by this extended regulation. However, such a choice cannot be absolute, for instance, it is unlikely that a B2B contract for the supply of digital content may set a specific period of trader's liability different than the liability time periods envisaged in Article 11 of the Directive 770/2019.

Summary

The transposition process of the new Consumer Sales Directives adopted in 2019 has already commenced in Latvia by drafting a draft Law intended to amend the Consumer Rights Protection Law. However, these amendments would deal with regulation of contract whose object is a digital thing only within the civil law relationship B2C. An obvious challenge for this draft law relates to the characterisation of this contract as a *sui generis* contract which would mean that

[47] See European Union Commission Staff Working Document. Impact Assessment.

[48] Ibid.

[49] The Civil Law distinguishes natural elements of a contract in addition to essential and incidental elements of the contract. The Civil Law explains that the natural elements of a transaction are those which are its direct consequences by law if the transaction is entered into according to its essential principles. Therefore, these elements are self-evident, even without a special arrangement, but they may be removed or changed by special agreement, which shall be proved by the party referring to such (Article 1471 Civil Law).

[50] Para. 1 Article 4^1 of Consumer Rights Protection Law.

it will be regulated on the basis of special regulation to be included in that law in addition to general contract law provided by the Civil Law. However, an unclear and problematic issue relates to regulation of that contract outside the civil law relationship B2C. In this regard, the article proposes a solution for the Latvian legislator which could be obviously considered within or after the transposition process of both abovementioned Directives will take place, i.e., to supplement Article 4[1] of the Consumer Rights Protection Law with a provision which would extend the discussed regulation to the civil law relationship B2B.

Acknowledgment

The research reflected in this article was financed by the programme of Fundamental and Applied Research Projects funded by the Latvian Council of Science.

Sources

Bibliography

1. DLA Piper UK LLP. Comparative Study on cloud computing contracts. Final Report. Luxembourg: Publications Office of the European Union, 2015. Available: https://op.europa.eu/en/publication-detail/-/publication/40148ba1-1784-4d1a-bb64-334ac3df22c7 [last viewed: 06.09.2021].
2. *Giliker, P.* Adopting a Smart Approach to EU Legislation: Why Has it Proven so Difficult to Introduce a Directive on Contracts for the Supply of Digital Content? In: *Synodinou, T., Jougleux, P., Markou, C., Prastitou-Merdi, T.* (eds.). EU Internet Law in the Digital Era: Regulation and Enforcement. Cham: Springer, 2020.
3. *Mantrovs, V.* Intelektuālā īpašuma līgumu regulējuma modernizācija Latvijas Republikas Civillikumā [Modernisation of Regulation for Intellectual Property Contracts in the Civil Law of the Republic of Latvia]. *Journal of the University of Latvia. Law*, No. 2, 2011, pp. 115–128. Available: https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No2/V_Mantrovs.pdf [last viewed: 06.09.2021].
4. *Mantrovs, V.* Jaunā patērētāja pirkuma Direktīva (Direktīva 2019/771): izaicinājumi un iespējas Latvijas likumdevējam [New Consumer Sales Directive (Directive 2019/771): Challenges and Possibilities for Latvian Legislator]. In: Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās: Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums [Application of the International and European Union law in the national courts. Collection of research papers of the 78th International Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2020, pp. 319–329.
5. *Micklitz, H.-W., Reich, N., Rott, P.* EU Consumer Law. 2nd edition. Antwerpen, Portland, Oregon: Intersentia, 2014.
6. *Rozenfelds, J.* Property Law. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* (eds.). The Law of the Baltic States. Cham: Springer, 2017.
7. *Torgāns, K.* Saistību tiesības [Law of Obligations]. 2nd revised edition. Rīga: Tiesu namu aģentūra, 2018.
8. *Torgāns, K., Kārkliņš, J.* Contract Law and Non-Contractual Obligations. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* (eds.). The Law of the Baltic States. Cham: Springer, 2017.
9. *Torgāns, K., Kārkliņš, J., Mantrov, V., Rasnačs, L.* Contract Law in Latvia. Alphen aan den Rijn: Kluwer Law International, 2020.

Normative Acts

1. 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. *OJ*, L 136, 22.05.2019, pp. 1–27.

2. 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, pp. 28–50.
3. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. *OJ*, L 304, 22.11.2011, pp. 64–88.
4. Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. *OJ*, L 48, 23.02.2011, pp. 1–10.
5. 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, pp. 12–16.
6. Civil Law of the Republic of Latvia (1937). Official translation into English available on the official webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/The%20Civil%20Law.doc [last viewed: 06.09.2021].
7. Consumer Rights Protection Law. Official translation into English available on the official webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/Consumer%20Rights%20Protection%20Law.docx [last viewed: 06.09.2021].

Other Sources

1. Likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" anotācija [Annotation of the draft law "Amendments to the Consumer Rights Protection Law"] (24.04.2014). Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/WEBRespDocumByNum?OpenView&restricttocategory=724/Lp11|2483 [last viewed: 06.09.2021].
2. Likumprojekts "Grozījumi Patērētāju tiesību aizsardzības likumā" [Draft Law "Amendments to the Consumer Rights Protection Law"]. Available: http://tap.mk.gov.lv/lv/mk/tap/?pid=40495464 [last viewed: 06.09.2021].
3. European Union Commission Staff Working Document. Impact Assessment. Accompanying the document – Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods (SWD/2015/0274 final/2 – 2015/0287 (COD)). Brussels, 17 December 2015. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1450432347519&uri=SWD:2015:274:REV1 [last viewed: 06.09.2021].