SOME CONSIDERATIONS ON THE TRANSPOSITION OF DIRECTIVE (EU) 2019/771 INTO ROMANIAN LAW

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Abstract

It is well known that the regulation of consumer contracts has developed a lot in recent decades, becoming a very important component of EU law. However, any evolution requires critical reflections. In this study we try to focus on the new elements that have occurred and especially on the effects produced by the transposition of Directive (EU) 2019/771 into Romanian law.

At first glance, we must observe what is new in the text of the directive and whether these novelties are correlated with the technological evolution of consumer products.

On the other hand, a regulation of the sale calls into question the degree of timeliness of the ordinary regulation offered by the Civil Code. Are there two parallel regulations? Can we talk about a pressure on the basic regulation offered by the Civil Code if the new regulation also provides a definition of the sale-purchase contract?

These are questions that this study tries to answer.

Keywords: *consumer law, sale agreement, CSIG, seller's guarantees, buyer's rights.*

1. Introduction

As is well known, consumer law has become in recent decades an extremely important set of legal norms in the development of the EU public policies.

Unfortunately, the creation of a set of rules for consumer contracts has created a third category of contracts governed by private law. Considering that in Romania, despite the alleged unification of 2011, a part of the Commercial Code is still in force, the consumer legislation only creates an image that lacks homogeneity or clarity, even if there is also a consumer code[1].

2. Guarantee mechanism

2.1. Guarantees imposed by Civil Code

As it is known pursuant to art. 1707 para. (1) CC the seller guarantees the buyer in case of the existence of „hidden defects".

In order for the „warranty to operate", the latent defect must meet the following conditions:

- it cannot be detected by a buyer who does not have specialized knowledge in the field; art. 1707 para. (2) CC considers hidden that defect which, at the date of delivery, could not be discovered, without specialized assistance, by a prudent and diligent buyer;
- it has to exist on the date of delivery of the property; art. 1707 para. (3) CC expressly states that even the existence of a cause of the defect entails the seller's liability.
- it has not been known by the buyer; therefore, a visible (apparent) defect, i.e., perceptible through the ordinary senses of a prudent and diligent buyer, will not be able to determine the mechanisms of the seller's liability.

The text of the current Civil Code regulates the „guarantee for the lack of agreed qualities". This form of liability is undoubtedly a welcome novelty without being able to qualify as a form of additional protection.

As a result, according to the provisions of art. 1714 CC, the applicable rules regarding the warranty against latent defects will be used even in the event that the sold good does not correspond to the qualities agreed by the parties.

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[1] Law no. 296/2004 regarding the Consumer Code.

The envisaged rule encourages the parties to establish various criteria or qualities that the asset must present at the time of its delivery. In the event of a dispute, the court will be able to discern more easily whether or not the will of the parties – in this case expressed in a detailed form – has been respected.

In the same sense is the guarantee in case of sale by sample or model provided by art. 1715 CC. In the case of sale by sample or model, the seller guarantees that the good has the qualities of the sample or model.

A new mechanism for protecting the buyer's interests is the guarantee for the proper functioning regulated by art. 1716 para. (1) CC.

A few clarifications are necessary.

First of all, the „guarantee for proper functioning" is a form of protection of an additional nature, because it is added to the „guarantee for defects", an aspect that is mentioned by art. 1716 para. (1) CC.

Secondly, the existence of the guarantee is a choice of the seller, an option of the seller, who in conditions of competition prefers to retain his customer by offering him a more effective protection tool than the one traditionally recognized by the Civil Code.

Third, the „guarantee" mechanism is substantially different.

On the one hand, the seller's obligation exists or, practically, produces legal effects only for a certain time.

On the other hand, at the level of the objective of the evidence, the buyer only has the obligation to communicate to the seller the defect that occurred within the warranty period so that at that moment the seller's obligation to repair the sold good at his expense is configured.

Last but not least, the seller's main obligation is to repair the property. The buyer cannot choose any other remedy and the court cannot decide this aspect either.

2.2. Conformity of the good. A new concept in the Guarantee Facility

The mechanism of liability of the professional seller is still based on the scheme designed by the previous regulation, an option that has been generally appreciated in the specialized literature[2].

As such, unlike the CC provisions regarding the warranty against defects or for proper functioning, provisions that are currently found under similar expressions in the most important European codes, art. 4 of GEO no. 140/2021, with the suggestive title „Conformity of goods", refers indirectly to two legal landmarks, opposed par excellence, „conformity" and „lack of conformity", respectively, introduced into EU and national law[3] by previous regulations.

The current rule avoids providing a definition of „conformity", despite the current trend in the drafting of European normative acts, thus limiting itself to providing that „as the case may be, the seller has the obligation to deliver to the consumer goods that meet the requirements of art. 5-7, without prejudice to the provisions of art. 8".

In other words, in order to establish the existence or not of the „conformity of the good" with the agreement of the parties, mainly with the expressed wish of the buyer, a series of criteria strictly determined by law will be used.

The origin of the two benchmarks by means of which it is determined to what extent and whether the seller's obligation has been performed, as well as the evaluation mechanism, seem to be found in the provisions of the UN Convention on Contracts for the International Sale of Goods, concluded in Vienna on 11 April 1980[4].

On the one hand, art. 36 para. (1) of the said Convention specifies that the seller is *responsible*, in accordance with the contract and international convention, *for any lack of conformity* that exists at the time of the transfer of risks to the buyer, even if this lack does not appear until later, while art. 35 para. (1) of the same normative act requires the seller *to hand over goods* whose quantity, quality and type correspond to those provided for in the contract and whose packaging or conditioning corresponds to that provided for in the contract.

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[2] See on this path in French legal doctrine J. Calais-Auloy, F. Steinmetz, *Droit de la consommation,* Dalloz, Paris, 2003, p. 269. The same, in Italian doctrine, M. Girolano, *La conformità del bene al contratto di vendita. Criteri soggettivi e criteri oggettivi,* in di Cristofaro, Giovanni (ed.), *La nuova disciplina della vendita mobiliare nel codice del consumo*, Giapichelli, Torino, 2022*,* p. 66.

[3] See art. 5 para. (1) of Law no. 449/2003.

[4] F. Ferrari, *The CISG and its impact on national legal systems*, Sellier, Munich, 2008, p. 351; S. Grudmann, *Conformity with the Contract*, in M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive*, Intersentia, Antwerp, 2002, p. 141 and M.C. Bianca, *Rights of the consumer*, p. 152.

Based on art. 35 para. (2), in the absence of a contrary provision of the parties, the goods shall not be considered in conformity with the contract unless:

- they are suitable for the uses for which goods of the same type are usually used;
- they are suitable for any special use that has been brought to the seller's attention, expressly or tacitly, at the time of the conclusion of the contract, unless it results from the circumstances that the buyer has left them to the competence or appreciation of the seller or that it was reasonable on his part to do so;
- possesses the qualities of a commodity that the seller has presented to the buyer as a sample or model;
- they are packaged or conditioned in the usual manner for goods of the same type or, in the absence of a customary manner, in a manner suitable for their preservation and protection.

In this context, it is a mistake to consider that we are witnessing a modernisation of national law by taking over mechanisms and concepts from EU law.

Romania acceded to the International Convention through Law no. 24/1991[5], and the norms of international law were already found in domestic law, being applicable through the special rules of the Convention only to international commercial relations involving subjects of foreign nationality.

2.3. Preliminary conclusions

Theoretically, the buyer could resort to both the CC provisions and the special provisions of consumer legislation.

The defect is absorbed into a much broader notion, that of lack of conformity in relation to the contract[6].

3. Conformity assessment

3.1. Subjective criteria

The buyer's choice of the good is, most of the time, subjective if not extremely subjective.

The European or national legislator resorted to the use of the phrase „*subjective* compliance requirements" (a phrase that is identified in the text of GEO no. 140/2021 with the title art. 5)[7].

Despite this, he took into account these criteria for assessing the conformity of the good in relation to the buyer's will, and the word „subjective" should not, in my opinion, mislead us.

As a consequence, in order to be able to assess the conformity of the delivered goods, in relation to the content of the sales contract, art. 5 of GEO no. 140/2021 lists a limited series of conditions that the former must meet, namely:

- to comply with the description, type, quantity and quality and to have the functionality, compatibility, interoperability and other characteristics provided in the sales contract;
- to correspond to the special purpose for which the consumer requests them, which the consumer has brought to the attention of the seller at the latest at the time of concluding the sales contract and which the seller has accepted;
- to be delivered together with all accessories and all instructions, including installation instructions, provided in the sales contract;
- to be provided with updates according to the provisions of the sales contract.

3.2. Objective elements

As we have observed, the previous criteria are outlined starting from the premise of the existence of an agreement of the parties, which must have expressed itself in the content of the contract in an undoubted and precise manner regarding the characteristics of the asset to be sold.

In the absence of precise contractual provisions on the characteristics of the goods sold, on the wish expressly expressed by the buyer and in such a way that this desire can be proved, the criteria considered subjective cannot be used to establish the conformity of the goods delivered.

[5] Published in the Official Gazette of Romania no. 54/19.03.1991.

[6] J. Calais-Auloy, F. Steinmetz, *op. cit*., p. 269.

[7] See art. 6 of Directive (EU) 2019/771.

As a result, in order to be able to apply the provisions of Directive (EU) 2019/771 effectively, it was imperative to establish a set of universally valid criteria.

Their use in the event of a dispute is of huge significance because the court can determine whether or to what extent the seller has delivered a compliant good in the absence of clauses that expressly provide for the specific technical characteristics, or at least of documents that reconstruct the will of the parties.

Art. 6 of GEO no. 140/2021 mentions, from this perspective, criteria that actually play the role of supplementary rules[8].

The rule we have under analysis presents hypotheses in which the following are considered compliant goods:

- whether they correspond to the purposes for which goods of the same type would normally be used, taking into account, where appropriate, the legal provisions in force, technical standards or, in the absence of such technical standards, codes of conduct applicable in the field and specific to the sector;
- when they possess the quality and correspond to the description of a sample or model that the seller has made available to the consumer before the conclusion of the contract;
- when delivered together with the accessories, including packaging, installation instructions or other instructions that the consumer can reasonably expect to receive;
- whether they comply with quantity and possess the qualities and other characteristics, including durability, functionality, compatibility and security, which are normal for goods of the same type and which the consumer can reasonably expect, having regard to the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons at earlier stages of the chain of transactions, including by the manufacturer, especially in advertisements or on the label.

3.3. Removal of the liability of the final operator

The relevance of „public statements" must be analysed in detail in any conflict situation in which the issue of the conformity of the property arises, and the provisions of art. 6 para. (1) of GEO no. 140/2021.

The impact of this possible element to which we can relate is extremely different from one case to another.

As a result, the European legislator has retained several hypotheses that absolve the final operator of liability in the context in which the buyer would invoke „public statements" as a substantial vector in the choice made.

The hypotheses were regulated by art. 7 of the previous regulation, which provided that the seller „*is not liable for the public statements* provided for in art. 5 para. (2) letter d)[9], in *any of the following situations*, if he proves that:

- he did not know and could not reasonably have known the statements in question;
- the declaration had been corrected at the time of concluding the sale-purchase contract;
- the decision to buy the product could not be influenced by the public statements in question".

Currently, art. 6 para. (2) of GEO no. 140/2021 reproduces in a similar form the same causes that remove liability by providing that the seller „*is not required to comply with public statements*, in accordance with the provisions of para. (1) letter d), if he demonstrates at least one of the following situations:

- did not know and could not reasonably have known the public statement in question;
- by the time the contract is concluded, the public statement has been rectified in the same or similar way to that in which it was made; or
- the decision to acquire the goods could not have been influenced by the public declaration".

Similarly to the previous regulation, the analysed text of GEO no. 140/2021 does not contain any definition of the concept of „public statement" nor does it provide elements that, through a logical connection, can provide us with an answer in this regard[10].

In this context, it is logical, in our opinion, to understand the notion of „public statement" superior – in terms of content – to the phrases used in art. 6 para. (2) of GEO no. 140/2021, namely „advertisements" or „labels".

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[8] M. Girolano, *op. cit*., p. 81.

[9] Accordingly, art. 6 para. (1) letter d) of GEO no. 140/2021.

[10] The text of the European directives has the same deficiency, an aspect criticized in the doctrine (M. Girolano, *op. cit*., p. 86).

Public statements could be considered as any messages intended for a large number of people, messages with different characteristics or qualitative aspects asserted in favour of the product in question[11].

As regards the author of the „public statements", the substitution of the phrase „his representative", that is to say, of the producer with „other persons" seems to exclude the statements of formal representatives, who, in reality, were not in the chain of transactions concerning the product sold[12].

3.4. A new definition

According to the provisions of art. 2 letter b) of Law no. 449/2003, the product was a „movable tangible asset whose final destination is individual or collective consumption or use". The old definition of goods had become, from a certain perspective, outdated by the technological advances that we have witnessed in the last two decades.

Recital no. 5 of Directive 771 was merely to establish that objective reality. „Technological evolution, this text states, has led to an ever-growing market for goods that incorporate digital content or digital services or are interconnected with them. Given the increasing number of such devices and the rapid increase in their consumer uptake, action at Union level is needed to ensure a high level of consumer protection and to increase legal certainty as regards the rules applicable to contracts for the sale of such products. Increasing legal certainty would help increase consumer and seller confidence."

Legal protection means, firstly, a new definition of the consumer good and, secondly, a correlation of the seller's obligations in relation to this category of goods.

As a result, if art. 2 of GEO no. 140/2021 specified that goods are also understood within the meaning of the law as „goods with digital elements", the same norm defined „goods with digital elements" as „any movable tangible object that incorporates digital content or a digital service or is interconnected with them, so that, in the absence of that digital content or digital service, the good could not perform its functions".

3.5. An additional obligation

Will thus be incumbent on the seller pursuant to art. 6 para. (3) of GEO no. 140/2021, since the former, in the case of goods with digital elements, the seller must ensure that:

- the consumer is informed of updates and;
- that it is provided with updates.

By the term update (used in the plural in the text of the law) we will also consider those security updates, which are necessary *to maintain the compliance* of those goods during a period determined according to two parameters.

Thus, in the first case, the period during which the obligation to update must be performed is the period during which the consumer can reasonably expect it, having regard to the type and purpose of the goods and digital elements and taking into account the circumstances and nature of the contract, where the contract of sale provides for a single act of supply of the digital content or digital service.

Unlike this hypothesis, in the second case the period is the one provided by the provisions of art. 9 para. (3) and (4) of GEO no. 140/2021, *i.e.*, more precisely in the situation where the sales contract provides for the continuous supply of digital content or digital service during a certain period.

In order to eliminate some doubts that we have mentioned in our work, recital no. 13 seeks to clarify by specifying, on the one hand, that Directive (EU) 2019/771 and Directive (EU) 2019/770 should complement each other. While the latter lays down rules on certain requirements relating to contracts for the supply of digital content or digital services, Directive (EU) 2019/771 contains rules on certain requirements relating to contracts for the sale of goods.

As a result, in order to meet consumer expectations and provide a clear and simple legal framework for traders of digital content or digital services, Directive (EU) 2019/770 applies to the supply of digital content or digital services, including digital content provided on a physical medium, such as DVDs, CDs, USB flash drives and

[11] M. Girolano, *op. cit.*, p. 86; M. Castilla Barea, *La nueva regulación europea de la venta de bienes muebles a* consumidores, Navarra: Aranzadi, 2021, p. 131.

[12] M. Girolano, *op. cit.*, p. 86.

memory cards, as well as the material medium, provided that the material medium serves exclusively as a medium for the digital content.

Conversely, Directive (EU) 2019/771 is to apply to contracts for the sale of goods, among which we will find the so-called goods with digital elements, or in other words goods, which require digital content or a digital service that makes them capable of performing their functions.

According to the recital no. 14 from the preamble of the Directive mentioned above „the term *goods* as provided for under this Directive should be understood to include *goods with digital elements*, and therefore to also refer to any digital content or digital service that is incorporated in or inter-connected with such goods, in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions. Digital content that is incorporated in or inter-connected with a good can be any data which are produced and supplied in digital form, such as operating systems, applications and any other software. Digital content can be pre-installed at the moment of the conclusion of the sales contract or, where that contract so provides, can be installed subsequently. Digital services inter-connected with a good can include services which allow the creation, processing or storage of data in digital form, or access thereto, such as software-as-a-service offered in the cloud computing environment, the continuous supply of traffic data in a navigation system, or the continuous supply of individually adapted training plans in the case of a smart watch".

A special case in which one can speak of incorrect installation of goods is provided by art. 7. Any non-conformity caused by incorrect installation of goods is considered to represent a non-conformity of goods in one of the following situations:

- the installation is part of the sales contract and was carried out by the seller or under the seller's responsibility;
- the installation, intended to be carried out by the consumer, was carried out by the consumer and the incorrect installation was due to deficiencies in the installation instructions provided by the seller or, in the case of goods with digital elements, by the seller or provider of the digital content or digital service.

4. Seller's liability

4.1. Preliminary considerations

The seller's liability is regulated by art. 9 of GEO no. 140/2021. In order to initiate the buyer protection mechanism, it is supposed the fulfilment of following key conditions[13]:

- the existence of a material, digital or legal lack of conformity;
- this lack of conformity must exist at the time of the conclusion of the sale-purchase contract;
- the lack of conformity must be discovered within a specified period.

4.2. Lack of conformity of the property

The lack of conformity of the good is the essential motivation of the buyer's action, because only by ascertaining such a state can we consider a possible culpable non-performance of the seller's obligations, a non-performance that may also lead to the termination of the contract if, obviously, the other complementary conditions are also met.

The non-conformity of the property will be ascertained by resorting to the subjective criteria or, in their absence, to the subjective ones mentioned above[14].

4.3. Existence of non-conformity at the time of conclusion of the sale-purchase contract

The second condition essentially completes the mechanism of contractual liability.

4.4. The term in which the defect must be discovered

The buyer's right to remedies cannot be exercised at any time.

[13] See M. Castilla Barea, *op. cit*., pp. 97, 153.
[14] See *above*.

Taking into account that the directive refers to consumer goods, the term of 2 years remained as a reference period. Subsequent discovery does not allow the buyer to act under consumer law.

5. Conclusions

One of the most important novelties brought by the above-mentioned directive and the emergency ordinance is the defence of consumers' interests and rights in the case of high-tech products.

However, the parallel regulation of the sales contract with consumers is, in our opinion, questionable.

It is true that the legal relationship with the consumer involves certain specific features. However, we are currently facing two sales contracts, one regulated by the civil code and one regulated by the emergency ordinance.

The existence of two regulations with a common core can lead to a non-unitary application of the law and to a pressure on the Civil Code in order to standardize with the consumer legislation.

References

- Calais-Auloy J., Steinmetz, F., *Droit de la consommation*, Dalloz, Paris, 2003;
- Castilla Barea, M., *La nueva regulación europea de la venta de bienes muebles a consumidores*, Navarra: Aranzadi, 2021;
- Ferrari, F., *The CISG and its impact on national legal systems*, Sellier, Munich, 2008;
- Girolano, M., *La conformità del bene al contratto di vendita. Criteri soggettivi e criteri oggettivi*, in di Cristofaro, Giovanni (ed.), *La nuova disciplina della vendita mobiliare nel codice del consumo*, Giappichelli, Torino, 2022.