

SETTING COMMON GROUND RULES



MICHAŁ MATYSIAK, SENIOR ASSOCIATE AT SQUIRE PATTON BOGGS, EXPLAINS THE GOVERNMENT-DRAFTED PROVISIONS OF TWO EU PRO-CONSUMER DIRECTIVES INTO POLAND'S CONSUMER PROTECTION LEGISLATION.

Two EU pro-consumer directives, essential, for the well-being of the e-commerce sector, will soon be implemented in the Polish legal system. They are the Digital Content and Services Directive (DCSD) and the Sales of Goods Directive (SGD). The two directives are intended to complement each other. DCSD lays down rules governing specific contract requirements for the supply of digital content or digital services. In contrast, SGD lays down rules governing particular requirements for contracts involving the sale of goods. It applies to contracts for the sale of goods, including goods with digital elements and the act drafted by

Polish government experts also proposes a similar division. Both directives adhere to the EU maximum harmonization principle, which means that EU member states should not adopt or maintain any other regulations that differ from those set in the directives. Based on the same principle, EU members are not to introduce higher levels of consumer protection than those defined in the directives. However, there may be exemptions from this principle. Both directives became law in 2019. All EU member states were obliged to implement them in their legal systems by July 1, 2021, and make them effective law come January 1, 2022.

Poland failed to meet the deadlines. On June 29, the government drafted an act amending the Act on Consumer Rights and Certain Other Acts and submitted it to Parliament. By implementing the two directives, Polish lawmakers primarily amend the Act on Consumer Rights by adding some new definitions, clarifying the scope of regulations, and delineating the scope of application of SGD and DCSD.

WARRANTY AND LIABILITY

With the implementation of SGD and DCSD, Article 7a of the Act on Consumer Rights will define the general provisions

concerning the time limits for handling complaints. In turn, the most important parts of SGD are implemented in New Chapter 5a. In light of the new regulations, the trader will be liable for the lack of conformity of the goods if the consumer was not expressly informed that a specific attribute of the goods deviates from the requirements for conformity with the contract, and, at the latest, at the time of conclusion of the contract, expressly and separately did not accept the lack of a specific attribute of the goods. Additionally, the trader will be liable for any lack of conformity



According to the government draft of an a law adopting two pro-consumer EU directives, in certain situations, it is justified for the consumer to have the right to an immediate price reduction or to withdraw from the contract.

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of the goods resulting from incorrect installation of the goods if it was carried out by or under the responsibility of the trader, or the incorrect installation carried out by the consumer was due to errors in the instructions provided by the trader or a third party, under certain conditions.

SELLER'S LIABILITY

The trader shall be liable for lack of conformity of the goods which existed at the time of delivery and which is discovered within two years of that time, unless the expiry date of the goods, as determined by the trader, its legal predecessor, or representatives, is longer.

Any lack of conformity of the goods with the agreement that comes to light within two years after delivery shall be presumed to have existed at the time of delivery.

For goods with digital elements, the trader is liable for the non-conformity with the contract of the digital content or digital service supplied continuously, which occurred or became apparent when, according to the agreement, they were to be provided.

trader may refuse to bring the goods into conformity with the contract.

The trader shall pick up the goods from the consumer at his own expense. If the goods were installed before the lack of conformity became apparent, the trader shall disassemble the goods and reassemble them after repair or replacement or have them reassembled at his own expense. The consumer is not obliged to pay for the regular use of the goods that have been replaced.

Additionally, suppose the goods are not in conformity with the contract. In that case, the consumer may make a statement to either reduce the price or withdraw from the agreement if certain conditions are met. The trader shall reimburse the consumer the amounts due as a result of exercising the right to reduce the price without delay, but no later than 14 days after receiving the consumer's statement about the price reduction. The consumer may not withdraw from the contract if the non-conformity of the goods with the agreement is insignificant. If the

Digital content is deemed to be delivered when it or the means to access or download it have been made available to the consumer or to a physical or virtual device that the consumer has independently selected for that purpose, or when the consumer, or such device, has accessed it. The consumer may withdraw from the contract without informing the content provider only if certain circumstances apply, such as when the seller has stated or it is clear from the circumstances that he will not supply the digital content or service.

Articles 43i-43m of the act drafted by the government deal with the compliance of the digital content or digital service with the agreement (DCSD, Articles 7-9) and the trader's liability in the absence thereof (DCSD, Articles 11-18). Article 42i of the drafted act imposes an obligation of subjective and objective conformity with the contract.

In assessing conformity with the contract, under consideration must be the purpose for which digital content or services of the same kind are typically used.

the contract, has been informed that a specific characteristic of the digital content or service differs from the requirements for conformity with the contract and has explicitly and separately accepted the lack of a particular feature of the digital content or service. This means that to be exempted from liability under this provision, the trader should, before the conclusion of the contract, explicitly and inform the consumer of the lack of a specific characteristic of the digital content or digital service—that is to say, that the digital content or digital service lacks a distinctive feature notwithstanding that content of the same type or services of the same type usually possess such characteristics. In such a case the consumer should explicitly and separately accept the lack of that characteristic, which means that both conditions must be present together.

Notably, where a contract continuously provides digital content or a digital service, the digital content or service must remain contractually compliant for the time of its provision specified in the agreement.

The seller is liable for any lack of conformity with the contract of the digital content or digital service supplied individually or in parts, which existed at the time it was delivered and manifested within two years.

This time shall not be less than two years from the delivery of goods with digital elements. The lack of conformity with the contract should be presumed to have occurred within this period if it became apparent within that time.

CONSUMER RIGHTS

If the goods do not conform to the contract, the consumer may demand their repair or replacement. The trader may make the replacement when the consumer requests repair or the trader may repair when the consumer requests replacement if it is impossible or would require excessive costs for the trader to bring the goods into conformity with the contract in the manner chosen by the consumer. If the impossibility or unreasonable cost applies to both repair and replacement, the

lack of conformity concerns only some goods delivered under the contract, it will not be possible to withdraw from the entire contract only if certain conditions are met.

RIGHTS, OBLIGATIONS, AND THE MANNER OF PERFORMANCE

Article 43h of the act drafted by the Polish government addresses the performance of the obligation to provide digital content or service—Article 5 of DCSD—and the consumer's rights in case of non-performance—Article 13 of DCSD).

The trader shall provide the consumer with the digital content or service digital content or service immediately after the conclusion of the contract unless otherwise agreed by the parties.

They should also be characterized by features and functionalities that digital content or services of the same type usually have, taking into account applicable law, technical standards and good practices.

The seller will be required to inform the consumer of updates, including security features, necessary to make the digital content or digital service with the contract and provide them to the consumer for a specified time. In case the consumer does not install the traders' updates within a reasonable time, the vendor is not liable for the non-conformity of the digital content or digital service with the contract, which is exclusively due to the lack of updates.

Additionally, the vendor is not liable if the consumer, at the latest at the time of the conclusion of

TIME AND SCOPE OF LIABILITY
Article 43j (1) and (3) of the government draft set out the time limits on the trader's liability for the non-conformity of digital content or service when supplied on a one-off, partial or continuous basis, as well as the circumstances indicating when the trader's presumption of liability may be rebutted—Article 43j (5) of the draft.

The seller is liable for any lack of conformity with the contract of the digital content or digital service supplied individually or in parts, which existed at the time it was delivered and manifested within two years. The seller is also liable for lack of conformity of digital content or digital service of digital content or digital service supplied continuously that had occurred or become apparent at the time when it was

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contractually required to be provided.

CONSUMERS' CLAIMS

According to Article 43k of the drafted act, the consumer will have the right to bring the digital content or service into conformity with the contract. The seller may refuse to get the digital content or digital service into conformity if conforming the digital content or digital service to the contract in such a manner is impossible or would require excessive cost to the trader.

Article 43l(1) of the act drafted by the Polish government specifies when a consumer is entitled to make a statement on price reduction or rescission of the contract. Article 43l(1) of the draft indicates that the consumer may make a statement to reduce the price or withdraw from the agreement if the lack of conformity continues despite the seller's attempts to bring the digital content or digital service into conformity, or the lack of conformity is so significant as to justify either immediate reduction in price or withdrawal from the contract, or it is clear from the trader's statements or the circumstances that the trader will not bring the digital content or digital service into conformity with the contract within a reasonable time or without excessive incon-

venience to the consumer. time during which the consumer was unable to use the digital content or digital service by the agreement.

The consumer may not withdraw from the contract if the digital content or service is supplied in exchange for the payment of a price and the lack of conformity with the contract is minor.

Article 43m introduced in the government draft obliges the seller not to use the content created or supplied by the consumer after the consumer has withdrawn from the contract except for specific situations.

After withdrawal, the trader may not use the content other than personal data supplied to or created by the consumer in the course of the use of digital content or a digital service provided by the trader, except for content that: (i) is only useful to the digital content or digital service that was the subject of the contract; (ii) relate solely to the consumer's activity in the course of using the digital content or digital service which was the subject matter of the contract; (iii) have been combined by the trader with other data and cannot be disconnected without undue difficulty; (iv) and have been created by the consumer together with other consumers who may continue to use them.

A trader is obliged to make avail-

formity with the contract, even if the consumer used it before the withdrawal.

The seller may change to digital content or a digital service, which is not necessary to conform with the agreement, only if the agreement provides and only for valid reasons indicated in the contract. However, the seller may not make a change to digital content or digital service provided on a one-off basis. If the change significantly and adversely affects the consumer's access to or use of the digital content or digital service, the trader is required to inform the consumer in reasonable time on a durable medium of the characteristics and timing of the change and the law. The consumer may terminate the contract without notice within 30 days of the change or notice of the change if the notice is later than the change.

EXCLUSION OF APPLICATION

To a contract under which the seller is obliged to provide digital content or digital service and other performances, the above-mentioned provisions shall apply only to the extent of the contract's provisions relating to the digital content or digital service. To a contract under which a trader is obliged to provide digital content or digital service and

other performances, the provisions apply only to the extent of the contract's provisions relating to the digital content or digital service.

AMENDMENTS TO THE CIVIL CODE

The amendments to the Civil Code introduced in the government draft involve the removal of distinctions concerning contracts concluded with consumers in the provisions on warranty at the sale of movable goods, which, because of the exclusion of the application of the Civil Code provisions on warranty concerning these provisions, due to the exclusion of the application of the Civil Code provisions on the warranty to consumers, become irrelevant.

NON COMPLIANCE RISKS

For non complying with the new regulations, vendors may incur additional costs related to contracts with consumers that have not addressed all the necessary issues and for which the trader has not obtained the relevant statements. In certain situations, the lack of precise regulation in this area will allow the consumer to withdraw from the contract and claim a full refund.

A vendor who fails to adapt standard templates and other contractual documentation to the new regulations and leaves the existing warranty and guarantee entitlements in place, could be

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In certain situations, it is justified for the consumer to have the right to an immediate price reduction or to withdraw from the contract. The same principle applies if it is clear that the trader will not bring the digital content or digital service into conformity with the contract within a reasonable time or without significant inconvenience to the consumer.

If a consumer is entitled to price reduction, the calculation of the reduction must take into account the diminution in value of the digital content or digital service due to both the lack of conformity with the contract and the

able to the consumer the content created or provided by the consumer in the course of using digital content or a digital service, other than personal data, except content specified in the Draft Act (e.g., are only useful in connection with the digital content or digital service that constituted the subject matter of the contract). The obligation must be fulfilled at the consumer's request and the seller's expense, within a reasonable time, and in a commonly used machine-readable format.

Most importantly, the seller is not entitled to be paid for the period during which the digital content or digital service was not in con-

formity with the contract, even if the consumer used it before the withdrawal.

The above provisions do not apply to electronic communications services within the meaning of the European Electronic Communication Code; contracts under which the consumer is not obliged to provide any consideration other than the supply of personal data and such data is processed by the trader solely to improve security, compatibility or interoperability software offered under an open and free license; and digital content provided under the Act of 11 August 2021

considered as misleading to the consumer. This situation may cause a risk of a claim for damages and cancellation of the contract and return of the price paid as well as imposing a fine of up to 10 percent of the vendor's revenue generated in the previous year. The fine may be imposed by the President of the Office of Competition and Consumer Protection UOKiK.