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Articles

Studia Iuridica Lublinensia vol. 32, 5, 2023
DOI: 10.17951/sil.2023.32.5.181-194

Paweł Jurczyński
Pomeranian University in Słupsk, Poland
ORCID: 0000-0002-6705-0454
pawel.jurczynski@upsl.edu.pl

Comments on the Implementation of the Sale of Goods Directive into the Polish Legal Order

Uwagi o implementacji dyrektywy towarowej do polskiego porządku prawnego

ABSTRACT

The purpose of the article is to examine the effects of the entry into force of the Act of 4 November 2022 amending the Consumer Rights Act, the Civil Code Act and the Private International Law Act, being a result of the implementation of the so-called Sale of Goods Directive. The author analyses the issue using the formal-dogmatic method, focusing on the impact of the changes introduced by the above-mentioned Act on the standard of consumer protection and the manner in which entrepreneurs conduct their business activities. Moreover, he identifies the most significant problems related to the implementation of the Sale of Goods Directive into the Polish legal order, drawing attention to the legal and economic consequences of the choices and solutions adopted by the Polish legislator. He also assesses both the content of the Act in question and the content of the Sale of Goods Directive, formulating *de lege ferenda* conclusions.

Keywords: consumer protection; entrepreneur; Sale of Goods Directive; Polish legal order

INTRODUCTION

On 1 January 2023 the Act of 4 November 2022 amending the Consumer Rights Act, the Civil Code Act and the Private International Law Act[1] entered into force, which in Article 2 (15) amended the Act of 30 May 2014 on consumer

CORRESPONDENCE ADDRESS: Paweł Jurczyński, MA, Assistant, Pomeranian University in Słupsk, Institute of Law and Administration, Arciszewskiego 22A, 76-200 Słupsk, Poland.

[1] Journal of Laws 2022, item 2337, hereinafter: the Amendment.

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rights.[2] The Amendment implements into the Polish legal order, i.a., the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC.[3]

The European Union legislator stated in Article 4 of the Directive that harmonization of consumer protection rules was to take place to the maximum extent possible, i.e., as a general rule, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in the Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive. Undoubtedly, the above assumption had a strong influence on the final shape of the provisions of the CRA.

It must be emphasised that the subject matter covered by the Amendment is of elementary importance for consumer and economic transactions in general, and it deals with institutions of a well-established tradition. Therefore, one might expect that the Amendment will excel in the quality of legal rules as well as in logical and linguistic correctness. This view seems to be supported by the historical perspective, as the regulation concerning warranty had no fortune in terms of proper legislation in post-war law-making. Clear, comprehensive and precise provisions of the Code of Obligations[4] were simplified and condensed in the Civil Code (CC).[5] This kind of "regression" was deepened by the SCSA, in which the concept of defect was abandoned and replaced by the concept of non-conformity of goods with the contract. This Act was repealed in 2014, and the discussed matter was again included in Article 556 ff. CC,[6] and consequently, in the context of consumer transactions,

[2] Consolidated text, Journal of Laws 2020, item 287; consolidated text, 2021, item 2105, hereinafter: CRA.

[3] OJ L 136/28, 22.5.2019, hereinafter: the Directive. This Directive repealed 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 171/12, 7.7.1999), which was implemented into the Polish legal order through the Act of 27 July 2002 on special conditions of consumer sales and on the amendment of the Civil Code (Journal of Laws 2002, no. 141, item 1176, as amended), hereinafter: SCSA. See also Sejm RP, Uzasadnienie do rządowego projektu ustawy o zmianie ustawy o prawach konsumenta oraz niektórych innych ustaw, Druk nr 2425, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2425 (access: 9.12.2023), pp. 1–2.

[4] Regulation of the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Journal of Laws 1933, no. 82, item 598, as amended), hereinafter: OC. On this subject, see also A. Falkowska, *Ochrona konsumenta na przełomie epok – instytucja rękojmi w prawie najnowszym*, "Zeszyty Prawnicze UKSW" 2011, vol. 11(2), p. 110.

[5] Act of 23 April 1964 – Civil Code (Journals of Laws 1964, no. 16, item 93). It is enough to mention that the OC regulated these issues in 30 units, and the CC – in 20 units. Nevertheless, the doctrine claimed that the CC basically continued the concept of warranty specified in the OC. See W. Czachórski, *Prawo zobowiązań w zarysie*, Warszawa 1968, p. 438. A. Falkowska (*Ochrona…*, p. 117) claims that the regulation of the CC was a "step backwards" in relation to the OC in the matter in question.

[6] Consolidated text, Journal of Laws 2014, no. 121, as amended.

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the concept of defect was returned.[7] However, when amending the provisions on warranty regarding consumer transactions in the CC, errors were not avoided, and the changes weakened the legibility, linguistic correctness and systemic coherence of this very important and fundamental institution.[8] The model in the form of the CO remained unsurpassed.

Therefore, the purpose of this article is to study the changes of the CRA being a result of the transposition of the provisions of the Directive into the Polish legal order, focusing on highlighting and describing the issues that raise the greatest doubts and are related to the provisions regarding the concept of non-conformity of goods with the contract and the consumer's rights in this respect.[9] I have recognised six issues that arise from the new regulation of the CRA that seem to be of greatest importance and, in my opinion, demand immediate reconsideration. This study begins with the query of problems featuring formal and abstract nature, mainly regarding the idea of transposition, and then gradually developing into the analysis of the specific law institutions.

RESEARCH AND RESULTS

1. Different standards of consumer protection

The Polish legislator has decided to implement the Directive by means of amending the CRA in a manner that there has been introduced the whole new Chapter 5a which deals with the issue of non-conformity of goods with the contract. Nevertheless, a traditional institution of warranty for defects, although slightly modified, remained in the CC. It caused a dualism in the law: currently, the CRA regulates the problem of non-conformity of goods with the contract of sale concluded between a consumer and an entrepreneur, while the provisions of the CC regarding the warranty are applicable to situations in which: (a) an entrepreneur sells an immovable property to a consumer, (b) an entrepreneur sells a movable

[7] This was possible because Directive 1999/44/EC harmonized the law to a minimum, not a maximum (see Article 8 (2) of this Directive). Accurate criticism of the method of implementation was made, among others, by R. Stefanicki, *Zgodność towaru z umową w świetle ustawy o szczególnych warunkach sprzedaży konsumenckiej*, [in:] *Europeizacja prawa prywatnego*, eds. M. Pazdan, W. Popiołek, E. Rott-Pietrzyk, M. Szpunar, vol. 2, Warszawa 2008, pp. 468–469 and the literature cited therein; A. Falkowska, *Odpowiedzialność sprzedawcy z tytułu rękojmi za wady fizyczne rzeczy*, Warszawa 2010, chapter 5.

[8] See J. Krauss, *Nowa regulacja rękojmi przy sprzedaży w stosunkach pomiędzy przedsiębiorcami – zmiany kodeksu cywilnego wprowadzone ustawą o prawach konsumenta*, "Przegląd Prawa Handlowego" 2015, no. 3, p. 4 ff.

[9] The provisions of Articles 43h to 43q CRA were therefore omitted from the analysis.

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or an immovable property to another entrepreneur, and what is the most important, (c) a person who is neither an entrepreneur nor a consumer sells a movable or an immovable property to another person of such a status,[10] and (d) a consumer sells a movable or an immovable property to an entrepreneur.

The decision of the Polish legislator to split the regulation in question into two acts of law may appear controversial. On the one hand, it seems to be proper, because the language and concepts adopted in the Directive differ significantly from those in the CC,[11] so the implementation of new notions which originate from the Directive into the CC would involve the risk of systemic inconsistency and interpretation problems. On the other hand, it must be stressed that although the new regulation of the CRA in some aspects introduces a higher standard of consumer protection comparing to the previous regulation, interestingly, in others it worsens a consumer's legal position towards an entrepreneur. This very fact results in substantial consequences, causing systematic discrepancies in the standards of consumer protection and spawning a bit of chaos. Therefore, under the new version of the CRA, paradoxical situations may occur as an entrepreneur who buys a movable property from a consumer will benefit a wider range of rights or claims than a consumer who buys the said items from an entrepreneur, or, in which a consumer who buys an immovable property form an entrepreneur will benefit more rights than a consumer who buys goods from an entrepreneur. Both former and latter examples lead to a conclusion that there is a logical inconsistency in the said regulation, as it must be a consumer who is better protected, and it is a sale of goods not an immovable property that demands special treatment as in general purchasing a real estate usually takes time and *per se* requires deep consideration. Nevertheless, the outlined perspective suggests that it is difficult to accept the above conclusions as rational.

2. Misleading content of the Civil Code

As it was mentioned above, the Polish legislator input new regulation deriving from the Directive into the CRA. However, no *expressis verbis* provision has been introduced into the CC which would exclude Article 556 ff. CC[12] from governing the sale of goods between an entrepreneur and a consumer. Moreover, in the content of many provisions of the CC,[13] the legislator still uses the term "a consumer". As a result, when analysing the said provisions of the CC, one may *prima facie* come to the erroneous belief that they also apply to the sale of goods in the consumer trade.

[10] However, the explanatory statement of the CRA ignores this scope of application.

[11] In the past, the same considerations were decisive in transferring the matter of non-conformity of the goods with the contract with the CC to the SCSA. Cf. Sejm RP, *op. cit.*, p. 11.

[12] Consolidated text, Journal of Laws 2022, item 1360, as amended.

[13] For example, Article 556^1 § 2, Article 556^2, Article 557 § 3, Article 561^5 CC.

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The lack of exemption referred to above shall be assessed unequivocally negatively, as it misleads consumers, and, again, causes difficulties in the interpretation of the laws concerning matters of cardinal significance to them. The solution to this issue could be to include the following provisions in the CC: "the provisions of this section do not apply to contracts obliging to transfer the ownership of a movable property concluded between an entrepreneur and a consumer". Such a procedure would significantly improve the readability of this regulation.

In conclusion, it must be stressed that the omnipresent demand in consumer law for transparency, clarity and simplicity of regulations has not been recognised by the legislator in this case.

3. Vague concept of the "non-conformity of goods with the contract"

As it was mentioned above, because of the requirement of full harmonization of the Directive, the Polish legislator in terms of consumer trade withdrew, for the second time in history, from a concept of the "defect" of a movable item sold by an entrepreneur to a consumer, and replaced it with the notion of the "non-conformity of the goods with the contract".

In order for the consumer to be able to exercise his or her rights under the above-mentioned provision, there must be an event in the form of non-conformity of the goods with the contract. Following the formula of the Directive, the CRA defined a "positive" and open catalogue ("in particular"),[14] specifying the examples of objective[15] and subjective[16] conformity of the goods with the contract. A similar type of legislation technique was applied in Article 556[1] CC, however, there is a "negative" catalogue, i.e. specifying examples of non-conformity of the sold item with the contract.[17] As a result, before exercising his rights, the consumer ought to

[14] It is worth noting that a positive catalogue of conditions for the conformity of goods with the contract has also been applied in Article 35 (2) of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (Journal of Laws 1997, no. 45, item 286, as amended), on which the EU legislator clearly drew inspiration. However, this provision contains the phrase: "Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (…)", while Article 43b (1) CRA, as well as the Directive, use the phrase: "In order to conform with the sales contract, the goods shall, in particular, where applicable: (…)". In my opinion, the shape of the regulation in the Convention is more correct and easier to interpret, because the fact that the goods do not meet the conditions expressly set out in the Convention makes it legitimate to claim that the goods are inconsistent with the contract. In the CRA, the sense of the regulation is not present in such a clear way.

[15] Article 43b (2) CRA.

[16] Article 43b (1) CRA.

[17] Article 556[1] § 1 CC: A defect is the lack of conformity of the item sold with the contract. The item sold lacks conformity with the contract in particular if: 1) it fails to have a property, which a thing of that kind should have regarding the purpose stipulated in the contract or arising from the

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assess whether the purchased goods are compliant with the contract in the manner resulting from Article 43b (1) and (2) CRA. However, the issue of proper performance of an obligation is a broad concept; it encompasses many prerequisites, as follows from the content of Article 354 CC. Therefore, the applied legislative technique in the CRA means that there may occur, at least theoretically, a factual situation in which, despite the fact that the goods do not comply with the contract as per the CC, they will comply with the premises indicated in Article 43b (1) and (2) CRA. As a consequence, paradoxically, the consumer will not be entitled to use the legal instruments referred to in Articles 43d and 43e CRA. This situation, of course, may not be frequent, since the catalogue of prerequisites for compliance with the contract under Article 43b (1) and (2) CRA is broad, but the mere fact of its possible occurrence determines that, in the final analysis, it was safer for the consumer to prescribe the previous, negative regulation of the conditions for the non-conformity of the goods with the contract.

Recital 25 of the Directive states that the provisions under consideration were introduced "in order to provide clarity as to what a consumer can expect from the goods and what the seller would be liable for in the event of failure to deliver what is expected (…)". It seems that the regulation of Article 6 of the Directive and Article 43b (1) CRA do not achieve this goal for the reasons that have been articulated.

Furthermore, it should be pointed out that the Polish legislator has not distinguished the prerequisites of non-conformity of goods with the contract which would correspond to the meaning of the "legal defects". The explanatory statement of the Amendment indicates that this procedure was deliberate.[18] However, in my opinion it is erroneous. It must be emphasized that Recital 35 of the Directive indicates that

circumstances or its intended use; 2) it fails to have a property, about which the seller has assured the buyer, specifically by presenting to the buyer a sample or a model; 3) it fails to lend itself to the purpose, which the buyer indicated to the seller at the conclusion of the contract, and the seller failed to make a reservation to such an intended use; 4) it was released to the buyer incomplete.

[18] In the explanatory statement of the Amendment (see Sejm RP, *op. cit.*), it was indicated that at the same time, in order to avoid interpretation doubts, it should be indicated that legal defects, including cases of restrictions that may prevent or limit the use of goods in accordance with the contract, and resulting from the infringement of third party rights, in particular property rights intellectual property rights (Articles 9 and 10 of the Directive), are covered by the general regulations contained in Articles 43b and 43i CRA. The problem with no concept of legal defects also occurred on the grounds of the SCSA. However, Article 3 (1) of Directive 1999/44/EC which was transitioned into the SCSA provided that the seller is liable to the consumer for any lack of conformity that exists at the time of delivery of the goods, which was a clearer solution, albeit in my opinion inappropriate. It should be noted that there was a discussion on the grounds of the SCSA on whether the notion of non-conformity of goods with the contract also includes legal defects. See, among others, a summary of positions in this regard done by A. Koniewicz, *Odpowiedzialność z tytułu niezgodności z umową na gruncie ustawy o sprzedaży konsumenckiej a odpowiedzialność za „wady prawne"*, [in:] *Europeizacja…*, pp. 565–593 and the references therein. In the judgments of 3 December 2008 (V CSK 293/08, LEX no. 484687) and of 14 October 2011 (III CZP 50/11, OSNC 2012, no. 4, item 54), the

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the concept of conformity with the contract should cover both material and legal defects, and Article 9 of the Directive determines that where a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the goods in accordance with Articles 6 and 7, Member States shall ensure that the consumer is entitled to the remedies for lack of conformity provided for in Article 13, unless national law provides for the nullity or rescission of the sales contract in such cases.

The legislator has not decided to introduce a provision to the CRA that would unambiguously determine that the legal instruments under Articles 43b and 43d CRA are also available to the consumer in case of the legal defects, however, solemnly ensuring in the explanatory statement of the Amendment that the above regulation covers the said issue.[19]

Prima facie, one may find it difficult to understand the sense of Article 43b (1) and (2) CRA in such a way that the concept of conformity of the goods with the contract also covers the cases of "legal defects" of the goods. Nevertheless, the precise indication in the CRA that the consumer has rights related to the traditionally understood notion of the legal defects of the goods seems to be crucial. It will make it easier for the consumer to pursue claims towards the entrepreneur in the event of his or her improper performance of the obligation, and involving, among others, a sale of a non-existent ownership right to goods, a right encumbered with the right of a third party or affected by a restriction in its use or disposal. The existence of a clear and legible regulation in the above scope is necessary for legal transactions to be safe and its participants to trust each other. The incomprehensibility of the legislator's approach is compounded by the fact that the EU legislator allowed in Article 9 of the Directive to guarantee consumer rights in this respect in national legislation, as well as the fact that the legislator (inconsistently) amended Article 556^3 CC, defining a legal defect of the sold goods, justifying the above with the intention to "extend" the scope of Article 556^1 CC also to legal defects.[20]

4. No regulation regarding second-hand goods and living animals

The CRA does not give the parties to a contract concluded in consumer trade a power of excluding or limiting the provisions of Article 43b (1) and (2) ff. CRA as per the sale of second-hand items, including in particular those purchased at a public auction, and living animals. The legislator manifested the said attitude also by deleting the second sentence of Article 568 § 1 CC. It must be stressed that

Supreme Court took the position that the concept of non-conformity of goods with the contract also includes legal defects.

[19] See Sejm RP, *op. cit.*, p. 16.

[20] See *ibidem*, p. 15.

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pursuant to Article 3 (5) of the Directive, Member States may exclude contracts for the sale of second-hand goods sold at public auctions and living animals from the scope of the Directive.[21] As a result, an entrepreneur who intends to sell second-hand goods to a consumer and wants to waive the requirement of objective conformity of goods in questions with the contract needs to apply the instruments prescribed in Article 43b (3) CRA (an equivalent to Article 7 (5) of the Directive).[22] It stipulates that the entrepreneur is not liable for the lack of conformity of the goods with the contract (objective) if the consumer, at the latest at the time of concluding the contract, was clearly informed that a specific feature of the goods deviates from the requirements of objective conformity with the contract and clearly and separately accepted the lack of specific characteristics of the goods.

However, it appears that requiring that the entrepreneur-seller who takes part in the trade of second-hand goods, including public auctions, or living animals, will clearly indicate, each time when concluding a contract, which of the specific feature of the goods deviates from the requirements of conformity with the contract (set out in Article 43b (2) and (3) CRA), does not fit the nature of trade in these goods. So it seems in terms of requiring that the consumer explicitly and separately accepts the lack of a specific feature of the goods. The trade in second-hand goods or living animals is a dynamic one, takes place in specific conditions and places, most often "from hand to hand", where the parties usually do not find time for a thorough examination of the goods or to provide detailed information on the conformity of the goods with the contract. Therefore, the regulation in question is not flexible.

As pointed out in Recital 2 of the Directive, it aims to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity. There are reasons to believe that the Amendment has not achieved the balance in question: as a result of the implementation of the Directive, the safety of the consumer buying second-hand goods or animals has increased,[23] but it is the value of liquidity of trading on the markets for these goods that has been sacrificed.

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[21] Similarly, Recital 36 of the Directive provides that in order to ensure that there is sufficient flexibility in the rules, for instance in relation to the sale of second-hand goods, it should be possible for the parties to deviate from the objective requirements for conformity provided for in this Directive. Such a deviation should only be possible if the consumer was specifically informed about it and if the consumer accepts it separately from other statements or agreements, and by way of active and unequivocal conduct.

[22] It should be noted that pursuant to Article 7 CRA, the consumer may not waive the rights granted to him in the CRA. Contractual provisions less favourable to the consumer than the provisions of the CRA are invalid, and the provisions of the CRA shall apply in their place.

[23] Compared to the solutions regarding Article 557 §§ 1 and 2 CC, where the prerequisite for exclusion of the warranty is the buyer's knowledge of the defect at the time of concluding the contract or handing over the item.

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5. Too long deadlines for pursuing claims and exercising rights

The legislator omitted in the CRA the mechanism present in Article 568 § 2 CC, therefore, it has not defined a short, one-year limitation period for pursuing claims regarding the replacement or repair of sold goods. In the explanatory statement of the Amendment, it was emphasized that "in view of the non-application of the provisions of the CC in consumer transactions on the warranty and the lack of a separate regulation of this issue in the draft regulations, the limitation period for the consumer's claim will be determined on the basis of general rules (Article 118 ff. CC), which are much more favourable for the buyer than those special provisions in the CC regarding the limitation of warranty claims (Article 568 § 2 CC)".

It should be recalled that pursuant to Article 118 CC, the limitation period for consumer claims is six years and falls on the last day of the calendar year. It is worth mentioning that at the same time, the legislator: (a) decided that an entrepreneur shall be liable for the non-conformity of the goods with the contract, if it was revealed within two years of its delivery to a consumer (Article 43c (1) and (3) CRA),[24] (b) did not regulated an obligation of a consumer to notify an entrepreneur about the occurrence of a case of non-conformity of the goods with the contract and the deadline for its performance,[25] (c) regulated a presumption that the non-conformity with the contract existed at the time of delivery, if it became apparent within two years from the time of delivery, unless proven otherwise, or this presumption cannot be reconciled with the specificity of the goods or the nature of the lack of conformity of the goods with the contract (Article 43c (1) *in fine* CRA),[26] and (d) regulated a presumption that the lack of conformity of the goods with the contract is significant (Article 43e (4) CRA), in the context when a consumer exercises the right to withdraw from the contract.

It seems that the above mechanisms protect the interests of the consumer too strongly, at the expense of the entrepreneur. In this form, the regulation creates room for abuse, *de facto* making it impossible for the entrepreneur to prove that the non-conformity was caused by the fault of the consumer within two years from the moment of delivery of the goods. The seller will bear the risk that the consumer

[24] In fact, therefore, the said regulation in its structure resembles that of Article 577 § 3 CC, relating to guarantees. The above-mentioned provision provides that the buyer, in order to exercise the rights provided by the guarantee, is not obliged to notify the guarantor of the defect before the expiry of the guarantee period, but is obliged to prove that the defect appeared during the guarantee period. A similar conclusion can be drawn from Article 568 § 1 CC, after the amendment of Article 563 § 1 CC made by the CRA. Cf. R. Trzaskowski, [in:] *Kodeks cywilny. Komentarz*, vol. 4: *Zobowiązania. Część szczegółowa*, ed. J. Gudowski, Warszawa 2017, p. 464.

[25] However, this option was granted to Member States by Article 12 of the Directive.

[26] Since 2014 this period was one year and it was maintained in the case of warranty for real estate defects (see Article 556^2 CC). Meanwhile, Article 11 (1) of the Directive generally provides for a period of one year, allowing in item 2 Member States to introduce a two-year period.

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exercises his rights resulting from the CRA for many years after the date of delivery. This issue illustrates the following example. On 1 January 2023, the consumer buys a pair of shoes which are delivered the same day. He uses them until 31 December 2031. On this day he brings a lawsuit against the entrepreneur demanding the replacement of the shoes with new ones, due to their non-conformity with the contract. The consumer confirms the fact that non-conformity occurred within two years from the date of delivery (that is until 1 January 2025) with the testimony of witnesses. As a consequence, the burden of proof shifts to the entrepreneur who needs to provide in 2032 credible evidence that the non-conformity of shoes with the contract occurred after 2025 or did not exist at the time of delivery.

Moreover, the legislator has not taken advantage of the opportunity provided by Article 10 (6) of the Directive, and has not introduced in the CRA separate limitation periods for claims regarding non-conformity of second-hand items with the contract. Therefore, in the above illustrating example when we substitute the shoes for a two-year-old car the results will be more absurd as the entrepreneur will stay potentially liable to the consumer for non-compliance with the contract of even a 10-year-old vehicle. The same adverse conclusions may be drawn in the situation where an entrepreneur sells to a consumer a live pet, e.g. a cat or a dog.[27]

In addition, juxtaposing the provisions of the CRA and the CC, there is a striking disproportion between the six-year limitation period for claims regarding non-conformity of the goods with the contract (that is the removal of it or replacement of the goods with a new ones, Article 43c (1) and (3) CRA) and the one-year limitation period for such claims regarding the immovable properties or, in general, in sales between persons who are not entrepreneurs (Article 568 § 2 CC). It seems that such a difference in the limitation period is not axiologically justified.

To summarise the above, the Polish legislator resigned from the well-established tradition that provided for short, one-year limitation periods for claims under the warranty for the replacement or repair of movables.[28] Modification of this type of private law institution should be balanced and careful, as it concerns an elementary legal structure in consumer transactions, and thus affects the economic activity of many entrepreneurs. It seems that also in this case *ratio legis* of the Directive, which is to ensure an appropriate balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity, has not been achieved, therefore, *de lege ferenda*, these provisions should be amended in accordance with the regulation similar with the content of Article 568 § 2 CC.

[27] Pursuant to Article 1 (2) of the Act of 21 August 1997 on the protection of animals (consolidated text, Journal of Laws 2022, item 572, as amended), in matters not covered by the Act in question, the provisions concerning things shall apply accordingly to animals.

[28] See Article 336 § 1 OC, as well as Article 568 § 1 CC in its original wording, i.e. Journal of Laws 1964, no. 16, item 93.

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Furthermore, the CRA does not regulate a deadline for submitting declarations of price reduction and withdrawal from the contract (Article 43e CRA) which seems to be a legislative defect requiring immediate repair. When implementing the Directive, the legislator did not introduce the equivalent of Article 568 § 3 CC. There is no doubt that the declaration of withdrawal from the contract and of the price reduction are right-forming powers resulting from a declaration of will, while a demand for replacement or repair of the goods is a claim.[29] As a result, in relation to the powers in question Article 118 CC which regulates the limitation periods for claims (not powers) does not apply.

One may try to argue that the above regulation is correct, because the effective exercise of right-forming powers is a source of claims that are themselves subject to the limitation periods stated in the CC.[30] This interpretation appears to be highly questionable, because it would mean that the consumer will be entitled to submit to the entrepreneur a declaration of withdrawal or of reduction of the price and to call on him to immediately return the benefit (price)[31] within least six years from the date the defect became apparent. This attitude would cause another huge unjustified disproportion between the regulation of the CRA and of the CC, because as per Article 568 § 3 CC the consumer may exercise the right-forming powers to withdraw from contract or to reduce the price only within one year from the discovery of the defect of the item (and within two years from the delivery of the item). This would also greatly disturb the balance between the rights of customers and the rights of entrepreneurs.

The lack of precise regulation on such an important issue may lead to regulatory chaos or a significant reduction of the balance, neither of which is desirable. It is therefore necessary to introduce the proper time limits, as is the case in Article 568 § 3 CC.

6. Lower standards of consumer protection

The Amendment, which was intended to improve the legal position of consumers, narrowed the scope of their rights resulting from the non-conformity of the goods with the contract, thus lowering the standard of its protection. This raises serious doubts. The most important problems were listed below.

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[29] Among many, see R. Trzaskowski, *op. cit.*, p. 468; E. Habryn-Chojnacka, [in:] *Kodeks cywilny*, vol. 2: *Komentarz do art. 450–1088*, ed. M. Gutowski, Warszawa 2016, p. 427.

[30] See R. Trzaskowski, *op. cit.*, p. 468.

[31] Pursuant to Article 455 CC if the time limit for the performance has not been specified or if it does not result from the nature of the obligation, the performance shall be rendered immediately after the debtor has been called upon to render it. According to Article 120 § 1 CC the course of limitation shall commence on the day when the claim became mature. Where the maturity of the claim depends on undertaking a specified act by the entitled person, the course of the time limit shall commence on the day when the claim would have become mature if the entitled person undertook the act at the earliest possible opportunity.

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Firstly, the CRA introduced a hierarchy of consumer rights following the content of the Directive. In principle, a consumer should first request an entrepreneur to repair or a replace the goods which do not conform with the sales contract (Article 43e (1) CRA). Although it is possible for the consumer to omit this procedure and immediately submit a declaration of withdrawal from the contract or of a price reduction, one needs to prove that the lack of conformity is major. There is no such regulation in the CC.

Secondly, for incomprehensible reasons, the legislator has not applied a solution similar to the one in Article 566 §§ 1 and 2 CC, and therefore it has not allowed a consumer to seek damages from an entrepreneur under the so-called negative contractual interest. This institution is an important element of the warranty regime, enabling the buyer to compensate more easily for the damage to his property due to the non-compliance of the sold item with the contract. It is believed that this liability arises regardless of the fault of the seller and the degree of the fault.[32] It is worth mentioning that the Directive acknowledges the possibility of such an arrangement, since Recital 61 indicates that consumers should be entitled to claim compensation for any detriment caused by an infringement by the seller of the Directive, including for damage suffered as a consequence of a lack of conformity.[33]

Thirdly, the CRA abandons, following the provisions of the Directive, the mechanism that may be found in Article 561^5 CC, which provides that if the buyer who is a consumer demanded replacement of the item or removal of the defect or made a statement of price reduction, specifying the amount by which the price is to be reduced, and the seller did not respond to this request within fourteen days, it is considered that the request was justified. Article 43d (4) CRA requires that entrepreneur shall make a repair or replacement within a reasonable time from the moment when he or she was informed by the consumer about the lack of conformity with the contract, and without excessive inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer purchased it. This change undoubtedly lowers the standard of consumer protection and may result in extending the "complaint" procedures related to the pursuit of rights for non-conformity of goods with the contract.

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[32] The view of the absolute nature of responsibility was expressed, among others, by C. Żuławska, *Komentarz do art. 556*, [in:] *Komentarz do Kodeksu cywilnego. Księga trzecia. Zobowiązania*, ed. G. Bieniek, vol. 2, Warszawa 2011, thesis no. 1. The view on warranty liability as based on the risk principle was taken up by E. Habryn-Chojnacka, *op. cit.*, p. 394. The view on objective liability was taken, among others, by W.J. Katner, J. Pisuliński, [in:] *System Prawa Prywatnego*, vol. 7: *Prawo zobowiązań. Część szczegółowa*, ed. J. Rajski, Warszawa 2018, pp. 143–145.

[33] See also Recital 18 of the Directive stating that it should not affect national law to the extent that the matters concerned are not regulated by this Directive, in particular with regard to the legality of the goods, damages and general contract law aspects such as the formation, validity, nullity or effects of contracts.

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CONCLUSIONS

The arguments presented in this article demonstrate that the implementation of the Directive into the Polish legal order requires reconsideration, especially as to whether it has achieved its intended objectives. Unfortunately, errors that were not avoided testify to the low quality of the legislative technique and question the rationality of the legislator. The most serious allegation, however, is that the standard of consumer protection has deteriorated and legal uncertainty has increased with regard to elementary regulations related to the non-conformity of goods with the contract in the consumer trade.

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ABSTRAKT

Celem niniejszego artykułu jest zbadanie skutków wejścia w życie ustawy z dnia 4 listopada 2022 r. o zmianie ustawy o prawach konsumenta, ustawy Kodeks cywilny oraz ustawy Prawo prywatne międzynarodowe, stanowiącej wyraz implementacji tzw. dyrektywy towarowej. Autor analizuje to zagadnienie z wykorzystaniem metody formalno-dogmatycznej, koncentrując się na wpływie zmian wprowadzonych przez wymienioną powyżej ustawę na standard ochrony konsumenta oraz sposób prowadzenia działalności gospodarczej przez przedsiębiorców. Ponadto identyfikuje najistotniejsze problemy związane z implementacją dyrektywy towarowej do polskiego porządku prawnego, zwracając uwagę na konsekwencje prawne i ekonomiczne wyborów i rozwiązań przyjętych przez polskiego ustawodawcę. Dokonuje też oceny zarówno treści przedmiotowej ustawy, jak i treści dyrektywy towarowej, formułując wnioski *de lege ferenda*.

Słowa kluczowe: ochrona konsumenta; przedsiębiorca; dyrektywa towarowa; polski porządek prawny