

Implementation Of The Digital Content Directive In Poland: A Fast Ride On A Tandem Bike Against The Traffic

by **Monika Namysłowska, Agnieszka Jabłonowska, Filip Wiaderek***

Abstract: Just like two cyclists on a tandem, Directive 2019/770 (DCD) and Directive 2019/771 (SGD) ride together in the same direction. Their ultimate goal is to increase the level of consumer protection and improve the functioning of the internal market by laying down conformity standards and remedies in contracts for the sale of goods and supply of digital content and digital services. The purpose of this article is to present the way, in which the Directives concerned are scheduled to be implemented into the Polish legal system. In order to provide the

necessary background, initial Polish experiences with the implementation of the EU consumer acquis are discussed. These early developments are then contrasted with the recently unveiled plans for the DCD and SGD implementation, which met severe criticism in Polish academia. Instead of an integrated approach, a “copy-paste” implementation outside of the Civil Code is proposed. This may result in a systemic disruption affecting not only consumer law, but also contract law as a whole.

Keywords: Directive 2019/770; Directive 2019/771; SGD; digital content; digital services; sale of goods; implementation; Polish law; consumer protection

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A. Introduction: the next leg of the EU consumer law journey

1 On 20 May 2019, the EU legislature adopted two legal acts harmonising certain aspects of consumer contract law: Directive 2019/770 on the supply of digital content and digital services¹ (hereinafter:

“DCD”) and Directive 2019/771 on the sale of goods² (hereinafter: “SGD”). The purpose of both acts was to increase the level of consumer protection by laying down the conformity standards with contracts of goods, digital content and digital services and by providing consumers with reliable remedies in case of non-conformity. Since the adoption of Directive 1999/44/EC on the sale of consumer goods³, the Directives concerned are the most significant developments in the field of consumer contract

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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 [2019] OJ L 136/1.

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 [2019] OJ L 136/28.

3 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 [1999] OJ L 171/12.

law.⁴ The transposition period for both acts elapses on 1 July 2021. Implementing provisions, adopted at the national level, shall become applicable as of 1 January 2022.

- 2 In a systemic perspective, the SGD supersedes the currently applicable Directive 1999/44/EC, which is to be repealed with effect from 1 January 2022. Similarly to its predecessor, the scope of the new act covers contracts for the sale of goods, including contracts for the supply of goods to be manufactured or produced.⁵ In response to more recent market developments, the SGD clarifies that the notion of goods also covers “goods with digital elements”, namely tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions.⁶
- 3 By contrast, the DCD applies to contracts for the supply of digital content and digital services.⁷ “Digital content” is to be construed as data that are produced and supplied in digital form, while the notion of “digital service” refers to a service that allows the consumer to create, process, store or access data in digital form or to share or otherwise interact with data in digital form uploaded or created by the consumer or other users of that service.⁸ As was already mentioned, digital content incorporated in or inter-connected with goods with digital elements is explicitly excluded from the Directive’s scope and in case of doubts the SGD applies.⁹ Accordingly, both Directives do not overlap with regard to the material scope of application. Nonetheless, they are certainly part of a common harmonization effort and in many respects need to be seen together.
- 4 What is especially relevant for national lawmakers, who are now in the process of implementing the SGD and the DCD into domestic law, is that both acts in principle provide for a full level of harmonisation.¹⁰ From the Commission’s perspective, which proposed

this approach, minimum harmonisation established by Directive 1999/44/EC did not guarantee a desired improvement in the functioning of the internal market.¹¹ Although the personal scope of both Directives is limited to business-to-consumer relations (B2C), Member States remain free to extend the protection afforded to consumers to other entities, such as non-governmental organisations, start-ups or small and medium-sized enterprises.¹² Moreover, even in respect of B2C relationships, the Directives do not affect national law concerning matters not covered by their scope, such as formation, validity, nullity or effects of contracts and non-contractual remedies.¹³ In the specific context of the DCD, Member States also remain free to determine the legal nature of relevant contracts and categorize them, e.g. as a sale, service, rental or *sui generis* contract.¹⁴

- 5 Against this background, the paper discusses the envisaged implementation of the DCD into Polish law and its possible implications. Firstly, it briefly recounts prior approaches to the implementation of the consumer *acquis* in the analysed jurisdiction and indicates their relevance for the prospective implementation of the SGD and the DCD. Following this general overview, the draft implementing act published in December 2020 will be outlined, with a particular focus on the DCD and the reasons behind the envisaged national approach. The paper concludes with the assessment of the draft act concerned.

B. Initial Polish experience with the implementation of the EU consumer aquis: blazing the trail

- 6 The experience concerning the implementation of previous consumer law directives into the Polish legal order provides an essential background for studying

4 J. M. Carvalho ‘Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771 (2019)’ 5 *Journal of European Consumer and Market Law* 194.

5 SGD, Article 3(1) and (2).

6 SGD, Article 2(5)(b) and Article 3(3).

7 DCD, Article 3(1).

8 DCD, Articles 2(1) and (2).

9 DCD, Article 3(4).

10 SGD, Article 4; DCD, Article 4.

11 Commission ‘Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods’ COM(2015) 635 final 7; Commission ‘Staff Working Document on the impacts of fully harmonised rules on contracts for the sales of goods supplementing the impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods’ SWD(2017) 354 final.

12 SGD, Recital 21; DCD, Recital 16.

13 SGD, Recital 18; DCD, Recital 12.

14 DCD, Recital 12.

the approach proposed by the domestic legislature in case of the SGD and the DCD. The story dates back to the early days of the Polish membership in the EU. Transposing pre-existing consumer protection measures, including harmonised provisions on consumer sales, constituted one of the requirements for the Polish accession to the EU, which took place on 1 May 2004. Given the pressure of time, the Polish legislator decided to transpose Directive 1999/44/EC outside the Civil Code – in a dedicated Act on specific conditions of consumer sale.¹⁵ This solution has been openly criticised in the academia and was viewed as a disruption to the existing terminology of national contract law and the central role of the Civil Code.¹⁶ The legislature was well aware of that and accepted the criticism.¹⁷ However, the approaching time of accession served as a reasonable excuse.

- 7 The decision to refrain from developing a uniform solution for consumer and non-consumer sales, without drawing clear boundaries between the two regimes, led to severe interpretative difficulties in borderline cases, e.g. regarding goods used in both private and professional capacity.¹⁸ These problems were further exacerbated by a different level of protection envisaged by the implemented EU rules and the pre-existing domestic ones. Ultimately, the standard of protection afforded to consumers in the Act on specific conditions of consumer sale (e.g. in respect to the burden of proof and available remedies) was lower compared to the provisions of the Polish Civil Code.
- 8 A significant shift towards a more integrated approach took place in 2014 when the Polish legislature was compelled to transpose Directive

2011/83/EU on consumer rights (CRD).¹⁹ Although the new rules were implemented mostly in the new Act on consumer rights²⁰ (e.g. those pertaining to information duties²¹ and withdrawal rights²²), a decision was made to incorporate some of them (e.g. on delivery²³) into the Civil Code. At the same time, the opportunity was taken to revisit the implementation of Directive 1999/44/EC by repealing the Act on specific conditions of consumer sale and bringing more coherence to the rules on sales.²⁴

- 9 The explanatory memorandum to the draft Act on consumer rights stressed that the original transposition of Directive 1999/44/EC outside the Polish Civil Code was a temporary solution, chosen due to shortage of time before Polish accession to the EU and complexity of the subject-matter.²⁵ When proceeding the Act on specific conditions of consumer sale, an assumption was made that provisions in question should be ultimately transposed to the Civil Code. These plans were interrupted in 2008, however, when the Commission published the initial proposal for the CRD. In the first draft version, the CRD was to repeal Directive 1999/44/EC and introduce a more comprehensive set of rules for consumer contracts.²⁶ This circumstance led the Polish legislature to await the development of the EU legislative proceedings.²⁷

15 Act of 27 July 2002 on specific conditions of consumer sale and amendments to the Civil Code (Ustawa o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego), Dz.U. 2002 nr 141 poz. 1176.

16 Cf. M. Pecyna 'Ustawa o sprzedaży konsumenckiej. Komentarz' (Kraków 2004) 14–23; J. Szczotka 'Sprzedaż konsumencka. Komentarz' (2 ed., Lublin 2007) 9.

17 Explanatory Memorandum to the draft act on specific conditions of consumer sale (Uzasadnienie projektu ustawy o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie kodeksu cywilnego) (Sejm of the IV term, document no. 465) 12 – 13 (accessed: 29 January 2021) < [http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/465/\\$file/465.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/465/$file/465.pdf)>.

18 A. Kurowska 'Implementacja dyrektywy o sprzedaży konsumenckiej do porządków prawnych wybranych państw członkowskich' (2008) 6 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 93, 96.

19 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 [2011] OJ L 304/64.

20 Act of 30 May 2014 on consumer rights (Ustawa o prawach konsumenta), Dz.U. 2014 poz. 827.

21 CRD, Articles 5 and 6.

22 CRD, Articles 9–16.

23 CRD, Article 18; Act of 23 April 1964 – Civil Code (Kodeks cywilny), Dz.U. 2020 poz. 1740, Article 543¹, hereafter: Polish Civil Code.

24 Explanatory Memorandum to the draft Act on consumer rights (Uzasadnienie projektu ustawy o prawach konsumenta) (Sejm of the VII term, document nr 2076) 2 (accessed: 29 January 2021) <<https://orka.sejm.gov.pl/Druki7ka.nsf/0/BE57572B371BB245C1257C690038EFE9/%24File/2076.pdf>>.

25 *ibid.*

26 Proposal for a Directive of the European Parliament and of the Council on consumer rights (COM(2008) 614 final).

27 Explanatory Memorandum to the draft Act on consumer rights (n 25) 2.

Eventually, the provisions on consumer sales were largely withdrawn from the CRD during negotiations with the Council.²⁸

- 10 As previously indicated, most provisions of Directive 2011/83/EU were implemented to the Polish legal order in the Act on consumer rights. The chosen way of proceeding appears to have been linked to the full level of harmonisation provided for by the Directive.²⁹ Conversely, re-implementation of Directive 1999/44/EC into the Polish Civil Code was justified by the fact that the underlying principle of minimum harmonisation³⁰ made it possible to depart from the original text of the Directive and incorporate its provisions in the existing regime of seller's liability.³¹ A coherent approach in respect of consumer sales received overwhelming support from scholars, while the chosen venue of implementation for Directive 2011/83/EU met mixed reactions. Considering the peripheral nature of the matters covered by the Act on consumer rights, the adoption of a separate act in this regard has been reconciled with over time.
- 11 Thus, the legal framework applicable to date is the following. Most provisions of the CRD are implemented in the Act on consumer rights, which directly reflects the Directive in question. By contrast, provisions implementing Directive 1999/44/EC have been adjusted to the domestic legal categories, known from the Polish regime of seller's liability, and form part of the Polish Civil Code.

28 See generally: E. Hall, G. Howells, J. Watson 'The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law' (2012) 2 ERCL 139; S. Weatherill 'The Consumer Rights Directive: How and why a quest for "coherence" has (largely) failed' (2012) 4 CMLR 1279.

29 Explanatory Memorandum to the draft act on consumer rights (n 25) 3; CRD, Article 4.

30 Directive 1999/44/EC, Article 8(2).

31 Explanatory Memorandum to the draft Act on consumer rights (n 25) 3–4.

C. Sales of goods and supply of digital content and services: on a rocky road to Europeanisation

I. Substantive norms on liability prior to the SGD and the DCD: a solid ground for adaptation

- 12 From the above, one may infer that Directives providing for full harmonisation are more likely to be implemented by the Polish legislator via separate acts, even though a decision of this kind is certainly not automatic.³² Systemic importance of the subject matter from the perspective of the Civil Code is also a consideration. Both of these factors need to be examined when assessing the envisaged implementation of the SGD and the DCD into Polish law.
- 13 As was already mentioned, unlike Directive 1999/44/EC but in line with the broader tendency in the EU consumer *acquis* epitomized by the CRD,³³ the EU legislator decided that both new Directives on consumer contracts should aim for full harmonisation. The sale of consumer goods addressed by the SGD, without doubt, belongs to the core of domestic civil law. However, well-established national doctrines in this respect have already been largely harmonised with the emerging corpus of the EU private law during the re-implementation of 2014. By contrast, the supply of digital content and digital services has not been explicitly addressed in Polish civil law so far. An attempt to do so was made in 2014, during a discussion about the implementation of the CRD. Initially, a proposal was made to apply provisions pertaining to the sale of goods *mutatis mutandis* to contracts for the supply of digital content.³⁴ Ultimately however, following criticism from the scholarship, this initiative was

32 Separate acts were adopted to transpose Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market, Directive 2008/48/EC on consumer credit and Directive 2015/2302 on package travel. By contrast, certain provisions of the CRD and the Council Directive 85/374/EEC on the liability for defective products have been implemented into the Civil Code.

33 K. Tonner 'From the Kennedy Message to Full Harmonising Consumer Law Directives: A Retrospect' in: K. Purnhagen, P. Rott (eds) 'Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz' (Springer, 2014) 693, 702–704.

34 T. Targosz, M. Wyrwiński 'Dostarczanie treści cyfrowych a umowa sprzedaży. Uwagi na tle projektu nowelizacji art. 555 kodeksu cywilnego' (2015) 1 Forum Prawnicze 18, 20.

abandoned. The non-material and, at least in certain business models, continuous nature of consideration in contracts for the supply of digital content was deemed contrary to the characteristics of the sale of goods, whereby the seller transfers ownership of a particular good in exchange of a price paid by the buyer.³⁵ As a result, legal qualification of contracts for the supply of digital content has remained an unregulated matter.

- 14 Since, contracts for the supply of digital content or digital services currently constitute innominate agreements, their legal qualification is contingent on a case-by-case analysis of a given contractual relationship.³⁶ Depending on the way consideration has been defined, provisions pertaining to different types of nominate agreements may apply. Among possible qualifications (e.g. sale of goods, donation, lease, loan for use, or provision of service) one may find contracts that differ significantly regarding the regime of the liability they provide for. Agreements of result tend to underlie a stricter liability regime. In the case of sales, for example, liability is linked to “defects” within an object of transaction.³⁷ By contrast, agreements of due diligence, such as contracts for the provision of services, underlie general rules of the liability based on the principle of fault. With respect to the supply of digital content, reliance on the service model is typically observed in the contracting practice.³⁸

II. The Polish legislature implementing new contract law Directives, or There and Back Again

- 15 In late December 2020, the Government Legislation Centre published a draft act implementing the SGD and the DCD.³⁹ The proposed act, dated 16

35 *ibid* 22.

36 ‘D. Lubasz ‘Komentarz do art. 2’ in: D. Lubasz, M. Namysłowska ‘Ustawa o prawach konsumenta. Komentarz’ (Wolters Kluwer, 2015); T. Czech ‘Komentarz do art. 2’ in: T. Czech ‘Prawa konsumenta. Komentarz’ (ed. II, Wolters Kluwer, 2020).

37 See generally: W. Czachórski ‘Zobowiązania – Zarys wykładu’ (ed. 11, LexisNexis 2009) 398.

38 T. Targosz (n 35) 20, 31.

39 Draft act on the amendment of the Act on consumer rights and the Civil Code (Projekt ustawy o zmianie ustawy o prawach konsumenta oraz ustawy – Kodeks cywilny) <<https://legislacja.rcl.gov.pl/projekt/12341810/kata->

September 2020, envisages a transposition of both Directives into the Act on consumer rights and a repeal of the provisions of the Polish Civil Code which implemented Directive 1999/44/EC. The Polish legislature did not substantiate the decision to implement the Directives in question in the same legal act. It is noteworthy, however, that both Directives share a substantial number of legal definitions and envisage similar regimes of liability for the sale of goods and for the supply of digital content or digital services. Moreover, the SGD is, under certain circumstances, applicable to digital content incorporated in or inter-connected with a good with digital elements. Diffusing the provisions pertaining to the supply of digital content among various legal acts could reduce the clarity of the national legislation and result in practical difficulties. Therefore, the decision to implement the two Directives in the same legal act appears to be reasonable.

- 16 Nonetheless, a generally positive assessment of the idea to implement the SGD and the DCD in the same act does not imply a similar approval of the chosen venue of implementation and the substantive proposals made. Instead of implementing the provisions envisaged in the two Directives into the Polish Civil Code, a de-codification of the subject-matter belonging to the core of the civil law is again proposed. The justification of the proposed solution⁴⁰ leaves much to be desired.

- 17 According to the memorandum accompanying the proposed act, an implementation of the SGD and the DCD in the Polish Civil Code would risk destabilising the latter’s systematics, considering the fundamental nature of the changes to be introduced. Such a solution, it is argued, should be preceded by gathering experiences about how the provisions in question would function in the economic reality.⁴¹ The authors purport that liability of the seller in the Polish Civil Code is traditionally linked to the legal category of “defect”, whereas the notion of “non-conformity with the contract” set forth in the new Directives constitutes a *novum* to the Polish legal order.⁴² This argument, however, is deeply flawed, considering that liability based on the category of

[log/12752756#12752756](https://legislacja.rcl.gov.pl/log/12752756#12752756)> accessed: 29 January 2021.

40 Explanatory Memorandum to the draft act on the amendment of the Act on consumer rights and the Civil Code (Projekt ustawy o zmianie ustawy o prawach konsumenta oraz ustawy – Kodeks cywilny), 2 <<https://legislacja.rcl.gov.pl/docs//2/12341810/12752756/12752757/dokument482603.pdf>> accessed: 29 January 2021.

41 *ibid*.

42 *ibid* 4, 6.

“non-conformity with the contract” has already been harmonized with the notion of defect during the re-implementation of Directive 1999/44/EC. Moreover, the fact that full harmonisation does not preclude the possibility of further successful adjustments is best illustrated by the approach of lawmakers in Germany. Despite the fact that the seller’s liability in German law is also based on the notion of “defect”, implementation of the SGD outside of *Bürgerliches Gesetzbuch* (BGB) has remained out of the question. Instead, the legislator correctly observed that the SGD does not introduce fundamental changes to the seller’s liability regime. Concluding that adjusting the domestic framework to the rules envisaged in the SGD is feasible, the German legislature has seen no reason in abandoning the solutions introduced to its Civil Code following the implementation of Directive 1999/44/EC.⁴³ The venue of implementation for the DCD has been discussed more extensively in the German law-making process; however, the question of whether the adoption of a separate act would be desirable received less attention as the focus was instead on how to best place the novel set of rules within the BGB.⁴⁴

- 18 As seen from above, the principle of full harmonisation is not universally regarded as a circumstance precluding the integration of EU contract law into a domestic civil code. The Polish legislature invoked the opposite argument when preparing the draft act implementing the Directives at hand.⁴⁵ As stressed previously, the Polish approach to the transposition of directives following the principle of full harmonisation usually boils down to enacting specific acts that precisely reflect relevant EU norms. This method is not entirely unfounded, especially in view of an approaching deadline for implementation. Interference in acts of a systemic significance, such

as national civil codes, requires thoughtful actions. Inappropriate adjustment of domestic norms may lead to a disturbance in the internal legal order and draw the Commission’s attention in the process of implementation monitoring. From this perspective, transposition which faithfully reflects the wording of a given directive constitutes a safe solution that minimises the risk of the Commission’s intervention. The explanatory memorandum, however, does not invoke the arguments presented above. Instead, it contains a number of erroneous and contradictory statements. As mentioned prior, the extent of a conceptual dissonance between the Civil Code and the SGD is overstated. Moreover, reference to the gathering of experience is followed by a suggestion that re-implementation into the Polish Civil Code remains a possibility,⁴⁶ yet the legislator has not been seeking any academic expertise in this regard. It is doubtful whether swiftly introduced legislation, not well-embedded in the legal order, is going to result in the development of good practice.

- 19 The vision of a temporary de-codification also remains at variance with the arguments invoked in favour of implementation in the Act on consumer rights. Firstly, the proposed solution is presented as a one that would ensure consistency concerning the structure and wording of the provisions implementing the EU consumer *acquis* and reduce further interference in the Civil Code.⁴⁷ Secondly, the explanatory memorandum asserts that the chosen solution would result in the creation of a single, coherent and essentially self-contained set of norms, governing the relations between traders and consumers, thereby limiting the need of referring to various legal acts.⁴⁸ In reality, the chosen solution would lead to opposite outcomes, as it would create two different regimes of seller’s liability, thwarting the previously created ground for a systemic reform. Moreover, the assumption that the chosen method of implementation would result in a comprehensive framework of consumer transactions seems unsubstantiated. Numerous rules pertaining to consumer relations are spread among various legal acts including the Civil Code and the ones contained in the Act on consumer rights are not fundamentally interrelated. Therefore, the proposed method of implementation will not create an act of a systemic significance, moving towards the emergence a “Consumer Code”.

43 Explanatory Memorandum to the referee draft act on the implementation of the SGD (Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Regelung des Verkaufs von Sachen mit digitalen Elementen und anderer Aspekte des Kaufvertrags) 12 <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Warenkaufrichtlinie.html> accessed: 8 February 2021.

44 Explanatory Memorandum to the draft act on the implementation of the DCD (Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes zur Umsetzung der Richtlinie über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen) 28–29 <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bereitstellung_digitaler_Inhalte.html> accessed: 8 February 2021.

45 Explanatory Memorandum to the draft act on the amendment of the Act on consumer rights and the Civil Code (n 41) 2–3.

46 Explanatory Memorandum to the draft act on the amendment of the Act on consumer rights and the Civil Code (n 41) 2–3.

47 *ibid* 3–4.

48 *ibid* 3.

III. Implementation of the DCD: a missed highway exit to a systemic solution

20 The spurious reasoning set out above determined the approach of the Polish legislature for the implementation of the SGD and the DCD, which as mentioned, are to be implemented together outside the Civil Code. The present section provides a more detailed account of the proposals made in respect of digital content and digital services.

21 According to the draft act, provisions implementing the DCD will be introduced to the Act on consumer rights in wording that essentially reflects the Directive's text. The proposal begins with a list of legal definitions. A contract for the supply of digital content or a digital service will be construed as a contract pursuant to which the trader is obliged to supply the digital content or digital service to the consumer (according to the consumer's directions) while the consumer is obliged to pay the price or provide personal data to the trader, except where personal data provided by the consumer are exclusively processed by the trader for one of indicated purposes.⁴⁹ The definition at hand reflects the wording of Article 3(1) of the DCD, specified by the exception from Article 3(5)(f). The personal scope of the rules in question is limited to B2C relations.

22 Following the DCD, the definition of the price transposed to the Act on consumer rights includes not only official currencies, but also a digital representation of values.⁵⁰ Possible legal consequences of the envisaged norm for virtual currencies remain uncertain, considering the unclear status of cryptocurrencies in Polish law so far and the open-ended wording of the DCD in this regard.⁵¹ Furthermore, in line with the Directive, the proposed provisions acknowledge that the consumer's consideration may take the form of consent to processing personal data. Consequences of a possible withdrawal of consumer's consent are nonetheless not specified.

⁴⁹ The purposes include: 1) supplying the digital content or digital service; 2) improving security, compatibility or interoperability of the software offered by the trader on a free and open-source licence; 3) complying with legal requirements. See: Draft act on the amendment of the Act on consumer rights and the Civil Code (n 40), Article 1(3)(a).

⁵⁰ Draft act on the amendment of the Act on consumer rights and the Civil Code (n 40), Article 1(3)(c).

⁵¹ DCD, Recital 23.

23 As was already mentioned, the DCD does not determine the legal qualification of the contracts for supply of digital content or digital services. Member States are therefore free to stipulate whether the agreements in question shall be qualified as sales, service, rental or *sui generis* contracts. The Polish legislator decided to introduce a definition of the contract for supply of digital content or digital services,⁵² which could suggest that the contract in question is to join the catalogue of nominate contracts. On the one hand, the definition indicates the parties' main obligations thus determining *essentialia negotii* of the contracts concerned. On the other hand, it is enshrined in Article 2 of the Act on consumer rights, which merely explains the statutory terms. Accordingly, the character of the described definition remains an open question.

24 A key part of the DCD is to be included in the Act on consumer rights as a separate chapter (5b) governing the contract for the provision of digital content or a digital service. Draft provisions reflect the DCD with limited adjustments resulting from the specificity of the Polish legislation. Concerning the performance standard, the Polish legislature decided to refer to the articles implementing the SGD since they lay down similar objective and subjective requirements of conformity. The provisions in question are to be followed by several supplementary norms focused on matters specific to the digital content and digital services, such as continuous consideration and software updates. Subsequent provisions address consumer remedies in the event of the non-conformity of digital content or service with the contract and determine instances, in which the service or content provider is entitled to introduce modifications to the service or content in question.

25 In general, the explanatory memorandum provides little explanation with regard to the implementation of the DCD. It does not contain many arguments which substantiate the chosen type of contract, nor does it testify to any additional reflection concerning the personal scope of the new rules. The choices made in relation to both these aspects appear to flow from a decision not to interfere in the text of the Polish Civil Code and instead amend the Act on consumer rights. Nonetheless, this is not the only path the Polish legislature could have taken. Firstly, an alternative solution could be to transpose the provisions of the DCD to the general provisions on contracts in the Polish Civil Code, following the approach of German lawmakers.⁵³ Secondly, a proposal could introduce a new type of nominate

⁵² Draft act on the amendment of the Act on consumer rights and the Civil Code (n 40), Article 1(3)(a).

⁵³ Draft act on the implementation of the DCD, Title 2a of BGB [German Civil Code].

agreement to the Polish Civil Code. Last but not least, provisions regulating the supply of digital content or digital services could be dispersed among provisions regulating existing types of contracts, in which the consideration could take the form of supply of digital content or digital services. With regard to the personal scope of application, the Polish legislature decided not to extend it, although a possibility of doing so is explicitly mentioned in the DCD.⁵⁴ As a result, the type of contracts for the supply of digital content or digital services, introduced outside of the Civil Code, pertains to B2C relations only. If such a contract is concluded between businesses or peers, it will be governed by provisions of the Civil Code corresponding with the legal relationship in question. Accordingly, contracts of the same content could be governed by substantially different regimes of liability, depending on the legal qualification of the contracting parties.

D. Conclusions: a finish with no applause?

- 26 The interconnection between the SGD and the DCD speaks in favour of implementing them together in the same act. As such, reflection upon the transposition of the DCD, which constitutes the main subject of this paper, could not be carried out without addressing the transposition of the SGD.
- 27 A substantial part of the SGD pertains to the seller's liability in contracts for the sale of consumer goods. In Poland, this matter is currently regulated in the Civil Code in a manner which is not completely identical to the new EU rules. As a result, doubts about the appropriate method of transposition have arisen. The Polish legislature seems to conclude that an interference in the Civil Code is undesirable. Consequently, the SGD and the DCD are set to become incorporated in the Act on consumer rights, which initially implemented Directive 2011/83/EU on consumer rights into the Polish legal order.
- 28 The chosen method of transposition is highly controversial. Introduction of provisions governing the sale of consumer goods to the Act on consumer rights would entail a repeal of certain provisions of the Polish Civil Code, implementing Directive 1999/44/EC. De-codification would result in the emergence of separate liability regimes in sale contracts based on similar legal categories and using different legal terms. Their applicability would be contingent on the B2B, B2C or peer-to-peer nature of the legal relation between the parties. For example, the hierarchy of remedies would only apply to consumer contracts.
- 29 This dissonance will not emerge with contracts for the supply of digital content or digital services, for which no well-established rules and doctrines are currently in place. In reality, the discrepancy would become even more significant. Directly following the DCD approach, the Polish legislature decided to limit personal scope of the new rules on digital content and digital services to B2C relations. However, agreements of the same nature may also be concluded between traders and peers; as such, their legal assessment will need to be performed case-by-case. Should such contracts be qualified as agreements for the provision of services, their performance will underlie a fundamentally different regime of liability from the one envisaged in the DCD. In conclusion, contracts of the same content would be governed by substantially different sets of norms depending on their parties' legal qualification.
- 30 The aforementioned negative implications result from the Polish legislature's decision to step away from the path of an integrated approach in implementing the EU consumer *acquis* in favour of a simpler solution. Instead of riding on a firm route paved with existing legal institutions, a decision was made to take a shortcut that may not lead towards the same destination. A ride on a tandem bike may be an extraordinary experience as long as one bears in mind that every move has to be synchronised. Indeed, it is better to ride on firm ground, even if extra effort is necessary.

⁵⁴ DCD, Recital 16.