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SUPPLY OF DIGITAL CONTENT AND SERVICES – NEW LEGAL CONCEPTS MARRED WITH OLD PRACTICAL PROBLEMS

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SUMMARY

The world is undergoing a digitalization. Work, entertainment, education, even procurement of basic necessities is more and more done online. Some even speak of digital revolution. As of 11 June 2019, Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services ("DCD") and Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods ("SGD") have entered into force and will be effective from 1st of January 2022. These directives are a key legislative component of EUs' Digital single market policy, and can be seen as a culmination of years-long legislative and political initiative, that aims to regulate the ever-evolving digital market.

Much has already been written by both EU committees and independent legal experts about the DCD, its' issues, and possible impact of the DCD on national legal systems. This article aims to showcase the whole initiative of regulating the digital market with regards to consumer rights, describe the core issues of the DCD that have been identified since its' conception, and present a compilation of how some of the national legislators, namely the legislators of Austria, Czechia, Poland and Spain, have dealt with said issues during the arduous task of transposition.

The article concludes that the DCD is but one of many acts of the long and arduous legislative task of regulating the digital market in both the Digital single market policy and the "New deal for consumers". The directive itself is not without its' issues: its provisions are often too broad and general to constitute an actual improvement for the consumer. This is especially the case regarding the standard of quality for the supply of digital content and digital services. The DCD also omits important to classify of the contact for the supply of digital content as a specific contract type, and glosses over whether consumers' counter-performance in allowing access to their personal data is on par with monetary counter-performance. Generally the issues of the DCD were not addressed or rectified by the examined national transpositions. However,

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in some specific cases, the national legislators have actually improved the situation. The new legislation will not solve the problem of binding the digital market in equitable legal rules. It does however serve as a stepping stone that includes some new legal concepts, that are necessary to comprehensively and properly regulate the digital market.

KEY WORDS

Digital content, digital service, digital single market, new deal of consumers, standard of quality, personal data, DCD.

INTRODUCTION

As of 11 June 2019, Directive (EU) 2019/770 *on certain aspects concerning contracts for the supply of digital content and digital services* ("DCD") and Directive (EU) 2019/771 *on certain aspects concerning contracts for the sale of goods* ("SGD") have entered into force and will be effective from 1st of January 2022. These directives are a key legislative component of EUs' Digital single market policy,[2] and can be described as a culmination of years-long legislative and political initiative, that aims to regulate the ever-evolving digital market.

Much has already been written by both EU committees[3] and independent legal experts[4] about the DCD, its' issues, and possible impact of the DCD on national legal systems. This article aims to showcase the whole initiative of regulating the digital market with regards to consumer rights, describe the core issues of the DCD that have been identified since its' conception,[5] and present a compilation of how some of the national legislators dealt with said issues during the arduous task of transposition.

EU LEGISLATION ON SUPPLY OF DIGITAL CONTENT AND SERVICES

The Digital single market policy is an initiative that spans all sections of law and is not limited to contractual obligations.[6] Considering the scope of the digital world itself, and many

[2] Long term plan of the EU to create Digital Single Market in its‘ member states. Digital Single Market is one where individuals and businesses can access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. See more at Communication COM (2015) 192 final of 6th of May 2015, A Digital Single Market Strategy for Europe.

[3] Mańko, Rafał. and Monteleone, Shara. *Contracts for the supply of digital content and personal data protection*. European Parliamentary Research Service. PE 603.929 May 2017.

[4] Aydin, Serap and Tichy Wolfgang. *New rules for Digital Content & Sale of Goods.* mondaq.com. Schönherr Rechtsanwälte GmbH. 23 September 2019.

[5] While SGD creates interesting changes in rules of sale of goods with digital elements to the consumer, these cannot be examined in this article for the sake of reasonable article length; the rest of the article will focus solely on DCD.

[6] Communication COM (2015) 192 final of 6th of May 2015, A Digital Single Market Strategy for Europe. p. 5

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areas it seeps into, this cannot be any other way. DCD is therefore only one of the many new secondary acts, that aim to create a system of norms that will truly and comprehensively regulates the digital market. The start of initiative for regulating supply of digital content is often seen with Draft Common Frame of Reference in 2009.[7] The initiative has seen many earlier drafts fail for various reasons, the most prevalent one being their ambition to create a new legal framework with a wide contractual scope, [8] for which they were criticized by both legal experts and committees and ultimately rejected by member states.

One area of law that is intrinsically bound to the regulation of supply of digital content and services is the personal data protection. Since the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC* ("GDPR") has entered into force, personal data protection has been an omnipresent part of legal transactions, especially those occurring on the digital market. The other secondary act of the EU that regulates personal data protection on the digital market is the e-Privacy Directive (with its' long-awaited replacement, the e-Privacy Regulation). The interplay between the DCD and the existing public law rules on personal data protection has been the subject of much debate.[9] The text of the DCD clearly indicates that European legislators intended to build upon prior digital data regulations, including personal data protections. This is most evident in the fact that DCD refers to the GDPR when defining personal data, rather than presenting its own definition (Article 2(8) of the DCD), and even explicitly mentions the GDPR in the recital.[10] The one new and innovative concept created in DCD that deals with personal data will be analysed in detail below.

It is practically an axiom of consumer law in Europe, that the consumer has little individual power in enforcing their rights,[11] with credit to exceptions.[12] EU has already taken a number of measures to improve awareness and enforcement of consumer rights and consumer redress. However, there still are gaps in national laws regarding truly effective penalties to deter and sanction intra-Union consumer rights infringements and insufficient individual remedies for consumers harmed by breaches of national legislation. Regarding that, EU has presented a "A New deal for consumers" which aims mainly to empower the consumer and create efficient legal instruments to enforce their rights.[13] This New deal for consumers builds upon the Digital single market policy with the aim to improve the situation in areas the latter has not.[14] The DCD is in

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[7] Twigg-Flesner, Christian. *The Europeanisation of Contract Law: current controversies in law*. 2nd ed. New York: Routledge. 2013. p. 85

[8] Weber, Rolf. H. 2017. The Sharing Economy in the EU and the Law of Contracts. In: *The George Washington Law Review* n0. 85. 28th of February 2018. p. 1795.

[9] Metzger, Axel. et al. *Data-Related Aspects of the Digital Content Directive.* 9 (2018) JIPITEC 90

[10] Recital 37 of the DCD

[11] Selucká, Markéta. Návrh směrnice o některých aspektech smluv o prodeji zboží v kontextu českého soukromého práva. (The proposal of Directive on certain aspects of sale of goods in the context of the Czech private law). In: *Vereinigung von tschechischen, deutschen, slowakischen und österreichischen Juristen*. XXVII. Konferenz der Karlsbader Juristentage/XXVII. Prague: Leges, 2019. p. 458

[12] For example, extensive procedure for consumer rights protection is present in Scandinavian countries, with their Market courts and Consumer ombudsman.

[13] A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement, Brussels, 11 April 2018. p 1.

[14] A New Deal for Consumers: ibid. p. 2

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its' core a substantive legal act, however it does partake in the "New deal" by reversing the burden of proof with regards to defects (Art. 12 of DCD) and forcing member states to empower specific organizations, so that they may take legal action in enforcement of the consumer rights given by the DCD (Art. 12 of DCD).

One of the New deals acts that warrant mentioning with respect to the DCD is the so-called Omnibus directive,[15] which modernizes several older acts with respects to new acts of consumer protection, including the Directive EU (*2011/83/EU*) *of the European Parliament and of the Council of 25 October 2011 on consumer rights. This Omnibus directive actually integrates definitions of digital content, digital service, personal data etc., as defined by DCD, SGD and GDPR, into the older general directive. This ensures that the terminology remains up-to-date and consistent throughout all the acts and that the rules and tools of consumer rights directive are applicable to digital content and services.*[16] *Because of relatively small scope of the DCD, this should be considered a necessary step in creating coherent and comprehensive legislation.*

DCD (and other relevant acts) aim for full harmonization of their respective topics, in a sense, that no legal divergence, neither stricter nor more lenient set of rules, is possible at the level of individual member states.[17] *While this gives EU de facto more power over national legal system, and member states as a whole, it is a necessary approach if the Digital single market policy is to be achieved; if the consumers are to engage in cross-border transactions, they must be assured that the same rules apply regardless of where the provider of content*[18] *is from.*

The EU is by no means done with regulating supply of digital content. With basic contractual framework and new technological concepts and terminology established, the EU legislator has moved on to specific issues of the market and consumer protection. For example, the proposed Digital Services Act would introduce a series of new, harmonized EU-wide obligations for digital services, or the Digital Markets Act (DMA), which would introduce rules for platforms that act as 'gatekeepers' in the digital sector.[19] There's also an initiative to set rules for civil liability and the AI.[20] There are and surely will be many more acts regulating supply of digital content and services and the digital market as a whole, that warrant further research.

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[15] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

[16] Cauffman Caroline. New EU rules on business-to-consumer and platform-to-business relationships. *Maastricht Journal of European and Comparative Law*. 2019;26(4):469-479. p.7

[17] Mak, Vanessa. "Review of the consumer acquis: towards maximum harmonization?" *European Review of Private Law* 17.1. (2009). p 40

[18] For the sake of simplicity, data supplied under the DCD, meaning digital content and digital services, will be referred to jointly as "content" in the text.

[19] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online. Proposal for a Regulation of The European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/Ec. Com/2020/825 Final

[20] Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts. COM/2021/206 final.

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MAIN ISSUES OF THE DCD

From its' conception, the DCD had to deal with myriad of problems. These stem from covering previously vastly unregulated field, with technological and practical specifics that simply do not exist outside of it, political hurdles typical for any secondary act of the EU, mainly the required acceptance of the text of an act from all the member states, and the necessity to create new concepts and terminology from scratch. Generally, these challenges were met by the directive. However, the final version of the DCD is not without its' issues, most important of which were already identified by the academy and are described below.

Unidentified contract type

DCD purposefully does not classify a contract for the supply of content as a specific contract type (e. g. license, sale of goods, service); this task of legal theory is explicitly left to the national law.[21] This has already been a point of criticism in previous drafts of the directive, as it might lead to fragmentation of the law throughout member states.[22] This is a valid concern, as member states classify contracts for supply of content differently. For example, French law abstains from the classification completely, while French judiciary acts differ depending on a case.[23] Finnish law explicitly states, that if digital data is provided on tangible medium or on-line, the contract form is a service.[24] In previous drafts, this problem was more of less theoretical, as the harmonization was very strict, therefore, even in the case of different contract types, the rules would remain the same. The DCD however explicitly does not fully harmonize the general aspects of contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract or the right to damages.[25] Therefore, practice in different member states is bound to differ considerably, and there might be many issues regarding interpretation, especially in the case of applicability of specific provisions that regulate specific contract types, like service contract, licenses and so on. This broadness also hinders one of the main goals of DCD, harmonization of contract law in the EU.[26] The lack of typology for contracts for the supply of content has the potential to create major differences in approach across the union. [27]

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[21] Recital 12 of the DCD

[22] Mak, Vanessa. *The new proposal for harmonized rules on certain aspects concerning contracts for the supply of digital content*. Directorate-General for Internal Policies of the Union, Tillburg University. 14th of December 2016. p. 28

[23] Helberger, Natali et. al. Digital Content Contracts for Consumers. In: *Journal of Consumer Policy*, 36, 3rd ed., (2005). p. 42

[24] Hesselink, Martijn. et. al., *Towards a European civil code*. 4th ed. Alphen aan den Rijn: Kluwer Law International, 2011. p. 208

[25] Recital 12 of the DCD

[26] Hoekstra, Johanna. and Diker-Vanberg, Aysem. The proposed directive for the supply of digital content: is it fit for purpose? In: *International Review of Law, Computers & Technology*, 33:1, (2019). p. 11

[27] Hoekstra, Johanna. and Diker-Vanberg, Aysem. ibid. p. 13

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Digital data as a contractual counter-performance

Probably the main innovation of DCD is a concept of giving access to ones' personal data counter-performance. DCD regulates supply of that content, for which a consumer pays a price (Art. 3 Sec 1 DCD). However, the price no longer means just direct monetary compensation, but it also includes allowing access to one's personal data.[28] This change in the concept of price aims to regulate the content that is nominally "free", but the consumer gives access to their personal data, which the supplier then collects and uses to acquire profit – typically by selling the data to marketing companies. Pursuant to that, DCD does not consider giving access to personal data as paying the price in situations, in which the collection of personal data is required by law, and the provider does not use it for any other purposes.[29] The theoretical issue here is, that DCD implicitly makes access personal data, and hence privacy, equal to money and other commodities. This does not correspond with default concept of personal data and privacy protection as a basic right, which should not be tradable.[30] The practical issue is that DCD lacks any specific norms that would hinder the misuse of personal data by the provider, specifically, that they will not use them outside the given set of permissions. There are also many specific norms in national legal systems regarding the ability of certain groups of people and their ability to give consent.

The core act that regulates personal data is of course GDPR. The handling of said data is built around the concept of consent (Art. 6, para. 1, let. a) of the GDPR), unless there is any other lawful reason – which generally isn't in private contracts. Therefore, in contract for supply of digital content, if access to consumers' personal data is given to the supplier, an explicit consent must be a part of the contract. The consent to processing must be express, concrete and informed, as adjudicated by the Tribunal.[31] Of course, this does not mean that consent cannot be automatized, such as clicking a button in an installation program, which is the most common practice.[32] If the consent is however not given properly, the handling of personal data by the provider must be considered unlawful.

A major problem also arises when the consumer is a minor, who may be able to conclude a contract under national law, but their personal data are granted increased protection by Art. 8 of the GDPR. Due to their age, children are less aware of the risks, consequences, guarantees and rights during its processing.[33] In consent-based processing of personal data, the minor must be at least 16 years old for such independent consent to be valid (Art. 8., para 1 of the GDPR). In the case of younger minors, the law establishes additional conditions: it must be an information

[28] Personal data in a sense that they are defined in 4 sec. 1 of the GDPR

[29] It should be noted that there is little to no guarantee that the provider will not use the collected personal data for profit. In digital market, the sale of data can be automatized and made milliseconds after the consumer gives consent, while being virtually untraceable.

[30] De Almieda Alves, Maria: Directive on certain aspects concerning contracts for the supply of digital content and digital services & the EU data protection legal framework: are worlds colliding? In: *EU Law Journal*, 5th ed., 2th of July 2019. p 38

[31] Judgement of the Tribunal of 3rd of December 2015, nr. 2015. T 343/13 (CN v. European Parlament).

[32] This information was acquired by field research by the author, in a grant research funded by Grant agency of Masaryk university, with the topic of Research of contractual practice of supply of digital data to the consumer („Výzkum smluvní praxe poskytování digitálních dat spotřebitelům"), nr. MUNI/A/1296/2020.

[33] Recital 32 of the GDPR

society service which must be offered and intended directly to and for children, and consent must be given or approved by a person exercising parental responsibility over the child. The GDPR also specifies that "*this special protection should in particular apply to the use of children's personal data for marketing purposes or to create personal or user profiles and collect personal data pertaining to children when using services offered directly to children."*[34] In practice this often does not happen. Many national legal systems also contain provisions regarding nullity of contracts entered into by minors under certain conditions, which is bound to invalidate many contracts for the supply of digital content with respect to personal data.[35]

Standard of quality

One of the core concepts of the DCD is quality demands for supply of content. These are present in the directive through a combination of subjective and objective requirements (Art. 7 and 8). The provision of digital content or service shall be deemed to conform to the contract when subjective and objective requirements are met. Otherwise, the trader is liable for the lack of conformity; thus, the service is "defective".[36] Subjective requirements are directly tied to the contract for supply of content; therefore, they shall apply only in situations when they are stipulated in the contract itself. That means however, that these requirements are, for all intents and purposes, voluntary, because of the practice in the digital market. The contracts for the supply of content are almost exclusively adhesions, drafted by the supplier, with little to no consumer initiative or power to negotiate.[37] Naturally, few suppliers would purposefully include a stipulation in a contract that hinders them, as it has been proven, that self-regulation on the market does not work among content providers.[38] The objective performance standards are therefore the only regulation that will apply. Those requirements, while rational and beneficial to the consumer, seem too general for practical application. Being fit for a purpose for which digital content or digital services of the same type would normally be used is to be examined while considering, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct (Art. 8 sec. 1 par. a) of the DCD). However, these other norms are uncommon while also not unified throughout the member states. For example, technical standards for digital content exist solely on national basis, and even then, they are few and far in between.[39] While those other norms that are transnational, are again completely in the hands of the suppliers, which highlights the issue of

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[34] Recital 38 of the GDPR

[35] For example, the law of Czechia gives minors right to enter a contract, if they are reasonably and mentally mature enough for it. It is heavily debatable just how much can a child understand the concept of privacy and personal data. If it cannot, any consent given by the child for handling of their personal data must be considered void.

[36] Aydin, Serap and Tichy Wolfgang. *New rules for Digital Content & Sale of Goods.* mondaq.com. Schönherr Rechtsanwälte GmbH. 23 September 2019.

[37] This information was acquired by field research by the author, in a grant research nr. MUNI/A/1296/2020. ibid.

[38] Jurkiewicz, Carole. L. Big Data, Big Concerns: Ethics in the Digital Age, In: *Public Integrity*. 20, 2018. p. 57

[39] Czech Republic, for example, has none, according to an official statement from Czech Office for Standards, Metrology and Testing.

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complete provider control of the market practice. Presently, the supply of content does not have any universally used pre-defined commercial terms,[40] that would be readily available and used by the suppliers.

*R*ight to end a contract in a case of lack of conformity or failure to supply

A consumer has the right to end a contract for the supply of digital content, if the content is faulty, and remedy is impossible, or if it would impose disproportionate costs on the supplier, or it is obvious that the supplier will not fix the fault. Value of the content and significance of the fault are taken into consideration. Taking this concept into its' logical conclusion regarding the commonly purchased content and its' "value" on the digital market, in most cases, the right to terminate a contract will be the only right consumer has. (Art 14 sec 2 letter b) of DCD).[41] From a practical point of view, there is little initiative for the content providers to fix any possible faults. Supplied content is predominantly of lower values, if it is paid for with money at all. especially in the cases of contracts that were not supplied against monetary compensation. This conclusion drastically breaches the *pacta sunt servanda* principle, since performance of the supplier in the case of contracts for supply of content is made de-facto voluntary in most cases. The only sanction against the provider is that the consumer terminates the contract. Therefore, the consumer has no guarantee that the content will be supplied to them at all.

TRANSPOSITIONS

The legal experts and legislative bodies of member states have asked many of the same questions regarding the DCD.[42] This part compares the different approaches to the transposition throughout member states, with focus on issues presented in the chapter above.

Systematic approach to transposition

Since every legal system in EU member states is unique, every transposition will be an original piece of legislative work. That does not mean however, that certain patterns can't be observed, thanks to the underlying conceptual similarities of all continental legal systems and the fact that all of them transpose the same subject-matter.

The Czech legislative branch has decided, that the best way of transposing the DCDs' provisions into the national law is the amendment of the Czech Civil code, which contains general rules of consumer protection. The Czech civil code is a general act of not only civil, but private

[40] Such as Incoterms.

[41] Much of the content on the market is not paid for, or the prices are comparatively small. Even the most expensive common content rarely exceeds 80 euro. This information was acquired by field research by the author, in a grant research nr. MUNI/A/1296/2020. ibid.

[42] Zöchling-Jud, Brigitta. Implementation of digital content directive in Austria, In: *Digital Consumer Contract Law and New Technologies conference*. Tallin. November 2020

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law, and is considered a starting point for any private-law related legal questions.[43] The legislator of Spain has similarly chosen the approach of updating the existing consumer protection law, which in Spain is represented by the Spanish Consumer Act.[44] In the same vein, Polish transposition envisages integration of both DCD and SGD into the Act on consumer rights, however, at the same time a repeal of the provisions of the Polish Civil Code which implemented Directive 1999/44/EC are to be made.[45] On the other hand, the transposition of the DCD into Austrian law has taken a form of separate Consumer warranty act, with auxiliary amendment of the Consumer Protection Act ("KSchG") and the General Civil Code ("ABGB"), whose core provisions should stay the same.[46]

It is obvious from these examples, that different DCD transpositions vary greatly dependent on specific national legal circumstances. They do however, share several similarities, especially the need of novelizing existing civil codes and consumer acts of respective states. It must also be stated that legal experts of their respective countries have often recommended a different approach than the one which was take. For example, there have been talks in Austria about promulgation of a separate law implementing the DCD[47] and Austrian legal experts have declared that the main goal in transposing DCD and SGD should be to avoid fragmentation[48] and therefore, a separate act is not desirable over the approach of simply amending the KSchG and the ABGB. [49] However, despite the warnings the Austrian legislator has chosen separate act in transposing the DCD. The Polish legal experts have likewise advised against fragmentation of supply of digital content and services form the general regime of civil code and the de-codification.[50]

Contract type

As was stated above, the DCD purposefully does not classify the contract for the supply of digital content as a specific contract type. Therefore, this theoretical task was left up to national legislators.

The Czech legislator has decided, that contracts for the supply of digital content shall be classified as a contract sui generis, however, it is systematically closest to a license contract. The Czech transposition also states, that, in the cases where it is necessary with regards to intellectual

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[43] Memorandum to Draft of the act no. 89/2012 coll. Civil code, in Collection of Laws of the Czech Republic. p. 111

[44] Gállego, Gonzalo and Robles, Juan Ramón. *Directive for the supply of digital content and digital services to consumers: Spain update.* engage.hoganlovells.com. 12 May 2021.

[45] Namysłowska, Monika. Jabłonowska, Agnieszka. Wiaderek, Filip. *Implementation of The Digital Content Directive in Poland: A Fast Ride on a Tandem Bike Against the Traffic*, 12 (2021) JIPITEC 241.para 10.

[46] Verbrauchergewährleistungsgesetz – VGG; Gewährleistungsrichtlinien Umsetzungsgesetz – GRUG, Änderung: Kurzinformation. 107/ME XXVII. GP – Ministerialentwurf – Kurzinformation. 6.4.2021. p. 2

[47] Kresbach, Georg and Zhang, Elizabeth. *Harmonising Consumer Protection in the digital context: the EU Digital Content Directive in Austria*. Wolff Theiss, March 2021. p.1.

[48] Zöchling-Jud, Brigitta. ibid.

[49] Kurzinformation ibid. p. 1

[50] Namysłowska, Monika. Jabłonowska, Agnieszka. Wiaderek, Filip. ibid. para. 16

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property, the provisions of license shall apply on the supply of digital content.[51] This should be considered optimal with respect to the technological and legal specifics of digital content and digital services, however, there is again more to it. Not every supplied content needs to be protected by copyright[52] and even if, that copyright might already be dealt with without consumer involvement. Since the contract type is completely new, there is no pre-existing practice or judicial interpretation that would affect the interpretation and application of the new provisions.[53] Similar approach has been presented in Poland, where the legislator decided to introduce a definition of the contract for supply of digital content, while not classifying it as an older contract time, but *sui generis*. Not all legislators have however seemed to have provided a classification. The Austrian Consumer warranty act omits to answer the question of contract type of the contract for supply of digital content and digital service. It remains to be seen whether the practice will deem the contracts as *sui generis*, or they will be classified differently, if at all.

It would seem that the fears of legal experts regarding the absence of contract type might be founded, as the member states have already chosen different approaches to the issue. And while the full harmonization is in effect, the fact remains that the different interpretation of basic contractual rules might cause discrepancies that will be felt in potential cross-border trade.

Digital data as counter-performance

Legislators of member states have integrated the concept of access to personal data as a contractual counter-performance. However, most of them have simply copied the concept as is without further clarification.[54] In the Czech transposition the stipulations regarding supply of digital content shall be used in cases, where consumer allows access to personal data instead of monetary payment.[55] Worryingly, the systematical structure of the Czech transposition omits the statement that payment with personal data should be equal to payment with money, or it is at least not obvious from it. Contrast the Austrian approach, where the Austrian civil law differentiates between contracts for pecuniary interest and the so-called gratuitous contracts, in which one party fulfills their end of the contract without receiving anything in exchange.[56] One of the tables of content of Austrian transposition was to deal with contracts that, where the counter-performance of the consumer is made with personal data.[57] This has fortunately been reflected in the transposition, where counter-performance in personal data is equal with pecuniary interest.

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[51] Comparative table to Draft of the act that amends the act. no. 89/2012 coll. Civil code in Collection of Laws of the Czech Republic. p. 2

[52] Memorandum to Draft of the act that amends the act. no. 89/2012 coll. Civil code. ibid. p. 14

[53] On an amusing side note, the Czech legislator has cornered themselves in the terminology. Czech law contains an act. no. 12/2020 Coll. on the right to digital service, which is a public-law act regulating the administration and its' digitalization, which uses the term digital service for its' own purposes. To avoid confusion, the Czech legislator was forced to use a new term in the DCD transposition, loosely translated as "service of digital content". As the number might indicate, the act on the right to digital service was proposed, drafted, accepted and entered into force in winter of 20201 long after the DCD has entered into force.

[54] Compare Namysłowska, Monika. Jabłonowska, Agnieszka. Wiaderek, Filip. ibid. para. 12; Draft nr. 1170/19 of the act that amends the act. of the Czech Republic no. 89/2012 coll. Civil code. p. 24

[55] Comparative table to Draft of the act that amends the act. no. 89/2012 coll. Civil code, ibid. p. 24

[56] Kresbach, Georg and Zhang, Elizabeth. ibid. p. 2

[57] Kurzinformation ibid. p. 1

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The Spanish transposition is unique in the fact that it explicitly handles the practical problem when a consumer revokes their consent with processing of personal data, in accordance with GDPR. The Spanish transposition explicitly states, that the supplier is allowed to terminate the contract if such a thing happens.[58]

The transpositions generally do not handle the theoretical issue of breach of basic right for privacy through its' monetization. Although, considering the obligation of member states to fully harmonize their law with accordance to the DCD, that is an expected pragmatic omission.

Standard of quality

As for the standard of quality, the Czech transposition stipulates that the supplier takes responsibility for any faults that might have existed during the transfer to the user. It keeps the dichotomy of subjective requirements of the Article 7 of DCD and objective ones of Article 8. While this is certainly in accordance with the DCD, it means that a major issue the directive itself has will be kept. The Austrian transposition takes form of a separate law has allowed the legislator to maintain the DCDs' terminology. Specifically, the concept of contract conformity was retained in the Austrian transposition, while it specifies, that it means the content is not faulty (art. 4 od the draft).59 Contrast the Polish legislature, which has, with regards to standard of quality of supplied content, 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.[60]

The analysis above indicates that the task of solving the myriad of issues of the new law was mostly not done by the national legislators, and therefore, left to others. Judiciary might eventually smooth-out and truly harmonize the rules trough euroconform interpretation. The legal practice itself will also show, which of the highlighted issued have real merit, and which are purely theoretical.

Right to end a contract

The issue of contract termination as the de facto only viable option of the consumer in case of small value content was not addressed by the examined transpositions, which is again sadly to be expected if the legislators are required to aim for full harmonization.

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[58] Gállego, Gonzalo and Robles, Juan Ramón. *Directive for the supply of digital content and digital services to consumers: Spain update.* engage.hoganlovells.com. 12 May 2021.

[59] Aydin, Serap and Tichy Wolfgang. *New rules for Digital Content & Sale of Goods.* mondaq.com. Schönherr Rechtsanwälte GmbH. 23 September 2019.

[60] Namysłowska, Monika. Jabłonowska, Agnieszka. Wiaderek, Filip. ibid. para. 24

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CONCLUSION

1. DCD itself is not an act that will solve all the issues on the market with digital content. In fact, the directive itself could be described as just a stepping stone on a long road to Digital single market; a framework that jump-starts the actual special regulation of supply of digital content. In that regard, the main benefit of the DCD for all legal systems is the introduction of technological aspects and terminology of supply of digital content to the general contract law. The consumer rights that it actually grants are either mostly already present in the national laws or are too broad and contract-bound to be of any use to the consumer themselves. It also offers very little in the way of enforcement of those rights as there are many gaps in the regulation when it's faced with realities of the market. The national transpositions have generally not helped to overcome these issues.
2. The transpositions in are systematically different, yet they often yield the same results. The quality of the transpositions themselves is debatable, some restrict themselves to simply incorporating the DCDs' provisions into the national legal system as they are, some, such as the Spanish and Czech one, are much more ambitious. Sometimes, the legislator goes above and beyond the bare minimum of work needed, such as in the case of Spanish approach to revocation of consent in access to consumers' personal data. Mostly however the specific issues were only addressed in scope, that the DCD itself uses, and not much more, which only delays the issues, not solves them. It seems that "the can was kicked down the road" and the practice will have to solve its' own problems. The issue of "lazy legislator" is nothing new in law, and it could and should be considered the sickness of transposition of European legislation.[61] The EU directives are not directly applicable acts of law that can stand on their own and should not be treated as such.
3. With respect to that, one might try to piece together a perfect transposition from all the approaches that have been taken. There are certainly advantages in some: the Austrian approach is technically a perfect transposition, as it incorporates every rule and concept of the DCD, both in text and in spirit. However, as was pointed out by many, this eventually leads to fragmentation and many practical problems may be caused down the road by introducing separate act and a change in terminology – same in Poland. The unitary approach, as chosen by Czechia and Spain is legislatively more ambitious because it has to integrate the directives' provisions into the existing framework. This generally results in a more coherent system; however, the legislator is not a perfect entity and the more ambitious the concept, the more errors might be made.
4. Regarding the actual power of the consumer, the DCD or its' transpositions have changed little. The change in burden of proof has the potential to empower the consumer considerably in the proceedings themselves. The new fact that consumer protection organizations will be able to take a legal action on behalf of the

[61] König, Thomas. and Luetgert, Brooke. Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives. Cambridge University Press. 2008. p. 29.

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consumers might lead to some cases of broad consumer rights' protection. However, neither of those changes will probably motivate the consumers to take a legal action themselves, or even contact the aforementioned organizations. This might be alleviated by the Collective redress directive, effective from November 2020, although doubts over the effectiveness of the new system have already been cast.[62]

5. There is a worrying trend in regard to regulation of new technological phenomena, especially those that regulate the digital market. Since the digital market has existed long before any legal system ever noticed it, it has already developed its own practices. For example, the practice of nominally free content where consumer provides their personal data to the provider. Of course, these practices are almost universally shaped by the providers, who are the stronger party in contractual relationship on the digital market. As such, many of them are simply not fair, equitable, or can be considered downright illegal.[63] The law however, seems not to aim to stop these undesirable practices that hurt the people, but seems content with actually incorporating them into the legal system proper. As in: this is already the way things are done, we might as well put it into legal framework. This means that the law is shaped not by the will of legislators, will of the people or even public interest, but by practices of corporations. This of course, is not the purpose of the law, much less the purpose of consumer protection law. The new legislation is but one of the many steppes that need to be taken and the road to an adequate consumer protection in the digital world remains long and arduous.

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SANTRAUKA

SKAITMENINIO TURINIO TIEKIMAS IR PASLAUGOS – NAUJOS TEISINĖS SĄVOKOS SUSIETOS SU SENOMIS PRAKTINĖMIS PROBLEMOMIS

Pasaulyje vyksta skaitmenizacija. Darbas, pramogos, mokslas, net būtiniausių prekių pirkimas vis dažniau vykdomas internetu. Kai kurie netgi kalba apie skaitmeninę revoliuciją. Nuo 2019 m. birželio 11 d. galioja Direktyva (ES) 2019/770 dėl tam tikrų aspektų, susijusių su skaitmeninio turinio ir skaitmeninių paslaugų teikimo sutarčių (toliau – DCD) ir Direktyva (ES) 2019/771 dėl tam tikrų aspektų, susijusių su prekių pirkimo-pardavimo sutartimis (toliau – SGD), kuri įsigalios nuo 2022 m. sausio 1 d. Šios direktyvos yra pagrindinė ES skaitmeninės bendrosios rinkos politikos teisėkūros sudedamoji dalis ir gali būti vertinama kaip ilgus metus trukusios

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teisėkūros ir politinės iniciatyvos kulminacija, kuria siekiama reguliuoti nuolat besivystančią skaitmeninę rinką.

Tiek ES komitetai, tiek nepriklausomi teisės ekspertai jau daug rašė apie DCD, su ja susijusias problemas ir galimą DCD poveikį nacionalinėms teisinėms sistemoms. Šiuo straipsniu siekiama pristatyti visą skaitmeninės rinkos reguliavimo iniciatyvą, susijusią su vartotojų teisėmis, apibūdinti pagrindines DCD problemas, kurios buvo nustatytos nuo pat jos sukūrimo, ir pateikti rinkinį, kaip kai kurie nacionaliniai įstatymų leidėjai, o būtent Austrijos, Čekijos, Lenkijos ir Ispanijos įstatymų leidybos atstovai, sprendė minėtus klausimus, atlikdami sudėtingą direktyvų perkėlimo užduotį.

Straipsnyje daroma išvada, kad DCD yra tik viena iš daugelio aktų, ilgoje ir sunkioje teisėkūros užduotyje, siekiant reguliuoti skaitmeninę rinką skaitmeninės bendrosios rinkos politikoje ir „Naujame vartotojų susitarime“. Pati direktyva nėra be trūkumų: jos nuostatos yra dažnai per plačios ir bendros, kad sukurtų faktinį pagerėjimą vartotojams. Tai ypač pasakyta apie skaitmeninio turinio ir skaitmeninių paslaugų teikimo kokybės standartą. Į DCD taip pat neįtraukta tai, kad yra svarbu klasifikuoti skaitmeninio turinio teikimo kontaktą kaip konkretų sutarties tipą, be to, DCD nutyli, ar vartotojų priešingi veiksmai suteikiant prieigą prie savo asmens duomenų yra lygiaverčiai piniginiams veiksmams. Išnagrinėjus nacionalinius teisės aktus, gauta išvada, kad DCD problemos apskritai nebuvo sprendžiamos ar ištaisytos. Tačiau kai kuriais konkrečiais atvejais nacionaliniai įstatymų leidėjai iš tikrųjų pagerino padėtį. Nauji teisės aktai neišspręs skaitmeninės rinkos problemos įpareigojant skaitmeninę rinką privalomai reguliuoti teisingomis teisinėmis taisyklėmis. Tačiau tai yra atspirties taškas, apimantis keletą naujų teisinių sąvokų, būtinų visapusiškam ir tinkamam skaitmeninės rinkos reguliavimui.

REIKŠMINIAI ŽODŽIAI

Skaitmeninis turinys, skaitmeninės paslaugos, skaitmeninė bendroji rinka, naujas vartotojų pasiūlymas, kokybės standartas, asmens duomenys, DCD.