

THE IMPORTANCE OF THE DIRECTIVE 2011/83/EU FOR THE TRANSPOSITION OF THE DIRECTIVE 1999/44/EC INTO THE POLISH LAW IN THE FIELD OF THE SELLER'S LIABILITY FOR PHYSICAL DEFECTS OF GOODS

Michał Hejbudzuki

Faculty of Law and Administration, University of
Warmia and Mazury in Olsztyn, Poland

michalhejbudzuki@wp.pl

HEJBUDZKI, Michał. The Importance of the Directive 2011/83/EU for the Transposition of the Directive 1999/44/EC into the Polish Law in the Field of the Seller's Liability for Physical Defects of Goods. *International and Comparative Law Review*, 2018, vol. 18, no. 1, pp. 217–230. DOI: 10.2478/iclr-2018-0033.

Summary: The Author examines the importance of the Directive 2011/83/EU for the transposition of the Directive 1999/44/EC into Polish law in the field of seller's liability for physical defects in the item sold. These considerations were prompted by the Act on Consumer Rights of 30 May 2014 including the amended provisions on liability under warranty which entered into force in Poland on 25 December 2014. The aim of the considerations included in this article is to identify new limits of liability for the quality of goods, which were determined by revised provisions of the Civil Code resulting from the aforementioned Act and to show the significance of the implementation of the Directive 2011/83/EU into the Polish law for this process. The matter of the analysis was subjected to both the subjective limitations, i.e. it was reduced only to seller-consumer legal relationships, and to the objective limitations, i.e. related only to liability under warranty for physical defects resulting from sales contracts.

Keywords: warranty for physical defects in the item sold, seller, consumer, sales contract

1 Introduction

The Act on Consumer Rights of 30 May 2014 (hereinafter: the Act on Consumer Rights¹) entered into force on 25 December 2014; the amended liability under warranty provisions are not included until the penultimate Chapter 6: The Amending Provisions. Thus, on the basis of the systemic interpretation, *prima facie* it can be concluded that a regulation of the issue in question remained outside the main scope of attention from the legislature in the course of the legislative work on this act. However, the opposite conclusion can be drawn from the

1 Journal of Laws of 2014, No. 87.

meaning and significance of such changes in the civil code aiming to remodel liability under warranty in a fairly comprehensive way. It means that another and not less important aim of implementing the regulations contained in the Act on Consumer Rights into legal transactions was to organize and integrate the provisions relating to liability for the quality of goods, in particular, the laws transposing the 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 guarantees² (hereinafter: the Directive 1999/44/EC), initially implemented to the Polish law by the Act of 27 July 2002 on specific conditions of consumer sales (hereinafter: the Act of 2002)³.

This conclusion is also confirmed by a historical interpretation⁴ showing that the initial transposition of the Directive 1999/44/EC outside the Civil Code⁵ (hereinafter: the CC), which remains a natural place to put provisions relating to liability for the quality of goods, was determined by two reasons.

First, the transposition of the Directive was made in the period just before and after the accession to the EU, which resulted in the need for smooth work, and putting the provisions outside the CC simplified the transposition process.

Second, the issues governed by the Directive 1999/44/WE were extremely complicated, particularly, in confrontation with national legislation. This situation was a source of high uncertainty, especially in relation to the discretion of the national legislature to regulate this area of social life in a manner that would allow a full implementation of this Directive within the traditional structure of national law. Thus, the choice of the non-code transposition had, above all, a practical nature and was reasonable, taking into consideration the time when it was made.

The implementation of the 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 (hereinafter: the Directive 2011/83/EU)⁶ provided an opportunity to new legislative work aimed not only at providing the CC with the provisions relating to the seller's liability for the quality of goods to the consumer, but first of all, encouraged the Polish legislature to create a uniform legal regime for the liability and for improving the legal situation of consumers.

2 Journal of Laws of 1999 WE L 171/12.

3 Journal of Laws of 2002, No. 141, item 1176 as amended, repealed by Art. 52(2) of Act on Consumer Rights on 25 December 2014.

4 See Sejm of the Republic of Poland 7th term, Parliamentary Document No. 2076.

5 Consolidated text in Journal of Laws of 2014, item 121 as amended.

6 Journal of Laws of 2011 L 304/64.

The aim of the considerations included in this chapter is to identify new frontiers of liability for the quality of goods, which had been determined by the CC amendment in the provisions of the Act on Consumer Rights, and to show how significant for this process the implementation of the Directive 2011/83/EU into the Polish law was. The volume of the issues discussed and the need to maintain the brevity of the argument resulted in subjecting the matter of the analysis both to the subjective limitations, i.e. it was reduced only to seller-consumer legal relationships, and to the objective limitations, i.e. related only to liability for physical defects in sales contracts.

2 The concept of the seller, consumer, and sales contract

In accordance with Art. 2(2) of the Directive 2011/83/EU, the term trader means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive. On the other hand, Art. 1(2)(c) of the Directive 1999/44/EC defines seller as any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession. The above definitions, when compared to the concept of the seller contained in the previously applicable provisions of the Polish law, lead to the conclusion that the implementation of both directives, in this regard, was not necessary. The Polish legal system defines the concept of the seller in several legal acts⁷. In view of the fact that seller's liability under warranty is in the area of private law, or for the systemic reasons, the most appropriate seems to be the definition contained in Art. 43¹ of the CC, in the light of which a seller is a natural person, a legal person, or an organizational unit not being a legal person with statutory legal capacity, acting in his name for purposes relating to his business or profession. At the same time, it is worth pointing out that the concept of business, which is not determined in the Civil Code, is defined in the judicature by indicating its characteristic features, such as professional nature, repeatability of actions, participation in business transactions, subordination to the rules of the market economy, among others in order to make a profit. Likewise, activities not intended to make a profit, but solely to obtain income for covering the cost of business, do not deprive it of the nature of business⁸. Therefore, the wording of

7 For example, Art. 431 of the CC, Art 4 of the Act of 2 July 2004 on Freedom of Business activity (consolidated text in Journal of Laws of 2013, item 672 as amended), Art. 36 of the Act of 20 August 1997 on National Court Register (consolidated text in Journal of Laws of 2013, item 1203 as amended), Art. 2 of the Act on 16 April 1993 (consolidated text in Journal of Laws of 2003, No. 153, item 1503 as amended), Art. 4(1) of the Act of 16 February 2007 (Journal of Laws of 2007, No. 50, item 331 as amended).

8 See resolution of the Supreme Court of 18 June 1991, ref. no. III CZP 40/91, published in OSNC of 1992, No. 2, item 17, and resolution of 6 December 1991, ref. no. III CZP 117/91, published in OSNC of 1992, No. 5, item 65.

the mentioned definition leads to the conclusion that indeed the current applicable Polish law are sufficient to meet the goals set by the both directives.

Referring to the concept of consumer⁹, it is worth reminding that in the Polish law, Art. 384(3) of the CC defined consumer as a natural person contracting for purposes that are not directly related to business activity. As a result of the amendment¹⁰ involving its replacement with Art. 22¹ of the CC, a definition of consumer, in the subjective aspect, was restricted to only natural persons. In accordance with Art. 2(1) of the Directive 2011/83/EU, the term consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. By meeting this requirement, the Polish legislature introduced in Art. 22¹ of the CC a new definition of the concept of consumer, according to which a consumer is any natural person making with a seller a legal action not directly related to business or professional activity¹¹. The amended definition prompts two reflections.

First, it is obvious that a seller, particularly as a natural person, can take both business-related activities and activities outside of it. With respect to the first type of the activities mentioned, no relation to business has to be noticed. Activities undertaken by a business entity fall within the scope of its business if they are functionally connected to it, in particular, they are undertaken in order to perform this entity's business-related tasks. In the light of the Directive 2011/83/EU, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not be predominant in the overall context of the contract, that person should also be considered as a consumer¹². The Polish legislature is convinced that modification of Art. 22¹ of the CC allows to apply the rules on consumer protection also to natural persons who, while undertaking activities related to their business or profession, are also acting for an unrelated purpose when the latter purpose prevails. Thus, the implemented regulation leads to the extension of protection provided by the provisions on consumer contracts, as up till now the given person has been deprived of such protection due to a connection between a legal transaction and the person's business or professional activity¹³. According to the judicature, for an assessment of the relationship between a

9 More on the concept of consumer see Bednarek, Małgorzata. [w:] *System Prawa Prywatnego*, t. 5 – *Prawo zobowiązań – część ogólna*, red. E. Łętowska (in: *Private law regime. Volume V – Contract law – General Part*, ed. E. Łętowska), Warszawa 2013, pp. 734–738; Kukuryk, Piotr. *Definicje konsumenta w kodeksie cywilnym (obecnym i przyszłym) w kontekście najnowszych unijnych dyrektyw konsumenckich* (Definitions of a consumer in the Civil Code (current and future) in the context of the latest EU consumer directives), *Przegląd Prawa Handlowego* 2014, no. 5, p. 18 and the literature cited there.

10 See Art. 1(1) and (30c) of Act of 14 February 2003 on amending the Act – Civil Code and some other acts, *Journal of Laws* of 2003, No. 49, item 408.

11 See Art. 221 of the CC.

12 See recital 17 of the Directive 2011/83/EU.

13 See Sejm of the Republic of Poland 7th term, Parliamentary Document No. 2076.

legal transaction and business activities as direct or indirect, the reference point is the specific circumstances of the case at the time of the activities. The relevance of the assessment results from the criteria for the type of a legal transaction and its object, a typical character of the action in relation to the business activity, the use of the purchased goods for a purpose directly or indirectly related to the business activity¹⁴. Summing up this part of the considerations, it should be noted that with relation to the activities, directly or indirectly connected with the business, as well as with reference to the activities unrelated to the business, a natural person who is an entrepreneur has the status of a consumer pursuant to Art. 22¹ of the CC.

Second, the literal interpretation of the current definition of consumer clearly and definitely states that a party to a legal transaction with a consumer should be an entrepreneur. This question, when analysed against the previous definition of consumer, led to a polarisation of views. It means that some representatives of the doctrine under systemic and purposive interpretation supported the view that the recognition of a natural person as a consumer was conditioned by the fact that the other party of the legal transaction was an entrepreneur¹⁵. Supporters of the opposite view¹⁶ perceived the fact that Art. 22¹ of the CC did not indicate the person with or to whom a legal transaction would be concluded. Thus, based on the semantic interpretation, it should have been concluded that the fact whether the contractor had the status of an entrepreneur was irrelevant in order to recognise a natural person as a consumer. The same conclusions were reached with the use of the historical method and the method of comparative law through reference to previously existing provisions of Art. 384(3) of the CC, which contained a definition of consumer. It indicated that a consumer was understood as a person who concluded a contract with a seller for a purpose unrelated directly to business activity. The provisions of Art. 384(3) of the CC were replaced by the provisions of Art 22¹ of the CC, which did not provide the definition of consumer with the requirement of concluding a contract with an entrepreneur; that replacement proved that the purpose of rational legislature was to remove the requirement that the other party of the contract was an entrepreneur from the conditions governing the recognition of an entity as a consumer. As a result, it is justified to conclude that, in the aspect presented, the subjective scope of the current definition of consumer has been limited.

14 See judgement of the Supreme Court of 3 October 2014, ref. No. V CSK 630/13, published in OSNC of 2015, No. 7–8, item 96.

15 See Frąckowiak, Józef. *Instytucje prawa handlowego w kodeksie cywilnym* (Entities governed by commercial law in the Civil Code), Rejent 2003, No. 6, p.31.

16 See Pajor, Tomasz. *komentarz do art. 221 k.c. [w:] Kodeks cywilny. Część ogólna. Komentarz, red. M. Pyziak – Szafnicka* (comment on Art. 221, in *The Civil Code. General Issues. Commentary*, ed. M. Pyziak-Szafnicka), Lex 2009; Kruszevska-Sobczyk, Katarzyna, Sobczyk, Marek. *Niedozwolone klauzule w umowach zawieranych przez konsumenta* (Abusive clauses in contracts concluded by the consumer), *Radca Prawny* 2004, No. 4, p. 112.

On the other hand, pursuant to Art. 2(5) of the Directive 2011/83/EU, a sales contract means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services. The existing Polish regulations have already met the requirements of the proposed definition, by which the inactivity of the Polish legislature is justified.

3 Limitations of the seller's liability for physical defects to the buyer

The amended provisions of the CC maintain the seller's liability to the buyer if the goods have a physical defect. The amendment removed the artificial and unfamiliar for the existing tradition of the Polish law dichotomous division into the seller's liability for defects of goods and – with respect to legal transactions with consumers – the seller's liability for non-conformity of the consumer goods with the contract. The origin of a significant part of the rules implemented into the CC and relating to consumer can be observed in the provisions of the Act of 2002 and the Directive 1999/44/EC¹⁷. However, the amendment introduced by the Act on Consumer Rights in reference to the limitations of the seller's liability for physical defects to the buyer requires a deeper analysis.

In the light of the new regulations, a physical defect means non-conformity of the consumer goods of the goods with the contract. In particular, the item sold is inconsistent with the contract if: 1/ it lacks the properties it should have due to the contract purpose designed or resulting from circumstances or destination; 2/ it lacks the properties the existence of which was confirmed by the seller, including a presentation of a sample or design to the buyer; 3/ it is not suitable for the purpose of which the buyer was informed by the seller at the conclusion of the contract, and the seller did not raise any objections to this purpose; 4/ it was released to the buyer in an incomplete state¹⁸. Compared to the previous wording of Art. 556(1) of the CC, the new definition of physical defect is characterised by greater casuistry, which was inspired by Art. 4(2) and (3) of the Act of 2002, and Art. 2(2) of the Directive 1999/44/EC.

The seller is liable for any physical defects that existed at the time the risk was passed to the buyer or resulted from a different cause that had already been present in the item sold¹⁹. Pursuant to the provisions in force before the amendment, the seller is not liable for any physical defects which appeared after the risk had been passed to the buyer, unless the defects resulted from a different

17 For example, Art. 5561 § 2 corresponding to Art. 4(4) of Act of 2002; Art. 5561 § 3 of the CC corresponding to Art. 6 of Act of 2002; Art. 5572 § 3 originated in Art. 5 of Act of 2002; Art. 558 § 1 sentence 2 of the CC corresponding to Art. 11(1) of Act of 2002.

18 Legal defects defined by article 5563 of the CC were excluded from considerations in this chapter.

19 See Art. 559 of the CC.

cause that had already been present in the item sold. Against the referred legal status, discrepancies appeared both in the judiciary²⁰ and in the legal doctrine²¹ in relation to the apportionment of the burden of proof. It appears that the systemic interpretation should be used in the search for a solution. For it should be noted that a legal instrument that strengthens consumer rights is implemented in Art. 556² of the CC the presumption of the existence of a physical defect at the time the risk has been passed to the buyer if it was found within one year prior to the release of the goods²². As a result, it appears reasonable to claim that the presumption of the existence of a defect refers mainly to the situation in which it was found within one year from the date of release of goods to the consumer. In legal transactions with consumers, it means that shifting the burden of proof on the seller, who, wishing to release from liability for physical defects, will be obliged to prove that the defects did not exist at the time the risk was passed to the buyer nor they resulted from a different cause that had already been present in the item sold. After one year from the date of release of goods, the consumer will basically have the burden of proof²³. However, the opinion expressed in the regulations should be taken into account, according to which the question of the burden of proof in relation to the basis for the seller's exemption from liability under warranty requires consideration of circumstances of a particular case, and thus it is not suitable for creating general rules²⁴. The up-to-date character of the presented view appears to be maintained according to the new regulation as well.

- 20 See justification of the Supreme Court of 30 December 1998, ref. No. III CZP 48/88, published in OSNC 1998, No. 3, item 36, and judgement of the Supreme Court of 26 October 2000, ref. No. II CKN 305/00, published in Lex, No. 52594.
- 21 See Żuławska, Czesława. [w:] Komentarz do kodeksu cywilnego. Zobowiązania, t. 2, red. G. Bieniek (in: Commentary on the Civil Code. Liabilities, Volume II ed. G. Bieniek), Warszawa 2006, p.58; Jędrej, Kamil. [w:] Kodeks cywilny. Komentarz, red. J. Ciszewski (in: The Civil Code. Commentary, ed. J. Ciszewski), Warszawa 2014, p. 933; Uliasz, Roman. Komentarz do art. 559 k.c. (Commentary on Art. 559 of the Civil Code), Lex 2013; Gawlik, Zdzisław. Komentarz do art. 559 k.c., [w:] Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część szczególna, wyd. II, red. A. Kidyba (Commentary on Art. 559 of the Civil Code, in The Civil Code. Commentary. Volume III. Liabilities. Special Issues, 2nd ed., ed. Kidyba A.), Lex 2014; Sikorska, Aleksandra. Ciężar dowodu w przypadku odstąpienia od umowy sprzedaży przez kupującego z powodu wad rzeczy lub niezgodności towaru z umową (The burden of proof in the case of withdrawal from the sales contract by the buyer because of defects or non-conformity), Radca Prawny 2005, No. 1, pp. 60–64.
- 22 The amendment in this regard consists in particular of extending the former, resulting from Art. 4(1) of the Act of 2002, six-month period to one year. The new regulation is more favourable to consumers than the minimum resulting from Art. 5(3) of the Directive 1999/44/EC, which foresees a six-month period. However, according to Art. 8(2) of the Directive 1999/44/EC, Member States may adopt more stringent provisions for the protection of consumers than resulting from this directive.
- 23 See Koszowski, Maciej. Ciężar dowodu w przypadku niezgodności towaru konsumpcyjnego z umową (The burden of proof in the case of non-conformity), Palestra 2013, No. 5–6, pp. 102, 104.
- 24 Judgement of the Supreme Court of 26 October 2000, ref. No. II CKN 305/00, published in Lex, No. 52594.

Significant changes have been implemented in relation to the seller's exemption from liability under warranty. Art. 557(1) of the CC maintains the principle according to which the seller is released from liability under warranty if the buyer knew of the defect at the moment of conclusion of the contract. In the context of the issues analysed herein, there is no doubt that this standard will be applied in situations where a sales contract is concluded between the seller and the consumer, and the object of the trade is a thing specified by its identity. It results from the statement that the consumer is not able to know of defects of things to come or specified by type at the moment of conclusion of the contract, but only at the release. However, the new provision of Art. 557(2) of the CC precludes the seller's exemption from liability under warranty to the buyer when the object of trade is the goods specified only by type or the future goods also in the case when the buyer who is a consumer knows of the defect at the moment of release. The interpretation of this provision is doubtful. The doctrine indicates the interpretation assuming that the customer's knowledge of the defect of the thing specified by type or a future thing will never release the seller from liability²⁵. The opinion was also expressed that in this situation, there will be a return to the rule contained in Art. 557(1) of the CC, which means that an entrepreneur as a seller will be released from liability under warranty if the buyer knew of the defect at the moment of conclusion of the contract²⁶. These comments can lead to the conclusion that in the situations where the object of the trade are the things specified only by type or the future things, it will be extremely difficult for a seller to release from liability due to the fact that at the moment of conclusion of the contract, the customer, incapable of verifying such things, will not be able to obtain the knowledge of their possible defects.

When interpreting the discussed regulation, it should be considered that it derives from Art. 7 of the Act. of 2002, which was significantly amended in 2009²⁷ in order to comply with the European law. The present wording of Art. 557(2) of the CC is consistent with the literal wording of Art. 2(3) of the Direc-

25 For more see Krauss, Jacek. Nowa regulacja rękojmi przy sprzedaży w stosunkach pomiędzy przedsiębiorcami – zmiany kodeksu cywilnego wprowadzone ustawą o prawach konsumenta (New warranty regulations applied to sales between businesses: changes to the Civil Code introduced by the Act on consumer rights), *Przegląd Prawa Handlowego* 2015, No. 3, p. 7.

26 For more see Lic, Jan. Odpowiedzialność dewelopera za wady fizyczne z tytułu rękojmi (The liability of the developer under the statutory warranty for physical defects), *Rejent* 2015, No. 10, p. 65.

27 Art. 7 was amended by Art. 1 of Act of 21 May 2009 (*Journal of Laws* of 2009, No. 115, item 960) amending the Act of 2002 effective from 21 August 2009. For more see Olczyk, Madalena. Szczególne warunki sprzedaży konsumenckiej oraz zmiana Kodeksu cywilnego. Komentarz do zmian wprowadzonych ustawą z dnia 21 maja 2009 r. o zmianie ustawy o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego (Specific conditions of consumer sale and changes to the Civil Code. Commentary on changes introduced by Act of 21 May 2009 on specific conditions of consumer sale and changes to the Civil Code), *Lex* 2010.

tive 1999/44/EC, in which the moment of conclusion of the contract is assumed to be authoritative for releasing the seller from liability, and not the time of release of the goods. It should be noted though that, in the Polish law, a contract of sales of future things or the things to come is a real legal transaction [Art. 155(2) of the CC], therefore, it takes effect only at the moment of the release of the thing to the consumer. It means that the seller is not entitled to claim against the consumer, who, aware of the defect of the thing at the moment of the release, refused to receive it. However, *de lege lata*, the seller is obliged to accept liability under warranty even when the consumer is aware of the defect of the goods at the moment of the release. Due to Art. 558(1) of the CC, exclusion or limitation of the seller's liability under warranty to the consumer is ineffective. Therefore, the unilateral waiver of consumer's rights should be considered ineffective in such cases. It results from Art. 58(1) of the CC in conjunction with Art. 7 of the Act on Consumer Rights, pursuant to which the consumer cannot waive his rights under the act. The systemic interpretation leads to the conclusion that Art. 7 of the Act on Consumer Rights, as in Chapter 1: The General Provisions, will be applied to all standards contained in the act, thus, also to Chapter 6 and its Art. 44(16)(a), introducing new regulations to Art. 557(2) of the CC. Consequently, Art. 557(2) of the CC requires entrepreneurs to act in the public interest through striving to free the consumer market from defective goods, otherwise liable under warranty²⁸.

4 The impact of the implementation of the Directives 2011/83/EU and 1999/44/EC on the seller's obligations resulting from fundamental rights of consumers for physical defects of the thing sold

The frontiers of the seller's liability are also conditioned by a catalogue of duties and their duration towards the consumers, which result from specific rights granted to the consumers²⁹.

In the previous regulations, in the case of a purchase of defective goods, the catalogue of the buyer's rights was paradoxically more favourable in the situation where the purchase was made by an entity not being a consumer. It resulted from the fact that Art. 560(1) of the CC indicated the withdrawal from the contract or the price reduction demand as the fundamental rights of the buyer. Yet, according to Art 8(1) of the Act of 2002, if a consumer good was inconsistent with the contract, the buyer would be entitled to demand that it be made consistent with the contract by free repair or replacement with a new one. Only when a repair

28 Gawlik, Zdzisław. Komentarz do art. 557 k.c., [w:] *Kodeks cywilny. Komentarz*, Tom III. Zobowiązania – część szczególna, wyd. II, red. A. Kidyba (Commentary on Art. 557 of the Civil Code, in *The Civil Code. Commentary. Volume III. Liabilities. Specific Part*. 2nd edition ed. A. Kidyba), Lex 2014.

29 In particular, the following should be specified: Art. 560–5613 of the CC, Art. 563–564 of the CC, Art. 566–5681 of the CC, Art. 574 of the CC, Art. 576 of the CC which were concerned by the amendment.

or replacement were impossible or required excessive costs, or the seller failed to comply with the above request in due time, or if the repair or replacement caused considerable inconvenience to the buyer, they were entitled to withdraw from the contract, however, they were not entitled to withdraw from the contract if the incompatibility of the consumer goods with the contract was irrelevant. It should be mentioned that the cited regulation corresponds to the minimum requirements of Art. 3 of the Directive 1999/44/EC.

The Act on Consumer Rights, implementing the Directives 2011/83/EU and 1999/44/EC through an amendment of the provisions of the CC, equalled, or even improved in certain situations, the legal status of the consumer when compared to the buyer who is not a customer, and when compared to the regulations prior to the amendments. From all the consumer's rights, a special attention should be paid to the four with a fundamental nature, with regard to which, the others are complementary and subordinate.

Above all, under Art. 560 of the CC, if the thing sold has a defect, the buyer is entitled to claim a reduction of the price or withdraw from the contract, unless the seller immediately without significant inconvenience to the consumer exchanges the defective thing for a thing free of defects or removes the defect. This limitation is not applied if the thing has already been replaced or repaired by the seller, or the seller failed to comply with the obligation to replace the thing for a thing free of defects or remove the defect. If the buyer is a consumer, instead of suggested by the seller removal of the defect, they are entitled to replace the thing for a thing free of defects or, instead of replacement, demand removal of the defect, unless bringing the goods into conformity with the contract, as specified by the buyer, is impossible or would demand excessive costs when compared to the way suggested by the seller. The evaluation of the excessive cost includes the value of the thing free of defects, the kind and nature of the defect, and it also takes into consideration the inconveniences which might result from meeting the buyer's satisfaction in another way. The buyer is not entitled to withdraw from the contract if the defect is irrelevant.

Moreover, pursuant to Art. 561(1) of the CC, if the thing sold has a defect, the buyer is entitled to demand a replacement for a thing free of defects or a defect removal.

It is also worth noting that pursuant to the wording of Art. 561⁵ of the CC, if the buyer being a consumer has demanded a replacement of the thing or removal of the defect, or placed a demand to reduce the price, determining the amount by which the price should be reduced, and the seller failed to respond to this demand within 14 days, the demand is considered to be justified. This regulation, in general, was derived from Art. 8(3) of the Act of 2002. However, the mentioned original referred only to the consumer rights to demand a repair or

replacement to a new consumer good, whereas Art. 561⁵ of the CC applies to all four of the above mentioned rights.

Favourable, from the consumers' point of view, is an amendment eliminating the limitation period for notifying the seller of a defect of the thing. According to Art. 9(1) of the Act of 2002, the buyer lost the rights under Art. 8 of this Act if he failed to notify the seller of a non-compliance of the product with the contract within two months of its discovery. In the current legal status, Art. 563 of the CC, which regulates this issue, applies only to relations between entrepreneurs. It means that based on Art. 8(2) of the Directive 1999/44/EC, as a result of the amendments, the Polish legislator waived the rights under Art. 5(2) of this directive, which foresees that a Member State may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.

The rules related to the terms to claim rights under warranty (thereby, the duration of the seller's liability thereunder) were based on the model for the protection of consumer rights foreseen in Art. 10 of the Act of 2002. Pursuant to Art. 568 and Art. 568¹ of the CC, the seller is liable under warranty if the physical defect is detected within two years, and for defects in real property, within five years from the day on which the thing is handed over to the buyer. If the buyer is a consumer, and the object of the trade is a used movable property, the seller's liability may be limited, not less than a year from the date the thing is released to the buyer. The claim for removal of a defect or replacement of the thing for a thing free of defects expires after one year from the day on which the defect is found. If the buyer is a consumer, the limitation period expires not earlier than after two years, and for defects in real property, within five years from the day on which the thing is handed over to the buyer. In the terms indicated above, the buyer can submit a statement of withdrawal from the contract or the price reduction for defects in the goods. If the buyer demanded a replacement of the thing for a thing free of defects or removal of a defect, the time limit for making a statement of withdrawal from the contract or the price reduction starts from ineffective expiry of the term for replacement of the thing or removal of the defect. In an event of proceedings before the courts the arbitration court in relation to one of the rights under warranty, the term for the execution of other buyer's rights in this respect is suspended until the proceedings are finished. This applies accordingly to mediation proceedings, and the term for the execution of other buyer's rights under warranty starts from the day of the court's refusal to confirm the settlement made before the mediator or an unsuccessful termination of the mediation. The expiry of time to notice a defect does not exclude the execution of the rights under warranty if the seller has deceitfully concealed the defect. If the expiry date of the thing determined by the seller or producer has passed after two years from the day on which the thing is handed over to the buyer, the seller

is liable under warranty if the physical defect is detected within the expiry date, and the expiry of time to notice a defect does not exclude the execution of the rights under warranty if the seller has deceitfully concealed the defect.

In the context of the regulations mentioned above, it should be emphasized that in the light of the new provisions of Art. 568(1) of the CC, the seller is liable under warranty if defects in real property are found within five years from the day on which the thing is handed over to the buyer. Thus, the Act on Consumer Rights not only extended the period of liability under warranty, but also related the longer period, which previously was three years and was reserved for defects in a building, to defects in real property, which means a clear departure from the previous terminology that could encourage the use of interpretation of public law, in addition, it also relates to commercial and residential premises. Thus, the direction of the legislative changes indicates that the will of the legislator was to protect the buyer of a building understood in a broader sense than foreseen by the Building Law. The result of the amendments is already noticed in the judicature where, according to the Supreme Court, the owner of an independent residential property within the meaning of Art. 2(2) of the Act of 24 June 1994 on premises ownership³⁰ has the rights under warranty for physical defects in the building in which the property is situated, in particular, when the defects concern this property (Art. 568(1) of the CC), which previously was questionable³¹. The presented interpretation will be especially significant for consumers being buyers of flats from developers.

5 Conclusions

In the fundamental part, the amendment of regulations of the CC made by the Act on Consumer Rights is connected with modification of sales law principles, including liability for the quality of goods. As a result, in addition to implementation of the Directive 2011/83/EU into the Polish law, the Act on Consumer Rights made a repeated transposition of the Directive 1999/44/EC. The Directive 2011/83/EU introduced amendments in the Directive 1999/44/EC, although to a very limited extent³². This is why, when evaluating the contribution of the Directive 2011/83/EU to framing the present Civil Code principles of liability under warranty, it has to be admitted that its nature is mainly indirect. The impact of this directive on the issues under discussion results from the fact that during the work on the transposition of the Directive 1999/44/EC into the Act of 2002, it was assumed that the nature of this solution was temporary and ultimately the Directive 1999/44/EC should be transposed into the CC. The transposition of the Directive 1999/44/EC outside the framework of the CC, in isolation from

30 Consolidated text in Journal of Laws of 2000, No. 80, item 903 as amended.

31 Judgement of the Supreme Court of 8 October 2014, II CSK 505/13, published in OSNC 2015, No. 9, item 107.

32 See recital 62 and 63, and Art. 33 of the Directive 2011/83/EU.

the taxonomy and structure of the Polish law, created problems in practice and justified criticism in the doctrine, relating in particular to weakening consumer protection and creating inconsistencies and gaps in the system. Work on the transposition of the Directive 1999/44/EC into the CC had been planned for a long time, however, it could not be taken due to the fact that the proposed directive on consumer rights originally contained provisions related to the Directive 1999/44/EC, which were eventually removed in the Council negotiations. The legal status, created as a result of implementation of the Directive 2011/83/EU, in relation to European regulations, became clear, which in turn resulted that it was possible and advisable to reform sales law (especially because the Directive 2011/83/EU also regulates certain issues related to consumer sales).

The effects of the amendment under discussion should be evaluated as positive. Provoked to some extent by the Directive 2011/83/EU, repeated implementation of the Directive 1999/44/EC resulted in unification of the provisions related to liability for the quality of goods. The new principles of the seller's liability for physical defects go far beyond the adoption of solutions in the Act of 2002, but in some respects, they introduce new solutions that reinforce the legal status of consumers. It should be hoped that the removal of as many as three former regimes in the Polish law, which related to liability in this regard, i.e. the provisions of the CC on liability for defects, the regulations contained in the Act of 2002 on non-conformity of the goods with the contract, and the regulation foreseen in the Vienna Convention on contracts for the international sale of goods³³, will contribute to meet the need for legal clarity, thus strengthening consumer protection, and improving business transactions between entrepreneurs. In relation to business transactions, the analysed changes will result in the alignment of the level of protection in the area where, before the implementation of the Act on Consumer Rights, the situation of the consumer was less favourable than the situation of purchasing entrepreneurs and entities not being consumers.

References:

- Bednarek, Małgorzata. [w:] System Prawa Prywatnego, t. 5 – Prawo zobowiązań – część ogólna, red. Ewa Łętowska (in: Private law regime. Volume V – Contract law – General Part, ed. Ewa Łętowska), Warszawa 2013, pp. 734–738.
- Frąckowiak, Józef. Instytucje prawa handlowego w kodeksie cywilnym (Entities governed by commercial law in the Civil Code), *Rejent* 2003, No. 6, p.31.
- Gawlik, Zdzisław. Komentarz do art. 557 k.c., [w:] Kodeks cywilny. Komentarz, Tom III. Zobowiązania – część szczególna, wyd. II, red. Andrzej Kidyba (Commentary on Art. 557 of the Civil Code, in The Civil Code. Commentary. Volume III. Liabilities. Specific Part. 2nd edition ed. Andrzej Kidyba), Lex 2014.
- Gawlik, Zdzisław. Komentarz do art. 559 k.c., [w:] Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część szczególna, wyd. II, red. Andrzej Kidyba (Commentary on Art. 559 of the Civil Code, in The Civil Code. Commentary. Volume III.

³³ Journal of Laws of 1997, No. 45, item 287.

- Liabilities. Special Issues, 2nd ed., ed. Kidyba Andrzej), Lex 2014.
- Jędrej, Kamil. [w:] Kodeks cywilny. Komentarz, red. Jerzy Ciszewski (in: The Civil Code. Commentary, ed. Jerzy Ciszewski), Warszawa 2014, p. 933.
- Koszowski, Maciej. Ciężar dowodu w przypadku niezgodności towaru konsumpcyjnego z umową (The burden of proof in the case of non-conformity), *Palestra* 2013, No. 5–6, pp. 102, 104.
- Krauss, Jacek. Nowa regulacja rękojmi przy sprzedaży w stosunkach pomiędzy przedsiębiorcami – zmiany kodeksu cywilnego wprowadzone ustawą o prawach konsumenta (New warranty regulations applied to sales between businesses: changes to the Civil Code introduced by the Act on consumer rights), *Przegląd Prawa Handlowego* 2015, No. 3, p. 7.
- Kruszewska – Sobczyk, Katarzyna, Sobczyk, Marek. Niedozwolone klauzule w umowach zawieranych przez konsumenta (Abusive clauses in contracts concluded by the consumer), *Radca Prawny* 2004, No. 4, p. 112.
- Kukuryk, Piotr. Definicje konsumenta w kodeksie cywilnym (obecnym i przyszłym) w kontekście najnowszych unijnych dyrektyw konsumenckich (Definitions of a consumer in the Civil Code (current and future) in the context of the latest EU consumer directives), *Przegląd Prawa Handlowego* 2014, no. 5, p. 18.
- Lic, Jan. Odpowiedzialność dewelopera za wady fizyczne z tytułu rękojmi (The liability of the developer under the statutory warranty for physical defects), *Rejent* 2015, No. 10, p. 65.
- Olczyk, Magdalena. Szczególne warunki sprzedaży konsumenckiej oraz zmiana Kodeksu cywilnego. Komentarz do zmian wprowadzonych ustawą z dnia 21 maja 2009 r. o zmianie ustawy o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego (Specific conditions of consumer sale and changes to the Civil Code. Commentary on changes introduced by Act of 21 May 2009 on specific conditions of consumer sale and changes to the Civil Code), Lex 2010.
- Pajor, Tomasz. komentarz do art. 22¹ k.c. [w:] Kodeks cywilny. Część ogólna. Komentarz, red. Małgorzata Pyziak – Szafnicka (comment on Art. 22¹, in The Civil Code. General Issues. Commentary, ed. Małgorzata Pyziak-Szafnicka), Lex 2009.
- Sikorska, Aleksandra. Ciężar dowodu w przypadku odstąpienia od umowy sprzedaży przez kupującego z powodu wad rzeczy lub niezgodności towaru z umową (The burden of proof in the case of withdrawal from the sales contract by the buyer because of defects or non-conformity), *Radca Prawny* 2005, No. 1, pp. 60–64.
- Uliasz, Roman. Komentarz do art. 559 k.c. (Commentary on Art. 559 of the Civil Code), Lex 2013.
- Żuławski, Czesław. [w:] Komentarz do kodeksu cywilnego. Zobowiązania, t. 2, red. Gerard Bieniek, (in: Commentary on the Civil Code. Liabilities, Volume II ed. Gerard Bieniek), Warszawa 2006, p. 68.
- Druk Sejmu RP VII kadencji nr 2076. (Sejm of the Republic of Poland 7th term, Parliamentary Document No. 2076.)