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The Place of Contract for Digital Thing in Latvian Contract Law Within the Context of the Consumer Sale Directives 2019

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The article aims to explore the place of contract for digital thing (i.e., a good with digital elements; digital content; and digital service) from the point of view of Latvian contract law considering the recently adopted Consumer Sale Directives 2019 (Directives 2019/770 and 2019/771). The topicality of the article's theme is rooted in transposition of these directives into Latvian national law. On the one hand, it is necessary to find a proper place for classification of contract for a digital good considering approaches and contents of Latvian contract law for the appropriate understanding of this contract within Latvian contract law and, speaking broadly, Latvian civil law. On the other, the transposition of these directives would mean that digital goods for non-consumers will remain without explicit regulation because these directives are intended to be transposed into consumer rights protection law being as *lex specialis* without introducing any amendments into general contract law. At the beginning, the present article provides an overview of the place of contract for a digital thing before transposition of the Consumer Sale Directives 2019 into Latvian consumer rights protection law, i.e., in the current regulation of Latvian contract law. The article continues with analysis of the expected place of contract for a digital thing after the currently intended transposition of these directives. Afterwards the article addresses the consequences of that transposition. The article concludes with summary following the discussion contained therein.

Keywords: digital thing (digital good), supply of digital service, digital content, consumer sale, contract law, Latvia, Directive 2019/770, Directive 2019/771.

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Introduction

The contracts whose object is a digital thing[1] are considered as a type of modern contracts increasingly gaining importance in recent years due to rapid technological progress and evolving digital environment. These contracts are usually considered as *sui generis* contracts and, therefore, they are traditionally subject to the need for a special regulation in contract law. However, as it is admitted in European consumer rights protection literature, "rules on the supply of digital content [and digital services – the authors' remark] are generally absent in European private law systems"[2] with a few exceptions.[3] The situation in Latvia is not an exception. The Latvian situation for regulation of contracts whose object is a digital thing is, therefore, difficult due to several significant aspects.

One the one hand, the Civil Law[4] (a Latvian civil law codification which, *inter alia*, deals with general contract law) does not explicitly recognise digital content as a contract object. This is true both regarding sale (purchase) and supply – contracts traditionally distinguished by the Civil Law[5] which in this situation continues the approach of its predecessor, Part III of BLVK[6]. Likewise, the Civil Law does not recognise a contract for supply of service but instead regulates a contract for work-performance following the Roman tradition. As it is explicitly indicated in Latvian legal literature, Latvian law does not recognize services as a separate subject matter of contracts.[7] Therefore, the contract for supply of service cannot be considered as a typical (nominate) contract and is, therefore, left without any special regulation in the Civil Law.[8] It means that the regulation of contract for work-performance

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1 This concept is understood within the meaning of the new consumer sale directives adopted in 2019 dealt further and covers three different consumer sale objects: a good with digital elements; digital content; and digital service.

2 *Giliker, P.* Adopting a Smart Approach to EU Legislation: Why Has it Proven so Difficult to Introduce a Directive on Contracts for the Supply of Digital Content? In: *Synodinou, T., Jougleux, P., Markou, C., Prastitou-Merdi, T.* (eds.). EU Internet Law in the Digital Era: Regulation and Enforcement. Cham: Springer, 2020, p. 300.

3 Ibid., pp. 300–301.

4 Civil Law of the Republic of Latvia (1937). Official translation into English available on the webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/The%20Civil%20Law.doc [last viewed: 06.09.2021].

5 This distinction is based on different regulation (though similar) for both types of contracts: contract of sale is regulated in Articles 2002–2090 of the Civil Law, while supply contract – in Articles 2107–2111 of the Civil Law. Consequently, Latvian legal literature traditionally treats both these types of contracts as different contracts.

6 Part III of the Baltic Local Laws Collection 'Civil Laws' (*Baltijas vietējo likumu kopojuma III daļa 'Civillikumi'* in Latvian). For its brief overview from the perspective of contract law, see *Torgāns, K., Kārkliņš, J., Mantrov, V., Rasnačs, L.* Contract Law in Latvia. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 25–26.

7 *Torgāns, K., Kārkliņš, J., Mantrov, V., Rasnačs, L.* Contract Law in Latvia, p. 215.

8 Except the amendments to the Civil Law introduced in recent years such as a special set of rules included in the Civil Law by transposing the Late Payment Directive (Directive 2011/7/EU of

included in the Civil Law cannot be applied to the contract for supply of digital service.

On the other hand, the contract whose object is a digital thing is explicitly regulated within the Consumer Rights Protection Law[9] already since the transposition of the Consumer Rights Directive 2011[10], as discussed further in this article. This regulation included in the Consumer Rights Protection Law is considered as *sui generis* and, therefore, treats this contract as an independent contract in the same meaning which is attributed to this contract by the above Directive.

In this situation, the Latvian legislator is concerned with the transposition of the recent Consumer Sale Directives adopted in 2019, which specifically deal with contracts for digital thing. In addition to requiring a systematic approach, this transposition process presents a systematic challenge of transposing these directives into Latvian national law considering the attitude of the Civil Law towards this type of a contract.

Therefore, the aim of the present article is to examine the issues arising in relation to the transposition of the recent Consumer Sale Directives adopted in 2019 into Latvian law. In order to achieve this aim, at the outset the article considers the situation before and after the transposition of the Consumer Sale Directives 2019 if the transposition would follow the currently considered approach. Afterwards, the expected transposition is critically considered from a systematic point of view of Latvian civil law concerning its consequences, if the intended transposition approach would be maintained. This leads to elaboration of legislative suggestions to the Latvian legislator for improvement of the transposition of the Consumer Sale Directives 2019 into Latvian law.

1. Situation Before the Transposition of Consumer Sale Directives 2019

1.1. Regulation of Contract for a Digital Thing Within the Civil Law Relationship B2C

Before the transposition of the Consumer Sale Directives of 2019, a contract between a seller and a consumer, whose object is digital thing was explicitly regulated in Latvian national legislation – only in the Consumer Rights Protection Law. Taking into account the necessity to transpose the obligations set out in the Consumer Rights Directive of 2011, the term 'digital' first appeared in the Consumer Rights Protection Law in 2014.[11] Thus, the Consumer Rights Protection Law began to recognise two types of digital things: 1) a good with digital content,

the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. *OJ*, L 48, 23.02.2011, pp. 1–10), i.e., Articles 1668[1]–1668[11] Civil Law in conjuncture with Article 1765(2) Civil Law in relation to the amount of interest.

[9] Consumer Rights Protection Law. Official translation into English available on the official webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/Consumer%20Rights%20Protection%20Law.docx [last viewed: 06.09.2021].

[10] 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. *OJ*, L 304, 22.11.2011, pp. 64–88.

[11] Law "Amendments to the Consumer Rights Protection Law" adopted on 24 April 2014, entered into force 28 May 2014. No official English translation is available.

which was included in the definition of 'goods' as 'digital content together with a material medium (CD, DVD or similar material medium)'[12]; 2) digital content, which was defined as 'data which are produced and supplied in digital form'.[13]

While digital content supplied on a tangible medium was considered as goods, and therefore could be an object of sales contract, the contracts for digital content which is not supplied on a tangible medium were classified neither as sales contracts nor as service contracts, nor any other specific type of contract following the approach of the Consumer Rights Directive 2011. In order to avoid uncertainties regarding the requirements applicable to such contracts[14], Article 4.[1](7) of the Consumer Rights Protection Law provided that rules of this law governing provision of services shall apply to digital content which is not supplied on a tangible medium unless otherwise provided by special norms regulating the protection of consumer rights. Therefore, contracts concerning such digital content were protected as a *sui generis* contract by the Consumer Rights Protection Law.[15]

It must be noted that the Consumer Rights Protection Law does not define any types of contracts, including contracts for digital things except references to either a purchase contract[16] or a supply contract[17] (and, frequently, confusing[18] both types of contracts[19]). Moreover, it does not generally regulate the rules on the formation, validity, nullity of contracts, the rules for the interpretation of the will of parties, or the legality of digital content as an object of an agreement or transfer of the author's economic rights.[20] Among other things, it merely indicates additional rules which the parties must comply with before[21] and after concluding contracts, the object of which is a digital thing, as well as lays down certain obligations as to the content of contracts. Thus, for such issues, general contract law as *lex generalis* law envisaged by the Civil Law still applies.[22]

Some of these *lex generalis* provisions can generally be applied to all types of contracts. For example, for a contract to be considered as concluded, the following obligatory elements are required to be established: complete agreement between the parties, particular form, intention to mutually bind (Article 1533 of the Civil Law).[23] However, it is important to understand that different types of contracts

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[12] Point 6 Article 1 Consumer Rights Protection Law.

[13] Point 8 Article 1 Consumer Rights Protection Law.

[14] See Likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" anotācija [Annotation of the draft law "Amendments to the Consumer Rights Protection Law"] (24.04.2014). Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/WEBRespDocumByNum?OpenView&restricttocategory=724/Lp11|2483 [last viewed: 06.09.2021].

[15] Certain provisions regarding digital content were also transposed in the regulations of the Cabinet of Ministers issued on the basis of the Consumer Rights Protection Law.

[16] For instance, Point 5, Article 3 Consumer Rights Protection Law.

[17] For instance, Paragraphs 6–7, Article 12 Consumer Rights Protection Law.

[18] For instance, obviously in Point 5, Paragraph 3, Article 6 or Article 30[1] Consumer Rights Protection Law.

[19] It should be noted that Latvia is one of rare jurisdictions where a purchase contract is differentiated from a supply contract (*Torgāns, K.* Saistību tiesības [Law of Obligations]. 2nd revised edition. Rīga: Tiesu namu aģentūra, 2018, pp. 286, 288). See Article 2002 *et seq* and Article 2107 *et seq* Civil Law.

[20] Article 2[1] (2) Consumer Rights Protection Law.

[21] For example, a requirement to provide information to the consumer.

[22] I.e., Chapters 2–8 of the Law of Obligations Part of the Civil Law. For a useful summary of this topic from the point of view of Latvian contract law in English, see *Torgāns, K., Kārkliņš, J.* Contract Law and Non-Contractual Obligations. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* (eds.). The Law of the Baltic States. Cham: Springer, 2017, pp. 291–298.

[23] *Torgāns, K.* Saistību tiesības [Law of Obligations], p. 42.

have their own essential elements, without which a contract cannot be considered as concluded (Articles 1470 and 1533 of the Civil Law), as well as their own specific rules. Therefore, it is important to indicate which contract type (types) also covers contracts for digital things.

1.2. Regulation of Contract for a Digital Thing Outside the Civil Law Relationship B2C

If a contract for a digital thing within the civil law relationship B2C is regulated by the Consumer Rights Protection Law, this contract outside this relationship, i.e., within B2B and C2C, is regulated on the basis of general and special contract law included in the Civil Law. According to the Civil Law, the type of contract depends on whether the object of the contract is digital content or a good with digital elements.

If a seller sells goods with digital elements to a consumer (the object of a contract is sale of goods with digital elements), the concluded contract will generally be a purchase (sales) contract of a movable. In such a situation, regulation on purchase (sales) contract envisaged in the Civil Law applies.[24]

However, if a seller sells digital content,[25] which is not supplied on a tangible medium, then a specific contract type cannot be identified as such on the basis of the Civil Law. Namely, no legal provision that currently regulates alienation contracts[26] could in the same way be applicable to contracts, the object of which is digital content. All alienation contracts share a common characteristic – their conclusion or execution results in the transfer of the right of property. As indicated in Article 927 of the Civil Law, the right of property can be exercised only over a thing (both tangible and intangible).[27] Given the fact that digital content is not a tangible thing (because it lacks spatial characteristic), nor it is an intangible thing (because intangible things in the legal system of Latvia are only rights), it has to be concluded, that one cannot execute right of property over digital content, and because of that one cannot pass these rights on to someone else. For this reason, no legal provisions applicable to alienation contracts may be directly applied to contracts, the object of which is digital content.

Similar conclusions can be found in other jurisdictions (including member states of the European Union). For example in the Comparative Study on cloud computing contracts prepared for the European Union Commission, it was stated that "In many jurisdictions (e.g. Belgium, England & Wales, France, Ireland, Lithuania, Luxembourg, Malta, Sweden, Slovenia, the Netherlands and also the United States), the application of the regulations on sales of goods are deemed inapplicable, as goods are likely defined as tangible movable items, which generally does not apply to a cloud computing context".[28] At the same time, as stated in the above comparative study, if specific rules exist in relation to services contracts, these rules will likely

[24] Articles 2002–2090 of Civil Law.

[25] Latvian law does not currently separate digital content from digital services.

[26] The Civil Law perceives purchase (sales), supply, exchange, and maintenance contracts as alienation contracts as they are regulated in a special chapter called 'Claims from alienation contracts' (Article 2002 Civil Law *et seq.*).

[27] For a useful discussion of this topic from the point of view of Latvian property law in English, see *Rozenfelds, J.* Property Law. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* The Law of the Baltic States, 2017, p. 280.

[28] DLA Piper UK LLP. Comparative Study on cloud computing contracts. Final Report. Luxembourg: Publications Office of the European Union, 2015, p. 28. Available: https://op.europa.eu/en/publication-detail/-/publication/40148ba1-1784-4d1a-bb64-334ac3df22c7 [last viewed: 06.09.2021].

apply to a cloud computing context which is the case of several EU Member States.[29] As noted above, this is not a case in Latvia, as the Civil Law does not recognise a contract of services.

However, this does not mean that contracts whose object is a digital thing cannot be concluded. It just means that these kinds of contracts in Latvian civil law are to be recognised as *sui generis* (i.e., ones which lack regulation by law). A legislator is entitled to stipulate that the provisions regulating other specific types of contracts are also applied to specific *sui generis* contracts. As mentioned above, Latvia has taken a cautious approach in this regard, stating that the Consumer Rights Protection Law rules governing provision of services generally apply to contracts object of which is digital content, at the same time indicating that these (*sui generis*) contracts cannot themselves be classified neither as sales contracts nor as service contracts within the civil law relationship B2C.

For the sake of truth, it should be mentioned that the contracts whose object is a digital thing may be subject to regulation of other sub-branches of law. Although this article is not aimed to view these other sub-branches of law in relation to a contract whose object is a digital thing, in this regard, it is sufficient to outline the perspective of intellectual property law. Depending on whether the subject-matter of the contract is either a right of use or an ownership right over a digital content, intellectual property law distinguishes two types of contracts, namely, licence contract and assignment contract. As indicated in Latvian legal literature, features of lease or rent contract may be established in the former situation, but in the latter situation – purchase (sales) contract.[30] However, regulation of these contracts within intellectual property law would be applicable as far as they concern intellectual property objects and their exploitation. As it is justly observed in this regard in the literature dedicated to European consumer rights protection law, "[i]n difference to normal sales contracts of movables, where the buyer acquires full rights of use and sale of the good, digital content contracts [as well as other types of contracts whose object is a digital thing – authors' remark] usually contain use restrictions on the consumer-buyer in general contract terms".[31]

1.3. Conclusion from the discussion in previous two sub-chapters

Consequently, the regulation of a contract whose object is goods with digital elements is provided in both the Civil Law and the Consumer Rights Protection Law: if the former regulation applies to civil law relationships such as C2C and B2B, the latter applies to B2C only; the former is based on general regulation of purchase contract, whereas the latter – on conformity of a thing to the contract which is generally more favourable to a consumer as a buyer (purchaser) than regulation of purchase (sales) contract included in the Civil Law to a buyer (purchaser). In such a way, it must be emphasized that the existing provisions regulating digital things

[29] DLA Piper UK LLP. Comparative Study on cloud computing contracts. Final Report. Luxembourg: Publications Office of the European Union, 2015, p. 28. Available: https://op.europa.eu/en/publication-detail/-/publication/40148ba1-1784-4d1a-bb64-334ac3df22c7 [last viewed: 06.09.2021].

[30] *Mantrovs, V.* Intelektuālā īpašuma līgumu regulējuma modernizācija Latvijas Republikas Civillikumā [Modernisation of Regulation for Intellectual Property Contracts in the Civil Law of the Republic of Latvia]. *Journal of the University of Latvia. Law*, No. 2, 2011, pp. 115–128. Available: https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No2/V_Mantrovs.pdf [last viewed: 06.09.2021].

[31] *Micklitz, H.-W., Reich, N.* Chapter 4. Sale of Consumer Goods. In: *Micklitz, H.-W., Reich, N., Rott, P.* EU Consumer Law. 2nd edition. Antwerpen, Portland, Oregon: Intersentia, 2014, p. 193.

it will be regulated on the basis of special regulation to be included in that law in addition to general contract law provided by the Civil Law. However, an unclear and problematic issue relates to regulation of that contract outside the civil law relationship B2C. In this regard, the article proposes a solution for the Latvian legislator which could be obviously considered within or after the transposition process of both abovementioned Directives will take place, i.e., to supplement Article 4[1] of the Consumer Rights Protection Law with a provision which would extend the discussed regulation to the civil law relationship B2B.

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