



Lack of Conformity and Seller's Liability in Consumer Sales Contracts in Czech and Polish Law

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Abstract. This article analyses the legal solutions contained in Czech and Polish law regarding the definition of the lack of conformity and the conditions for the seller's liability in the consumer sales contracts, before and after the transposition of Directive (EU) 2019/771. Both national laws were initially based on Directive 1999/44/EC, subsequently transposing Directive (EU) 2019/771. Both legal frameworks explicitly distinguish between subjective and objective criteria for conformity, holding sellers liable for the lack of conformity deriving from the incorrect installation or assembly. While both national laws set a general two-year liability period, the Polish legislator allows for it to be longer when the shelf life of the goods exceeds this duration. Another important difference concerns the duration of the presumption of non-conformity that in Czech law is extended from six months to one year after the takeover of the goods, while in Polish law it covers the period of two years after the delivery. In addition, regarding the treatment of second-hand goods, Czech law allows a reduction in the seller's liability period, a possibility that is not permitted anymore under Polish law.

Keywords: lack of conformity, defect, consumer, seller, the Czech Republic, Poland

1. Introduction

Consumer protection matters are pervasive and critically significant, influencing the daily experiences of individuals. It is worth underlining that the issues regarding the consumer's position in the event of the lack of conformity of the goods with the contract gained their crucial relevance with the adoption

of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (hereinafter referred to as ‘Directive 1999/44/EC’), based on the minimum harmonization approach. The mentioned Directive was repealed by enacting Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (hereinafter referred to as ‘Directive (EU) 2019/771’), characterized by the maximum harmonization approach.

The abovementioned Directive exerted a significant influence on the national laws of the Member States of the European Union, among them the Czech Republic and Poland. This article analyses and compares the legal solutions concerning the definition of the lack of conformity, relevant moments determining the seller’s liability, and deadlines and burden of proof – in these two countries before and after the transposition of Directive (EU) 2019/771. The principal objective is to establish the similarities and differences between these two national laws, as well as to determine the modifications brought by the implementation of Directive (EU) 2019/771.

2. The Czech Republic

2.1. Lack of Conformity

Before the transposition of Directive (EU) 2019/771, the requirements concerning the lack of conformity were contained in Section 2161 of the Czech Civil Code¹ (hereinafter referred to as ‘the CzCC’), entitled ‘Quality upon takeover’ (*Jakost při převzetí*). Namely, the CzCC established the seller’s liability for the lack of conformity of the goods (the exact term used was *vada* ‘defect’) towards the buyer (consumer) at the takeover.² The Czech legal theory stressed that the lack of conformity was to be determined by taking into account the sales contract concluded between the parties or eventual requirements enshrined in a legal act applicable to the specific case.³ Thus, subjective and objective requirements were included in determining the existence of a lack of conformity. This legal solution was based on the principle of the seller’s liability for each illegality.⁴ It may be stated that the conformity criteria were ampler in Czech law than in Directive 1999/44/EC, which in Art. 2, para. 1 obliges the seller to deliver the goods in conformity with the sales contract.

While the mentioned Directive introduced the rebuttable presumption of the conformity of the goods, the Czech legislator stipulated that the seller was

1 Občanský zákoník [Civil Code], Sbírka zákonů [Collection of Laws], No. 89/2012.

2 The CzCC, Sec. 2161 (1).

3 Hrádek, 2020, p. 11.

4 Chvátalová, 2015, p. 231.

particularly liable to the buyer (consumer) for ensuring that the goods, at the time he/she took them over:

1. had the properties that the parties agreed upon and, in the absence of such an agreement, the properties that the seller or manufacturer described or which the buyer expected given the nature of the goods and the advertising the seller or manufacturer presented;
2. were suitable for the purpose stated by the seller or for which the goods of that kind were usually used;
3. corresponded in quality and design to the agreed sample or model if the quality or design was determined according to the agreed sample or model;
4. had the corresponding quantity, measure, or weight;
5. met the requirements laid down by legal regulations.⁵

Moreover, as stated in the subdivision devoted to the purchase of movable goods, defects in the documents required for the use of the goods were also considered a lack of conformity.⁶ Although the Czech legislator did not explicitly and separately include the provision on the incorrect installation of the goods from Art. 2, para. 5 of Directive 1999/44/EC among the requirements for quality upon takeover, it is worth noting that it constituted a lack of conformity since the seller's obligation deriving from the (consumer) sales contract also comprised installation or assembly of the goods.⁷

Although retaining the title of the section ('Quality upon takeover'), the implementation of Directive (EU) 2019/771⁸ brought significant novelties reflecting subjective and objective requirements for conformity. The subjective requirements stem from the specific consumer sales agreement.⁹ The seller's liability in this respect particularly includes the prerequisite that the goods:

1. correspond to the agreed description, type, and quantity, as well as quality, functionality, compatibility, interoperability, and other agreed features;¹⁰
2. are suitable for the purpose for which the buyer requires them and to which the seller has agreed;

5 The CzCC, Sec. 2161 (1).

6 The CzCC, Sec. 2099 (1).

7 Petrov, Výtisk, Beran et al., 2017, p. 2185; Hrádek, 2020, p. 11.

8 Zákon, kterým se mění zákon č. 634/1992 Sb., o ochraně spotřebitele, ve znění pozdějších předpisů, a zákon č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů [Act amending Act No. 634/1992 Coll., on consumer protection, as amended, and Act No. 89/2012 Coll., Civil Code, as amended], Sbírka zákonů [Collection of Laws], No. 374/2022.

9 Explanatory Memoranda to the Amendments, pp. 137–138.

10 The properties of the goods that the seller is obliged to communicate to the consumer before the conclusion of the contract pursuant to Sec. 1820 of the CzCC are also included among the agreed features.

3. are delivered with the agreed accessories and instructions for use, including assembly or installation instructions.¹¹

Compared to the previous regulation, the seller has to accept the purpose of the goods required by the consumer. The CzCC does not explicitly demand that the buyer (consumer) inform the seller about that purpose at the moment of the conclusion of the contract, as stipulated in Directive (EU) 2019/771. Moreover, the delivery with the accessories and instructions also found its place among the subjective requirements. It is worth noting that the determination and content of the subjective requirements are generally connected to the buyer's ability to negotiate and reach an agreement about them with the seller.¹²

In addition to the subjective, the goods, to be in conformity, should also meet the objective requirements. Transposing Art. 7, para. 1 of Directive (EU) 2019/771, the CzCC envisages that the seller is liable to the buyer (consumer) that the goods:

1. are suitable for the purpose for which the goods of the same type are usually used, also considering the rights of third persons, legal regulations, technical standards, or codes of conduct of the given industry, if there are no technical standards;
2. correspond in quantity, quality, and other features, including durability, functionality, compatibility, and safety, to the usual properties of the goods of the same kind that the buyer can reasonably expect, also considering the public statements made by the seller or another person in the same contractual chain, in particular in advertising or on labelling;
3. are delivered with accessories, including packaging, assembly instructions, and other instructions for use that the buyer can reasonably expect;
4. correspond to the quality or description of a sample or model that the seller provided to the buyer before the conclusion of the contract.¹³

The Czech legislator allows the seller to be exempt from liability for the public statement made by another person in the same contractual chain. Namely, in order to be exempt, the seller should demonstrate that he/she was not aware of the public statement in question or that it was modified at the time of the conclusion of the contract in at least a comparable way as it was made or that it could not have influenced the buyer's decision to purchase the goods.¹⁴ The burden of proof is explicitly attributed to the seller who has to prove that at least one of the mentioned circumstances is met. This legal solution represents the

11 The CzCC, Sec. 2161 (1).

12 Hrádek, 2023, p. 175.

13 The CzCC, Sec. 2161 (2).

14 The CzCC, Sec. 2161 (3).

transposition of Art. 7, para. 2 of Directive (EU) 2019/771. It is worth noting that the buyer's awareness or knowledge of the public statement is to be assessed by taking into account the knowledge that a person familiar with the case would reasonably acquire when considering the circumstances that must have been obvious to him/her in that position.¹⁵

The objective requirements for conformity are applicable in each case, i.e. they are not subject to the parties' contractual determination.¹⁶ However, their application can be excluded when the seller specifically informs the buyer before concluding the contract that a certain property of the goods differs, deviating from the objective requirements. The mere informing is not sufficient since the buyer (consumer) needs to expressly agree on such deviation at the time of concluding the contract.¹⁷ This provision transposes Art. 7, para. 5 of Directive (EU) 2019/771.

Finally, the CzCC introduced the rule, already acknowledged in the Czech legal theory, that the seller is liable for any lack of conformity deriving from the incorrect installation or assembly carried out by the seller or under his/her responsibility according to the contract.¹⁸ It should be emphasized that the seller's liability is conditioned by the circumstance that the installation or assembly constitutes his/her contractual obligation. The seller is also liable if the installation or assembly was carried out by the buyer (consumer) and the lack of conformity is attributable to the shortcomings in the instructions provided by the seller.¹⁹ These legal solutions are concordant with Art. 8 of Directive (EU) 2019/771.

2.2. Relevant Moments Determining Liability

Prior to the implementation of Directive (EU) 2019/771, the Czech legislator established that the seller was liable to the buyer (consumer) for the lack of conformity of the goods existing at the moment of takeover, without clarifying that the seller's knowledge was irrelevant regarding the deficiencies of the goods.²⁰ It is worth underlining that the consumer acquired ownership over the goods at that moment.²¹ It may be inferred that the seller's liability was not explicitly connected to the transfer of the risk to the consumer but the priority was given to the moment of takeover of the goods.²²

The CzCC envisaged cases in which the consumer did not have the rights arising from the lack of conformity, i.e. the seller was exonerated from liability. First, the

15 The CzCC, Sec. 4 (2).

16 De Franceschi, 2019, p. 86.

17 The CzCC, Sec. 2161 (4).

18 The CzCC, Sec. 2161a.

19 The CzCC, Sec. 2161a.

20 The CzCC, Sec. 2161 (1).

21 The CzCC, Sec. 2160 (1).

22 Pipková, 2014, p. 135.

circumstance that the consumer, before the takeover of the goods, was aware of the lack of conformity extinguished the availability of consumer remedies.²³ This rule represented the transposition of Art. 2, para. 3 of Directive 1999/44/EC. However, the Czech legislator omitted to include that the same rule also applied when the consumer could not reasonably be unaware of the lack of conformity. The finality of this exculpatory reason was to prevent the consumer's deceitful behaviour given that it implied that his/her cognizance of the defect influenced his/her decision to conclude the sales contract with the seller under the agreed conditions.²⁴ The consumer could not dispose of the remedies stemming from the lack of conformity also when he/she caused it.²⁵ Thus, the seller was exonerated when the lack of conformity could not be ascribed to his/her fault or omission but was caused by the consumer. This exculpatory reason was ampler than that enshrined in Art. 2, para. 3 of Directive 1999/44/EC stating that there is no lack of conformity when it has its origin in materials supplied by the consumer. It may be stated that such a defect could have been interpreted in Czech law as caused by the consumer consequently exempting the seller from liability.

The transposition of Directive (EU) 2019/771 did not bring notable novelties in this regard. The relevant moment for determining the seller's liability remained the moment of takeover.²⁶ Moreover, the circumstance that the consumer caused the lack of conformity is retained as a reason excluding the availability of consumer remedies and exonerating the seller.²⁷ The Explanatory Memoranda mention the inappropriate handling of the goods as a situation when the defect is caused by the consumer.²⁸ As a novelty, the CzCC specifically stipulates that the wear and tear of the goods caused by their usual use or, in the case of second-hand goods, corresponding to the extent of their previous use cannot be considered a lack of conformity.²⁹ While the legal solution regarding the normal use of the goods presupposes that they conformed to the consumer sales contract at the moment of their takeover, the one applying to the second-hand goods departs from the presumption that the consumer accepted the defect while concluding the sales contract.³⁰

2.3. Deadlines and Burden of Proof

When the Czech law was based on Directive 1999/44/EC, the CzCC, transposing its Art. 5, para. 1, envisaged that the consumer could use the available remedies

23 The CzCC, Sec. 2170.

24 Howells et al., 2019, pp. 184–185.

25 The CzCC, Sec. 2170.

26 The CzCC, Sec. 2161 (1).

27 The CzCC, Sec. 2167 (1).

28 The Explanatory Memoranda to the Amendments, p. 142.

29 The CzCC, Sec. 2167 (2).

30 The Explanatory Memoranda to the Amendments, p. 142.

arising from the lack of conformity that emerged within twenty-four months of the takeover.³¹ Essentially, such a twenty-four-month deadline was a period during which the lack of conformity had to appear.³² Therefore, for the seller to be liable, the lack of conformity had to exist at the time of the takeover and become visible in the period of two years commencing from that moment. The Czech legislator established a specific rule applying to the situation when the period for which the goods could be used was specified on the sold goods, their packaging, instructions attached to the goods, or in the advertisement according to other legal regulations. In that case, the provisions of the quality guarantee found their application.³³

The consumer's position was strengthened by the provision disregarding any agreement between the seller and the buyer that stipulated a reduction of the period for asserting the consumer remedies derived from the lack of conformity.³⁴ Such a provision would have been null and void.³⁵ However, the Czech legislator, using the opportunity provided by Art. 7, para. 1 of Directive 1999/44/EC, allowed the contractual parties to reduce such a period to half of the legal period (12 months) when the second-hand goods were the object of the sales contract. If the parties exceeded this limitation, by stipulating a period shorter than 12 months, the presumption that half of the legal period was agreed upon applied.³⁶

Moreover, the CzCC stipulated that the provision from Sec. 2165 did not apply in the following cases:

1. when the goods were sold for a lower price because of a lack of conformity for which such a lower price was agreed;
2. when the defect concerned the wear and tear of the goods caused by their normal use;
3. when the defect of second-hand goods corresponds to the extent of the use of those goods or the wear or tear they presented at the moment of takeover by the buyer (consumer);
4. when the lack of conformity derived from the nature of the goods.³⁷

Regarding the burden of proof, the Court of Justice of the European Union (hereinafter referred to as 'the CJEU') in the *Faber* case provided important indications also relevant in Czech law. Primarily, the consumer had to demonstrate that the lack of conformity existed upon takeover and that it occurred within twenty-four months of that moment. In this respect, the CJEU ruled, 'the onus is,

31 The CzCC, Sec. 2165 (1).

32 Hulmák in Hrádek, 2020, p. 13.

33 The CzCC, Sec. 2165 (2).

34 The CzCC, Sec. 2168.

35 Hrádek, 2020, p. 14.

36 The CzCC, Sec. 2168.

37 The CzCC, Sec. 2167.

in principle, on the consumer to furnish the evidence that a lack of conformity exists and that the lack of conformity existed at the time when the goods were delivered'.³⁸

The CzCC facilitated the consumer's task by introducing a presumption that the lack of conformity had already existed upon takeover if it appeared within six months from that moment.³⁹ The CJEU, in the above-mentioned Faber case, affirmed that the consumer, in order to benefit from the reversed burden of proof, has to 'furnish evidence that the goods sold are not in conformity with the relevant contract',⁴⁰ without being obliged to demonstrate 'the cause of that lack of conformity', nor the attribution of its origin to the seller.⁴¹ In line with this judgment, the Czech legal theory stressed that the consumer had to prove only that a lack of conformity of the goods existed.⁴² The CJEU imposed an additional requirement on the consumer, ruling that he/she should prove that 'the lack of conformity in question became apparent, that is to say, became physically apparent, within six months of delivery of the goods'.⁴³ It may be stated that this presumption in the CzCC represented an incomplete transposition of Art. 5, para. 3 of Directive 1999/44/EC since it was omitted that it did not apply if it was incompatible with the nature of the goods or the nature of the lack of conformity. However, it would be erroneous to assume that this presumption was irrebuttable. The Czech legal doctrine accentuated that the seller was allowed to rebut it, stating that it was not sufficient solely to question the reasons for the lack of conformity.⁴⁴

The transposition of Directive (EU) 2019/771 partly modified the mentioned issues of deadlines and burden of proof. For the seller to be liable, the lack of conformity, in addition to its existence at the time of the takeover, has to manifest itself within two years of that moment.⁴⁵ Although this Directive granted the Member States the discretion to set a time limit longer than two years, the Czech legislator did not use this opportunity, deeming that such an extension would impose additional costs on the seller that would consequently be reflected in a higher price of consumer goods.⁴⁶ It is specified that when the consumer asserts his/her rights deriving from the lack of conformity, this two-year long time limit does not run for the period during which the consumer cannot use the goods.⁴⁷

Regarding the second-hand goods, the CzCC, taking advantage of the opportunity provided in Art. 10, para. 6 of Directive (EU) 2019/771, still allows the contractual

38 Faber case, Para. 52.

39 The CzCC, Sec. 2161 (2).

40 Faber case, Para. 70.

41 Faber case, Para. 70.

42 Hrádek, 2020, p. 14.

43 Faber case, Para. 71.

44 Hradék, 2020, p. 12.

45 The CzCC, Sec. 2165 (1).

46 The Explanatory Memoranda to the Amendments, p. 141.

47 The CzCC, Sec. 2165 (4).

parties to reduce the two-year time limit to one year.⁴⁸ However, the Czech legislator eliminated the provision presuming that the parties agreed upon half of the legal period if they stipulated a period shorter than 12 months. Therefore, it may be inferred that in the case of an agreement between the parties exceeding the permitted shortening of the time limit, the general two-year period of time would apply.

Moreover, the presumption that the lack of conformity existed at the moment of receipt became more advantageous to the consumer's position since its duration is extended from six months to one year. Thus, it is presumed that the lack of conformity existed upon takeover if it manifested itself within one year of that moment. Transposing Art. 11, para. 1 of Directive (EU) 2019/771 and confirming what had already been stated by the Czech legal theory, the CzCC acknowledges that this presumption is rebuttable by stipulating that it is excluded when it is incompatible with the nature of the goods or the nature of the lack of conformity.⁴⁹ The Explanatory Memoranda mention the goods that are perishable by nature such as flowers as an example of incompatibility with the nature of the goods. At the same time, the circumstance that the consumer caused the defect or it is a consequence of an obvious external cause that took place after the handover of the goods is mentioned as an example when this presumption is contrary to the nature of the lack of conformity.⁵⁰ It is worth underlining that the one-year time limit does not run also in this case for the period during which the consumer cannot use the goods if he/she disposed of the available remedies.⁵¹ Finally, the Explanatory Memoranda confirms the relevance of the above-mentioned judgment rendered by the CJEU in the Faber case by stating that it is sufficient for the consumer to demonstrate that there is a lack of conformity, without being forced to show that the goods were defective from the moment of their takeover and that he/she did not cause it.⁵² The burden of proof that the goods conformed with the sales contract at the moment of their takeover is placed on the seller.

3. Poland

3.1. Lack of Conformity

Prior to the transposition of Directive (EU) 2019/771, the rules applicable to the consumer sales contract were contained in the Polish Civil Code⁵³ (hereinafter referred to as "the PoCC"). It should be emphasized that the Polish legislator used

48 The CzCC, Sec. 2168.

49 The CzCC, Sec. 2161 (5).

50 The Explanatory Memoranda to the Amendments, p. 138.

51 The CzCC, Sec. 2161 (5).

52 The Explanatory Memoranda to the Amendments, p. 138.

53 Kodeks cywilny [Civil Code], Dziennik Ustaw [Journal of Laws], 1964/16/93.

the term ‘defect’ (*wada*), corresponding to the notion of the lack of conformity from Directive 1999/44/EC.⁵⁴ The PoCC established the seller’s liability for physical and legal defects of the goods.⁵⁵ The lack of conformity in the physical sense was defined as the non-compliance of the sold goods with the contract.⁵⁶ This provision is in concordance with the spirit of Art. 2, para. 1 of Directive 1999/44/EC stating that the seller has to deliver goods to the consumer that conform with the contract. Moreover, the PoCC determined the situations in which the sold goods were particularly inconsistent with the contract. The Polish legal theory defined such a determination as ‘a negative catalogue’, signifying that the PoCC provided examples of when the sold goods were not in compliance with the (consumer) sales contract.⁵⁷

First, the lack of conformity existed when the goods did not possess properties that the goods of that type should have had due to the purpose specified in the sales contract or resulting from the circumstances or their intended use.⁵⁸ This situation presupposed, on the one hand, that the purpose of the goods was stipulated in the consumer sales contract. At the same time, it considered the external factors such as circumstances of the specific case and the intended use of the goods which conditioned the properties of the sold goods.

Moreover, there was a lack of conformity when the goods did not have properties that the seller assured the buyer (consumer), including by presenting a sample or model.⁵⁹ This case required that the seller undertake additional activities to assure the consumer about the properties of the goods, especially by showing him/her a sample or model. Essentially, assuring the consumer could be interpreted as a description given to the consumer about the goods. Thus, this legal solution aligned with Art. 2, para. 2 (a) of Directive 1999/44/EC.

Another case of the particular inconsistency of the goods with the contract concerned the situation when the goods were not suitable for the purpose that the buyer (consumer) informed the seller while concluding the contract and the seller did not raise any objection to the intended use of the goods.⁶⁰ It presupposed that the consumer at the moment of the conclusion of the sales contract notified the seller about the purpose for which he/she needs the goods. The PoCC did not require that the seller explicitly accept such a purpose. It was sufficient that he/she was reticent, omitting to make any objection to the intended use of the goods. It may be considered a crucial difference compared with the legal solution from

54 Zoll, 2023, p. 516.

55 The PoCC, Sec. 556.

56 The PoCC, Sec. 551-1 (1).

57 Jurczyński, 2013, p. 185.

58 The PoCC, Sec. 551-1 (1-1).

59 The PoCC, Sec. 551-1 (1-2).

60 The PoCC, Art. 556-1 (1-3).

Art. 2, para. 2 (b) of Directive 1999/44/EC where the seller had to accept the particular purpose the consumer notified him/her about.

Finally, the lack of conformity also existed when the goods were delivered to the buyer (consumer) in an incomplete condition.⁶¹ The PoCC also considered as lack of conformity a situation when the goods were incorrectly installed and put into operation, provided that these activities were performed by the seller or a third party for whom he/she was liable or the buyer who followed the instructions received from the seller.⁶² This 'IKEA' clause differs from the legal solution from Art. 2, para. 5 of Directive 1999/44/EC. It did not specify that the obligation to install the goods formed part of the sales contract. Furthermore, the PoCC did not explicitly mention the condition that the incorrect installation of the goods was attributable to the shortcomings in the instructions given by the seller.

The Polish legislator established that in the case of sales contracts concluded in the consumer context, the public statements made by the manufacturer or his/her representative, the person who placed the goods on the market within the scope of his/her business activity, and the person who by placing his/her name, trademark, or other distinctive mark on the sold goods purports to be the manufacturer are treated equally as the seller's public statements.⁶³ It should be emphasized that this provision found its application only when one of the contractual parties was a consumer. However, the seller could be released from liability for such public statements if he/she was unaware or could not have reasonably been aware of these statements, if they could not have influenced the consumer's decision to conclude the sales contract, or if their content was corrected before the conclusion of the sales contract.⁶⁴ These circumstances were provided for alternatively.

Considering the legal defects, the PoCC introduced the seller's liability to the buyer (consumer) if the sold goods were the property of a third party or were burdened with the rights of a third party, and if the limitation in the use or disposal of the sold goods resulted from a decision or ruling of a competent authority.⁶⁵

The transposition of Directive (EU) 2019/771 in the Consumer Rights Act⁶⁶ (hereinafter referred to as 'the PoCRA') brought notable modifications to the notion of the lack of conformity. First, concerning the sales contract of movable goods concluded in the consumer context, the Polish lawmaker abandoned the

61 The PoCC, Art. 556-1 (1-4).

62 The PoCC, Art. 556-1 (3).

63 The PoCC, Art. 556-1 (2).

64 The PoCC, Art. 557 (3).

65 The PoCC, Art. 556-3.

66 Ustawa z dnia 4 listopada 2022 r. o zmianie ustawy o prawach konsumenta, ustawy - Kodeks cywilny oraz ustawy - Prawo prywatne międzynarodowe [Act of 4 November 2022 amending the Act on Consumer Rights, the Civil Code and the Private International Law Act], *Dziennik Ustaw* [Journal of Laws], 2022/2337.

notion of the defect (*wada*) from the PoCC, substituting it with the concept of ‘non-conformity of the goods with the contract’ in the PoCRA (*brak zgodności towaru z umową*).

In accordance with Art. 6 of Directive (EU) 2019/771, the PoCRA determines that the goods conform with the contract in particular if they:

1. possess the description, type, quantity, quality, completeness, and functionality, and in the case of goods with digital elements, also compatibility, interoperability, and availability of updates as required by the sales contract;
2. are suitable for a particular purpose for which the consumer needs them, about which he/she notified the seller at the latest at the time of the conclusion of the contract, and which the seller accepted.⁶⁷

This provision substantially reiterates the subjective requirements for conformity contained in Art. 6, para. 1–2 of Directive (EU) 2019/771, although the Polish legislator does not explicitly mention such a term.⁶⁸ Their determination depends on the contract or agreement between the consumer and the seller. Compared to the legal solution from the PoCC, the PoCRA requires that the seller accept the particular purpose for which the consumer needs the goods.

In addition to the mentioned subjective criteria, for the goods to be deemed conformant with the contract, they must:

1. be suitable for the purposes for which goods of that kind are typically used, taking into account applicable legal regulations, technical standards, and good practices;
2. be of such quantity and possess such characteristics, including durability and safety, and in the case of goods with digital elements, also functionality and compatibility, which are typical for goods of that kind and which the consumer can reasonably expect, having regard to the nature of the goods and any public assurance given by the seller, his/her legal predecessors, or persons acting on their behalf, in particular in advertising or on labelling;
3. be delivered with packaging, accessories, and the instructions that the consumer can reasonably expect to receive;
4. be of the same quality as the sample or model that the seller provided to the consumer before the conclusion of the contract and correspond to the description of that sample or model.⁶⁹

⁶⁷ The PoCRA, Art. 43b (1).

⁶⁸ Ostrowski, 2023, p. 10.

⁶⁹ The PoCRA, Art. 43b (2).

By introducing these objective criteria, which correspond to the objective requirements for conformity outlined in Art. 7, Sect. 1 of Directive (EU) 2019/771, the consumer's position has been reinforced in cases where movable goods are the subject matter of the sales contract, compared to the legal framework provided by the previous regulation, the PoCC.⁷⁰ Moreover, it should be emphasized that the PoCRA defines the notion of the lack of conformity as 'a positive catalogue'. Namely, it delineates, combining subjective and objective criteria, when the goods conform with the sales contract, as opposed to the legal solution from PoCC, which employed a 'negative catalogue'.⁷¹

Transposing Art. 7, para. 2 of Directive (EU) 2019/771, the PoCRA allowed the seller to be exempt from liability for public assurances specified in Art. 43b, para. 2 (2). The burden of proof explicitly falls on the seller, who has to demonstrate the presence of at least one of the following circumstances:

1. that he/she did not know about the given public assurance and could not have reasonably known about it;
2. that, before the conclusion of the contract, the public assurance was rectified while observing the conditions and form in which it was given, or in a comparable manner;
3. that the public assurance did not influence the consumer's decision to conclude the contract.⁷²

Finally, the seller is also accountable for any lack of conformity arising from the incorrect installation of the goods. In this regard, the seller's liability extends to instances where the installation was conducted by the seller or under his/her responsibility or when the incorrect installation carried out by the consumer was attributable to the shortcomings in the instructions provided by the seller or a third party referred to in Art. 6, para. 2.⁷³ This legal solution represents the transposition of Art. 8 of Directive (EU) 2019/771.

3.2. Relevant Moments Determining Liability

The PoCC established the seller's liability for the lack of conformity (defect) existing at the moment of the passing of the risk to the buyer (consumer). In addition, the seller was also accountable for the lack of conformity arising from a cause inherent in the sold goods at the moment of the passing of the

70 Garnowski, 2024, p. 59.

71 Jurczyński, 2013, p. 185.

72 The PoCRA, Art. 43b (2-2).

73 The PoCRA, Art. 43b (5).

risk.⁷⁴ It is worth highlighting that in the case of consumer sales contracts the risk of accidental loss or damage shifts to the consumer upon the delivery of the sold goods to him/her.⁷⁵ Thus, such a legal solution aligns with Art. 3, para. 1 of Directive 1999/44/EC. In concordance with Art. 20 of Directive 2011/83/EU, delivery of the goods is also considered to have taken place when the seller entrusted them to the carrier provided that the seller did not influence the consumer's choice of the carrier.⁷⁶ Although these rules were not mandatory, they possessed a semi-mandatory nature within consumer law, allowing for deviation from them in favour of the consumer.⁷⁷

The PoCC exonerated the seller from liability if the buyer (consumer) was aware of the lack of conformity at the time of the conclusion of the contract.⁷⁸ This provision represents the transposition of Art. 2, para. 3 of Directive 1999/44/EC. It assumed that the consumer's awareness of the defect prompted him/her to enter into the sales contract under the specified conditions or that the seller depended on that circumstance.⁷⁹ Curiously, the Polish legislator did not transpose the provision from Directive 1999/44/EC absolving the seller from liability when the lack of conformity originated from materials provided by the consumer.

The consumer's stance was strengthened by the provision that, when the purchaser was a consumer, the seller's liability could be limited or excluded only in cases outlined in specific provisions.⁸⁰ However, the PoCC extinguished the possibility of limiting or excluding the seller's liability if he/she deceitfully concealed the lack of conformity from the consumer.⁸¹ In that manner, the Polish legislator penalized the seller who acted *in mala fide*.

With the transposition of Directive (EU) 2019/771 in Polish law, the seller remained liable for the lack of conformity of the goods existing at the moment of their delivery.⁸² Furthermore, the seller can be released from liability if the consumer, no later than at the time of the conclusion of the contract, has been expressly informed that a specific feature of the goods diverges from the objective criteria for conformity outlined in Art. 43b, para. 2–3 of the PoCRA, and has expressly and separately accepted the absence of said specific feature of the goods.⁸³ This provision mirrors Art. 7, para. 5 of Directive (EU) 2019/771. It is worth emphasizing that the seller's exemption from liability has elevated the level of consumer protection compared to the legal solution from the PoCC

74 The PoCC, Art. 559.

75 The PoCC, Art. 548 (3).

76 The PoCC, Art. 548 (3).

77 Zoll, 2023, p. 521.

78 The PoCC, Art. 557 (1).

79 Affermi, 2022, p. 203.

80 The PoCC, Art. 558 (1).

81 The PoCC, Art. 558 (2).

82 The PoCRA, Art. 43c (1).

83 The PoCRA, Art. 43b (4).

since it became more stringent.⁸⁴ The mere consumer's knowledge of the lack of conformity does not suffice anymore for the seller to be absolved from liability. Namely, in addition to the circumstance that this type of awareness has to derive from a notification, the consumer's consent to the absence of a particular feature of the goods must be given explicitly and separately.

3.3. Deadlines and Burden of Proof

Prior to the implementation of Directive (EU) 2019/771 in Polish law, the PoCC delineated the seller's liability for the defect (lack of conformity) discovered before the expiration of two years from the date of delivery of the goods to the consumer.⁸⁵ Consequently, the seller's accountability was contingent upon the manifestation of the lack of conformity, present at the time of delivery, within the two-year timeframe from that moment. This rule aligns with Art. 5, para. 1 of Directive 1999/44/EC. However, the buyer's (consumer's) position was bolstered by the provision stating that the expiry of the deadline for the occurrence of the lack of conformity did not prevent the exercise of warranty rights if the seller fraudulently concealed it.⁸⁶ In addition, a specific rule applied when the shelf life of the goods designated by the seller or manufacturer extended beyond two years from the date of delivery of the goods to the buyer (consumer). In such scenarios, the seller was liable for any lack of conformity (defect) identified before the expiry of such timeframe.⁸⁷

Utilizing the opportunity articulated in Art. 7, para. 1 (2) of Directive 1999/44/EC, the Polish legislator enabled the contractual parties to reduce the duration of the seller's accountability in instances involving second-hand goods as the subject matter of the consumer sales contract, albeit not falling below one year from the date of delivery of the goods to the consumer.⁸⁸ It is crucial to accentuate that this provision was applicable solely when one of the contractual parties was a consumer.

Concerning the burden of proof, the guidance rendered by the CJEU in the previously noted Faber case was significant also within the Polish legal framework. Thus, it primarily rested upon the consumer to substantiate that the defect (lack of conformity) existed at the moment of the passing of the risk and that it surfaced within two years after that event. As per the CJEU, 'the onus is, in principle, on the consumer to furnish the evidence that a lack of conformity exists and that the lack of conformity existed at the time when the goods were delivered'.⁸⁹

⁸⁴ Ostrowski, 2023, p. 16.

⁸⁵ The PoCC, Art. 568 (1).

⁸⁶ The PoCC, Art. 568 (6).

⁸⁷ The PoCC, Art. 568-1.

⁸⁸ The PoCC, Art. 568 (1).

⁸⁹ Faber case, Para. 52.

However, the PoCC notably enhanced the consumer's position by instituting a presumption that the lack of conformity or its cause existed at the moment of the passing of the risk to the consumer if it was discovered within one year from the date of delivery of the sold goods.⁹⁰ Intriguingly, the Polish legislator did not explicitly delineate the inapplicability of this presumption in the event of its incompatibility with the nature of the goods or the character of the lack of conformity. The timeframe provided by the PoCC exceeded that of Directive 1999/44/EC (one year as opposed to six months), thereby rendering it more favourable to the consumer. It may be stated that the indications offered by the CJEU in the Faber case *mutatis mutandis* applied in this context as well. Consequently, the consumer was obligated to demonstrate the presence of the lack of conformity and its occurrence within one year from the delivery of the goods.

Following the transposition of Directive (EU) 2019/771, the seller continues to be liable for any lack of conformity revealed within two years from the moment of delivery. Nonetheless, the seller's liability may exceed the general two-year time boundary when the shelf life of the goods, as determined by the seller, his/her legal predecessors, or persons acting on their behalf surpasses two years.⁹¹ Fundamentally, these rules do not differ from the legal stipulations contained in the PoCC concerning the sale of movable goods. The consumer's position remains reinforced by the provision that precludes the seller from invoking the expiration of this timeframe if he/she deceitfully concealed the lack of conformity.⁹²

It may be argued that the most significant novelty resides in the extension of the temporal validity of the presumption regarding the existence of the lack of conformity at the time of delivery. Namely, it finds its application when the defect is identified within two years from the moment of delivery. The PoCRA explicitly specified that this presumption is rebuttable since it ceases to hold when it is proven otherwise or it cannot be reconciled with the specificity of the goods or the nature of the lack of conformity.⁹³ The Polish lawmaker seized the opportunity afforded by Art. 11, para. 2 of Directive (EU) 2019/771, which permits the Member States to introduce a two-year period commencing from the moment of delivery of the goods to the consumer. In that manner, this presumption encompasses the entire conventional duration of the seller's liability for the lack of conformity, indubitably enhancing the level of consumer protection compared to the PoCC.⁹⁴ Curiously, the Polish legal theory contends that the protection of consumer's interests in this respect might be considered excessively ample, potentially facilitating abuse to the detriment of the seller.⁹⁵ Nonetheless, this

90 The PoCC, Art. 556-2.

91 PoCRA, Art. 43c (1).

92 PoCRA, Art. 43c (2).

93 PoCRA, Art. 43c (1).

94 Garnowski, 2024, p. 61.

95 Jurczyński, 2013, p. 189.

legal arrangement seems legitimate, as it does not contravene the principle of maximum harmonization outlined in Directive (EU) 2019/771.

Moreover, the jurisprudential guidance provided by the CJEU in the Faber case remains pertinent. Likewise, Directive (EU) 2019/771 in Recital 45 specifies that the consumer is solely required to demonstrate that the goods do not conform to the contract. The burden of refuting this presumption rests with the seller, who must prove that the lack of conformity did not exist at the moment of delivery of the goods. It is noteworthy that the exclusion of this presumption based on its contradiction with the specificity of the goods incorporates especially perishable products. Simultaneously, the exclusion based on the nature of the lack of conformity refers to a deficiency stemming from consumer actions or overt external factors occurring after the delivery of the goods to the consumer.⁹⁶

Finally, the PoCRA does not contain any provision regarding the potential reduction of the duration of the seller's liability to one year for second-hand goods, indicating that this is no longer permissible.⁹⁷ Such a legal solution does not violate the maximum harmonization character of Directive (EU) 2019/771. On the contrary, the same Directive views the reduction of the general two-year timeframe as an option granted to the Member States. In this manner, the Polish legislator has further strengthened the consumer's position.

4. Conclusions

Both Czech and Polish legal systems, concerning the consumer's position in the event of the existence of a defect in the goods, were initially influenced by Directive 1999/44/EC. Subsequently, these countries transposed Directive (EU) 2019/771. Since Directive 1999/44/EC was of minimum harmonization, the divergences between the legal solutions adopted in the Czech Republic and Poland were more accentuated than the legislation now based on the maximum harmonization Directive (EU) 2019/771.

Regarding the existence (definition) of the lack of conformity prior to the transposition of Directive (EU) 2019/771, the Czech legislator took into account both subjective and objective requirements, establishing the situations in which the seller was particularly liable to the consumer. The Polish lawmaker defined it as non-compliance of the goods with the contract and determined instances where the sold goods were particularly inconsistent with the contract. With the implementation of Directive (EU) 2019/771, the examined legal systems distinguish between the subjective and objective requirements/criteria of

⁹⁶ Recital 45 of Directive (EU) 2019/771; Ostrowski, 2023, p. 11.

⁹⁷ Ostrowski, 2023, p. 11.

conformity and explicitly mention the seller's liability for the defect stemming from incorrect installation or assembly.

Moreover, the Czech legislator subjects the seller's liability to the existence of the lack of conformity at the moment of the takeover of the goods, while the relevant moment for its Polish counterpart was that of the passing of risk (in the CzCC, before the transposition of Directive (EU) 2019/771) and delivery (in the PoCRA). In both the examined legal frameworks, it is admissible to exclude the application of the objective requirements for conformity and exonerate the seller from liability if the consumer, who was informed no later than at the time of the conclusion of the contract that a specific feature of the goods diverges from the objective criteria, expressly and separately accepts that divergence.

In addition, for the seller to be liable, the defect has to emerge within two years of the takeover (the CzCC) or delivery of the goods (the PoCRA). The Polish legislator allows for the seller's liability to be longer than two years when the shelf life of the goods, as determined by the seller, his/her legal predecessors, or persons acting on their behalf, exceeds the mentioned general timeframe. Finally, the CzCC prolonged the duration of the presumption that the lack of conformity existed at the moment of takeover from six months to one year. On the other hand, the legal solution in Polish law is more advantageous to the consumer's position since this presumption is applicable when the defect emerges within two years of the delivery. Another difference concerns the possibility of reducing the period of the seller's liability when second-hand goods constitute the subject matter of the consumer sales contract. While such a possibility exists in Czech law, the Polish legislator no longer permits it.

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