



The Lack of Conformity and Consumer Rights in Hungarian Law

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Abstract. This paper aims to analyse the rules defining the lack of conformity of consumer goods with the contract and those governing the remedies at the consumer's disposal in Hungarian law. Together with the regulation representing the transposition of Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods that are in force today, this paper covers the respective rules inspired by Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees contained in the Civil Code enacted in 2013, with the principal intent to compare them and determine similarities and divergences. The definition of the lack of conformity differentiating subjective and objective requirements and the existence of the hierarchy of remedies available to the consumer may be considered the crucial similarity uniting the examined legal rules. On the other hand, reducing the number of claims at the consumer's disposal may be deemed the fundamental difference influencing the consumer's position. The hierarchy of claims stipulated in the Civil Code consisted of repair and replacement as the primary set of remedies and self-repair, repair at the seller's expense, appropriate price reduction, and the termination of the contract as the subsidiary remedies. Under the influence of the above-mentioned Directive (EU) 2019/771, the application of self-repair and repair at the seller's expense has been excluded in the case of consumer sales contracts.

Keywords: lack of conformity, Hungarian Civil Code, Government Decree, hierarchy of rights, repair, replacement, appropriate price reduction, termination of the contract

1. Introduction

The process of the harmonization of the regulation concerning the consumer's position, if there is a lack of conformity of the goods with the contract at the level

of the European Union, commenced 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’), considerably influenced by the United Nations Convention on Contracts for the International Sale of Goods.¹ The principal feature of the mentioned Directive was the minimum harmonization approach.² Thus, it allowed the Member States to adopt more stringent provisions in order to ensure a higher level of consumer protection.³ It is worth mentioning that this Directive exerted the most significant impact on contract law.⁴

A further step in this regard was made by enacting Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (hereinafter referred to as ‘Directive (EU) 2019/771’), which repealed Directive 1999/44/EC. This Directive is characterized by the maximum harmonization clause,⁵ signifying that Member States are not allowed to maintain or introduce provisions diverging from those contained in it, including more or less stringent provisions in order to ensure a different level of consumer protection unless otherwise provided for in the same Directive.⁶

Both Directives were transposed into Hungarian law and exercised a notable influence on its legal system. This paper focuses on two consumer sales law issues: the definition of the notion of lack of conformity and remedies at the consumer’s disposal. Its objective is to present and compare the regulation of the mentioned issues before and after the transposition of Directive (EU) 2019/771 in Hungarian law. The provisions influenced by Directive 1999/44/EC will be presented starting from the adoption of the Hungarian Civil Code in 2013. Finally, this paper also contains a chapter devoted to the legal sources transposing the mentioned Directives.

2. Sources of Law

The Hungarian legislator transposed the provisions of Directive 1999/44/EC in 2002 by amending the Civil Code, adopted in 1959.⁷ The amendments modified the general rules of contract law, inter alia, related to the buyer’s position in the

1 Schwenzer 2014. 44.

2 Twigg-Flesner 2008a. 407.

3 Directive 1999/44/EC, Art. 8, Sec. 2.

4 Twigg-Flesner 2008b. 59.

5 Carvalho 2020. 33.

6 Directive (EU) 2019/771, Art. 4.

7 2002. évi XXXVI. Törvény a Magyar Köztársaság Polgári Törvénykönyvéről szóló 1959. évi IV. törvény, valamint egyes törvények fogyasztóvédelemmel összefüggő jogharmonizációs célú módosításáról [Act No XXXVI of 2002 Amending Act No IV of 1959 on the Civil Code of the Republic of Hungary and Certain Acts for the Purpose of Harmonizing Legislation in Relation to Consumer Protection].

event of a lack of conformity of the goods with the contract.⁸ The Hungarian legal theory stressed that incorporating basic private consumer law rules into the Civil Code was advantageous since these norms appeared in a system appropriate to their nature and regulation method.⁹ Repeating rules with identical content and double regulation were avoided in that manner.¹⁰ The novel Civil Code adopted in 2013, whose preparation was initiated in 1998,¹¹ retained the same regulation method, considering that the provisions on the lack of conformity applied to both the consumer sales contracts and contracts concluded outside the consumer context.¹² However, it was stressed explicitly if a particular provision applied solely and exclusively to consumer sales contracts.

The principal act transposing Directive (EU) 2019/771 into Hungarian law is Government Decree No 373/2021 on the sale of goods and the supply of digital content between consumers and businesses and detailed rules for contracts for the provision of digital services¹³ (hereinafter referred to as ‘the Government Decree’) followed and amended by Government Decree No 365/2022 on detailed rules for contracts between consumers and businesses for the sale of goods and the supply of digital content and digital services.¹⁴ The legal ground rendering possible this kind of regulation is given by the amendment of Act CLXXVII on transitional and enabling provisions related to the entry into force of Act V of 2013 on the Civil Code¹⁵ that allows the government to determine by decree rules on the consumer sales contract, including detailed rules on conformity with the contract, defective performance, and related remedies and the conditions for their enforcement and guarantees.¹⁶

8 Dudás 2020. 1046.

9 Vékás 2006.

10 Vékás 2021. 67.

11 Fuglinszky 2019. 265; Dudás 2013. 338.

12 Dudás 2020. 1053.

13 A Kormány 373/2021. (VI. 30.) Korm. rendelete a fogyasztó és vállalkozás közötti, az áruk adásvételére, valamint a digitális tartalom szolgáltatására és digitális szolgáltatások nyújtására irányuló szerződések részletes szabályairól [Government Decree No 373/2021 on the Sale of Goods and the Supply of Digital Content between Consumers and Businesses and on Detailed Rules for Contracts for the Provision of Digital Services].

14 A Kormány 365/2022. (IX. 23.) Korm. rendelete a fogyasztó és vállalkozás közötti, az áruk adásvételére, valamint a digitális tartalom szolgáltatására és digitális szolgáltatások nyújtására irányuló szerződések részletes szabályairól szóló 373/2021. (VI. 30.) Korm. rendelet módosításáról [Government Decree No 365/2022 on the Detailed Rules for Contracts between Consumers and Businesses for the Sale of Goods and the Supply of Digital Content and Digital Services, Amending Government Decree No 373/2021].

15 2013. évi CLXXVII. Törvény a Polgári Törvénykönyvről szóló 2013. évi V. törvény hatálybalépésével összefüggő átmeneti és felhatalmazó rendelkezésekről [Act No CLXXVII on Transitional and Enabling Provisions Related to the Entry into Force of Act No V of 2013 on the Civil Code].

16 Act No CLXXVII, Art. 11, Sec. (1i).

The transposition of Directive (EU) 2019/771 introduced an important conceptual novelty since the provisions in the Government Decree apply exclusively to sales contracts concluded in the consumer context, i.e. between a consumer and a seller. The same Government Decree states that its provisions are to be applied together with the requirements of the Civil Code related to the lack of conformity of the goods with the contract.¹⁷ The Hungarian legislator justified the separate regulation by stressing that the scope of the mentioned Directive is narrower than the scope of the Civil Code.¹⁸ However, in line with Art. 3 of Act CXXX of 2010 on Law-Making¹⁹ stipulating that there should be no unnecessary parallel or multi-level regulation, the Government Decree attempts to avoid repeating the provisions already contained in the Civil Code.²⁰ Therefore, it may be inferred that the Government Decree is the principal legal source for determining the consumer's position in the event of a lack of conformity of the goods with the (consumer sales) contract, while the provisions of the Civil Code find their application when the Government Decree does not regulate a particular issue.²¹

Finally, it is worth underlining that the Government Decree is not the only legal act transposing Directive 2019/771, albeit it may be defined as 'the major piece of the transposition measure',²² since certain provisions of the mentioned Directive are implemented into the Civil Code (amendments introduced by Act LI of 2021 Amending Certain Laws Relating to Service and Sectoral Judicial Legislation),²³ the Consumer Protection Act,²⁴ and the Government Decree on Consumer Contracts.²⁵

17 The Government Decree, Art. 6.

18 Végső előterjesztői indokolás a fogyasztó és vállalkozás közötti, az áruk adásvételére, valamint a digitális tartalom szolgáltatására és digitális szolgáltatások nyújtására irányuló szerződések részletes szabályairól szóló 373/2021. (VI. 30.) Korm. rendelethez [Final Explanatory Memorandum to Government Decree No 373/2021 (June 30) on the Detailed Rules for Contracts between Consumer and Business for the Sale of Goods, Respectively for the Supply of Digital Content and for the Provision of Digital Services] (henceforth: Final Explanatory Memorandum). 1354–1355; Szilágyi 2021. 269.

19 2010. évi CXXX törvény a jogalkotásról [Act No CXXX of 2010 on Law-Making].

20 Final Explanatory Memorandum. 1355.

21 Ibid.; Szilágyi 2021. 269.

22 Szilágyi 2021. 268.

23 2021. évi LI. törvény egyes törvényeknek a kézbesítéssel és az igazságügyi ágazati szabályozással összefüggő módosításáról [Act No LI of 2021 Amending Certain Laws Relating to Service of Documents and Sectoral Judicial Legislation].

24 1997. évi CLV. törvény a fogyasztóvédelemről [Act No CLV of 1997 on Consumer Protection].

25 45/2014. (II. 26.) Korm. rendelet a fogyasztó és a vállalkozás közötti szerződések részletes szabályairól [Government Decree No 45/2014 on the Detailed Rules on Contracts between Consumer and Business].

3. Lack of Conformity

Before the transposition of Directive (EU) 2019/771, the definition of lack of conformity in the consumer context in the Civil Code differed from that in Directive 1999/44/EC. Namely, it was interpreted as a situation when the seller's performance at the delivery date did not comply with the quality requirements laid down in the contract or stipulated by law.²⁶ Thus, the determination of the quality requirements was subject to the parties' will expressed in the consumer sales contract (subjective requirements) or the provisions of a specific law (objective requirements). On the other hand, Directive 1999/44/EC introduced a general obligation imposed on the seller to deliver goods that are in conformity with the contract of sale.²⁷ The European legislator also established a presumption of conformity if specific requirements were satisfied.²⁸ It is worth noting that the mentioned presumption was rebuttable, meaning that goods that met the prescribed requirements could have been found not to be in conformity with the sales contract.²⁹

Furthermore, the Hungarian legislator released the seller from liability if the consumer knew or should have known the lack of conformity at the time of the conclusion of the contract.³⁰ This provision represents an incomplete transposition of Art. 2, Sec. 3. of Directive 1999/44/EC since the circumstance that the lack of conformity had its origin in materials supplied by the consumer was omitted. Its purpose was to limit the potential seller's liability.³¹ Interestingly, the provisions on the incorrect installation of consumer goods and shortcomings in the installation instructions, present in Directive 1999/44/EC and the old Civil Code, were excluded from the novel Civil Code. However, the incorrect installation could have been considered a breach of the seller's contractual obligation if they were obliged to install the consumer goods according to the consumer sales contract, while general rules of contract law could have determined the seller's liability for the shortcomings in the installation instructions.³² Moreover, the Civil Code explicitly envisaged that any derogation from the warranty provisions to the consumer's detriment in the consumer sales contract was null and void.³³ It may be inferred that the warranty provisions applying to sales contracts concluded in the consumer context were unilaterally cogent.³⁴

26 The Civil Code, Sec. 6: 157 (1).

27 Directive 1999/44/EC, Art. 2, Sec. 1.

28 Id. Sec. 2.

29 Howells et al. 2018. 180; Twigg-Flesner 2008. 91.

30 The Civil Code, Sec. 6: 157 (1).

31 Weatherill 2005. 130.

32 Kemenés 2014, cited in Dudás 2020. 1053.

33 The Civil Code, Sec. 6: 157 (2).

34 Dudás 2020. 1047.

Transposing Art. 5, Sec. 3 of Directive 1999/44/EC, the Hungarian legislator established a presumption applying solely to consumer sales contracts that the lack of conformity existed at the time of delivery if the consumer detected it within six months of the date of performance. This presumption was rebuttable since it did not find its application if it was incompatible with the nature of the goods or the characteristics of the lack of conformity.³⁵ In this regard, it is essential to mention the judgment of the Court of Justice of the European Union (hereinafter referred to as 'the CJEU') rendered in the Faber case. Namely, the CJEU affirmed that the provision establishing this presumption (i.e. Art. 5, Sec. 3 of Directive 1999/44/EC) 'must be regarded as a provision of equal standing to a national rule that ranks, within the domestic legal system, as a rule of public policy', implying the obligation of the national court to apply of its own motion any provision of its domestic law which transposes the abovementioned Art. 5, Sec. 3. of Directive 1999/44/EC.³⁶ The objective of the CJEU was to safeguard the position of a consumer who omitted to use this presumption.³⁷ Moreover, the CJEU determined that the consumer, in order to dispose of the mentioned presumption successfully, is obliged to demonstrate that the lack of conformity existed and that it became apparent within six months of the delivery of the goods while they are not required to prove the cause of the lack of conformity nor to establish that its origin is attributable to the seller.³⁸ On the other hand, the seller can rebut the presumption by showing that the lack of conformity is a consequence of circumstances that arose after the delivery of the goods to the consumer.³⁹ This ruling may be considered beneficial to the consumer's position since it avoids the situation in which they cannot discern the actual cause of the lack of conformity.⁴⁰

Implementing Directive (EU) 2019/771 brought significant novelties. Following its letter and spirit, the Government Decree differentiates subjective and objective requirements for conformity. Concerning the subjective requirements for conformity, it is stipulated, in concordance with Art. 6 of Directive (EU) 2019/771, that the goods (the exact term used by the Hungarian legislator is the performance/service – *szolgáltatás*), in order to conform to the consumer sales contract, shall:⁴¹

35 The Civil Code, Sec. 6: 158.

36 Case C-497/13, para. 56.

37 Patti 2016. 14.

38 Case C-497/13, para. 75.

39 Ibid.

40 Hacker 2016. 174.

41 The Government Decree, Art. 5, Sec. 2.

- (1) be of the description, quantity, quality, type and possess the functionality, compatibility, interoperability, and other contractual features specified in the sales contract;
- (2) be fit for any particular purpose specified and made known to the seller by the consumer at the latest at the time of the conclusion of the sales contract, and in respect of which the seller has given acceptance;
- (3) have all accessories and instructions, including on installation and customer service support, as specified by the sales contract; and
- (4) be supplied with updates as stipulated by the sales contract.

Regarding the objective requirements for conformity, the Government Decree, transposing Art. 7, Sec. 1 of Directive 2019/771, envisages that the goods shall:⁴²

- (1) be fit for the purposes prescribed by law, technical standards or, in the absence of such technical standards, a relevant code of conduct for the same type of goods;
- (2) possess the quantity, quality, performance, and other features, including in relation to functionality, compatibility, accessibility, continuity, and security normal for goods of the same type and which the consumer may reasonably expect, taking into account any public statement made by the seller or their representative regarding the specific features of the goods, particularly in advertising or on labelling;⁴³
- (3) possess accessories and instructions that the consumer may reasonably expect, including packaging and installation instructions; and
- (4) correspond to the features and the description of a sample, model, or trial version that the seller made available before the conclusion of the contract.

It is essential to underline that objective requirements for conformity apply to each consumer sales contract, even when nothing specific was agreed upon between the contractual parties in the particular case. In contrast, subjective requirements for conformity supplement them, being subject to the parties' will expressed through the sales contract.⁴⁴ Applying the subjective requirements

⁴² Id. Sec. 3.

⁴³ Interestingly, the Hungarian legislator did not explicitly include the notion of durability among the objective requirements of conformity, albeit it is defined in Art. 2, Sec. 14. (*tartósság* 'durability'). The nature of the goods determining the reasonable expectation of the consumer, contained in Directive (EU) 2019/771, is absent as well. Furthermore, it is not specified that public statements are made by other persons in previous links of the chain of transactions, including the producer.

⁴⁴ Twigg-Flesner 2020. 56.

from conformity directly derives from the specific relationship between the contractual parties.⁴⁵

The Hungarian legislator, transposing Art. 7, Sec. 2 of Directive 2019/771, rendered possible the exoneration from the liability for the seller for public statements made according to the abovementioned Art. 5, Sec. 3 (b). Namely, the seller shall not be bound by such public statements if they demonstrate that:⁴⁶

- (1) they were not aware, and could not have been aware, of the public statement in question;
- (2) the public statement had been duly corrected by the time of the conclusion of the contract; or
- (3) the public statement could not have influenced the consumer's decision to buy the goods.

Moreover, the Government Decree reintroduced the provisions on the incorrect installation of consumer goods and shortcomings in the installation instructions (IKEA clause). Transposing Art. 8 of Directive 2019/771, it envisages that any defect resulting from the improper installation of the goods shall be regarded as a lack of conformity of the goods if:⁴⁷

- (1) the installation forms part of the consumer sales contract and was carried out by the seller or under the seller's responsibility *or*
- (2) the installation was intended to be carried out by the consumer, and the incorrect installation was due to shortcomings in the installation instructions provided by the seller.

Similarly to the legal solution contained in the Civil Code, the seller is released from liability, i.e. there will be no lack of conformity if, at the time of the conclusion of the sales contract, the consumer was informed explicitly that a particular characteristic of the goods was deviating from the objective requirements for conformity laid down in Art. 5, Sec. 3 and the consumer expressly and separately accepted that deviation when concluding the sales contract.⁴⁸ This provision represents the transposition of Art. 7, Sec. 5 of Directive 2019/771, whose *ratio legis* is to prevent the consumer from complaining about the lack of conformity when they knew about it before the conclusion of the sales contract.⁴⁹

45 Mišćenić et al. 2021. 55.

46 The Government Decree, Art. 5, Sec. 4.

47 Id. Art. 9, Sec. 1.

48 Id. Art. 8, Sec. 4.

49 Twigg-Flesner 2020. 71.

Finally, the lapse of time for the emergence of the lack of conformity covered by the abovementioned rebuttable presumption that it existed at the time of delivery has been extended to one year, compared to six months as prescribed in the Civil Code.⁵⁰ However, the conditions set by the CJEU in the Faber case should still find their application.⁵¹

4. Consumer's Remedies

At the moment of its enactment, the Civil Code granted the consumer more remedies than Directive 1999/44/EC that differentiated repair, replacement, appropriate price reduction, and termination of the contract.⁵² Transposing Art. 3, Sec. 3 of the mentioned Directive, the Hungarian legislator stipulated that the consumer could choose between repair and replacement in the first place if there were a lack of conformity of goods with the contract. The consumer's freedom of choice was excluded if compliance with the selected remedy was impossible or it imposed disproportionate expenses to the seller compared to the other alternative remedy, taking into account the value the goods would have if there were no lack of conformity, the significance of the lack of conformity, and the harm caused to the consumer upon compliance with the chosen remedy.⁵³ In this regard, it is essential to mention that the CJEU, in the Weber and Putz case, ruled that the term disproportionate is to be interpreted 'exclusively in relation to the other remedy, thus limiting it to cases of relative lack of conformity'.⁵⁴ Therefore, the proportionality test is applied exclusively between the repair and replacement remedies.⁵⁵ The CJEU, moreover, allowed the consumer to request an appropriate price reduction or rescission of the contract instead of the replacement, 'since the fact that a consumer cannot have the defective goods brought into conformity without having to bear part of these costs constitutes significant inconvenience for the consumer'.⁵⁶

Furthermore, the Civil Code stipulated that any repair or replacement should be completed within a reasonable time limit considering the consumer's interests, the characteristics of the goods, and their designated purpose that can be expected from the consumer.⁵⁷

Transposing Art. 3, Sec. 5 of Directive 1999/44/EC, the Hungarian legislator allowed the consumer to demand a price reduction or terminate the contract

⁵⁰ The Government Decree, Art. 11, Sec. 1.

⁵¹ Carvalho 2020. 42.

⁵² Directive 1999/44, Art. 3, Sec. 2.

⁵³ The Civil Code, Sec. 6: 159 (2a).

⁵⁴ Joined Cases C-65/09 and C-87/09, para. 68.

⁵⁵ Mišćenić et al. 2021. 67; Michel 2018. 223.

⁵⁶ Joined Cases C-65/09 and C-87/09, para. 77.

⁵⁷ The Civil Code, Sec. 6: 159 (4).

if the seller did not provide repair or replacement or was unable to comply with this obligation under the conditions set out in the abovementioned Sec. 6:159 (4) or if repair and replacement no longer served the consumer's interest. Additionally, under such circumstances, the consumer was allowed to repair the lack of conformity themselves or have it repaired at the seller's expense.⁵⁸ These remedies were not present in Directive 1999/44/EC. It is worth mentioning that self-repair may be attractive and beneficial from the point of view of circular economy and environmental protection since it saves transportation costs and enables the use of regenerated spare parts.⁵⁹ However, the amendments to the Civil Code in 2021 excluded the possibility of applying self-repair and repair at the seller's expense to the contracts concluded in the consumer context.⁶⁰ Furthermore, in concordance with Art. 3, Sec. 6 of Directive 1999/44/EC, the consumer could not terminate the contract if the lack of conformity was minor.⁶¹

Concerning compensation for damages inflicted on the consumer by the lack of conformity, it was closely connected to the impossibility of providing for repair or replacement. Namely, the consumer was entitled to claim damages if repair or replacement was not possible, if the seller did not provide repair or replacement or could not perform this obligation, or if the consumer's interest in repair and replacement ceased to exist.⁶²

It may be inferred that the Hungarian legislator, before the amendments to the Civil Code of 2021, established the hierarchy of claims available to the consumer consisting of repair and replacement as the primary set of remedies and appropriate price reduction, self-repair, repair at the seller's expense, and the termination of the contract as a secondary set of claims.⁶³ The mentioned amendments reduced the number of remedies at the consumer's disposal since the self-repair and repair at the seller's expense became applicable solely in the case of sales contracts concluded outside the consumer context. The secondary set of remedies entailed activating compensation for damages.

Interestingly, the Civil Code contains some peculiar legal solutions. It envisages that the consumer's request does not bind the court, but the court cannot order the performance of the remedy objected to by both parties.⁶⁴ Without this provision, the consumer whose request was not founded would have been forced to commence another proceeding to realize their rights.⁶⁵ Such a legal solution is similar to what was stated in the Duarte case. Namely, the CJEU in judgment

58 Id. 159 (2b).

59 Zoll et al. 2020. 540.

60 The Civil Code, Sec. 6: 159 (2a).

61 Id. 159 (4).

62 Id. 174 (2).

63 Hajnal 2022. 186.

64 The Civil Code, Sec. 6: 162.

65 Dudás 2020. 1053–1054.

C-32/12 (Duarte case) allowed the national court to ‘grant of its own motion an appropriate reduction in the price of goods which are the subject of the sales contract in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only the rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end’.⁶⁶ The mentioned judgment refers to a situation when the consumer cannot obtain the requested termination of the contract due to the minor nature of the lack of conformity.⁶⁷ Conversely, the legal solution present in the Civil Code is broader since each consumer’s request does not bind the court, not exclusively when the termination of the contract is not admissible due to the lesser relevance of the lack of conformity. Hypothetically, it is possible to imagine that the court avoids terminating the contract because of its detrimental environmental consequences. However, the court cannot order the remedy to whose performance both parties are contrary. Moreover, the consumer is entitled to switch from the chosen remedy to another one. In that case, they are obliged to pay the costs caused by such a switch to the seller unless the seller provoked the switch or it was otherwise justified.⁶⁸

The Hungarian legislator established the direct liability of the producer, applying exclusively to sales contracts concluded in the consumer context. It is worth noting that Recital 23 of Directive 1999/44/EC stressed the importance of ‘providing for the producer’s direct liability for defects for which he is responsible’ for ensuring a high level of consumer protection and more far-reaching harmonization. Following that track, the Civil Code enables the consumer to demand from the producer a repair if there is a lack of conformity or the replacement of the goods if the repair is not possible within an appropriate time limit and without harming the consumer’s interest.⁶⁹ For the sake of establishing the direct liability of the producer, the lack of conformity exists if the goods do not comply with the quality requirements in force when the goods were placed on the market or if they did not have the characteristics specified by the producer.⁷⁰ It is crucial to underline that, in this case, the repair is considered the primary remedy. The availability of the replacement, as the subsidiary remedy, is conditioned by the impossibility of performing the repair within an appropriate time limit and without causing harm to the consumer’s interest. The consumer is not entitled to demand the appropriate price reduction and termination of the contract from the producer because the consumer concluded the sales contract only with the seller.⁷¹ These

66 Case C-32/12, para. 43.

67 Jansen 2014. 990; Micklitz–Kas 2014. 62.

68 The Civil Code, Sec. 6. 160.

69 Id. 168 (1).

70 Ibid.

71 Kemenés 2014, cited in Dudás 2020. 1055.

two claims can be used exclusively towards the seller. Essentially, it is admissible for the consumer to request the repair or replacement of the defective goods from the seller and producer simultaneously.⁷² However, the cumulative performance of their request is excluded.⁷³ It is fundamental to stress that the unsuccessful completion of the request made towards the seller to repair or replace the goods is not a precondition for activating the direct liability of the producer.⁷⁴

Finally, the Civil Code obliges the consumer to inform the seller about the lack of conformity without delay after its discovery in order to be able to dispose of the available remedies.⁷⁵ Taking advantage of the opportunity granted by Art. 5, Sec. 2 of Directive 1999/44/EC, the Hungarian legislator specified that in the event of consumer sales contracts, a lack of conformity notified to the seller by the consumer within two months following its discovery is to be considered communicated without delay.⁷⁶ Interestingly, the Civil Code did not prescribe any indication concerning the content and form of the consumer's notification of the lack of conformity. However, the already-mentioned judgment of the CJEU rendered in the *Faber* case may be particularly relevant in this regard. The CJEU affirmed that 'the notification to be given relates only to the existence of that lack of conformity and that it is not subject to rules of evidence which would make it impossible or excessively difficult for the consumer to exercise their rights.'⁷⁷ If we consider that the purpose of this obligation is to merely notify the seller that a lack of conformity was discovered,⁷⁸ the legal solution present in Hungarian law seems concordant with the requirements posed by the CJEU.

Essentially, the Government Decree retained the identical remedies at the consumer's disposal as contained in the Civil Code after the amendments of 2021. Consequently, repair and replacement remained the primary set of claims. Given that the provision excluding the consumer's freedom of choice between repair and replacement is not present in the Government Decree, the abovementioned Sec. 6: 159 (2-a) of the Civil Code still applies. However, the Hungarian legislator, transposing Art. 13, Sec. 3 of Directive (EU) 2019/771, allowed the seller to refuse to bring the goods into conformity if repair and replacement are impossible or would impose disproportionate additional costs on them, taking into account all the circumstances, including the value the goods would have if there were no lack of conformity, and the significance thereof.⁷⁹ Moreover, the obligation to complete the repair or replacement within a reasonable time limit envisaged by Sec. 6: 159

72 Dudás 2020. 1055.

73 Kemenés 2014, cited in Dudás 2020. 1055.

74 Dudás 2021. 943.

75 The Civil Code, Sec. 6. 162 (1).

76 Id. 162 (2).

77 Case C-497/13, para. 65.

78 Howells et al. 2018. 197.

79 The Government Decree, Art. 12 (1).

(4) of the Civil Code still finds its application. It is worth mentioning that the Government Decree did not use the possibility granted in Recital 55 of Directive (EU) 2019/771 to specify a fixed period for completing repair or replacement. Therefore, determining the reasonable time limit depends on the circumstances of the particular case. In line with Art. 14, Sec. 1 (b) of the mentioned Directive, the Government Decree only envisages that the reasonable time period shall be calculated from the moment the consumer has informed the seller about the lack of conformity.⁸⁰

The successful completion of repair and replacement presupposes the obligation posed to the consumer to make the goods available to the seller.⁸¹ On the other hand, the seller is obliged to give back the replaced goods at their own expense.⁸² These provisions represent the transposition of Art. 14, Sec. 2 of Directive (EU) 2019/771. Furthermore, the Hungarian legislator, in concordance with Art. 14, Sec. 3 of the mentioned Directive, introduced a particular rule applying to the eventuality when the repair or replacement required the removal of goods that had been installed in accordance with their nature and purpose before the lack of conformity became apparent. In such a case, the obligation to repair or replace the goods includes the removal of the defective goods and installing replacement or repaired goods or bearing the costs of that removal and installation.⁸³ This provision is a clear example of how the jurisprudence of the CJEU inspired the European legislator.⁸⁴ Namely, the CJEU, in the already mentioned Weber and Putz case, ruled that concerning defective consumer goods installed *in bona fide* by the consumer in a fashion consistent with their nature and purpose, ‘the seller is obliged either himself to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods’.⁸⁵ Moreover, the CJEU specified that such an obligation ‘exists regardless of whether he was obliged under the contract of sale to install the consumer goods already purchased’.⁸⁶ It is worth noting that this judgment imposed an additional obligation to the seller not stipulated in the consumer sales contract, intervening in the contractual balance between consumer and seller.⁸⁷

Transposing Art. 13, Sec. 4 of Directive (EU) 2019/771, the Hungarian legislator stipulates that the appropriate price reduction and the termination of the contract, as the subsidiary set of claims, are available to the consumer if:⁸⁸

80 Id. Art. 13 (1).

81 Id. Art. 13 (2).

82 Id. Art. 13 (3).

83 Ibid.

84 Rodrigo 2022. 1300; Loos 2016. 12.

85 Joint cases C-65/09 and C-87/09, para. 62.

86 Id. para. 62.

87 Micklitz–Kas 2014. 61.

88 The Government Decree, Art. 12 (2).

- (1) the seller has not completed repair or replacement or has not carried it out following the conditions laid down in Art. 13 (3) or has refused to bring the goods into conformity according to the above-mentioned Art. 12 (1);
- (2) a lack of conformity appears even though the seller has attempted to bring the goods into conformity;
- (3) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the contract; or
- (4) the seller has not undertaken to bring the goods into conformity, or it is clear from the circumstances that they will not bring the goods into conformity within a reasonable period of time or without significant inconvenience to the consumer.

In order to better understand the second case, one should take into account Recital 52 of Directive (EU) 2019/771, recommending an objective determination of whether the consumer should accept further attempts of the seller to eliminate the lack of conformity. Namely, the circumstances, such as the type and the value of the goods, and the nature and the significance of the lack of conformity should be considered in this respect. Another attempt by the seller should be granted in the case of expensive and complex goods. Furthermore, the European legislator recommends that the consumer's confidence in the seller's ability to bring the goods into conformity shall also be taken into consideration.

Regarding the price reduction, the Government Decree, in the spirit of Art. 15 of Directive (EU) 2019/771, envisages that it is appropriate if it is equal to the difference between the value the goods would have if they conformed with the contract and the value received by the consumer.⁸⁹

Moreover, there are some important additional provisions on the termination of the contract. First, the mentioned provision of the Civil Code stating that it is not possible to terminate the contract when the lack of conformity is minor still finds its application. At the same time, the Government Decree explicitly places on the seller the burden of proof that the lack of conformity is of lesser relevance.⁹⁰ The Hungarian legislator did not take advantage of the opportunity provided by Art. 3, Sec. 7 of Directive (EU) 2019/771 to allow consumers to choose a specific remedy if the lack of conformity becomes apparent within a period not exceeding 30 days after the delivery of the goods. Consequently, the fact that a lack of conformity appeared immediately or shortly after the delivery of the goods does not make any difference regarding the hierarchy of remedies at the consumer's disposal.

When it comes to how the contract is terminated, the Government Decree envisions that the consumer exercises this remedy by means of a statement

89 Id. Art. 14.

90 Id. Art. 12 (3).

addressed to the seller expressing their decision to terminate the consumer sales contract.⁹¹ This provision represents the transposition of Art. 16, Sec. 1 of Directive (EU) 2019/771. It may be inferred that the consumer sales contract can be terminated extrajudicially since the consumer's unilateral statement directed to the seller proves sufficient.⁹² However, following the letter and the spirit of Art. 16, Sec. 2 of the mentioned Directive, the Government Decree introduced the rule that when the lack of conformity relates only to part of the delivered goods, the consumer may terminate the contract solely concerning those defective goods. Conversely, it is admissible to terminate the contract in relation to the remaining goods if the consumer cannot be reasonably expected to keep only conforming goods.⁹³ It may be stated that such a legal solution is laudable from the point of view of environmental protection because of its potential to reduce the environmental costs connected with the disposal of returned goods.⁹⁴

It is worth noting that the termination of the contract presupposes certain obligations for both contractual parties. Transposing Art. 16, Sec. 3 (a) of Directive (EU) 2019/771, the Hungarian legislator obliges the consumer to return the seller the goods at the seller's expense.⁹⁵ On the other hand, the seller's obligation concerns reimbursing the consumer the price paid for the goods upon receipt of the goods or of evidence demonstrating that the consumer has sent the goods back.⁹⁶ This provision is concordant with Art. 16, Sec. 3 (b) of Directive (EU) 2019/771. Interestingly, the Government Decree did not envisage any time limit for performing the abovementioned obligations. It is evident that the consumer's obligation to return the goods precedes and activates the seller's obligation to refund the price paid.

It is important to accentuate that the Government Decree does not contain any provision regulating compensation for damages the consumer has incurred because of the lack of conformity. Therefore, it may be inferred that the abovementioned provisions from the Civil Code linking compensation for damages to the impossibility of providing for repair or replacement and placing it essentially among the subsidiary set of claims still find their application. Moreover, the provision of the Civil Code stating that the court is not bound by the consumer's request but cannot order the performance of the remedy objected to by both parties is also still applicable.

Moreover, the direct liability of the producer to perform repair and replacement, as envisaged in the Civil Code, should be compared to the guarantee of durability. Namely, the Government Decree, transposing Art. 17, Sec. 1 of Directive (EU)

91 Id. Art. 15 (1).

92 Sartoris 2020. 708.

93 The Government Decree, Art. 15 (2).

94 Zoll et al. 2020. 544.

95 The Government Decree, Art. 16 (3a).

96 Id. Art. 16 (3b).

2019/771, stipulates that, as a type of commercial guarantee, when the producer provides a guarantee of durability for certain goods and for a certain period of time, the consumer may require the producer during the entire period of the guarantee of durability to eliminate the lack of conformity by repair or replacement according to the rules governing the exercise of these remedies.⁹⁷ Additionally, the producer may offer the consumer more favourable conditions in the guarantee of durability statement. The legal effect of this type of commercial durability is the same as that of the direct liability of the producer from the Civil Code. It enables the consumer to choose whether to demand the elimination of the lack of conformity by repair or replacement from the seller or the producer.⁹⁸

However, there are essential differences between these two institutes. First, the direct liability of the producer from the Civil Code is mandatory because the producer's liability to provide for repair and replacement is not subject to their consent. Substantially, the consumer may require the producer to repair or replace the defective goods in each case. However, the Civil Code envisioned certain eventualities in which the producer would be exempt from liability. On the other hand, the consumer's right to demand repair or replacement from the producer stemming from the guarantee of durability is conditioned by the producer's free will and decision to offer this kind of commercial guarantee. Another difference concerns the fact that the direct liability of the producer from the Civil Code presupposes a hierarchy of claims signifying that the repair is prioritized over the replacement. Conversely, in the commercial guarantee of durability, equal merit is given to these two remedies.

Finally, it is noteworthy that the Government Decree does not contain any provision governing the consumer's obligation to inform the seller about the lack of conformity. Thus, the abovementioned provisions from the Civil Code obliging the consumer to notify the seller within two months following the detection of the lack of conformity still find their application.

5. Conclusions

At the moment of the enactment of the novel Civil Code, the rules on the lack of conformity of the goods with the contract were inspired by Directive 1999/44/EC. However, the minimum harmonization character of the mentioned Directive authorized the Hungarian legislator to diverge from its provisions significantly, particularly regarding the definition of the lack of conformity and the remedies at the consumer's disposal. Namely, the Civil Code did not introduce the presumption of conformity if specific requirements were satisfied.

97 Id. Art. 16 (2).

98 Cárcamo 2022. 158; Vékás 2021. 77.

Still, it differentiated subjective and objective requirements defining the lack of conformity as a situation when the seller's performance at the delivery date did not comply with the quality requirements laid down in the contract or stipulated by law. Moreover, the Civil Code did not contain a provision on the incorrect installation of consumer goods and shortcomings in the installation instructions present in its predecessor, the old Civil Code. On the other hand, the presumption that the lack of conformity existed at the time of delivery if the consumer detected it within six months of the date of performance unless it was incompatible with the nature of the goods or the characteristics of the lack of conformity found its place into the Civil Code.

Concerning the remedies available to the consumer, it may be stated that the Civil Code was more beneficial to the consumer's position than Directive 1999/44/EC since they had more claims at their disposal. Repair and replacement were considered the primary set of remedies, while self-repair, repair at the seller's expense, appropriate price reduction, and termination of the contract were subsidiary remedies. Additionally, the Hungarian legislator envisaged the direct liability of the producer for repair or replacement, applying exclusively to contracts concluded in the consumer context.

The transposition of Directive (EU) 2019/771 brought a fundamental conceptual novelty since the Government Decree became the primary legal act regulating the consumer's position in the event of a lack of conformity, while the provisions of the Civil Code apply when a particular issue is not governed by the Government Decree. As regards the definition of the lack of conformity and specific claims at the consumer's disposal, it may be stated that the Government Decree faithfully transposes the provisions of Directive (EU) 2019/771, characterized by the maximum harmonization clause. The Hungarian legislator distinguished subjective and objective requirements for conformity. The provisions on the incorrect installation and shortcomings in the installation instructions have been reintroduced. At the same time, the lapse of time covered by the presumption that the lack of conformity existed at the time of delivery has been extended to one year.

Finally, following the letter and spirit of Directive (EU) 2019/771, the Government Decree envisions the repair and replacement among the primary set of remedies, while the appropriate price reduction and the termination of the contract form part of the secondary set of claims. The circumstance that the lack of conformity appeared immediately or shortly after the delivery of goods does not modify the hierarchy of remedies at the consumer's disposal.

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