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## **THE IMPLEMENTATION OF THE NEW CONSUMER SALES DIRECTIVES IN THE BALTIC STATES: A STEP TOWARDS FURTHER HARMONISATION OF CONSUMER SALES**

**Keywords:** consumer sales, goods with digital elements, digital content, digital service, contract law, data protection law, Directive 2019/770, Directive 2019/771

### **Summary**

The present article deals with the implementation of the new Consumer Sales Directives (Directives 2019/770 and 2019/771) into the national law of the Baltic States. The topicality of the paper is related to the implementation of the new Consumer Sales Directives into national law in a particular region, i.e., the Baltic States, by analysing implementation approaches and

difficulties during the implementation and post-implementation periods from a comparative perspective of all three Baltic states. At the outset, the paper notes the differences in the existing regulation of consumer sales in the Baltic States. Lithuania and Estonia incorporated consumer sales in their civil codifications, whereas Latvia has chosen a different path by regulating consumer sales on the basis of *sui generis* regulation in the Consumer Rights Protection Law. As a result of such initial situation before the implementation of the new Consumer Sales Directives, different implementation strategies were used in the Baltic States, consequently leading to different consequences and difficulties during the implementation process of the new Consumer Sales Directives. Likewise, the application process of the new Consumer Sales Directives itself has created significant problems and risks. The available legal acts together with their *travaux préparatoires* in the Baltic States demonstrate the possibility that the new regulation implementing the new Consumer Sales Directives may contradict the existing contract law regulation and data protection law, and have implications thereon.

## Introduction

Recently, a reform was undertaken in the EU concerning consumer sales with the aim to improve the current regulation of consumer sales in existence since 1999, when the Consumer Sales Directive 1999<sup>1</sup> was adopted. This reform has resulted in the adoption of two new consumer sales directives, i.e., the Consumer Sales Directive 2019<sup>2</sup> and the Consumer Digital Sales Directive<sup>3</sup>, in 2019. Both directives aim to achieve higher protection of consumers in the modern digital world concerning the conclusion and fulfilment of sales contracts. As the European Commission has admitted, “[t]he general objective of the proposals [for adoption of the above directives – authors’ remark] is to contribute to faster growth of opportunities offered by creating a true Digital Single Market, to the benefit of both consumers and businesses”.<sup>4</sup>

The new rules included in these two recent directives are not completely novel but to a great extent based on the regulation of consumer sales included

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<sup>1</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sales of consumer goods and associated guarantees [Consumer Sales Directive 1999]. OJ, L 171, 7.7.1999, pp. 12–16.

<sup>2</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [Consumer Sales Directive 2019]. OJ, L 136, 22.5.2019, pp. 28–50.

<sup>3</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [Consumer Digital Sales Directive]. OJ, L 136, 22.5.2019, pp. 1–27.

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2015) 635 final, Chapter 1.

in the previous directive, i.e., the Consumer Sales Directive 1999.<sup>5</sup> Indeed, the application scope set in the previous directive is also introduced in the new Consumer Sales Directives by covering movables (with exceptions)<sup>6</sup> and the main institutes of consumer sales such as the conformity of the purchase object with the contract, available remedies, and time limits. At the same time, the new Consumer Sales Directives deepen and broaden the scope of regulation of consumer sales in the European Union (EU) law as initially provided by the Consumer Sales Directive 1999. On the one hand, the previous regulation has been further deepened with new developments, especially considering longer time limits, the types of conformity with the contract, and the guarantee. On the other hand, the new regulation envisaged by the new consumer sales directives takes into account important developments within the modern digital environment by introducing new consumer sales objects, i.e., the so-called digital things, such as goods with digital elements, digital content and digital services. Introduction of such new consumer sales objects, in turn, raises new challenges and issues concerning the implementation strategies and the relationship between the new rules and other branches of law, especially contract law and data protection law. Consequently, the new regulation will have a significant impact on national law of EU Member States not only from the perspective of consumer protection but also from contract law in general. Although the new consumer sales directives are exhaustive harmonisation directives unlike the Consumer Sales Directive 1999 which is a minimum harmonisation directive, certain legislative choices are left to EU Member States. Though the implementation term of the new directives is set as 1 July 2021, neither Latvia nor Estonia has timely implemented these directives. Draft legal acts in Latvia and Estonia were submitted to their Parliaments in 2021 and were available before the preparation of this article, however, none of them were adopted at the moment of preparation of this article: the draft legal act was submitted to the Parliament in Latvia in October 2021<sup>7</sup>, while in Estonia – in May 2021.<sup>8</sup>

<sup>5</sup> This conclusion is supported by the European Commission which indicated that the proposal concerning the current Consumer Sales Directive 2019 “takes the rules of Directive 1999/44/EC as a basis” (Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2015) 635 final, Chapter 1).

<sup>6</sup> Article 2(1) and (5) Consumer Sales Directive 2019; Article 1(1) and (2)(b) Consumer Sales Directive 1999.

<sup>7</sup> Likumprojekts “Grozījumi Patērētāju tiesību aizsardzības likumā” [Draft Law “Amendments into the Consumer Rights Protection Law”] (Nr. 1179/Lp13). Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/946D649B5CF1D56CC22587680040405B?OpenDocument> [viewed 08.11.2021.].

<sup>8</sup> Volaõigusseaduse ja tarbijakaitseaduse muutmise seadus (digitaalse sisu, tarbijalemüügi ning muudetud tarbija õiguste direktiivide ülevõtmine) 404 SE [Act of Amendment of the Law of Obligations Act and the Consumer Protection Act (transposition of the Digital Content, Consumer Sales and Amended Consumer Rights Directives) 404 SE]. Third reading took place on 10 November 2021.

Only in Lithuania the legal act for implementation of the new Consumer Sales Directives was adopted in timely manner on 29 June 2021.<sup>9</sup>

The topicality of the present paper relates to the implementation of the new Consumer Sales Directives into national law in a particular region, i.e., the Baltic States, and potential problems and risks related to application of the new regulation. The paper uses the comparative approach by considering these issues from the perspective of all three Baltic States.

At the beginning of the article, the paper analyses the starting point in the Baltic States before implementation of the new consumer sales directives by discussing the place of consumer sales in the current national law in each Baltic State. The article proceeds to discuss implementation strategies and employed approaches in each country considering different starting points analysed before. The article concludes with discussion of potential difficulties and risks concerning the application of the new rules in the post-implementation era.

## 1. Starting position in the Baltic States before the implementation

The implementation of the new consumer sales directives deals with adjusting the existing regulation of consumer sales in the Baltic States by covering both contract law and consumer protection law. Therefore, it is necessary to discuss the starting position which exists in the Baltic States before the implementation of the new Consumer Sales Directives, especially considering the integration (or lack of it) of rules concerning consumer sales into existing regulation of contract law. Despite the fact that all three Baltic States share similar legal, economic, and historical roots, yet there are different starting positions before the implementation (i.e., transposition) of the new Consumer Sales Directives into national law of the Baltic States which may be explained by different approaches taken after the restoration of independence at the beginning of 1990s.

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Available in Estonian: [https://www.riigikogu.ee/tegevus/eelnoud/eelnou/18196fee-86c7-4116-aa70-11449eba0364/Võlaõigusseaduse%20ja%20tarbijakaitseaduse%20muutmise%20seadus%20\(digitaalse%20sisu,%20tarbijalemüügi%20ning%20muudetud%20tarbija%20õiguste%20direktiivide%20ülevõtmine\)](https://www.riigikogu.ee/tegevus/eelnoud/eelnou/18196fee-86c7-4116-aa70-11449eba0364/Võlaõigusseaduse%20ja%20tarbijakaitseaduse%20muutmise%20seadus%20(digitaalse%20sisu,%20tarbijalemüügi%20ning%20muudetud%20tarbija%20õiguste%20direktiivide%20ülevõtmine)) [viewed 08.11.2021.].

<sup>9</sup> Lietuvos Respublikos civilinio kodekso 1.125, 6.228-1, 6.228-12, 6.228-14, 6.363, 6.364, 6.419 straipsnių ir priedo pakeitimo ir Kodekso papildymo 6.228-17, 6.228-18, 6.228-19, 6.228-20, 6.228-21, 6.228-22, 6.228-23, 6.228-24, 6.350-1, 6.364-1, 6.364-2, 6.364-3, 6.364-4 straipsniais įstatymas (The law amending Articles 1.125, 6.228-1, 6.228-12, 6.228-14, 6.363, 6.364, 6.419 and the Annex to the Civil Code of the Republic of Lithuania and Supplementing the Code Articles 6.228-17, 6.228-18, 6.228-19, 6.228-20, 6.228-21, Articles 6.228-22, 6.228-23, 6.228-24, 6.350-1, 6.364-1, 6.364-2, 6.364-3, 6.364-4). The law will enter into force since 2022-01-01. Available in Lithuanian: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/d3dbc880dd5f11eb866fe2e083228059?jfwid=18yngnjrr> [viewed 08.11.2021.].

On the one hand, both Estonia<sup>10</sup> and Lithuania have incorporated consumer sales in the regulation of contract law included in their civil codifications. In Lithuania, consumer contracts, considered as private law contracts, fall within the scope of the Lithuanian Civil Code.<sup>11</sup> Consumer contract of sales and other consumer contracts were specifically regulated in Part IV of Book 6 in the Civil Code (Separate types of contracts) as the special subtypes of contracts. Back in 2013, the Lithuanian Civil Code was amended (changes entered into force in June 2014) and the new separate chapter on consumer contracts (including digital content contracts) was included in Book 6, Part II of the Civil Code dealing with general part of contracts.

On the other hand, Latvia historically has chosen a different path by artificially differentiating contract law from consumer sales. The force of the Civil Law was restored in 1992–1993.<sup>12</sup> However, the Civil Law is not familiar with the concept of ‘consumer’ and, therefore, does not contain any rules on consumer protection.<sup>13</sup> At the same time, *sui generis* regulation on consumer sales has been and still remains included in the Consumer Rights Protection Law. Such dual regulation led to incompatibility of this regulation with contract law generally regulated by the Civil Law concerning the scope of liability of the seller.<sup>14</sup>

These differences concerning the regulation of consumer sales among the Baltic States also influence the character of current regulation included in a special legal act on consumer protection law in the Baltic States: if this regulation in Estonia and Lithuania is mainly of public law character, however, in Latvia this regulation contains both public law norms and contract law norms in regulation of consumer sales (as well as other aspects, such as pre-drafted contract terms,

<sup>10</sup> Estonia implemented digital content directive, the new consumer sales directive and modernisation directive 2019/2161 into Estonian law at the same time as all three directives are linked in substance. The implementation of the three directives complements the Law of Obligations Act (hereinafter – LOA) and the Consumer Protection Act. The Consumer Protection Act incorporates the definitions contained in the directives, the existing provisions on collective consumer protection and the administrative provisions related to the prevention of illegal activities of a trader. The rules of private law are implemented into LOA. Law of Obligations Act (*võlaõigusseadus*), 1 July 2002. Available in English: <https://www.riigiteataja.ee/en/eli/ee/512012021002/consolide/current>; Consumer Protection Act (*tarbijakaitseadus*), 1 March 2016. Available in English: <https://www.riigiteataja.ee/en/eli/ee/505032021002/consolide/current> [viewed 08.11.2021.].

<sup>11</sup> Civil Code of the Republic of Lithuania. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495> [viewed 08.11.2021.].

<sup>12</sup> For a brief discussion of adoption of the Civil Law and subsequent restoration of its force, see Torgāns K., Kārklīņš J., Mantrov V., Rasnačs L. *Contract Law in Latvia*. AH Alphen aan den Rijn: Kluwer Law International, 2020, pp. 25–27.

<sup>13</sup> For a useful discussion of Latvian contract law, see Torgāns K., Kārklīņš J. *Contract Law and Non-Contractual Obligations*, in: Kerikmäe T., Joamets K., Pleps J., Rodiņa A., Berkmanas T., Gruodytė E. (eds.). *The Law of the Baltic States*. Cham: Springer, 2017, pp. 291–298.

<sup>14</sup> Mantrovs V. *Jaunā patērētāja pirkuma Direktīva (Direktīva 2019/771): izaicinājumi un iespējas Latvijas likumdevējam [New Consumer Sales Directive (Directive 2019/771): Challenges and Opportunities for the Latvian Legislator]*. In: *Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās: Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums*. Rīga: LU Akadēmiskais apgāds, 2020, pp. 322–324.

information, division of liability, and other matters). Such an initial situation, in turn, determines different implementation strategies in the Baltic States, thereby leading to different consequences and difficulties during the implementation process of the new Consumer Sales Directives.

Therefore, different starting points before the implementation of the new Consumer Sales Directives in the Baltic States determine different implementation strategies in every country. Estonia and Lithuania already implemented new regulation in their civil codifications, while Latvia – in a consumer protection legal act without making any changes in the existing contract law. In this regard, two issues may be mentioned. First, one may refer to different difficulties during the implementation process. It seems that the main issue in Lithuania and Estonia was ensuring consistency with the existing regulation of contract law in general, relegating consistency of consumer protection to the second place. At the same time, in Latvia the situation is different, as the main concern is to ensure consistency with the existing consumer protection law. However, the aim of Latvia to reach such a consistency would inevitably lead in future to a problem with interaction of consumer sales including the new regulation, with the existing contract law regulation.<sup>15</sup> Second, different rationale for the use of available choices for a national legislature concerning deepening of the current consumer sales regulation and its broadening in respect of digital things. The latter aspect will be discussed in the next chapter of the article.

## **2. The use of available choices by a national legislator during the implementation process**

The new consumer sales directives endow a national legislator with the discretionary power to opt for a higher consumer protection in certain situations within the scope of both directives. Both directives will be further considered separately, starting with the Consumer Sales Directive 2019.

### **2.1. The Consumer Sales Directive 2019**

From the point of view of effective consumer protection, the most important situations relate to time limits: information about the lack of conformity with the contract, the burden of proof, and second-hand goods. Likewise, the nature of this time limit either being as preclusionary or limitation period is an important choice, but it will be discussed in the next sub-chapter.

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<sup>15</sup> For a discussion on interrelation between contract law and the new regulation on consumer digital sales objects in Latvia, see Kārklīņš J., Mantrov V. The Place of Contract for Digital Thing in Latvian Contract Law Within the Context of the Consumer Sale Directives 2019. The Journal of the University of Latvia Law, 2021, Vol. 14, pp. 68–79.

First, the national legislator may choose a two-year time limit instead of one-year time limit for the burden of proof concerning conformity of the purchase object with the contract.<sup>16</sup> Not a single legislator in the Baltic States has chosen such an option. Consequently, the seller in the Baltic States shall ensure conformity with the contract within 2 years from the delivery of the purchase object to the consumer, while the consumer enjoys a more favourable burden of proof only within the first year from that delivery.

Second, the national legislator may introduce a shorter period for conformity of the purchase object with the contract in the case of second-hand goods, i.e., not shorter than 1-year time limit instead of a 2-year time limit.<sup>17</sup> Only Lithuania chose such an option in Art. 6.364(3) of the Civil Code, however, it is purely a contractual choice left for the parties. It may be assumed that sellers of second-hand goods will be using such an option in their concluded contracts. At the same time, a consumer will have little possibility to oppose such a shorter period if selected by the seller.

Third, the national legislator may maintain or introduce a time limit for the consumer to inform the seller of a lack of conformity within a period of at least 2 months of the date on which the consumer detected such lack of conformity.<sup>18</sup> This term is already available in Latvia<sup>19</sup> and Estonia<sup>20</sup>. Nothing suggests that this situation will change as the national legislators in both countries are not going to refuse from this term. The situation is different in Lithuania where this term was not previously envisaged. However, this term was introduced during the implementation of the Consumer Sales Directive 2019 as the Lithuanian Civil Code was supplemented with a new Article 6.3641 whose paragraph 8 will reflect this term.

There are also other opportunities for the national legislator to use its discretionary power, which is explicitly allowed by the discussed Directive. The national legislator may exclude from the scope of the regulation by which the Consumer Sales Directive 2019 is implemented contracts for the sale of second-hand goods sold at public auction and live animals<sup>21</sup>; allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding 30 days<sup>22</sup>; whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies<sup>23</sup>; modalities for return and reimbursement in the case of termination of the contract<sup>24</sup>; and the so-called extended guarantees<sup>25</sup>.

<sup>16</sup> Article 11(2) Consumer Sales Directive 2019.

<sup>17</sup> Article 10(6) Consumer Sales Directive 2019.

<sup>18</sup> Article 12 Consumer Sales Directive 2019.

<sup>19</sup> Article 27(1) Latvian Consumer Rights Protection Law.

<sup>20</sup> Article 220(1) second sentence Estonian Law of Obligations Act.

<sup>21</sup> Article 3(5) Consumer Sales Directive 2019.

<sup>22</sup> Article 3(7) first sentence Consumer Sales Directive 2019.

<sup>23</sup> Article 13(7) Consumer Sales Directive 2019.

<sup>24</sup> Article 16(3) second sub-paragraph Consumer Sales Directive 2019.

<sup>25</sup> Article 17(4) Consumer Sales Directive 2019.

The Estonian legislator did not use the options provided for in these situations with two exceptions. The prospect to regulate the effect of the consumer's own infringement on the right to choose a remedy provided for in Article 13(7) of the Consumer Sales Directive 2019 has been used. Also, the obligation of the trader to reimburse the consumer in 14 days period after the reduction of the price or termination of the contract has been introduced.<sup>26</sup>

At the same time, the Latvian legislator (as far as the current draft Law is concerned) used none of these opportunities as one may observe from the very text of the Latvian draft act<sup>27</sup> which is approved by the Annotation to this draft itself<sup>28</sup>.

The Lithuanian legislator has used the opportunity to exclude from the scope of consumer sales contract the sales of second-hand goods sold at public auctions and live animals<sup>29</sup>, as well as introduced the modality that a consumer should be reimbursed in 14 days period in the case of termination of the contract<sup>30</sup>.

Therefore, one may observe from the discussion in this sub-chapter that the national legislators in the Baltic States were actually unwilling (with a few exceptions discussed above) to use available choices in the new Consumer Sales Directives by preferring to implement the regulation of these directives in the regular way.

## 2.2. The Consumer Digital Sales Directive

There are much poorer legislative choices for a national legislator in the Consumer Digital Sales Directive by containing just a few options for the national legislator. The most important of these situations relates to the character of the time limit for conformity with the contract. Indeed, the Digital Consumer Sales Directive (similarly as the Consumer Sales Directive 2019<sup>31</sup>) allows for the EU Member States to provide that this time limit has the character of the limitation period.<sup>32</sup> However, none of the Baltic States, except Lithuania, have opted out for this option as one may observe from the adopted legal acts in the Baltic

<sup>26</sup> According to the Estonian law, if the goods manufactured from the material and under instructions of the consumer, the trader is not liable for the non-conformity of work resulting from the instructions provided by the customer, defects in the material supplied by the customer or preliminary work performed by third parties if the contractor had sufficiently checked the instructions of the customer, the materials or the preliminary work (§ 208(5) and § 641(3) LOA).

<sup>27</sup> Likumprojekts "Grozījumi Patērētāju tiesību aizsardzības likumā" [Draft Law "Amendments into the Consumer Rights Protection Law"] (Nr.1179/Lp13). Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/946D649B5CF1D56CC22587680040405B?OpenDocument> [viewed 08.11.2021.].

<sup>28</sup> Likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" sākotnējās ietekmes novērtējuma ziņojums (anotācija), 1. tabula "Tiesību akta projekta atbilstība ES tiesību aktiem" [Initial impact assessment report (annotation) to the Draft Law "Amendments to the Consumer Rights Protection Law", Table 1 "Compliance of the draft act with EU legal acts"].

<sup>29</sup> Art. 6.3501 (3) of the Lithuanian Civil Code.

<sup>30</sup> Art. 6.3643 (4) of the Lithuanian Civil Code.

<sup>31</sup> Article 10(4)-(5) Consumer Sales Directive 2019.

<sup>32</sup> Article 11(2) third sub-paragraph and (3) second subparagraph Consumer Digital Sales Directive.



States concerning the implementation of the new Consumer Sales Directives. In Lithuania, the limitation period of two years was provided.<sup>33</sup>

In addition, EU Member States are free to regulate the consequences of the withdrawal of the consent for the processing of the consumer's personal data.<sup>34</sup> It would be important from the perspective of the interaction effects of the General Data Protection Regulation (GDPR), as it will be revealed in greater detail in the section 3.3. of this paper. However, it is sufficient to note in this regard that the Latvian and Lithuanian legislators, unlike those of Estonia, did not take the opportunity to clarify the key elements of the effects in the area of data protection law.

### **3. The situation in the Baltic States after the implementation: The potential problems with application of the new regulation**

The application of the new regulation will be potentially connected with significant challenges and risks in all Baltic States. The available adopted legal acts and their travaux préparatoires demonstrate the possibility that the new Consumer Sales Directives might contradict and have implications on the existing regulatory framework, contract law regulation and data protection law and countries may be liable for incorrect implementation of these directives into national law. Each of these aspects will be further discussed separately.

#### **3.1. Interrelation with the current regulatory framework of civil law**

At the beginning, a place of new consumer sales regulation in the framework of consumer protection in general and consumer sales in particular should be discussed. Three issues must be noted here. Application problems of the new regulation may arise due to shortcomings of the regulation included in the new Consumer Sales Directives. For instance, the new regulation puts greater emphasis on contract terms than statutory standard concerning conformity with the contract, therefore, drafting contract terms may circumvent the available consumer protection on conformity of the purchase object with the contract. Correspondingly, shortcomings of the implementation process of the new Consumer Sales Directives may play a role in correct application of the new regulation. For instance, the Latvian draft law currently does not distinguish objective and subjective conformity grounds, as it has already been pointed out in a report submitted to the legislator.<sup>35</sup> Finally, the effectiveness of consumer

<sup>33</sup> Art. 1.125(8) of the Lithuanian Civil Code.

<sup>34</sup> Consumer Digital Sales Directive, preamble, Recital 40.

<sup>35</sup> Ziņojums par likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" (Nr. 1179/Lp13) zinātnisko sākotnējo izvērtējumu (*ex ante*) [Report on the Scientific Preliminary Assessment (*ex ante*) of the Draft Law "Amendments to the Consumer Rights Protection Law" (No. 1179/Lp13)]. Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/OFD2149542AA3059C2258775006312BD?OpenDocument> [viewed 08.11.2021.].

protection concerning new digital things may be questioned, as the European legislator has put a greater emphasis on subjective than objective grounds of the conformity of the purchase object with the contract. However, it is a more general problem which is outside of the scope of the current article.

### 3.2. Interrelationship with contract law

Potentially, problems may arise due to introduction of the concept of digital things and their regulation, as these new consumer sales objects were previously unknown in the Baltic States as objects of sales contract. Also, consumer data as a remuneration could cause necessity for further explanation concerning its reconciliation with existing contract law. Likewise, interrelation with existing regulation, especially concerning time limits (limitation period), remedies, etc. should be considered.

Under Latvian law, contracts objects of which are digital content or digital services have to be viewed as *sui generis* contracts. The reasoning for the above-mentioned statement is, as follows: a unifying feature of alienation contracts (gift, purchase, etc.) is that the conclusion or performance of these contracts transfers ownership, which, in turn, means that the object of the contract must be of the kind over which ownership can be exercised at all. As indicated in Article 927 of the Civil Law, ownership can be exercised only over a thing (both tangible or intangible). This division has passed into Latvian legal system by adoption of Roman law.<sup>36</sup> Since digital content does not have any dimensions, nor does it have any matter, digital content cannot be classified as a tangible thing, as these characteristics are obligatory for something to be classified as “tangible”. At the same time, digital content cannot be recognized as an intangible thing, either. Article 841 of the Civil Law contains a definition of “intangible thing”, stipulating that intangible thing means “... various personal, property or liability rights insofar as they are part of property”. This means that intangible things are the subjective rights of the person, which have a material value, or subjective rights valued in money.<sup>37</sup> Currently, the Latvian legislator still has not acknowledged the previously highlighted situation by making changes in the Latvian Civil Law or by stipulating new regulation in the Consumer Rights Protection Law and, consequently, contracts whose object is digital content or digital service may be characterised as *sui generis* contracts only.

Under Lithuanian law, implementing the provisions of the Consumer Digital Sales Directive, consumer contracts for the supply of digital content or digital services, arguably, should also be considered as *sui generis* contracts. This conclusion can be drawn from the fact that these contracts were separately regulated in the Part II of the Book 6 of the Lithuanian Civil Code, instead of supplementing the pre-existing norms concerning sales or service contracts. Secondly, Art. 6.22817 (8),

<sup>36</sup> Balodis K. *Ievads civiltiesībās* [Introduction to Civil Law]. Rīga: Zvaigzne ABC, 2007, p. 111.

<sup>37</sup> Kalniņš E. *Privāttiesību teorija un prakse* [Theory and Practice of Private Law]. Rīga: Tiesu namu aģentūra, 2005, pp. 35–36.

following the Art. 3(6) of the Directive, clearly separates contracts for the supply of digital content or digital services from other sales or service contracts. Thirdly, on a more conceptual level, contracts for the supply of digital content or digital services hardly can be considered as falling under the regulation of any of the pre-existing contracts. While it seems that Lithuanian regulation of sales contracts is more flexible than in Latvia, and rules on sales could be extended also to digital content (although the possibility to acquire ownership to data remains unclear and somewhat problematic under Lithuanian law), it is notable that the same cannot be said with respect to digital services. Another problem with the applicability of sales contract is tied with the requirement for buyer to pay monetary consideration. Cases where consideration is personal data of a consumer are not compatible with sales contracts. Similar obstacles preclude application of other contracts foreseen in the special part of the Lithuanian Civil Code, such as contract of service or rent. Having said that, it must be noted that the question of the legal nature of the supply of digital content or digital services is not directly addressed in the Civil Code. Further complications can arise from the fact that these contracts are regulated in the general part of the Book 6 of the Civil Code, while all the specific contracts are laid out in the special part of contracts (Part IV of the Book 6 of the Lithuanian Civil Code). Therefore, the final legal qualification of the contracts of the supply of digital content or digital services remains to be seen.

The Estonian legislator has decided to reduce the risk of possible problems with specific regulation based on the object of the contract by placing all rules concerning the contracts of supply of digital content and digital services into a special section in the General Part<sup>38</sup> of the LOA. It could be inferred from the title of the division that this is a *sui generis* contract. However, the text of the provision does not allow such a conclusion to be drawn. Namely, according to § 625 of the LOA, unless otherwise provided, the provisions of the general part and the type of contract to which the contract for the supply of digital content or digital services corresponds shall also apply. It does mean that 'special' rules should be applied in conjunction with the rules laid down for a particular type of contract. For example, in the case of the sales of digital content – with the rules in sales contracts<sup>39</sup>, in the case of the provision of a digital service – with rules of mandate, lease, contract for work or other contracts depending on the nature of the contract.<sup>40</sup>

<sup>38</sup> Structure of the Part 1 (General Part) of the LOA is the following: Chapter 1: General Provisions. Chapter 2: Contract. Division 1: General Provisions; Division 2: Standard Terms; Division 3: Off-premises Contract; Division 4: Distance Contracts; Division 5: Contracts Entered into through Computer Network. New Division 6: Contract for the supply of digital content and digital services.

<sup>39</sup> See for example Kalamees P., Sein K. Connected consumer goods: Who is liable for defects in the ancillary digital service? *EuCML*, 2019, p. 14.

<sup>40</sup> See more on application of the new consumer sales regulation on contracts used in different business models in I. Kull, K. Vider, T. Mets, A. Kelli, K. Lindén, Krister. Compatibility of business models of Estonian language technology entrepreneurs with regulatory framework on the use of digital content. (2020) *International Comparative Jurisprudence*, 6(1), pp. 70–83. It should be noted that amendments were made only in the provisions of the contract of sale. See § 208 LOA.

### 3.3. Interrelationship with data protection law

The Consumer Digital Sales Directive raises important issues related to the need to regulate the situation, where consumers' personal data are extracted at no cost by online services. Article 3(1) of the Consumer Digital Sales Directive provides that the Directive "shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader". This norm assumes that consumers may agree to provide traders with as a counter-performance for services or accessory monetary or other benefits provided by the trader.<sup>41</sup> At the same time, the Consumer Digital Sales Directive also recognises that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity.<sup>42</sup> This norm is in line with the opinion of the European Data Protection Board which has stressed that personal data cannot be considered as a "tradeable commodity".<sup>43</sup> The EU legislator has not yet chosen between the two models – whether personal data may be regarded as a tradable commodity or they should be viewed as an inalienable asset, one that cannot be traded for a consideration – nor has it found a way to reconcile them.<sup>44</sup> The question on how to overcome the current situation, where consumers pay by other than monetary means, i.e., personal data, time or attention, and where the acquired personal data are used to modify consumers' behaviour, has become highly important and calls for new regulation.

Despite these challenges, Article 3(1) of the Consumer Digital Sales Directive entitles consumers to invoke rights and remedies provided for in the Directive even when he or she does not pay a fee but instead provides personal data to the trader. It is expressly recognized that the consumer will be able to carry out the provided remedies in the event of failure to supply or lack of conformity of the service or digital content.<sup>45</sup>

Moreover, EU data protection law should fully apply to the processing of personal data in connection with any contract falling within the scope of the Consumer Digital Sales Directive. It should be without prejudice to the rights, obligations and non-contractual remedies provided for by GDPR<sup>46, 47</sup>. In the

<sup>41</sup> Sartor G. New aspects and challenges in consumer protection. Digital services and artificial intelligence, 2020. Available: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2020\)648790](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)648790) [viewed 08.11.2021.].

<sup>42</sup> Consumer Digital Sales Directive, preamble, Recital 24.

<sup>43</sup> EDPB. (2021) Statement 05/2021 on the Data Governance Act in light of the legislative developments. Available: [https://edpb.europa.eu/system/files/2021-05/edpb\\_statementondga\\_19052021\\_en\\_0.pdf](https://edpb.europa.eu/system/files/2021-05/edpb_statementondga_19052021_en_0.pdf) [viewed 08.11.2021.].

<sup>44</sup> Sartor G. 2020.

<sup>45</sup> Consumer Digital Sales Directive, preamble, recital 24.

<sup>46</sup> European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ, L 119, 04.05.2016.

<sup>47</sup> Consumer Digital Sales Directive, preamble, Recital 38 and Article 3 (8).

event of conflict between the provisions of this Directive and EU law on the protection of personal data, the latter prevails (Article 3 (8) of the Consumer Digital Sales Directive). When implementing the requirements of that Directive into the Latvian Consumer Rights Protection Law, it is recommended to include a provision clarifying the relationship between the new Consumer Sales Directives and EU and national data protection law, as set out in the Directive.<sup>48</sup>

Estonian adopted provisions which consist of rules concerning the obligation to comply with the GDPR as it is demanded under the Consumer Digital Sales Directive. Similarly, Lithuanian law provides for the obligation to comply with the GDPR and the priority of the latter (Art. 22817 (7) of the Lithuanian Civil Code).

Where personal data is provided by the consumer to the trader, the trader should comply with the obligations under the GDPR (Recital 38 of the Digital Content Directive). Digital Content Directive acknowledges that the facts leading to a lack of compliance with requirements of the GDPR may, depending on the circumstances of the case, also be considered to constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity stipulated by this Directive (Recital 48). The right of the consumer to terminate the contract in accordance with Digital Content Directive should be without prejudice to the consumer's right under GDPR to withdraw any consent given to the processing of the consumer's personal data (Recital 39 of the Digital Content Directive).

In Estonia, the most controversy was caused by the need to regulate the legal consequences of the withdrawal of consent to the processing of personal data.<sup>49</sup> Recital 40 in the preamble to the Directive confers on the Member States the power to regulate the contractual consequences of the withdrawal of consent. It is clear, that the withdrawal of the consumer's consent to the processing of personal data does not automatically lead to the termination of the contract, which means that the trader is no longer entitled to process the personal data provided by the consumer. Under current law, this would obviously be a valid reason for a withdrawal from long-term contract (§ 196(1) LOA). Yet what matters is not so much whether the trader can withdraw from the contract, but whether it can seek remedies against the consumer. Recital 42 of the GDPR provides that consent should not be regarded as freely given, if the data subject has no genuine or free

<sup>48</sup> Ziņojums par likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" (Nr. 1179/Lp13) zinātnisko sākotnējo izvērtējumu (*ex ante*) [Report on the Scientific Preliminary Assessment (*ex ante*) of the Draft Law "Amendments to the Consumer Rights Protection Law" (No. 1179 / Lp13)]. Available in Latvian: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/0FD2149542AA3059C2258775006312BD?OpenDocument> [viewed 08.11.2021.].

<sup>49</sup> See, for example, a discussion in Kull I. Withdrawal from the consent to process personal data provided as counter-performance: contractual consequences. *Journal of University of Latvia "Law"*, 2020, No. 13, pp. 33–49; Kull I. Digisīsu ūleandmine ja digiteenuste osutamine isikuandmete esitamise vastu. *Euroopa Parlamendi ja nōukogu direktiiv (EL) 2019/770 [Supply of Digital Content and Digital Services in Return for Providing Personal Data. Directive (EU) 2019/770 of the European Parliament and of the Council]*. *Juridica*, 2019, No. 8, pp. 578–588.

choice or is unable to refuse or withdraw consent without detriment.<sup>50</sup> Therefore, the consumer must be able to exercise the rights conferred on him without fear of negative legal consequences. In accordance to the § 6218 of the LOA, withdrawal of the consumer's consent to the processing of personal data shall not be considered a breach of contract and the trader shall not be able to seek remedies against the consumer. Traders and third persons obligation to comply with the relevant obligations of GDPR to protect personal data after termination of the contract can be found in the § 6215 of the LOA.

### **3.4. Interrelationship with regulation on prohibition of unfair commercial practices**

It is important to note that the breach of the national regulation implementing the new Consumer Sales Directives may be simultaneously considered as an act of unfair commercial practice according to the Unfair Commercial Practices Directive and respective national legal acts.<sup>51</sup> As the theme of unfair commercial practices goes beyond the scope of the present article, it is not possible within this article to elaborate on this issue, yet respective situations may be outlined for the sake of clarity. For example, a trader misleads consumers about the remedies in the case of lack of conformity of a digital content or digital service with the contract or does not adequately inform consumers how their personal data are going to be processed. These acts could be considered as a misleading practice in addition to the possible breaches of the discussed national regulation. There is a court case where a consumer rights protection authority fined an online platform holder for misleading consumers during the registration due failing to immediately and adequately inform them during the creation of the account that the data provided would be used for commercial purposes and, more generally, of the remunerative purposes underlying the service, emphasising instead the free of charge nature of the service.<sup>52</sup>

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<sup>50</sup> See more on interrelation between contract law and data protection issues in Kelli A., Tavast A., Linden K., Birstonas R., Labropoulou P., Vider K., Kull I., Tavits G., Varv A., Mantrov V. Impact of Legal Status of Data on Development of Data-Intensive Products: Example of Language Technologies. In: Legal Science: Functions, Significance and Future in Legal Systems II. The University of Latvia Press, pp. 383–400.

<sup>51</sup> Reich N., Micklitz H. W., Rott P., Tonner K. European Consumer Law. 2<sup>nd</sup> edition. Cambridge: Intersentia, 2014, pp. 82–83; Davida Z. Economic analysis in legal argumentation of unfair commercial practice. New Challenges of Economic and Business Development – 2019: Incentives for Sustainable Economic Growth: 11th International Scientific Conference, May 16–18, 2019, Riga, University of Latvia: Proceedings/organised by Faculty of Business, Management and Economics, University of Latvia Riga: University of Latvia, 2019, pp. 193–203.

<sup>52</sup> European Commission. Commission Notice: Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, 2021/C 526/01. OJ, C 526, 29.12.2021, p. 68.

## Conclusion

By starting in different legal situations concerning regulation of consumer sales, the Baltic States did not prefer to use legislative choices offered by the new Consumer Sales Directives (with a few exceptions). At the same time, each Baltic State faced their own difficulties during the implementation of the new Consumer Sales Directives, which would be more clearly observed in the post-implementation era of these directives. Among these difficulties, one may mention the risk of ambiguity in the application of general and specific rules of contract law, on the one hand, and the new regulation on consumer sales, on the other. However, the new regulation will not generally change already settled provisions and concepts drastically but lead to the addition of important new concepts to the existing conceptual apparatus of contract law in general and consumer sales regulation in particular.

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