THE SENSE OF THE CONSUMER CODE AT THE END OF THE CONCEPT OF THE CONSUMER

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Introductory remarks

The rise of the consumer law has challenged the traditional codified systems of the private law. This challenge had several reasons. The consumer law in the broad sense has trespassed the borderlines of the private law, combining the classical private law rules (on contracts and torts) with the criminal law, unfair commercial practices law, procedural law etc.[1] The consumer law, driven by the acquis communautaire has also a very different approach to the yet-to-be regulated subject matter. The classical codes try to generalize and classify legal concepts by providing typology. They aim to built up a coherent system trying to treat all similar situations in the similar way. The method of the European directives is different. They follow the pattern of the "problem" approach, describing certain situation and providing rules adopted to this situations, without considering similar situations.[2] Certain undertakings within the Union to reverse this approach by envisaging the "framework directive"[3] have not produced a satisfactory result.[4] In the finally adopted Consumer Rights Directive[5] only certain relicts of rethinking the current methodology may be identi-

[1] See e.g. J. Ghestin, Le contrats de consommation. Règles communes, Paris 2011, p. 1; Also M. Schmidt-Kessel, Ch. Strünck, M. Kramme, in: M. Schmidt-Kessel, Ch. Strünck, M. Kramme, Im Namen der Verbraucher. Kollektive Rechtsdurchsetzung in Europa, Jena 2015, p. 5.

[2] H. Schulte-Nölke, F. Zoll, Structure and Values of the Acquis Principles: New features and their possible use for political purposes, in: Research Group on the Existing EC-Contract Law (Acquis Group), Principles of the Existing EC-Contract Law (Acquis Principles), Munich 2009, p. XXV.

[3] Green Paper on the Review of the Consumer Acquis, COM [2006] 774 final. See also: H. Schulte-Nölke, F. Zoll, Structure and Values, p. XXX.

[4] R. Schulze/F. Zoll, European Contract Law, Baden-Baden, 2018, Chapter 1, no. 36.

[5] Directive 2011/83/EU.

fied.[6] The outcome does not change in the fundamental way the long-practiced drafting style of the EU. It cannot, however, be denied that the scope of the new directives starts to be broader then in the 90ties of the last century. If the proposal of the directive for the supply of digital content will be adopted, it would mean a kind of revolution for the idea of codification.[7] It has a very broad scope of application (digital content and digital services) going across the traditional categories of the contract law and challenging the traditional structures of the codes.[8] For the subject matter of this paper, the development of the concept of the consumer does also have a crucial meaning.[9] The raise of the concept of consumer encompassing the transactions with the dual purpose means actually a departure from the traditional idea of the consumer law.[10] It has a fundamental impact on the possibility or reasonableness to frame an separate consumer law. The "mixed" definition of the consumer means that the original concept of the consumer law, lying in the clear identification of the typically weaker party of the mass transactions (with the stress on "typically"). In such a system between the consumers and non-consumers was a clear border-line.[11] The mixed concept, requiring the assessment whether the professional activity is dominating to exclude the qualification as consumer has made it impossible to draw a clear line between consumer and non-consumer. It has also undermined the efficiency of the consumer law, not being dependent on the qualifications done *ad casu*.

The consumer law has also experienced another development, which must be acknowledged from the perspective of the purposes of the codifications. It is the gradual diminishing difference between the consumer

[6] R. Schulze/F. Zoll, European Contract Law, Chapter 1, no. 36.

[7] Ch. Wendehorst, Hybride Produkte und hybrider Vertrieb, in: Ch. Wendehorst/B. Zöchling-Jud, Ein neues Vertragsrecht für den digitalen Binnenmarkt, Wien 2016, pp. 46–47.

[8] Ch. Wendehorst, Hybride Produkte, p. 47.

[9] F. Zoll, At the End Of the Concept Of a Consumer? in: J. Lazar/M. Gajdošová, Social function of law and growing wealth inequality, Trnava 2018, pp. 87–99; H. Schulte-Nölke: The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law? EuCML 4/2015, p. 138.

[10] F. Zoll, At the End of the Concept, R.; R. Schulze/F. Zoll, Europäisches, Chapter 2, no 26.

[11] F. Zoll, At the End; F. Zoll, O (nie) znowelizowanym pojęciu konsumenta, czyli o chęci uniknięcia niejasności i co z tego wynikło, in: Usus magister est optimus. Rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi, 2016, p. 295.

contract law and the unfair commercial practices law.[12] The "New Deal for the Consumer Law" of the European Commission will strengthen the merger of these two areas of law.[13]

To answer the question whether a "consumer code" is a good or wrong idea, several issues need to be addressed:

1) What is meant by the concept of the "consumer code" – is it a code in a sense of the legal act seeking to provide a coherence to the governed legal matter or is it only a compilation of different legal texts being usually an effect of the copy and paste method of the European directives' transposition?
2) Does the distinction between the private law and the public law matter yet?
3) Does the civil code as a central act in the area of the private law matter or has the process of the decodification deprived it of any value or is the law-maker ready to deprive the civil code of any significance?
4) Is it technically possible to maintain a coherence of the civil code and the consumer law? The idea of the "Europeanisation" of the civil code and its limits. The obscurity of the concept of the consumer and the application of law.
5) The impact of the consumer code on the application of law. Does it help to develop and maintain a coherent legal thinking and method?
6) Does it make sense to deepen the distinction between areas of law, while the criteria of this distinction are irreversibly disappearing (the notion of the consumer loses its distinctive function)?
7) Does all of this really matter if the law is losing its ability to govern the facts in the time of technological revolution?

[12] H. W. Micklitz, Unfair commercial practices and European contract law, in: Ch. Twigg-Flesner, The Cambridge Companion to European Private Law, Cambridge 2010, p. 232.

[13] https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal--consumers_en.

1 What is understood under a "consumer code"?

A discussion on the consumer code requires an understanding of what is meant by this concept.[14] It is a question whether the only criterion for the code is a "book-binder" criterion, which would mean that different legal texts are put into one book, without taking too much care concerning the consistence of the whole structure. Such a compilation facilitates the access to the texts and it is easy to replace the pieces of the cancelled law by the new pieces of legislation without destroying the existing structure. In such case it is, however, not really a discussion about the consumer code itself, but about the reasonableness of the de-codification process of the private law (and other laws, such as criminal law; however, I would not be focused on these domains of the law).

The discussion of the "real" consumer code must not be a compilation of various pieces of the consumer legislation, but it needs to concern an idea for the coherent and consistent consumer legislation. It is, however, quite difficult to combine the very different matters of law belonging to very different areas of the legal system into a coherent, internally connected set of rules. Even such a code confined only to the rules on the private law is not easy to be developed, unless with an idea to repeat just the rules of the civil code with the consumer law modifications. A certain idea for such a legislation has been developed by the Research Group on the Existing EC Contract Law, even the Acquis Principles were not only confined to the consumer law, but the core of this project was a consumer law. It was, however, a concept how to create a legislation in the area of the private law, which includes the consumer law in a coherent way. Nevertheless, the Acquis Principles have also been used as a basis for the consumer law content of the Draft Common Frame for Reference, which means that it has been incorporated in the civil code-like structure.[15]

However, even if it would be manageable to create a coherent and consistent set of the consumer law, it must be questioned whether it is reason-

[14] The "consumer codes" are already adopted in several European countries, like France, Italy or Luxembourg – J. Ghestin, Le contrats de consommation, p. 1.

[15] G. Dannemann, Consolidating EC Contract Law: an Introduction to the Work of the Acquis Principles, in: Research Group on the Existing EC-Contract Law (Acquis Group), Principles of the Existing EC-Contract Law (Acquis Principles), Munich 2009, p. XXXViii.

able to have a code which does not provide all the rules to govern certain legal relationship. This question will be discussed below.

2 Does the distinction between private and public law matter?

The question whether consumer code, combining the matters of the public (including criminal) and private law, makes sense[16] depends also on the approach of the national law-maker to the relevance of the distinction between the private and public law. Here one may find one of the most prominent sources of difficulties in the process of implementation, but also of application of the European rules. From the perspective of the European Union, a distinction between the private and public law does not play an important role. The European law-maker tries to achieve the goals related to the internal market[17] and it leaves the matter of incorporation of the rules to the Member States, disregarding its formal nature and attribution. From the perspective of at least some Member States, the attribution to the private or public law still matters, albeit it is well-known phenomenon of gradual disappearing of the sharp limits between the various areas of law. The example of the Directive on Unfair Commercial Practices may be called here as an example.[18] It was planned by the Commission to be kept outside of the contract law, trying to exist in the somehow artificially created space of the unfair commercial practices. From the perspective of the Member States Law, it enters in the several interactions with the national contract law, creating a tension between the classical institutions of the private law, like the vices of consent and the unfair market practices.[19]

It is, however, true that in consumer law, there is a growing relevance of the public law protection of the consumers' interests. The focus of the consumer protection has been moved to the administrative bodies, ombudsmen etc.[20] The rules of the private law are in the background of these

[16] On this matter see: J. Ghestin, Le contrats de consommation, p. 2.
[17] J. Ghestin, Le contrats de consommation, p. 3.
[18] H. M. Micklitz, Unfair commercial practices, pp. 231–232.
[19] H. M. Micklitz, Unfair commercial practices, p. 237.
[20] J. Stuyck, Basic models of consumer law in the EU, in: H. W. Micklitz, J. Stuyck, E. Terryn, Cases, materials, texts on Consumer Law, Oxford and Portland, Oregon, 2010, p. 55.

systems, but the gravity of the regulation is moving towards the administrative framework of law. The fact that the border line between the administrative and private law is getting more obscure may impact the way of regulating the consumer law. It could be an argument for the autonomous codification for the consumer law if the matter of the consumer law cannot be attributed to the particular area of law and the reasons of clarity and strengthening the position of the consumer law within the whole system may favor the idea of the separate codification.[21] Such approach contains, however, some essential flaws as well. The rules belonging to the various areas of laws put into one code are difficult to be applied in a consistent way, since they do not interact properly with the remaining parts of the given disciple of the law outside of the consumer code. Putting different consumer provisions to the one code, belonging to the different areas of the law does not facilitate the process of learning on rules governing the certain relationship, since not all of the rules relevant in the given case are to be found in one place. Gathering rules applicable to the consumer, belonging to the different areas of the law in one place gives a misleading picture of the completeness. It cannot be denied that such an idea of having all, civil, criminal and public law provisions on consumer law in one book may create an impression of facilitating the control over the whole complexity of the consumer law. This impression could, however, be misleading. Putting the rules belonging to different areas of laws facilitates to get a general picture of the consumer law, but does not facilitate the application of it. The norms do not interact with each other. The whole legislative context must be searched outside of the consumer code which undermines the idea of the code as a "complete" source of legislation in the examined area. So far, the distinctions among the public and private law matters, and the criterion of the "consumer law" do not give a sufficient justification to put the heterogenous legal matter into one code.

[21] See e.g. G. Magri, The Italian Codice del Consumo, a model for a consumer legislation? In: Y. M de Alencar Xavier/F. G. Alves/P. B. Vilar Guimarães/J. C. de Medeiros Nóbrega, Perspectivas Atuais do Direito de Consumidor no Brasil e na Europa, Natal 2014, p. 140.

3 Does the civil code as a central act in the area of the private law matter or the process of the decodification has deprived it or any value or the law-maker is ready to deprive the civil code of any significance?

The question whether a consumer code should be adopted depends very much on the overarching concept of the legislation in the area of the private law. In particular, it depends on the assumed role of the civil code. Should the idea of the civil code as the comprehensive and inclusive source of the civil law matter, a consumer code endangers such an idea by destroying the completeness of the civil code.[22] The underlining idea of the civil code is to provide the rules which govern certain legal relationships in the complete way, even if these rules are spread through the whole code. The idea of the consumer code is based usually on the different approach to the regulated matter. If it follows the way the European directives have been drafted, the consumer code follows a kind of the problem approach, giving an illusion of providing the complete set of rules leading to the resolution of the particular life situation.[23] It is, however, only an illusion due to the fact that not all relevant rules could be put into one place and the solution must be searched in many different pieces of legislation. It cannot be, however, denied that the process of the de-codification is already ongoing.[24] In many countries, specific private law statutes are common, which often also combine the public law and private law. In some countries, there is e.g. a banking law, which combines also the private law and the public law matters.[25] It does not, however, serve the simplification of the law and its application. The private law rules of banking are not complete – it creates a misleading picture of the normative content of the various legal institutions. It is also often true in case of the housing legislation. These examples of de-codifi-

[22] G. Magri, The Italian Codice del Consumo, p. 140, stresses that the consumer code marks the end of the idea of the uniform civil code.

[23] H. Schulte-Nölke, F. Zoll, Structure and Values, p. XXV.

[24] See: T. Giaro, Dekodyfikacja: Uwagi historyczno-teoretyczne, w: F. Longchamps de Bérier, Dekodyfikacja prawa prywatnego, Warszawa 2017, p. 16–19.

[25] See as example the the Polish Banking Law [Prawo bankowe, statute from the 29. 8. 1997, consolidated version Dz. U. (Official Journal) from 2017 r. pos. 1876].

cation are focused on the specific, partially isolated legal relationships and not on the broad spectrum of the legal relationships, denominated mostly by the personal status of the parties. The consumer law may go through the vast array of the areas of the law. If the legal system is built upon sharp demarcations line among the commercial law, consumer law and general private law, it is a concept which accepts the marginalization of the general private law, which role is then reduced to the collection of more or less idealistic principles of the private law, without a relevant field of their application. The inevitable process of the marginalization of the civil code cannot be welcome. Such marginalization leads to the result that the central concepts to the private law are dying out and they are cultivated only in the simplified forms at the margins of the system.

The central position of the civil code is worthy of being maintained. The existence of the "real" civil code which means a code, which plays a pivotal role in the legal system, not only as a symbolic act, but a real leaving core of the whole private law of the country, is an important factor influencing the quality of the private law.[26] Behind the civil code, there is a long tradition of the legal science, supporting the depth of the legal institutions being building blocks of this code. The expedition of certain legal concepts and constructions to the laws outside of the civil code to the special statutes or specific codes trespassing the boundaries of the private law can lead to certain "vulgarization" of the private law. They become less reflected while analyzing the scheme of the civil law and may experience a kind of trivialization of the traditional rules or concepts moved now to the "consumer code" and interpreted in the growing isolation from the "classical" civil code. This argument is also related to the process of the education. The matters which are in the civil code are usually the main topic of teaching. The export to the specific statutes outside of the code also often means marginalization of exported matter as a subject of a teaching of law.

The consumer code must diminish the relevance of the civil code. So if the law maker does not want to accelerate this process, it should abstain from the idea of adopting the specific consumer code.

[26] Z. Radwański, in: Z. Radwański, Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej, Warszawa 2006, p. 20.

4 Is it technically possible to maintain the coherence of the civil code and the consumer law? The idea of the "Europeanisation" of the civil code and its limits

The strong argument for the adoption of the consumer code and extracting of the consumer law matter from the civil code is a development of the case law of the Court of Justice of the EU. The strongly consumer-friendly tendency of this case law hampers the process of the Europeanization of law.[27] The idea of the Europeanization of law was based on the assumption that the rules of the consumer law directives are feasible for the generalization, which would mean that they are adjusted not only to the relationships between the parties, which are covered by the scope of application to the consumer law, but to all private law relationships.[28] Such process may work only if the case law of the Court of Justice is not too excessive and does not force the national courts into "divided interpretation" of the same wording of the provisions.[29] In such a situation, the consumer law is developing inevitably into a separated structure with a high level of autonomy. It may always be discussed whether the particular decisions of the Court of Justice have already reached a level truly requiring the application of the "divided interpretation"; nevertheless, the fact that the only specific scope of the provisions is in the hands of the Court of Justice, has a potential to endanger the homogeneity of the interpretation of the law and create a tendency towards keeping the law resulting from the implementation of the directives separately from the law of the purely national origin.

The wave of the fully harmonized directives also influences the possibility of inclusion of the consumer law in the civil code. The full harmonization requirement makes it difficult to include the implemented text in the

[27] On the Europeanization of the private law: R. Schulze, Die Europäisierung des Privatrechts – Stand und Perspektiven, in: A. Janssen, Auf dem Weg zu einem Europäischen Privatrecht. Beiträge aus 20 Jahren von Reiner Schulze, Baden-Baden 2012, pp. 285–297 (firstly printed in: Justiz und Recht im Wandel der Zeit, Festgabe 100 Jahre deutscher Richterband, Köln, München 2009, pp. 223–234).

[28] H. Schulte-Nölke, F. Zoll, Structure and Values, pp. xxiii–xxiv.

[29] On this issue see: F. Zoll, The Problems associated with the implementation of directives into national legal systems: a few examples from the codified legal traditions in Ch. Twigg-Flesner, Research Handbook on EU Consumer and Contract Law, Cheltenham, 2016, pp. 68–81.

civil code due to the missing flexibility of the text. It is then much easier to implement such directives in the self-standing statutes.[30]

It is true that the currently ongoing practice of the law making at the European level creates incentives to build up the self-standing autonomous collections of the European-based laws. The fully-harmonized directives invite to the "copy-paste" technic of the implementation. This technic was also broadly used in case of the minimum-harmonized directives, but in the latter case, it was probably rather a result of unwillingness of the national law-maker to take a risk of the integration of the European law into the own system, which would require a deeper process of the re-shaping of that system. In case of such directives such approach of the national law-makers was just a result of the easiest-way choice of the implementation. In case of the maximum-harmonized directives, the law maker has scarcely a reasonable alternative. All more sophisticated ways of implementation lead to the fear of the infringement of the EU-law.

This situation is however far from being desirable. Actually, the mentioned problems with the implementations of the directives bring not only the arguments against the integration of the implemented text into the civil code, but they make it also difficult to develop a reasonable consumer code. I say "reasonable" which means a real code, a not only a book containing a collection of the copy-paste implementations. The currently chosen way of the directives' drafting does not support or does not facilitate in the sufficient way the process of the Europeanization of the law. It is however probably a temporary situation. For the strengthening of the process of the establishing the internal market the process of the Europeanization of the law is essential, therefore the European law-maker will be forced once again to reconsider the process of the legislation.

[30] H. W. Micklitz, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in: G. Howells, R. Schulze, Modernising and Harmonising Consumer Contract Law, Munich, 2009, pp. 56–61; M.B.M. Loos, Full harmonisation as a regulatory concept, in: M. Stürner, Vollharmonisierung im Verbraucherrecht, München 2010, p. 97.

5 The impact of the consumer code on the application of law. Does it help to develop and maintain a coherent legal thinking and method?

The consumer code to make a sense should facilitate the application of law and access to the law. Of course, it is not so, that it is not possible to make a code which would positively enhance the functioning of the consumer law. The structure of the legislation is one of the many factors influencing the functioning of the law and it must not be overestimated. But it should not be also underestimated. It has a long-lasting impact on the legal method and the positioning of certain legal institutions within the whole legal system. A denomination "consumer code" is not decisive for the content of the code and certainly one may have a wonderful idea how to collect the consumer relevant rules in one code. Here comes back the question posed before, concerning the role of the private law and the civil code in the regulation of the consumer law. If the consumer law will quite the environment of the private law, the consumer law may have more sense. The worst scenario is to stop in the half of the way and create a code containing a hybrid of the rules of different origins, which do not emerge to the coherent system. It does not make sense to have code which does not contain the set of the complete rules. In such case, it is rather misleading. It does not show the "real" picture of the law and may influence badly the quality of legal reasoning.

6 Does it make sense to deepen the distinction between areas of law, whereas the criterions of this distinction are irreversibly disappearing (the notion of the consumer loses its distinctive function)?

The idea of the code is indispensably connected with the sustainability of the text. It does not make a lot of sense to prepare a code which has not a real future and represents the concept which are about to be abandoned. It is very likely that the concept of the consumer is currently loosing its

relevance.[31] I have discussed this problem already in another paper, so the complete argumentation does not need to be repeated here. It should be only summarized to make my thesis understandable that the concept of the consumer is deeply rooted in the economic system of industrial period. In these times it was easy to attribute the role to the market's participants: one was a trader the second was a consumer. This attribution was also justified by the dominating in the examined groups (traders and consumers) features: economic and intellectual weakness of the consumer in the relation to the trader. Only exceptionally the typically expected features of the consumer were not meeting the reality due to the particular and exceptional circumstances (extraordinary weak trader or especially powerful consumer). In the model of the consumer protection such injustice needed to be tolerated. The dichotomy trader – consumer in the world of the mass production and mass contracts was driven by its economic efficiency. It was not necessary to verify in any given case, whether the particular parties really fit into the basic assumptions of the model trader vs. consumer. To make this model operational it is, however, necessary that the vast majority of the configurations meets the assumption of the model – one party is clearly stronger, the another one clearly weaker. In our days the structure of the market are experiencing the dramatic reshaping. The raise of the technology-based market, e.g. development of the platform economy, has obscured the role played by the participants at the market. The equipping of the customers in the smartphones or other intelligent devices allows them to gather the necessary information at the pre-contractual stage, at least diminishing the original asymmetry of information.

The new categories, like prosumers, have been developed, which purpose was to describe the phenomenon of the "producing consumers", who despite the participating in the production and supply chain should not be deprived of the classification as a consumer. The original concept of the consumer has been also undermined by the rise of the category of the consumer contracts with the dual purpose (partially private and partially entrepreneurial). The expansion of the consumer's notion to such cat-

[31] On this topic see F. Zoll, At the End Of the Concept Of a Consumer? in: J. Lazar/M. Gajdošová, Social function of law and growing wealth inequality, Trnava 2018, pp. 87–99; H. Schulte-Nölke, The Brave New World of EU Consumer Law – Without Consumers and Even Without Law? EuCML 4/2015, p. 138.

egories converts actually the category "consumer" into the category of the "customer". These are only examples showing the probably inevitable process of emptying the notion of the consumer of its content.

All these examples show only that the fundamental change in the essence of the consumer law is approaching or already happening. Therefore, it is a question whether it makes a sense to make a code based on disappearing values or assumptions and considerations. In the history of the codifications, it is quite characteristic feature, that the law-makers staying behind the codification are seeking often to petrify the already existing relationships at the time of dramatic changes and combine them with the approaching modernization. Also in the idea of the consumer code can be seen a desire to grab the world in the form which is just disappearing. Actually, however, the processes launched by the development of the new technology accelerate so quickly that the consumer code will very likely miss such goal and simply will lose the ability to regulate anything. The disappearing consumer law is probably the strongest argument against adopting such a code.

7 Does all of this really matter if the law is losing its ability to govern the facts in the time of the technological revolution?

This last aspect I have already mentioned in the previous point. The development of the new technologies not only challenges the fundaments of the consumer law but it also challenges the idea of the law-making in the usual way. The new technological environment questions the distinction between the "command" and the "being" (*Sein und Sollen*). The smart or self-adapting contracts, the self-regulating realm of the platforms and social networks, the combined with them systems of the dispute resolutions and original "private" sanctions like temporary or permanents ban from the networks and finally ideas of the individually adjusted "granular law"[32]

[32] Ch. Busch, The Future of Pre-Contractual Information Duties: From Behavioral Insights to Big Data, in: Ch. Twigg-Flesner, Research Handbook on EU Consumer and Contract Law, Cheltenham, 2016, p. 231.

do not leave out a lot of space for the traditional ways of legislation. The idea of the consumer code is not able to find the answers to these trends. It is too late start this undertaking.

ZÁSADY EURÓPSKEHO SÚKROMNÉHO PRÁVA V APLIKAČNEJ PRAXI

SPOTREBITEĽSKÝ KÓDEX: ÁNO ČI NIE?

PRINCIPLES OF EUROPEAN PRIVATE LAW APPLIED IN PRACTICE

CONSUMER CODE: YES OR NO?

Marianna Novotná (ed.)

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