

## LEGAL PERSPECTIVES AND OBSTACLES FOR UNIFIED DIGITAL CONTRACT RULES OF ONLINE SALES IN THE EUROPEAN UNION WITHIN THE DIGITAL SINGLE MARKET STRATEGY CONTEXT

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### ABSTRACT

*The purpose of the article is to consider the unified digital contract rules of online sales in the European Union within the context of Digital Single Market Strategy in order to define their legal perspectives, obstacles and activities to overcome them.*

*Recently, the idea of legal regimes' globalization within the framework of existing economic, political and integration unions has gained great favor. The most significant and successful among them are: the European Union, Big Twenty (the G20), BRICS, the Euro-Asian Economic Community (EurAsEC). In the framework of these unions the initiative to create common legal and economic conditions for the movement of goods and services, via the Internet as well, in order to achieve economic and legal advantages has been enthusiastically taken at work. However, despite evident benefits and legal perspectives of these processes, there are a number of obstacles relating to Digital contract rules of online sales within the Single Digital Market Strategy context so that have become the subject of this article study. Having analyzed the legislations and the scientists' opinion on this issue, the authors have identified and considered some of the obstacles and offered a number of activities for their elimination.*

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## **1. INTRODUCTION**

The XXI century can fairly be determined as the “digital era”. Existing market relations between the parties in economic turnover are gradually moving into the global network “the Internet”. However, the splendor of a bygone era heritage is the developed rules, principles and practices within the system of “face to face” relations. Most countries based on of this heritage have to respond to the new challenges and to develop the rules of the remote form of the sale of goods.<sup>1</sup>

The European Union has developed a Digital Single Market Strategy adopted May 6, 2015, which is designed to improve the system of relations in this sphere. An objective necessity for changes is dominantly caused by the buyers and sellers’ distrust, by the difference in the EU and national legislations.

According to the statistics, presented in the Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, 39% of businesses selling online but not cross-border quote different national Contract laws as one of the main obstacles to cross-border sales. This applies particularly to remedies in case of a faulty product as mentioned by 49% of EU retailers selling online and 67% of those who are currently trying to sell or are considering cross-border selling online. Different national Contract law rules have created one-off costs for retailers selling to consumers of approximately €4 billion; these costs mostly affect micro and small- and medium-sized enterprises (SMEs). Only 18% of consumers who used the Internet for private purposes in 2014 purchased online from another EU country while 55% did so domestically. The process of the European Union legislation unification demands a thorough analysis of legal perspectives, advantages and obstacles in this field in order to work out the main directions for the further improvement of legislation and law enforcement practice.

## **2. LEGAL PERSPECTIVES**

The Digital Single Market Strategy includes 16 initiatives to be implemented by the end of 2016.<sup>2</sup> The initiatives presented by the European Commission, form one of the seven pillars of the Europe 2020 Strategy, which sets objectives

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<sup>1</sup> RF Government Decree of 27.09.2007 number 612 (in ed. from 04.10.2012) “On the approval of the rules of the remote sale of goods “, the RF legislation, 2007, N° 41, Art. 4894.

<sup>2</sup> Digital Single Market Strategy, COM (2015) 192 final <<http://ec.europa.eu/priorities/digital-single-market>, last accessed on 16/05/2016.

for the growth of the European Union (EU).<sup>3</sup> The main idea of the proposed changes is to form a digital single market in order to create a sustainable and inclusive growth of Europe. For this purpose, the EU European Commission presented a legislative initiative to harmonize the rules for the supply of digital content and online sale of goods. The aim of the online trade rules unification is to form a Single Market, which will operate under the same rules in all the EU countries.

The advantages of this initiative are quite evident. A single set of rules will bring legal certainty and thus help businesses expand their activities to foreign markets, will increase the level of trust and legal protection of consumers in the Internet market, while giving them the opportunity to enjoy the benefits of the Digital Single Market. Furthermore, it will ensure a broader choice of goods at more competitive prices for the consumers. At the same time, it will create a friendly environment for businesses, will contribute to the increase of cross-border trade volume, and simplify the legal framework which is a key prerequisite for the competitiveness and active participation in digital market.

Considering the advantages of this initiative from the parties in the legal relationship's point of view, should be emphasized, the two main tasks have to be successfully solved. From the seller's perspective, this is the possibility to extend the business without any legal barriers on the level of national legal regimes of the EU countries. For the buyer - it is to ensure a high level of legal protection in matters of online seller default.

The general objective of the proposals is to contribute to a faster growth of the opportunities offered by a true Digital Single Market creation for the benefit of both, the consumers and businesses, by eliminating the key contract law-related barriers hindering a cross-border trade. The rules put forward in the proposals will reduce the uncertainty faced by businesses and consumers due to the complexity of legal framework and the costs incurred by businesses resulting from differences in Contract law. Along with some obvious advantages of this initiative, there are several obstacles to be overcome.

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<sup>3</sup> Communication from the Commission. Europe 2020 a strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final. Brussels, 3/3/2010.

### **3. OBSTACLES TO BE OVERCOME**

#### *3.1. THE NECESSITY TO ESTABLISH THE RULES ON THE RATIO OF THE DIGITAL CONTRACT WITH "FACE TO FACE" PURCHASE AND SALE OF GOODS CONTRACTS*

The Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sale of goods (hereinafter - the Directive)<sup>4</sup> claims that harmonization of distance sales rules could be at risk because of significant differences between the abovementioned rules and the rules of "face-to-face" sale. The Directive states that the developed initiative is based on the experience acquired during the negotiation on the Proposals for a Regulation of the European Parliament and of the Council on a Common European Sales Law.<sup>4</sup> However, the process of creating a unified legal regulation of the EU Sales Law is not completed yet. Rapid removal of legal barriers to online trade is able to sharpen the incompleteness of a Common European Sales Law unification processes.

Another possible extreme is that a single digital sale of goods contract can become a separate type of a contract. The Directive notes the increasing importance of the omni-channel distribution model (directly in a shop, online or otherwise at a distance). Consumers and traders should have a coherent legal framework regulating both online sales and all other forms of sales in a uniform manner. However, these problems, according to the Directive, are to be resolved in the nearest future. Currently, the European Parliament has considered in the first reading the amendments to remove restrictions for online and other distance sales of goods.

In this regard, we believe, there should be developed a single, coherent package of legislative changes, unifying the EU contract law in general. Digital sale of goods contract cannot be presented as a separate individual type of a contract, since it contains the same elements: the subject, the object, the content (the rights and obligations of the parties) and the grounds for the contract. Ordinary and digital contracts correlate as the "general" and "specific" within one Contract law system. Otherwise it will cause a great number of problems in law enforcement practice related to the inconsistency common in nature of regulations. Furthermore, there will appear the issue of legal inconsistency of some legal relationships towards others.

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<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (Text with EEA relevance), (COM (2015) 634 final), (2015/0287 (COD), 9/12/2015).

The process of European Contract Law unification has been much discussed under the leadership of the European Commission since 2001. The main obstacle to the acceleration of the process is the necessity to harmonize national legal regimes of the EU member states. In 2003 the European Commission published an action plan proposing to increase the quality and coherence of European Contract Law by establishing a “Framework Advisory act» (Common Frame of Reference - CFR)<sup>5</sup>. According to the Commission’s intention, CFR was supposed to be a “toolbox” for European legislators to create a new contract law or to introduce some changes to the current EU legislation<sup>6</sup>. A member of the European Civil Code creation group, Professor of the Catholic University in Luvane Matthias E. Storme notices: “Our goal was to create a model law that could improve and harmonize the national laws of European countries, because it would be the fruit of thorough scientific research in the field of comparative law”<sup>7</sup>.

Criticizing unification processes in the field of substantive law, Professor of the Sorbonne University Vincent Eze indicates: “The unification of contract law, in particular, regulating international sale of goods (Vienna Convention of 1980) did not cover very important issues for this type of contract for instance, validity of the contract or the moment of goods ownership transfer. Fragmentation unification inevitably raises the question of harmonization of rules of several legal systems - the provisions of the Convention itself and the requirements of law, to which the conflict rule refers to. Furthermore, inaccuracy, ambiguity, inconsistency of uniform material standards is a big challenge for law enforcement officials. Uniformed rules should be interpreted and applied equally in the national courts. In practice, the French Court of Cassation in 1963 Hocke case developed its own rule of resolving this conflict - the priority is given to the interpretation, provided by the national legal system, to which the French conflict rule refers to. Globally this problem could only be solved by a supranational jurisdiction body. Finally, these tools cannot exclude the application of national mandatory rules. Despite the universal character of the

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<sup>5</sup> COM (2003) 68 du 12.02.2003

<sup>6</sup> Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law Edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll, 2009 by sellier. european law publishers GmbH, Munich.

<sup>7</sup> Matthias E. Storme. Une question de principe? Reponse a quelques critiques a l’égard du projet provisoire de «Cadre commun de reference». ERA Forum (2008) 9:S67.

Convention (78 participants), four countries - EU members - Britain, Ireland, Portugal and Malta have not ratified it.”<sup>8</sup>

Significant differences in legal rules on various forms of sales and the absence of a coherent policy for their implementation in Common European Contract Law cast doubt:

- The possibility of Common Principles of European Contract Law application towards the Internet Contracts. The Principles of European Contract Law (PECL)<sup>9</sup> developed by the United Nations Commission on International Trade Law (UNCITRAL) Vienna Convention on Contracts for the International Sale of Goods<sup>10</sup>, signed in 1980, which is applied by the default, unless the parties have chosen another law;<sup>11</sup>
- The principles of International Commercial Contracts (UNIDROIT Principles)<sup>12</sup>, which have established standard rules, regulating the purchase and sale of goods and services provision. All of the above mentioned fundamental legal acts have created uniform rules that serve as a model for the legislators around the world, as well as merchants themselves, including these provisions in their contracts.

At the same time, the introduction of Internet sale of goods legal regulation requires a change in the basic legislative acts. For instance, the scope of these legislative acts in the field of Contract Law is limited to the regulation of relations exclusively between professional parties, and in the case of the UN Vienna Convention of 1980 - the regulation of the movables sale. In addition, there is no mechanism to ensure a uniform interpretation and application of these acts.

The fact, described in section 3 of the Directive, confirms the above mentioned statements<sup>13</sup>. The EU member states are wary of political expediency and differ-

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<sup>8</sup> Eze B. Unification (standardization) of substantive law. Lecture delivered at the Faculty of Law of the HSE in the round table on the problems of unification of the rules MPP substantive nature.

<sup>9</sup> The Principles of European Contract Law 2002 (Parts I, II, and III). European Union. Lex Mercatoria<[www.lexmercatoria.org](http://www.lexmercatoria.org), <[www.jus.uio.no/lm](http://www.jus.uio.no/lm), last accessed on 18/05/2016.

<sup>10</sup> United Nations Convention on Contracts for the International Sale of Goods. United Nations Publication, New York, 2010, 42 p.

<sup>11</sup> Lando Ole/Beale Hugh: Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law, 2000, p. XXVII; Castronovo, Carlo: Contract and the Idea of Codification in The Principles of European Contract Law (in *Festschrift til Ole Lando*), 1997, p. 109-124.

<sup>12</sup> Unidroit Principles of International Commercial Contracts. Art 1.6(2) Unidroit Principles. Published by the International Institute for the Unification of Private Law, Rome. 454 p.

<sup>13</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (Text with EEA relevance), (COM (2015) 634 final), “Results of ex-post evaluations, stakeholder consultations and impact assessments”.

ences between online and offline sales rules. Some of them would prefer a more meticulous application, implementation and evaluation of the current legislation before making a new one. In most cases, the existing problems in the legal field can be solved by changing of the current legislation rather than forming a new one.

### *3.2. THE ABSENCE OF HARMONIZED RULES OF CROSS-BORDER ONLINE TRADE OF GOODS WITH THE RULES ON CONTRACTS FOR DELIVERIES AND POWER SUPPLY*

One more important obstacle lies in the fact that, according to the gist of the Directive, it regulates the purchase and sale of goods. The logical question arises: what rules will regulate other types of online sales contracts: deliveries (enterprise agreement), power supply, and sale of immovable property, works and services provision?

According to the Directive's conception it is to be applied to consumer contracts only in case the consumer purchases goods for his own household needs. At the same time, the most common approach in continental law system is the division into the general and special provisions. In this regard, the general provisions are applied to all types of contracts: the retail sale, deliveries (enterprise agreement), power supply, sale of immovable property, etc. To make these agreements in the online form is possible as well. Extensions of the Directive, subject to the action of all kinds of contracts, correspond to the overall objective that is to ensure economic growth and the development of civil turnover. However, the Directive does not presuppose this. Article 1 limits the spread of the rules to the service contract. If the sales contract contains the terms of the sale of goods and services provision, then the Directive is applied only to the part which relates to the sale of goods. According to Article 2d of the Directive, "goods" means "any tangible movable items with the exception of (a) items sold by way of execution or otherwise by authority of law; (b) water, gas and electricity unless they are put up for sale in a limited volume or a set quantity."<sup>14</sup> The prohibition to make contracts in which both parties are entrepreneurs, is given in the definition of a distance contract, which determines the parties to the contract as the "seller" and the "consumer". However, the definition of a distance sales contract as "any contract concluded under an organized distance scheme"<sup>15</sup> seems illogical.

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<sup>14</sup> Article 2d «Definitions» of the 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) 634 final), (2015/0287 (COD), 9/12/2015).

<sup>15</sup> Article 2d «Definitions» of the Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of good.

We suppose that the difference in the provisions on consumer contracts in comparison with other types of sales contracts violates the principle of a uniform legal regulation of homogeneous social relations.

### *3.3. THE CONTRADICTION BETWEEN THE PRINCIPLE OF FREEDOM OF THE CONTRACT AND THE GOAL OF A MANDATORY DIGITAL SINGLE CONTRACT MODEL CREATION*

The last obstacle under consideration, relates to the necessity to follow the principle of freedom of contract which is one of the fundamental principles of Civil law.

Civil law is based on the principle of equality of the parties, autonomy of will and property independence of the participants. Contract law emphasizes the importance of freedom of contract principle. The principle means that the parties to a contract are free to establish any conditions both prescribed and not prescribed in the provisions of the contract. The parties might even sign a contract, which is not provided by the current legislation, but does not contradict its merits.

Freedom of contract is the foundation for contractual relations. The Directive does not contain direct evidence of the parties' possibility to establish other rules of a digital contract, besides there are no links to a single model contract for the Internet trade. However, there is a provision in the Directive on the expediency of a strict model contract. "The non-binding document, such as a voluntary model contract will not allow achieving the goal to improve the functioning of the internal market. Traders will still be obliged to comply with different mandatory national rules of the consumer's country of residence in case, when national legal regime provides a higher level of consumer protection, that, in turn, will lead to an unjustified increase in their costs and will slow down the process of the total digital market expansion throughout the EU".<sup>16</sup>

The Directive presupposes the establishment of mandatory rules across the EU. Article 3. Level of harmonization states that the EU member states should not maintain or introduce provisions other than those, set out in the Directive, including more or less strict provisions to ensure a different level of consumer protection. "Member States shall bring into force the laws, regulations, administrative acts and provisions necessary to comply with this Directive no later

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<sup>16</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (Text with EEA relevance), (COM (2015) 634 final), "Choice of the instrument".



than two years from the date of its entry into force. The national acts shall contain a reference to this Directive (Article 20).”<sup>17</sup>

The Directive contains specific provisions on the necessity to ensure freedom of contract and its regulation. In order to avoid circumvention of the liability conditions for the lack of conformity and to ensure a high level of consumer protection, any derogation from the mandatory rules on criteria of conformity and incorrect installation, which is detrimental to the interests of the consumer, shall be valid only if the consumer has been expressly informed and has expressly consented to it when concluding the contract. There are separate provisions on the observance of the freedom of contract principle between the seller and the other parties in the chain of transactions. Details for the implementation of this law, in particular, against whom and how such funds should be carried out, should be submitted by member states.

The private nature of civil relations suggests the possibility for the implementation of their own will in discussing and fixing the conditions of the contract, its contents, liability issues, amendment and termination. Unfortunately, the Directive and other official documents of the EU do not provide a clear answer to this question. There is a significant priority of public law principles in the regulation of private relationships. It happens mostly due to the fact that online sales contracts are generally accession treaties in which the consumer can only agree with the terms of the contract or refuse to sign it. Ensuring a high level of consumer protection is a priority. At the same time, the consistency of contract law fundamentals, of a harmonious combination of the “general” and the “specific” in the legal regulation of various online sales contracts as well as of the freedom of contract principle are necessary for a single comprehensive review of the whole legislation on contracts, its systematization and harmonization across all the EU member states.

#### **4. CONCLUSION**

The main advantages of a single online market creation for international online trade are various. A single set of rules will: bring legal certainty for sellers and buyers in the legal regulation rules and thus help businesses expand their activities to foreign online markets; increase consumer trust in the Digital Single Market by providing a high level of consumer protection; ensure a wider choice of goods at uniform competitive prices; simplify the legal framework, create a friendly environment for businesses and contribute to the increase of the volume of cross-border trade.

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<sup>17</sup> Article 20d «Transposition » of the Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of good.

From the seller's perspective it provides the possibility to extend the existing business without any legal barriers in national legal regimes of the EU member states. From the buyer's perspective - to ensure a high level of legal protection in matters of online seller's default.

Along with the legal perspectives for unified digital contract rules of online sales in the EU there are some obstacles which slow down the process. In particular they are:

- The incompleteness of the unification process of the Common European Sales Law;
- The absence of harmonized rules of cross-border online trade of goods with the rules on contracts between businesses, power supply, sale of immovable property, works and services provision;
- The apparent contradiction between the principles of freedom of the contract and the goal of creation of a mandatory digital single contract model.

The analysis of the legislations, the scientists and experts' opinion on this issue prompted a number of activities to overcome the obstacles in order to support and fulfill the objectives of the legislative initiative. Obviously, it is necessary to:

- establish clear rules on the ratio of the digital contract of sales of goods with the rules on the purchase and sales of "face-to-face" contracts. Moreover, there is the need for a single, coherent package of legislative changes, unifying European Contract Law in general, to which common online sales rules will harmoniously fit;
- extend the application of the fundamental legal acts of European Contract Law on e-commerce products rules; to create a mechanism ensuring a uniform interpretation and application of these acts;
- develop common rules of e-commerce for businesses, deliveries, energy supply, sales of immovable property, works and services provision; to establish a clear ratio of "general" and "specific" in the rules of cross-border online trade;
- establish the optimal ratio of the imperative (not to be changed by an agreement of the parties), and the dispositive (possible to be changed) in the digital single contract rules. Parties to the digital contract should have a clear framework of their freedom in establishing the rules, regulating their relationship.

Thus, the unification process of online trade of goods' rules requires a comprehensive review of legal definitions and fundamentals of Contract Law, the

reconciliation of the rules regulating homogeneous contracts of online sales, as well as the basic principles of law (freedom of contract, uniform application of the general rules for homogeneous social relations, etc.).

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