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The Sale of Consumer Goods and Associated Guarantees in Ukraine: A Comparative Analysis with EU Law

I. Introduction

The intention of Ukraine to join the EU makes it necessary to align the Ukrainian legislation with the standards of the EU legislation. The corresponding commitment is set forth by the EU-Ukraine Association Agreement, dated 27 June 2014. Its preamble indicates that parties are committed to gradually approximate Ukrainian legislation with that of the Union and to implement it effectively. One of the areas of cooperation and approximation of the legislation is the sphere of granting consumer protection while avoiding the setting of barriers in trade. According to Art. 415 of EU-Ukraine Association Agreement the parties shall cooperate for ensuring a high level of consumer protection and achieving compatibility between their systems of consumer protection.

Currently the Government of Ukraine approved a plan for the implementation of certain legislative acts of the EU consumer protection system. The purpose of the implementation of this plan is to increase the level of consumer protection. It should be noted that this governmental document does not include the Directive 2011/83/EU on consumer rights (hereafter Directive 2011/83/EU) dated 25 October 2011 and entered into force as from 13 June 2014. However, the document includes the Directive 97/7/EC on the protection of consumers in respect of distance contracts (hereafter Directive 97/7/EC), repealed by the Directive 2011/83/EU. The reason of this choice is unclear. It seems to be due to carelessness. Indeed, Directive 97/7/EC should now be excluded from this list and instead the Directive 2011/83/EU has to be included.

The main aim of this contribution is to offer a comparative analysis of Ukrainian and EU legislation, in order to understand and define the legal framework of the consumer rights concerning the sale of consumer goods.

II. The legal framework

Nowadays, legal regulation of the sale of consumer goods in the EU is carried out by the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (hereafter Directive 1999/44/EC)¹ and Directive 2011/83/EU. As specifically concerns Directive 2011/83/EU, this was coming in a very particular time for the process of the harmonization of EU law: the second volume of the *Acquis-Principles* was about to be published and the second edition of the *Draft Common Frame of Reference* was coming soon on to the market.²

The consumer rights directive was adopted as a full harmonization Directive.³ By contrast, the harmonization of only certain aspects of consumer sales law raises questions as to the delimitation of the harmonized field from general contract law, which is supposed to remain unaffected by the harmonization.⁴

Directive 2011/83/EU, as well as the laws, regulations and administrative provisions adopted and published in Member

States necessary to comply with this Directive, are an important step towards the harmonization of consumer rights in Europe. Its adoption has become the basis for the implementation of the standard rules for the common aspects of distance and off-premises contracts, which would contribute to a high level of consumer protection in the European Union.⁵

There is no uniform regulation devoted to the sale of consumer goods in Ukraine. Legislation in this area is characterized by diversity and combination of laws, regulations and administrative provisions, which often contain overlapping and contradictory rules.

In Ukraine, the sale of consumer goods is regulated in the Civil Code of 16 January 2003 (hereafter CC), in particular in Art. 698-709, and also in the "Law on Consumer Rights Protection" of 12 May 1991 (hereafter Law on CRP). The

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- 1 See more: Sascha J. Morgenroth, 'Umsetzung der Verbrauchsgüterkaufrichtlinie in Spanien und Deutschland' (Peter Lang GmbH 2003); Thomas Zerres, 'Die Bedeutung der Verbrauchsgüterkaufrichtlinie für die Europäisierung des Vertragsrechts' (Sellier 2007); Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers (eds), 'EC Consumer Law Compendium. The Consumer Acquis and Its Transposition in Member States' (Sellier 2007); Kinga Heerstraßen, 'Gewährleistung im deutschen und polnischen Kaufrecht.' (Peter Lang GmbH 2012); Katerina Stringari, 'Die Haftung des Verkäufers für Sachmängel nach griechischem Recht' (2008) 16 ZEuP 563; Ulrich Bündenbender, 'Die Bedeutung der Verbrauchsgüterkaufrichtlinie für das deutsche Kaufrecht nach der Schuldrechtsreform' (2004) 12 ZEuP 36; Christian Twigg-Flesner, 'English Sales Law After the Implementation of Directive 99/44/EC on Consumer Sales – Back to the Drawing Board?' (2003) 1 GPR 12; and also see the special issue of ERPL (2001) 9 (i.e. works of Christoph Jeloschek, Edwoud Hondius, Anne-Dorte Bruun Nielsen, Stephan Watterson, Stefan Grundmann, Georgios I. Arnokouros, Timothy C. Bird, Manola Scotton, Martin Hogg, Javier Lete, Hanna Sivesand) 157.
- 2 Fryderyk Zoll, 'The Remedies for Non-Performance in the Proposed Consumer Rights Directive and the Europeanisation of Private Law' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Sellier 2009) 279.
- 3 Discussion for full harmonisation of consumer contract law in: Peter Rott, 'The Proposal for a Directive on Consumer Rights: No Single Set of Rules' (2009) 17 ZEuP 456; Thomas Wilhelmsson, 'Full Harmonisation of Consumer Contract Law?' (2008) 16 ZEuP 225; Jan Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18 ERPL 5; Marco Loos, 'Consumers Sales Law in the Proposal for a Consumer Rights Directive' (2010) 18 ERPL 15; Martijn Hesselink, 'Towards a Sharp Distinction between b2 b and b2 c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (2010) 18 ERPL 57; Martin Schmidt-Kessel and Ramona Sorgenfrei, 'Neue Anforderungen an die Umsetzung verbraucherschützender Richtlinien. Überlegungen aus Anlaß des Umsetzungsgesetzes zur Verbraucherrechterichtlinie' (2013) 10 ZEuP 242.
- 4 Jules Stuyck, 'The Provisions on Consumer Sales, Perspectives for European Consumer Law' in Hans Schulte-Nölke, Tichý Luboš (eds), *Towards a Directive on Consumer Rights and Beyond* (Sellier 2010) 24.
- 5 See more about Directive 2011/83/EU in: Oliver Unger, 'Die Richtlinie über die Rechte der Verbraucher – eine systematische Einführung' (2012) 20 ZEuP 270; Martijn Hesselink, 'Towards a Sharp Distinction between b2 b and b2 c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (2010) 18 ERPL 57; Martin Schmidt-Kessel and Ramona Sorgenfrei, 'Neue Anforderungen an die Umsetzung verbraucherschützender Richtlinien' (2013) 10 ZEuP 247.

EU legislation on consumer protection is partly reflected in those pieces of legislation. As a general rule, the CC is to be applied first in the regulation of any civil relations. However, according to Art. 698(3) CC the legislation on consumer rights protection shall be applicable to the sale of consumer goods if it is not otherwise provided by the CC.

The sale of consumer goods is also laid down in Ukrainian regulations and administrative provisions containing the duplicating provisions of CC and Law on CRP. It seems that the existence of so many regulations governing the same field of social relations does not cause legal certainty, but rather additional complexity and limits for consumers.

The regulation on sale of consumer goods in Ukraine dates back to the Civil Code of Soviet Union dated 18 July 1963 which determined the rights, duties and liability of the contractual parties, but was not specifically aimed at consumer protection. Unfortunately, the legislation of the Soviet Union was not fully consistent with international law, particularly with United Nations Guidelines for Consumer Protection (hereafter UNGCP).⁶

The determining factor in creating consumer legislation in Ukraine was the adoption of the Law on CRP as for the first time UNGCP were enshrined.⁷ The Law on CRP introduced significant changes in the evaluation of goods' quality, associated guarantees, goods information, and liability.⁸

This Law was brought in compliance with the EU legislation on consumer protection, in order to ensure the goods' safety in distributing and placing them on the market.

Thus, in the last two decades a new consumer law framework has been created and regulates relations in consumer sales in a fundamentally different way. However, most of the provisions of this legal framework need further improvement.

III. The concept of «lack of conformity»

The Ukrainian and EU legislation contain provisions determining the duty of the seller to deliver goods to the consumer which are in conformity with the contract of sale (Art. 2(1) Directive 1999/44/EC and Art. 673(1) CC). However, in the Law on CRP, the scope of seller's obligations is somewhat expanded compared to the CC and Directive 1999/44/EC. According to Art. 6(1) seller must deliver to the consumer goods of a proper quality, as well as provide information thereabout. Proper quality of products in the law means the property of products that meet the requirements established for these products in the legal acts and regulations and in a contract with the consumer. The seller must deliver the consumer goods according to the contract of sale and requirements set for this goods category in regulations (various government acts) and documents (technical regulations, standards, specifications).

In addition, a special law imposes an additional duty on the seller under contractual obligations to provide information on these goods. Art. 15 of the Law on CRP determines the content of this information and its form. The question arises about what legal consequences will arise in case the seller only delivers goods of proper quality and not providing information thereabout. Can this be regarded as lack of conformity of consumer goods or as non-performance or inadequate performance of his contractual obligations? An analysis of Art. 700 CC and Art. 15 of the Law on CRP

follows that the legislator regards this as a breach of the obligation. In fact, in case of failure to provide information to consumer on these goods, the consumer is entitled to terminate the contract, to claim for reimbursement of the price paid for the goods and to ask compensation for damages. Thus, the Supreme Court of Ukraine in case 6-13598св08⁹ decided that the sales contract was the subject of termination under Art. 15(1) of the Law on CRP because the seller had given false information about a TV as a "high quality product".

Furthermore, the legislator imposes on the seller, who did not provide complete and accurate information about the product, liability for lack of conformity, if the buyer proves that it arose from lack of such information.

The presumptions of Art. 2(2) Directive 1999/44/EC cover almost all the normal cases of non-conformity with the contract.¹⁰

Art. 2(2)(d) of Directive 1999/44/EC, related to public statements, has been often criticized in the literature above all because it may lead to a link to statements which have not become contractual.¹¹ General advertising can affect a consumer's expectation regarding the quality of the goods, and this is reflected in the criteria which shall be applied in establishing the goods' conformity with the contract.¹²

Opposite to EU legislation, Ukrainian law determine the consumers' remedies in case of delivery of the goods non in conformity with the contract. In other words, the legislator both in CC and in the Law on CRP divides the legal consequences concerning the lack of conformity of consumer goods into two types depending on the lack of conformity. However, the definitions of the concepts of 'defect' or 'substantive defect' can be found only the Law on CRP (Art. 1 (12) and Art. 1(15)).

If before the conclusion of a sales contract the buyer informed the seller about a specific purpose for purchasing goods, the seller shall be obliged to transfer to the buyer goods suitable for a use pursuant to this purpose (Art. 673 (2) CC). That gap in national legislation is not conducive to an appropriate consumers' protection because it deprives them of opportunities to recognize the lack of conformity of consumer goods with the sale contract if the goods do not correspond to specific purpose of purchasing and the buyer informed the seller about that. Therefore, it is reasonable to amend the definition of 'defect of the good' in accordance with the mentioned above into Art. 1 of the Law on CRP.

6 Anna Falkowska, 'Ochrona konsumenta na przełomie epok – instytucja rękopisów w prawie najnowszym' (2011) 11.2 Zeszyty prawnicze 101, 111.

7 Оксана Миколаївна Коршакова, 'Становлення законодавства щодо захисту прав споживачів' (2012) 1 Право і Безпека 261.

8 Олена Олександрівна Одінцова and Олена Ігорівна Петрова, 'Проблеми захисту прав споживачів в Україні: історичний та соціально-правовий аспекти' (2008) 2(38) Вісник Донецького Національного університету економіки і торгівлі ім. М. Туган-Барановського 127.

9 Узагальнення Верховним судом України судової практики з розгляду цивільних справ про захист прав споживачів (2009 – 2012 рр.) від 1.2. 2013.

10 Dirk Staudenmayer, 'The Directive on the Sale of Consumer Goods and Associated Guarantees – a Milestone in European Consumer and Private Law' (2000) 8 ERPL 547, 551.

11 See more: Sibylle Höffe, 'Die Verbrauchsgüterkaufrichtlinie 1999/44/EG und ihre Auswirkungen auf den Schadensersatz beim Kauf' (Peter Lang GmbH 2002) 40-41.

12 Hans-W Micklitz, Jules Stuyck, Evelyne Terryn (eds), 'Cases, Materials and Text on Consumer Law' (Hart Publishing 2010) 321.

The choice of the Ukrainian legislator to differentiate the concept of 'defect' of the goods into 'defect' and 'substantive defect' is questionable. In my opinion, the concept of 'lack of conformity of the goods' is broader than the concept 'defect' because it covers also the specific purpose of purchasing of goods. In Ukraine it is possible to exclude the relevance of the specific purpose if the consumer has concluded the sale contract with the seller in a written form and stated the purpose for which these goods are purchased. Therefore, in order to protect buyers properly, including consumers, to bring legislation in conformity with international standards, to unify legal terminology, the concept of 'defect' and 'substantive defect' should be changed by the Ukrainian legislator into the concept of '(lack of) conformity of the consumer goods with sale contract'.

Another interesting problem which should be analysed is the possibility of recognition of lack of conformity resulting from incorrect installation of the consumer goods in case of a shortcoming in the installation instructions. In Directive 1999/44/EC this is regulated in Art. 2(5)). Note that this does not mean that a consumer can claim that the goods were not in conformity simply because the installation instructions had a shortcoming (e.g. by being unclear or missing out information), but rather because the shortcomings caused the consumer to undertake the installation in a manner that resulted in a lack of conformity.¹³

Neither CC nor the Law on CRP do determine the lack of conformity as Art. 2(5) the Directive 1999/44/EC does. It is provided only in the regulation of the Order of the Ministry of Economy of Ukraine "On approval of the rules of retail of consumer goods" that in case of the incorrect installation of goods the consumer may require the repair or replacement free of charge. Thus, the legislator determined in the regulation the negative legal consequences for the buyer in case of lack of conformity resulting from incorrect conclusion and installation of the consumer goods. In this case, the consumer has only the right to require the removal of defects free of charge. The question is whether it should be regarded as a legal consequence of the acquisition of the goods with defects or the goods with substantive defects. This question can receive given both positive and negative answers. Indeed, from one point of view, if we understand the phrase 'remove the defects for free of charge' broadly, then realizing it consumer may require from the seller, in case of the incorrect assembling of goods, reimbursement for the elimination of defects and replacement the goods for the same or similar, which are available, and direct removal of defects of goods for free of charge. From the other point of view, analysing the provisions of CC and the Law on CRP, the phrase 'removal of defects free of charge', the legislator understands as one of the requirements of the consumer in case of identifying defects or substantive defects in the goods. The consumers may choose their own solutions: a decrease the price pro rata, a compensation for removal of the defects of the goods, a breach of the contract and giving the refund, a replacement of the goods for the same or similar which are available by the seller or producer.

It follows from the above mentioned that the phrase 'removal of the defects free of charge' should be interpreted in the narrow sense. Therefore, the legal consequences for the incorrect assembling and installation of goods that are determined in the regulation should be understood as sanctions for improper performance of contractual obligations, and not

as negative effects of buying the goods with defects or the goods with substantive defects, as it is stated in the Directive 1999/44/EC.

On the other hand, Ukrainian legislator does not consider the circumstances under which the incorrect assembling or installation is due to a shortcoming in the installation instructions. I think that any lack of conformity resulting from this shall be deemed to be equivalent to the lack of conformity of the goods if installation forms part of the contract and the goods were installed by the seller or by his representative. Eventually, the consumer would not receive the goods with the appropriate properties as he expected. Therefore, in order to protect rights and interests of non-professional individuals it would be advisable to consolidate in Ukrainian legislation a provision similar to Art. 2(5) Directive 1999/44/EC. This problem should be understood as lack of conformity of the goods.

IV. The rights of the consumer for lack of conformity

According to the general rule contained in Art. 3 (1) Directive 1999/44/EC, the seller should be liable to the consumer for any lack of conformity which existed at the time the goods were delivered, where the lack of conformity becomes apparent within two years since the delivery of the goods (Art. 5(1)). Member States may provide that, in order to benefit from their rights, consumers must inform the seller within a period of 2 months from the date on which they detected lack of conformity. Member States that have chosen not to make use of this option are Austria, Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxembourg, United Kingdom,¹⁴ and Poland.

In the Directive 1999/44/EC no obligation exists for the buyer to inspect the goods. Under the CISG, however, the buyer has to inspect the goods within a short a period of time as it is practicable in the circumstances and has to give notice to the seller of any lack of conformity within a reasonable period of time. This reasonable period of time has, in the case law, generally been set at about one month after the buyer has or should have discovered the defect. The provisions in the Directive give a very high level of protection to the buyer, whereas the CISG ensures more protection to the seller.¹⁵

Any lack of conformity which becomes apparent within 6 months of the delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. This presumption provides that the burden of proof for lack of conformity of the goods lies not on the consumer, but on the seller.¹⁶ Art. 5(3) of the Directive 1999/44/EC sets the presumption that if the lack of conformity has become apparent within 6 months of delivery of the goods, it is presumed to have existed at the time of delivery. It applies if the consumer provides evidence that the goods

13 Hans-W Micklitz, Jules Stuyck, Evelynne Terryn (eds), 'Cases, Materials and Text on Consumer Law' (Hart Publishing 2010) 322.

14 Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers (eds), 'EC Consumer Law Compendium. The Consumer Acquis and Its Transposition in Member States' (Sellier 2007) 432.

15 Sonja A. Krusinga, 'What Do Consumer and Commercial Sales Law Have in Common? A Comparison of the EC Directive on Consumer Sales Law and the UN Convention on Contracts for the International Sale of Goods' (2001) 9 ERPL 187-188.

16 Maciej Koszowski, 'Ciężar dowodu w przypadku niezgodności towaru konsumpcyjnego z umową' (2012) 4 Przegląd Legislacyjny 36.

sold are not in conformity with the contract and that the lack of conformity in question became apparent, that is to say, became physically apparent, within 6 months of delivery of the goods. The consumer is not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller.¹⁷

The Ukrainian legislator establishes requirements for the quality of the goods which the seller delivers or will deliver to the buyer. The goods should meet the quality requirements at the moment of their delivery to the buyer, unless another moment to determine the goods compliance with these requirements is established by a sales contract (Art. 675(1) CC). The seller is responsible for the defects of the goods. However, the burden of proof that the defects of the goods appeared before the goods were delivered to the buyer or due to the reasons existed prior to this moment, in the general rule, lies on the buyer (Art. 679(1) CC). Thus, compared with provisions of the Directive 1999/44/EC, and its presumption of non-conformity during the first 6 months, the Ukrainian legislation takes primarily the defense of the interests of the sellers, not of the consumers. In my opinion, also in Ukrainian legislation, the burden of proof of the conformity of the goods with the contract must lie on the seller.

According to Art. 8(14) of the Law on CRP, the consumer rights contained in this provision will not be the subject to satisfaction if the seller/producer has proved that defects in the goods emerged because of the consumer's failure to comply with the rules of using or storing the goods. No matter the form of guilt of the seller for the defects of the sold goods. However, if the presence of the seller's intention is proved, then the possibility of termination of a contract due to misleading of the buyer exists. In this case, there is another structure of civil law relations.¹⁸

The Ukrainian legislator exempts the buyer from burden of proof of the lack of conformity of the goods with the contract only in case the seller expressly provides guarantees for the quality of the goods. He shall be responsible for the defects of the goods, unless he proves the defects appeared after the goods transfer to the buyer due to the buyer's violation of the goods utilization or storage procedure, third persons actions, accident or force-majeure (Art. 679(2) CC). In any case, if the buyer detects the defects after expiration of the warranty period or serviceable life of goods, the seller shall be liable, provided the buyer proves that the defects of the good appeared prior to the goods delivery or by the reasons existed before this moment (Art. 680(5) CC). Besides, Art. 8(10) the Law on CRP states the defined period of use or ten-year-term for claiming in case of any defects (substantive defects) were identified because of the producer's fault.

The claim against the defects in goods may be raised by the buyer, provided the defects are detected during a reasonable period but within the limits of two years (Art. 680(2) CC). In this article the legislator uses the evaluative concept 'during a reasonable period' and establishes the maximum limit of two years. It seems reasonable to ask whether the buyer has the right to raise claims against the defects in goods if they rise to the seller during one year or one year and ten months since the moment the defects of goods has been detected. Can the seller, justifying it as a violation of 'the reasonable period', reject the buyer's claim? I consider that the utilisation of such evaluative

concepts by the legislator will only lead to legal uncertainty and increase the number of cases dealt with by the courts. Therefore, it would be reasonable to set a two-year period, as provided for in the Directive 1999/44/EC, and amending Art. 680(2) CC.

It should be noted that the Law on CRP does not use the evaluative concept 'during a reasonable period', it only establishes the right of consumer to raise the claim against the defects in goods to the seller (the producer), provided the defects are detected during two years.

Art. 2(3) Directive 1999/44/EC indicates that a lack of conformity cannot be assessed if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

According to Art. 708 CC it follows that there shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was notified by the seller about the defects of the goods. According to Art. 3(2) Directive 1999/44/EC, in the case of a lack of conformity the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate price reduction or the termination of the contract¹⁹

According to the Art. 3(6) of the Directive 1999/44/EC the consumer is not entitled to have the contract rescinded if the lack of conformity is minor. This concept is ambiguously resolved by the courts of Member States. The ECJ in case C-32/12 ruled that Directive 1999/44/EC must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the national court hearing the dispute to grant its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end.²⁰ The problem was related to the fact that under the Code of Civil Procedure of Spain, the national court is bound by the form of order sought by the applicant in her application initiating proceedings, and the applicant cannot vary the subject-matter of that application in the course of the proceedings. In addition, the applicant is not entitled to bring a fresh action in order to advance certain claims that he could have advanced, at the very least by way of alternative claim, in previous proceedings. Such an action would, in fact, be inadmissible on the basis of the principle of *res judicata*.

In Ukrainian Code of Civil Procedure dated 18 March 2004 there is no such provision. In connection with this, Ukrainian

17 Case C-497/13 *Froukje Faber v Autobedrijf Hazet Ochten BV* [2015]. Cf Rupperecht Podszun, 'Procedural autonomy and effective consumer protection in sale of goods liability' (2015) EuCML 149.

18 Олександр Васильович Дзера, Наталя Семенівна Кузнцова, Володимир Васильович Луць (eds), *Науково-практичний коментар Цивільного кодексу України* (Юрінком Інтер 2005) 231.

19 Massimo C Bianca and Stefan Grundmann (eds), 'EU Sales Directive. Commentary' (Intersentia 2002) 119.

20 Case C-32/12 *Soledad Duarte Hueros v. Autociba SA* [2013].

claimant will be able to appeal to the court again on the same case with modified claims. It means that if the claimant failed in one process, he would be able to declare his requirements in the new one after interpreting them in the different mode. If in the first claim the claimant brought an action before the court seeking rescission of the contract of sale, then in the next claim the claimant can bring an action before the court seeking price reduction of the bought car.

The comparative analysis of provisions of CC and the Law on CRP implies the following. In the case of a lack of conformity, the consumer shall be entitled at his option to claim from the seller or the producer to remove the defects free of charge, or to reimburse for the expenses or to have an appropriate price reduction. The consumer shall be entitled to present one of the claims, and in case of failure to declare another with these claims. According to the CC provisions, the consumer shall be entitled to claim to replace the goods or to have the contract rescinded. In Art. 708(1) CC the division of consumers' remedies is not determined in case of any lack of conformity of the goods into two groups, the satisfaction of which is possible only in the priority. Thus, the legislator does not establish the right of the seller, who cannot be guilty for the defects of the goods, a chance to correct the situation as to replace the goods or to bring the goods into conformity free of charge or to reimburse for the expenses incurred by the buyer or the third person for the removal of goods defects.

Instead, the Law on CRP provides that consumer shall be entitled to claim to rescind the contract or to replace the goods only in the case of any substantive defects in the goods, which arose because of the fault of the producer (the seller) of the goods or falsification of goods which has been confirmed, if necessary, by expert findings. The reasonable question will be concerning the consumer's rights in the case of substantive defects of the goods with no fault of the producer (the seller). There is no doubt that the delivery of the goods with the defects is an incorrect performance. However, the legal consequences of the delivery of defective goods are based on other grounds than those arising from general principles of liability. It can be considered as a means of buyer's protection.²¹

A clear legal qualification of consumers' rights in the case of any lack of conformity of the goods with the sale contract is important in the legal regulation of the social relations connected with the consumer protection. The Law on CRP associates the consumer's rights to rescind the contract or to replace the goods whether the defects in the goods are substantive or not. Art. 678 CC (the general provisions on the sales contract) contains similar restrictions.

Instead, according to Art. 708 CC (the special provisions on the consumers' sales contract), the consumers' rights to rescind the contract or to replace the goods are not related to the fact whether the defects in the goods are substantive or not.

The above mentioned gives grounds to assert the imperfection of legal regulations of the relations arising in connection with consumer's protection. The CC and the Law on CRP as acts of civil legislation of the consumers' sales contract carry it out in different ways. More consumer-friendly provisions are included in the CC. Taking into consideration the fact that CC is the basis of civil legislation, and other laws, including the Law on CRP should be adopted in accordance

with it, and that the provisions of CC are more consumer-friendly the priority is given to CC.

Therefore, the provisions of CC, in particular Art. 708 should be used to the legal relations connected with any lack of conformity of the goods with the sales contract. In order to eliminate the conflicts between Art. 708(1) CC and Art. 8 (1) of the Law on CRP, Art. 8(1) of this Law should be amended according to CC. The same position is in the Ukrainian legal doctrine.²² At the same time to take account of the interests of sellers who are liable for the lack of goods in case of the absence of their fault, in Ukrainian legislations, in particular in CC and in the Law on CRP, the priority of realization of consumers' rights in the case of any lack of conformity of the goods with the sales contract should be defined as in Directive 1999/44/EC.

It should be noted that the provisions of Directive 1999/44/EC as well as of CISG are characterized by the desire to maintain the contract as far as this is possible and reasonable. There from, the priority of the claims is given to the claim of repair or replacement, but not to the claim of the contract rescinding or an appropriate reduction made in the price. There is a significant difference between the Directive 1999/44/EC and the CISG in the requirements for terminating the contract. The CISG allows the claim of the consumer of the contract to rescind in the case of substantial breach of the contract, while the Directive 1999/44/EC allows the claim of the consumer of the contract to terminate only as *extrema ratio*, when all other remedies of the buyer were realized²³ as it is noted in the formulation of the provision.²⁴ Art. 49(1(a)) of the CISG clearly provides such possibility, by establishing that the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or CISG amounts to a fundamental breach of contract. Art. 3(5) Directive 1999/44/EC determines that the consumer may require an appropriate reduction of the price or have the contract terminated if the consumer is entitled to either repair, proper remedy or replacement. According to Art. 3(6) Directive 1999/44/EC the consumer is not entitled to have the contract rescinded if the lack of conformity is minor. The function of Art. 3(6) Directive 1999/44/EC is to prevent an abuse of the rescission right of the purchaser. Such an abuse would take place if a non-conformity of the goods is to be assumed on the basis of the application of the interpretation rules contained in Art. 2(2) of the Directive 1999/44/EC, but the purchaser's subjective interest in performance is de facto completely satisfied by the delivered goods.²⁵

21 Jacek Krauss, 'Nowa regulacja rękami przy sprzedaży w stosunkach pomiędzy przedsiębiorcami – zmiany kodeksu cywilnego wprowadzone ustawą o prawach konsumenta' (2015) 3 Przegląd prawa handlowego 4, 5.

22 Ольга Станіславівна Бурлака, 'Недолік товару, які слід вважати істотними: правова кваліфікація та вплив на право реалізацію' (2012) 6 Науковий вісник Національної академії внутрішніх справ <http://www.nbu.gov.ua/old_jrn/soc_gum/Nvknvvs/2012_6/burlak.htm> accessed 29 October 2016; Світлана Сергіївна Бичкова (ed), *Цивільне право України. Договірні та не договірні зобов'язання* (КНТ 2008) 33; Світлана Сергіївна Бичкова, 'Права покупця за договором роздрібної купівлі-продажу' (2006) 11 Підприємство, господарство і право 21, 23.

23 Cezary Błaszczak, 'Wpływ Konwencji narodów zjednoczonych o umowach międzynarodowej sprzedaży towarów na prawo Unii Europejskiej w zakresie sprzedaży konsumenckiej' (2014) 3 Studia Prawnicze 29, 41.

24 Stefano Troiano, 'The CiSG's Impact on EU Legislation' in Franco Ferrari (ed), 'The CiSG's and its Impact on National Legal Systems' (Sellier 2008) 367.

25 Ulrich Korth, 'Zur Auslegung des Tatbestandes der "geringfügigen Vertragswidrigkeit" in der Verbrauchsgüterkaufrichtlinie' (2014) 11 GPR 2014 87, 91-92.

V. Concluding remarks

In order to create the best conditions for Ukraine to join the EU, one of the tasks of Ukrainian legislator is to provide a level of consumers' protection not lower than that set at the EU level, and therefore to adapt the national law to *acquis communautaire*.

One of the specific features of Ukrainian legislation on consumers' protection is the multiplicity of regulations arising from incomplete coverage by legislation relations developing in this area. Legal regulation of the sale of consumer goods in CC, in the Law on CRP as well as in regulations and administrative provisions, causes numerous conflicts and gaps. This concerns e. g. the definition of concepts like conformity of the goods with the contract of consumer sale, the time limits where the lack of conformity becomes apparent, the time period for the liability of the seller in the case of second-hand goods, the hierarchy of the consumers' remedies in the case of a lack of conformity.

Consumer protection in Ukrainian legislation should be based on the development of modern market conditions, the

main international trends in this area, taking into account European experience in the field of consumers' protection and comply with the EU directives.

The results obtained in the research lead to the conclusion that Ukrainian law concerning the lack of the goods conformity is more consumer-friendly than the Directive 1999/44/EC as it gives the consumers more rights in cases when they could not reasonably be unaware of this type of problems at the time the contract was concluded. Having analysed Art. 708 CC, it shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was notified by the seller of the existence of defects in goods. There is no reservation in Ukrainian legislation that the consumer could not reasonably be unaware of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer. Therefore, references by the seller to the fact that the consumer could not reasonably be unaware of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer, does not relieve him from liability for the defects in the delivered goods. ■