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The Impact of EU Law on Consumer Protection in Real Estate Development Contracts (Pre-construction Contracts)

Abstract

The real estate development contract is partially regulated in the Act on the protection of the purchaser of dwelling premises or a detached house. This Act provides for three types of consumer protection measures: those related to the protection of the purchaser's interest at the moment of concluding the contract, those that secure his payments and those related to the stage of implementing the commitments of the developer. Moreover, the Act provides for civil penalties and criminal sanctions in respect of the developer's obligations. The impact of EU law on this Act is not unambiguous. On the one hand, EU legislation indicates and supports the overall objective of the regulation, namely the protection of the consumer. On the other hand, there is no corresponding directive on consumer protection in the real estate development contracts. Unfortunately, the European Union has not exercised the power granted to it under articles 4 and 169 of the Treaty on the Functioning of the European Union. It is only in the area of the liability for defects of the subject matter of a contract that one can perceive the direct impact of EU law, because in this respect Directive 1999/44/EC applies within the EU.

Keywords: real estate development contracts, the buyer of the premises, the information prospectus, escrow account, statutory warranty for defects, withdrawal from the contract, EU Directive.

JEL Classification: K12, K15.

1. Introduction

There is no doubt that real estate development contracts are significant both from an economic and a social point of view. Both aspects are important for consumer protection. In economic terms, because a contract's value often equals the lifetime income of the purchaser, it represents a significant financial burden, and thus exposes the property owners to great risk in the event of a project's failure. In social terms, these contracts have a significant impact on consumers' quality of life. As it is consumers that make up a community, which implements legitimate aspirations and desires, by all means their legal situation in these contracts deserves protection.

Despite legitimate reasons for introducing special consumer protection in real estate development contracts, not much has been done in this respect during the two decades since the political transformation in Poland. At this time in Poland, numerous developers went bankrupt while there was also a good deal of fraud, the misappropriation of buyers' funds and larceny. Despite this, it was not until 2011 that the Polish authorities decided to take firm statutory steps, and then it was only because they were required to do so by the Constitutional Court, which alleged the existence of a legal loophole in the protection of the rights of buyers of apartments¹. Such a late reaction of the legislature means that art. 76 of the Constitution was violated. That article specifically requires public authorities to protect consumers, users and tenants against activities threatening their health, privacy and safety, as well as against unfair market practices.

The purpose of this paper is to determine if and to what extent the EU law has impacted consumer protection in real estate development contracts. Consumer protection in such contracts calls for special legal regulations, as, due to their specific nature, general consumer protection is insufficient. The specific nature of such contracts is reflected in a number of aspects. First, consumers allocate substantial amounts of money for the developer's investment projects, which usually come from all their savings or from bank loans. Second, such funds nearly always must be entrusted to the developer well in advance of its service. In such a case, the consumer establishes complex relations with the developer and often also with a bank; however, they are the weaker party in such relations. Third, the investment process has multiple stages, which necessitates the establishment of a complicated system of contracts to be concluded, most of which must be in the form of a notarial deed. Due to the complicated nature of real estate development contracts, the EU legal acts and their implementation in national law which apply to consumers in general terms only will not be examined here. Hence, the paper

¹ Constitutional Court ruling of 2 August 2010, S 3/10, OTK-B 2010, no 6, item 407.

will not discuss the text of such important legal acts for consumer law as Directive 2005/29/EC² and its implementation into the national law in the Act on combating unfair commercial practices³. Suffice it to say that the consumer in the real estate development contract is also the consumer in general terms, thus, within such a limited scope, they are protected by the entirety of pro-consumer legislation.

2. Protection of the Purchaser of Dwelling Premises and a Detached House in Genere

Initially the laws protecting the purchaser of premises were included in the Act on Ownership of Premises⁴. Unfortunately, the protection measures introduced in art. 9 of the Act proved woefully inadequate. After the release of the said ruling of the Constitutional Court in 2010, the Act on the protection of the purchaser of dwelling premises or a detached house⁵ was enacted, coming into force on 28 April 2012. This Act contains pre-contractual, contractual and post-contractual consumer protection measures as well as sanctions in respect of the obligations imposed on the developer.

The pre-contractual protection measures of the consumer (the purchaser of dwelling premises or a detached house) include the requirement that a prospectus relating to the investment project or undertaking be prepared (art. 17 of the Act on the protection of the purchaser of dwelling premises or a detached house). Together with the annexes, this forms an integral part of the real estate development contract (art. 20 paragraph 2 of the Act on the protection of the purchaser of dwelling premises or a detached house).

The contractual consumer protection measure stipulates the conclusion of a real estate development contract that meets the statutory requirements⁶. Art. 22 paragraph

² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.06.2005, pp. 22–39).

³ The Act of 20.08.2007 on combating unfair commercial practices (Journal of Laws No 176, item 1206, as amended).

⁴ The Act of 24 June 1994 on the ownership of premises (Journal of Laws of 2000, No 80, item 903 as amended), hereinafter: Ownership of Premises Act.

⁵ The Act of 16 September 2011 on the protection of the purchaser of dwelling premises or a detached house (Journal of Laws of 2011, No 232, item 1377 as amended), hereinafter: the Act on the protection of the purchaser of dwelling premises or a detached house.

⁶ The Act of 23 April 1964 – the Civil Code (Journal of Laws of 1964, No 16, item 93 as amended), hereinafter: the Civil Code.

1 points 1–18 of the Act on the protection of the purchaser of dwelling premises or a detached house regulates in detail the content of this contract. The guarantee that the contractual interests of the consumer will be protected is a provision stating that if the terms and conditions of the real estate development contract are deemed less favourable for purchasers than the provisions of the Act, they are invalid, and in their place there shall apply the relevant provisions of the Act (art. 28 of the Act on the protection of the purchaser of dwelling premises or a detached house). An important contractual means of safeguarding the interests of the buyer is also the obligation to conclude the contract in notarial form (art. 26 paragraph 1 of the Act on the protection of the purchaser of dwelling premises or a detached house).

The post-contractual measure of safeguarding the interests of the buyer is the obligation to enter into the land and mortgage register the claim of the purchaser to have a building or a detached house constructed and to have the ownership rights to the property transferred to him, and in the case of residential premises, the buyer additionally has the right to have the premises separated (art. 23 of the Act on the protection of the purchaser of dwelling premises or a detached house). The entry into the land and mortgage register extends the validity of the claim in relation to any developer which acquires the property upon which the undertaken construction is implemented. The buyer may require the performance of the contract by the legal successor to the developer (art. 17 of the Act on land and mortgage register⁷).

The sanctions in respect of the responsibilities imposed on the developer include the purchaser's right to withdraw from the contract, as provided for in art. 29 of the Act on the protection of the purchaser of dwelling premises or a detached house. This right is vested in the buyer when the real estate development contract does not contain the elements of the contract detailed in art. 22 of the Act on the protection of the purchaser of dwelling premises or a detached house. Additionally, the purchaser may also withdraw from the contract for these four reasons: if the developer has not delivered the information prospectus; if the information prospectus does not contain all the information listed in the model prospectus; if there is an inconsistency between the information contained in the prospectus and the terms of the contract; or if the information is incompatible with the state of the facts or the law. At the same time, what the kind of incompatibility which exists and what information it applies to is irrelevant to the intention to withdraw from the contract (Burzak, Okoń & Pałka 2012, p. 303; Czech 2013, p. 420).

In addition to protecting the rights of the buyer in the contractual scope, the Act on the protection of the purchaser of dwelling premises or a detached house also provides extensive protection of the buyer's financial involvement in

⁷ The Act of 6 July 1982 on land and mortgage register (i.e. Journal of Laws of 2001, No 124, item 1361 as amended).

the construction process. The protection of the payments made by the purchasers is provided for in art. 4 of the Act on the protection of the purchaser of dwelling premises or a detached house in the form of: a closed escrow account, an open residential escrow account and insurance guarantee, an open residential escrow account and a bank guarantee and an open residential escrow account. According to some of the academic researchers, the purchaser may not waive this protection measure in the real estate development contract (Czech 2013, p. 89; conversely Ciepła 2012, p. 65). In practice, there are no agreements which would contain guarantees and therefore the provisions introducing these institutions have become irrelevant and unnecessary (Burzak, Okoń & Pałka 2012, p. 106; Czech 2013, pp. 89–90). Of the two other forms of security of the deposit paid by the buyer, the most commonly is the open escrow account⁸. Separate provisions of the Act on the protection of the purchaser of dwelling premises or a detached house regulate the rules of maintaining this account by the developer.

The developer can dispose of the funds paid out from an open residential escrow account solely for the purpose of implementing a development project for which the relevant account is kept (art. 8 of the Act on the protection of the purchaser of dwelling premises or a detached house)⁹. Withdrawals from this account can be made only after the bank determines that the individual stage of the execution of the investment project has been completed (art. 11 of the Act on the protection of the purchaser of dwelling premises or a detached house). It is assumed that the withdrawals should be made in proportion to the payments made (Czech 2013, p. 170). The stages of the implementation of the developer project should be specified in the schedule of the project. There may not be fewer than four of them (Lic 2015, p. 179). The provisions of the Act on the protection of the purchaser of dwelling premises or a detached house introduce numerous even more specific protection measures for the payments made by the purchasers of premises, such as the obligation to inform the buyer of the deposits and withdrawals made (art. 5.3 of the Act on the protection of the purchaser of dwelling premises or a detached house), the ban on changing the account agreement without the consent of the buyer (art. 6 paragraph 4 of the Act on the protection of the purchaser of dwelling premises or a detached house), or limiting the ability to terminate the contract only to important reasons (art. 5.4 of the Act on the protection of the purchaser of dwelling premises or a detached house) (Lic 2015, p. 180).

As a consumer, the buyer is protected in the real estate development contracts not only at the stage of concluding the contract, but also at the stage of its

⁸ See the report of the Office of Competition and Consumer Protection “Consumer in the developer market”, announced in January 2014, <https://uokik.gov.pl/raporty2.php> (accessed: 2.02.2017), pp. 25–28.

⁹ This provision is regarded as excessively restrictive (Burzak, Okoń & Pałka 2012, pp. 130–131).

implementation. Non-performance or improper performance of an obligation by the developer can consist in providing the real property with defects, providing the property but after a delay or a failure to provide the real property. The developer's liability for the failure to perform the obligations is subject to the regulatory consequences of default of mutual agreements (art. 487 *et seq.* of the Civil Code). This regulation was developed and specified in the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house. The purchaser has the right to withdraw from a developer contract in the event of a failure to transfer to the purchaser the ownership of the real property within the period specified in the real estate development contract (art. 29 paragraph 1 point 6 of the Act on the protection of the purchaser of dwelling premises or a detached house). Earlier, however, the buyer should appoint for the developer a 120-day deadline for the transfer of this right. Then, and only in case of ineffective expiry of the deadline, shall the purchaser be entitled to withdraw from this contract¹⁰. The purchaser also retains a claim for a contractual penalty for the delay period (art. 29 paragraph 3 of the Act on the protection of the purchaser of dwelling premises or a detached house), despite the fact that withdrawal from the contract will take *ex tunc* effect, which means as if the contract had never been concluded.

Enhanced consumer protection was included in the Law on Bankruptcy and Reorganisation of 2003¹¹. The provisions of bankruptcy proceedings against developers were introduced to this Act under art. 36 of the Act on the protection of the purchaser of dwelling premises or a detached house. The essence of the protection of the buyer in these provisions was the creation of, out of the funds and additional payments of the purchasers of the premises, a separate bankruptcy estate. This estate was designed, first, to meet the claims of the purchasers of residential premises or detached houses, covered by the developer project (art. 425² of the Bankruptcy and Reorganisation Act) and the possibility to satisfy the claims of the purchasers from the funds collected in escrow accounts or to allow the continuation of a development project by the manager or the receiver (art. 425⁴ paragraph 1 of the Bankruptcy and Reorganisation Act). The revised Bankruptcy and Reorganisation Act, which has been in force since 1 January 2016¹², also provides for the receiver to continue the project of the bankrupt developer with the permission of the judge-commissioner (art. 425e paragraph 1 of the Bankruptcy Act), provided that in the earlier recovery proceedings the purchasers adopted a resolution on additional payments and paid or secured these additional payments,

¹⁰ The standpoint that this is an abusive clause is presented by B. Pawlak (2012, p. 1315). A similar critical view has been expressed by J. Pisuliński (2013), p. 792.

¹¹ Act of 28 February 2003 – Act on Bankruptcy and Reorganisation (Journal of Laws of 2009, No 175, item 1361, as amended), hereinafter: Bankruptcy and Reorganisation Act.

¹² The current name: “Bankruptcy Act”, hereinafter: Bankruptcy Act.

but the arrangement with the bankrupt developer did not come into effect. If the receiver withdraws from the continuation of a development project, the receiver should pay back the additional payments to the purchasers as a whole (art. 425e paragraph 3 of the Bankruptcy Act). After the judge-commissioner has issued permission to cease pursuing the development project, the receiver should inform the bank which keeps the residential escrow account for this development project of this fact and should submit an instruction to return the funds in the account to the purchasers (art. 425h paragraph 4 of the Bankruptcy Act).

3. An Evaluation of the Impact of EU Law on the Protection of Purchasers under the Regulations of the Act on the Protection of the Purchaser of Dwelling Premises or a Detached House

The greatly belated legal regulation aimed at the protection of the purchasers of dwelling premises or a detached house contained in the regulations of the Act on the protection of the purchaser of dwelling premises or a detached house and the Bankruptcy Act is indeed an autonomous achievement of the Polish legislature. It was created independently of the directives of the European Union. In the explanatory memorandum to the draft Act on the protection of the purchaser of dwelling premises or a detached house it was merely stated that in most countries of the European Union, the law protects the customers of development companies. It was likewise noted that the draft is not contrary to EU law¹³. However, in the legal opinion of the Office of Parliamentary Analyses, as of 16 June 2011, it was emphasised that the provisions of the draft law have an indirect connection with Directive 2005/29/EC, which prohibits unfair commercial practices in business-to-consumer dealings prior to, in the course of and after the conclusion of a commercial transaction. Because this Directive defines unfair trade practices and sets their exemplary catalogue, it pursues the same objective the said draft law was guided by. Moreover, the Office of Parliamentary Analyses states that the said Directive requires Member States to ensure, in the interests of consumers, adequate and effective means to combat unfair practices, including the misleading of consumers. In addition, in accordance with art. 3.9, in relation to real property, Member States may impose more restrictive or more prescriptive requirements than those imposed in this Directive. Hence, in this respect, Directive 2005/29 applies the minimum harmonisation model. Moreover, the authors of the legal opinion of the Office of Parliamentary Analyses are right to claim that the EU

¹³ Parliamentary printed matter of the Sejm of the Republic of Poland of VI term, no 4349 of 9 June 2011, <http://ww2.senat.pl/k7/dok/sejm/083/4349.pdf> (accessed: 2.02.2017), pp. 21 and 30.

directives only provide a minimum level of protection in consumer contracts and, therefore, by adopting the said draft law, the Polish legislature uses the regulatory freedom entrusted to it by the power of consumer directives¹⁴.

Without a doubt the Act on the protection of the purchaser of dwelling premises or a detached house pursues the overall objective of consumer protection, which is also the aim of the European Union law. This trend of consumer protection can also be seen in model law, in particular in the Principles of European law on service contracts¹⁵. It should be noted, however, that these rules are not mandatory and therefore they can only be treated as guidelines for solutions that may one day be written down in European law (Gliniecki 2012, p. 87). It may surprise some to learn that EU law does not contain a directive that would impose an obligation on Member States to introduce regulations that protect the consumer in real estate development contracts, although the directives regulating the areas of consumer protection associated with a significantly lower financial risk and a weaker social impact were enacted many years ago¹⁶.

This overall assessment is not affected by relatively recent legislative changes related to the adoption of the Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights¹⁷, which amended Directive 93/13 on unfair terms in consumer contracts¹⁸. The implementation of

¹⁴ Parliamentary printed matter BAS-WAPEiM No 1471/11 of 16 June 2011, <http://ww2.senat.pl/k7/dok/sejm/083/4349.pdf> (accessed: 2.02.2017, p. 31).

¹⁵ Principles of European Law on Service Contracts (PEL SC) of 2007, which are the effect of the work of the team working in Tilburg in the Netherlands under the auspices of the Research Group on European Civil Code (Bartels & Giesen 2007, p. 169).

¹⁶ These include the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (Official Journal of the European Union, series L 158 of 23 June 1990), or Directive 98/6/EC of the European Parliament and the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers (Official Journal of the European Union, series L 80 of 18 March 1998), and, among more recent ones, the Directive of the European Parliament and Council 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Official Journal of the European Union, series L 33/10 of 3 February 2009).

¹⁷ Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights (Official Journal of the European Union, series L 304/64 of 22 November 2011).

¹⁸ Council Directive 93/13 of 5.04.1993 on unfair terms in consumer contracts (OJ L 95/29, 21.04.1993). This directive applied to unfair terms in consumer contracts (the so-called “abusive contract terms”, mainly in the form of contract models), which was implemented into the Polish law in art. 385¹–385³ of the Civil Code. As B. Gnela aptly notes, contracts providing for an obligation to sell real property, contracts of obligation and disposition and contracts transferring the ownership of real property cannot be concluded using a model contract; hence the need to protect the consumer-buyer of the real property against abusive contract terms not negotiated individually (art. 385¹–385³ of the Civil Code) does not seem to be of any greater importance (Gnela 2013, p. 302).

this Directive was made in the Consumer Rights Act¹⁹. It imposes upon the trader a number of obligations to provide information as well as many other consumer protection solutions. However, pursuant to art. 4 paragraph 1 of the Consumer Rights Act, the provisions of this Act shall not apply to contracts relating to the creation, acquisition and transfer of immovable property or other property rights and to contracts for rental of accommodation for residential purposes. It should therefore be recognised that this provision precludes the Consumer Rights Act from being applied to real estate development contracts.

4. The Impact of European Union Law Protecting the Purchaser against Defective Performance of a Contract

A separate sphere of influence of European law on the protection of purchasers of residential premises or a detached house is set by the regulations of EU directives related to the quality of performance. Essential to this issue is Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods²⁰. This Directive was implemented in 2002 to Polish law by the Act on special conditions of consumer sales and amending the Civil Code²¹. Since then, a period of dualism of legal regulations of the seller's liability for defects has begun, since the implementation related only to sales contracts concluded between the trader and the consumer, while the regulation of the seller's liability for defects in trade between the traders and in general commerce is covered by the regulations of the Civil Code. This Act also covers specific task contracts, supply contracts and consignment agreements.

Directive 1999/44/EC and its implementation into Polish law had no effect on shaping the liability of the developer for defects of a building, because, first, art. 27 paragraph 6 of the Act on the protection of the purchaser of dwelling premises or a detached house refers directly to the Civil Code and not to the implementation of Directive 1999/44/EC in the Act on special conditions of consumer sales. Secondly, art. 1 paragraph 1 of the Act on specific conditions of consumer sales limited its subjective scope only to the sale of movable property to an individual. In this

¹⁹ Act on consumer rights of 30 May 2014 (Journal of Laws of 2014, item 827, as amended), hereinafter: the Consumer Rights Act.

²⁰ Directive of the European Parliament and of the Council 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and guarantees for consumer goods (Official Journal of the European Union, series L 171 of 7 July 1999), hereinafter: the Directive.

²¹ The Act of 27 July 2002 on special conditions of consumer sales and amending the Civil Code (Journal of Laws of 2002, No 141, item 1176, as amended), hereinafter: the Act on special conditions of consumer sales.

situation, a certain new quality in the consumer protection law was created by Directive 2011/83/EU of 25 October 2011 on consumer rights. The implementation of this Directive into Polish law in the Consumer Rights Act has been combined with the reimplementation of Directive 1999/44/EC into the Civil Code. According to art. 52 and art. 55 of the Consumer Rights Act, on 25 December 2014 this Act came into force, and on the same day the Act on special conditions of consumer sales ceased to be binding. This brought to an end the period of dualism in the regulation of the liability for the quality of performance in sales contracts, specific task contracts, supply contracts and consignment agreements.

The impact of Directive 1999/44/EC on consumer protection in real estate development contracts on the quality of service may be traced back no further than 25.12.2014. This impact happened contrary to the intentions of the EU legislature, who in art. 1 paragraph 2b of the Directive defines consumer goods as any tangible movable items. In accordance with art. 1 paragraph 1 of the Directive, the regulation applies to the sales of such goods and not immovable property. Provisions of Directive 1999/14/EC have had an impact on consumer protection in real estate development contracts only because the Polish legislature, upon the implementation of the Directive in the Civil Code, as part of the regulation of the statutory warranty in sales contract, also derogated a separate regulation for the statutory warranty for defects of a specific work, and the regulation for the contractual warranty (guarantee) in sales contracts was extended to cover the contractual warranty (guarantee) for specific work, as, according to the new wording of art. 638 paragraph 1 of the Civil Code introduced in art. 44 item 35 of the Consumer Rights Act, the liability for defects of specific work will also be regulated by the provisions on the statutory warranty in sales contracts and, in accordance with paragraph 2, if the ordering party was granted contractual warranty (guarantee) for the specific work performed, the provisions of the contractual warranty in sales contracts will apply accordingly.

For the purchasers of premises who act as consumers, these solutions mean that they are protected under the harmonised provisions of the Civil Code in respect of the statutory warranty and contractual warranty (guarantee) in sales contracts, regardless of whether the real estate development contract is considered as a subtype of the specific task contract or a subtype of the sales contract. This issue was disputed in the doctrine and remains unresolved (Pisuliński 2012, p. 439 ff; Lic 2013, p. 147 ff; Strzelczyk 2013, p. 302 and pp. 306–307; Burzak, Okoń & Pałka 2012, p. 257; Goldszewicz 2013, p. 97). The difference lays currently only in the fact that in the event the real estate development contract is recognised as a sub-type of specific task contract, the provisions of the statutory warranty in the sales contract shall be applied accordingly and not directly to the defects in a building.

The concept of defect has a crucial significance for the liability described under the statutory warranty for defects in a building, such as dwelling premises or a detached house. Art. 2 of the Directive 1999/44/EC provides that the seller must deliver to the consumer goods which are in conformity with the contract of sale. The Civil Code, when implementing the provisions of the Directive, identifies in art. 556¹ paragraph 1 the notion of a physical defect with the concept of non-conformity of goods with the contract covering them. In addition, art. 556¹ paragraph 1 point 2 of the Civil Code, after art. 2 paragraph 2 of the Directive, specifies that the goods are not in conformity with the contract when they do not have the qualities which were ensured to the buyer by the seller (Loranc-Borkowska 2015, p. 106 ff). This provision complies with the provisions contained in art. 17–19 of the Act on the protection of the purchaser of dwelling premises or a detached house that impose on the developer the obligation to provide an information prospectus.

In respect of the liability under statutory warranty, the concept of the defect is equally important as the fact of determining the moment in which the liability arises. According to art. 3 paragraph 1 of the Directive, the seller shall be liable to the consumer for any lack of conformity which exists at the moment of delivery of the goods. In the transposition into the Civil Code, the liability under statutory warranty is determined by the moment at which the risk is transferred to the buyer (art. 559 of the Civil Code). The risk of accidental loss or damage to goods, and in the real estate development contracts – to a building, passes to the buyer at the moment the object is delivered (art. 548 paragraph 1 of the Civil Code). If the buyer (the purchaser) is a consumer and the physical defect was found within one year of the date of the delivery of the premises or a detached house, it shall be presumed that the defect or its cause existed at the time of the transfer of the risk to the buyer (art. 556² of the Civil Code).

A certain modification has been introduced by art. 27 paragraph 1 of the Act on the protection of the purchaser of dwelling premises or a detached house, which states that the transfer of the ownership to the buyer is preceded by the acceptance of the dwelling premises or a detached house. The legal nature of the acceptance is disputed in the doctrine (Strzelczyk 2013, p. 302 and pp. 305–307; Czech 2013, p. 405; Burzak, Okoń & Pałka 2012, p. 257; Goldiszewicz 2013, p. 97). It should be recognised that as *lex specialis*, art. 27 paragraph 1 of the Act on the protection of the purchaser of dwelling premises or a detached house stipulates the beginning of the period to exercise the powers under the statutory warranty is not from the delivery of the subject matter of the contract but from its qualitative (technical) acceptance. If the parties have agreed so, the acceptance may be connected with the delivery in the sense of the transfer of ownership.

The provisions of the Civil Code governing the premises of the liability for defects in the goods sold are directly applicable to defects of a building. The developer is exempt from the liability under statutory warranty, if the buyer knew of the defect at the time of conclusion of the contract (art. 557 paragraph 1 of the Civil Code). If the subject matter of the contract is to be created in the future, which is typical for real estate development contracts, the developer is exempt from liability if the purchaser knew of the defects at the time of the goods were delivered (art. 557 paragraph 2 of the Civil Code). This does not apply to instances when the buyer acts as a consumer, which is indeed the case in the vast majority of real estate development contracts. In those cases, the following principle shall apply: the developer is exempt from liability if the buyer knew about the defects at the time the contract was concluded. An example of such a situation is when the buyer had access to the project documentation. These principles constitute the implementation of art. 2 paragraph 3 of the Directive, which states that there shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity.

Exercising the powers under the statutory warranty for defects in a building differs to a considerable extent from exercising the rights arising from the sale of things. These differences arise from the specific regulation in the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house. These provisions provide that the qualitative inspection ends in drafting the protocol in which the buyer can report defects of the dwelling premises or of a detached house (art. 27 paragraph 3 of the Act on the protection of the purchaser of dwelling premises or a detached house). Then, the developer is obliged, within 14 days of the date of signing the protocol to deliver to the purchaser a declaration recognising the defects or on refusing to recognise the defects and its causes (art. 27 paragraph 4 of the Act on the protection of the purchaser of dwelling premises or a detached house). The Civil Code does not provide for such an obligation. Within 30 days of the date of signing the protocol, the developer is obliged to remove the defects found in the dwelling premises or in a detached house. If the developer, despite acting with due diligence, fails to remove the defects within the indicated deadline, he may indicate another appropriate date for the removal of the defects, and provide the reasons for the delay (art. 27 paragraph 5 of the Act on the protection of the purchaser of dwelling premises or a detached house).

As follows from the above regulations, if the developer recognises the existence of the defects, then the purchaser is not entitled to free choice of rights under the statutory warranty (Czech 2013, pp. 409–410)²². This restriction, however, is valid

²² Conversely and inaccurately (Burzak, Okoń & Pałka 2012, pp. 272–273).

only until the deadline to remove the defects has not yet expired. If the developer refuses to recognise the defects or to remove them, when the defects are indelible or the developer does not remove them in time, and when the defects are disclosed after the acceptance, art. 27 paragraph 5 of the Act on the protection of the purchaser of dwelling premises or a detached house does not apply, and the buyer has the freedom to choose the rights under the statutory warranty. Accordingly, the buyer can withdraw from the contract or submit a statement requesting a reduction of the price. Withdrawal from the contract, however, is possible only when the defect is significant (art. 560 paragraph 4 of the Civil Code). The developer is entitled to a corresponding right consisting in the fact that it can promptly and without undue inconvenience to the buyer remove the defect (art. 560 paragraph 1 sentence 1 of the Civil Code). The regulation in respect of the purchaser's rights constitutes the implementation of art. 3 paragraphs 2–6 of the Directive. Because the Directive ensures free choice of the entitlements by the buyer, the limits of this freedom arising from the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house can be regarded as inconsistent with this Directive.

The final subjective scope of the liability for non-conformity with the contract, as covered by the provisions of the Directive, is the provisions on the terms of the statutory warranty. Art. 5 paragraph 1 of the Directive provides that the seller bears liability, under art. 3, when the lack of conformity becomes apparent within two years of the date the goods are delivered. The implementation of this provision into the Civil Code provides more rights to the consumer. As is apparent from art. 568 paragraph 1 of the Civil Code, in the case of contracts for the sale of real estate, the developer bears liability under the statutory warranty if the physical defect is found within five years of the date the subject matter of the contract has been delivered to the purchaser have elapsed. During this period, the purchaser should submit a declaration that he is exercising his powers under the statutory warranty (art. 568 § 3 sentence 1 of the Civil Code). According to art. 568 paragraph 2 of the Civil Code, a claim for the removal of defects or (exceptionally) for the exchange of the subject matter of the contract for the one free from defects expires after one year of the date a defect is discovered. If the buyer is a consumer, the limitation period cannot end before the expiry of the five-year period in which the defect must be found. Pursuant to art. 568 paragraph 4 and paragraph 5 of the Civil Code, pursuing in the court of general jurisdiction, in court of arbitration or in mediation proceedings one of the rights under the statutory warranty results the suspension of the deadline for the execution of other powers enjoyed by the purchaser.

In the case of a guarantee (contractual warranty), the provisions of the Directive are very general and allow different solutions. Two provisions in this

respect are crucial, namely that the contractual warranty shall be legally binding on the provider of this warranty under the conditions laid down in the guarantee statement and the associated advertising (art. 6 paragraph 1 of the Directive), and that on request by the consumer, the guarantee shall be made available in writing or prepared in another durable medium available and accessible to him (art. 6 paragraph 3 of the Directive). The implementation of these provisions has been included in art. 577 paragraph 1 sentence 2 of the Civil Code, which states that the guarantee statement may be made in advertising as well as in art. 577² of the Civil Code, which authorises the holder of the guarantee to demand from the guarantor the issuance of the guarantee statement, made on paper or on another durable medium (the guarantee document).

5. Conclusions

The impact of EU law on the protection of the consumer as a buyer of dwelling premises or a detached house in real estate development contracts is not homogeneous. In the area of the protective rules introduced to the Polish legal system by the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house, this effect lies only in the fact that the EU legislation indicates and supports the overall objective of the regulation, namely protecting consumers. This is reflected in the adoption of a number of directives of a more or less general character, the object of which is the legal protection of the consumer. This does not change the fact that in the sphere of development activity, there is no relevant directive, and therefore the impact of EU law in this area remains limited.

The minimum ten-year-long delay in the proper legal regulation of real estate development contracts, the social effects of which have been exceedingly harmful, are the fault of, in equal measure, the Polish State and the European Union. The Polish State has failed to fulfill an obligation stemming from art. 76 of its Constitution. In violation of the injunction of the consumer protection against unfair market practices contained therein, the public authorities have essentially stood aside in consent as the estates of consumers were plundered. The European Union has not exercised the competence granted to it under art. 4 and art. 169 of the Treaty on the Functioning of the European Union (consolidated version)²³ to apply the measures which support, supplement and monitor the policy pursued by Member States in the field of consumer protection.

Liability for the defects of the subject matter of a contract is regulated by the EU law in Directive 1999/44/EC. After this Directive was re-implemented in

²³ Official Journal of the European Union, series C 326/47 of 26 October 2012.

the Civil Code, it was therefore fully applicable to the real estate development contracts, despite the fact that the Directive itself does not require this, because it only refers to the sale of movable property. As a result, within the scope of Directive 1999/44/EC, the buyers of premises and detached houses enjoy protection equal to that afforded buyers in sales contracts.

Bibliography

- Bartels S. E., Giesen I. (2007), *The Principles of European Law on Service Contracts: the Rules on Medical Treatment in a Future Europe Compared to the Rules in the Netherlands* (in:) K. Boele-Woelki, F. W. Grosheide (eds), *The Future of European Contract Law*, Wolters Kluwer, The Netherlands.
- Burzak A., Okoń M., Pałka P. (2012), *Ochrona praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego. Komentarz* [Protection of the purchaser of dwelling premises or a detached house. Commentary], Wolters Kluwer, Warszawa.
- Ciepła H. (2012) (in:) H. Ciepła, B. Szczytowska, *Ustawa o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego. Komentarz. Wzory umów deweloperskich i pism* [The Act on the protection of the purchaser of dwelling premises or a detached house. Commentary. Templates of developer contracts and letters], Lexis Nexis, Warszawa.
- Czech T. (2013), *Ustawa deweloperska. Komentarz* [Development Act. Commentary], Lexis Nexis, Warszawa.
- Gliniecki B. (2012), *Umowa deweloperska. Konstrukcja prawna i zabezpieczenie wzajemnych roszczeń stron* [Developer contract. Legal construction and the protection of mutual claims of the parties], Wolters Kluwer, Warszawa.
- Gnela B. (2013), *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym* [Consumer contract in Polish civil law and in private international law], Wolters Kluwer, Warszawa.
- Goldiszewicz A. (2013), *Treść i charakter prawny umowy deweloperskiej* [The content and the legal character of the developer contract], Wolters Kluwer, Warszawa.
- Lic J. (2013), *Pojęcie umowy deweloperskiej i jej charakter prawny* [The concept of the developer contract and its legal character], "Rejent", no 12.
- Lic J. (2015), *Ochrona konsumenta w umowach deweloperskich* [Consumer protection in developer contracts] (in:) B. Gnela (ed.), *Współczesne wyzwania prawa konsumenckiego* [Contemporary challenges of consumer law], C.H. Beck, Warszawa.
- Loranc-Borkowska J. (2015), *Pojęcie wady fizycznej rzeczy w Kodeksie cywilnym* [The concept of a physical defect of the things in the Civil Code] (in:) B. Gnela (ed.), *Współczesne wyzwania prawa konsumenckiego* [Contemporary challenges of consumer law], C.H. Beck, Warszawa.
- Pawlak B. (2012), *Uwagi o zakresie obowiązywania ustawy z 16.9.2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego* [Comments on the scope of the validity of the Act of 16 September 2011 on the protection of the purchaser of dwelling premises or a detached house], "Monitor Prawniczy", no 24.
- Pisuliński J. (2012), *Odpowiedzialność dewelopera za wady lokalu lub budynku* [The liability of the developer for defects in the premises or building] (in:) A. Dańko-Roesler, J. Jacyszyn,

- M. Pazdan, W. Popiołek (eds), *Rozprawy z prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce* [Theses on private law. Memorial book dedicated to Professor Aleksander Oleszko], Stowarzyszenie Notariuszy RP, Warszawa.
- Pisuliński J. (2013), *System prawa prywatnego* [The system of private law] (in:) E. Gniewek (ed.), *Prawo rzeczowe* [Property law], vol. 3, C.H. Beck, Warszawa.
- Strzelczyk R. (2013), *Ochrona praw nabywcy lokalu mieszkalnego lub domu jednorodzinного (ustawa deweloperska). Komentarz* [The protection of the rights of the purchaser of the dwelling premises or a detached house (developer act of law). Commentary], C.H. Beck, Warszawa.

Wpływ prawa europejskiego na ochronę konsumenta w umowach deweloperskich

(Streszczenie)

Umowa deweloperska została częściowo uregulowana w ustawie o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinного. Środki ochrony konsumenta przewidziane w tej ustawie można podzielić na: związane z zabezpieczeniem jego interesu przy zawarciu umowy, zabezpieczające jego wpłaty oraz odnoszące się do etapu wykonania zobowiązania dewelopera. Ponadto ustawa przewiduje sankcje cywilnoprawne i sankcje karne obowiązków dewelopera. Wpływ prawa Unii Europejskiej na przyjęte rozwiązania jest niejednorodny. Z jednej strony prawodawstwo unijne wskazuje i wspiera ogólny cel regulacji, jakim jest ochrona konsumenta. Z drugiej strony brak odpowiedniej dyrektywy dotyczącej ochrony konsumenta w umowach deweloperskich. Unia Europejska nie skorzystała niestety z kompetencji, jaką daje jej art. 4 i art. 169 Traktatu o funkcjonowaniu Unii Europejskiej. Jedynie w sferze odpowiedzialności za wady przedmiotu umowy można dopatrzeć się bezpośredniego wpływu prawa unijnego, gdyż w tym zakresie obowiązuje w Unii Europejskiej dyrektywa 1999/44/WE.

Słowa kluczowe: umowy deweloperskie, nabywca lokali, prospekt informacyjny, rachunek powierniczy, ustawowa gwarancja na wady, odstąpienie od umowy, dyrektywa UE.