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# Contracts Concerning Rights in Immovable Property in the Light of Directive 2011/83/EU, and the Consumer Rights Act Implementing It

## Abstract

The Consumer Rights Act of 30 May 2014 implements to the Polish legal system the Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights. It should therefore provide a comprehensive regulation on the contracts whose parties are the trader and the consumer. For the correct determination of the legal situation of the traders concluding contracts with the consumers, it is therefore important to specify a catalogue of contracts to which the provisions of the Consumer Rights Act apply. This catalogue (the subjective scope of the Act) came in for criticism by the legislature, which enumerated the contracts to which the provisions of the Act do not apply. This article focuses not so much on an overall analysis of the types of contracts excluded from the application of the Consumer Rights Act, but rather attempts to diagnose whether, and to what extent, contracts regulating the rights in immovable property have been excluded from the Act. In addition, it asks whether the regulations that shape these exclusions in the Consumer Rights Act in fact reflect the intention of the European legislature expressed in the Directive. To verify the aims of the study, the regulations of the Act that form the exclusions of the contracts concerning rights in immovable property are presented. As shown by the undertaken analysis, the content of the regulations affecting the exclusions regarding the contracts for the rights in immovable property can

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be interpreted inconsistently, which results in doubts as to what kind of contracts the Act applies to in full, and which contracts have been excluded from its regime and to what extent. The analyses presented in the study also show that the regulations contained in the Consumer Rights Act do not contain a proper reflection of the intentions of the European legislature. In respect to the exclusions of the application of the Consumer Rights Act to the contracts for the rights in immovable property, the Consumer Rights Act differs from the Directive.

**Keywords:** civil law, contracts, immovable property, law application, implementation of the Directive.

**JEL Classification:** K15.

## 1. Introduction

The Consumer Rights Act dated 30 May 2014<sup>1</sup> implements to the Polish legal system the Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights<sup>2</sup> (hereinafter: the Directive). This Directive is in principle an act introducing full harmonisation, and its primary goal was to harmonise the provisions on consumer contracts across the entire European Union. This is reflected in the content of art. 4 of the Directive, according to which “Member States may not within the scope regulated by the Directive maintain or introduce in their national laws provisions diverging from those laid down in the Directive, unless the Directive provides otherwise”<sup>3</sup>.

The Consumer Rights Act, implementing the Directive, shall, therefore, constitute an important regulation on contracts in which the parties are the trader and the consumer. It defines the rights of the consumer, and, in particular,

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<sup>1</sup> Act of 30 May 2014, Journal of Laws of 2014, item 827 (hereinafter: The Consumer Rights Act). The Consumer Rights Act also implements Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 on the distance marketing of consumer financial services (Official Journal of the EU, series L 144 of 1997, p. 19), and it also adds the regulation of the consumer sales contract to the Civil Code as well as modifies some other regulations relating to the performance of obligations.

<sup>2</sup> Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and the European Parliament and the Council Directive 1999/44/EC (Official Journal of the EU, series L 304 of 2011, p. 64). The Directive 2011/83/EU repealed the Directive 85/577/EEC of 20 December 1985 on the protection of consumers in respect of contracts negotiated away from business premises (Official Journal of the EU, series L 372, of 31 December 1985, p. 31) and the Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts (Official Journal of the EU, series L 144 of 4 June 1997, p. 19).

<sup>3</sup> The model of maximum harmonisation was introduced also in recital 13 of the Directive 202/65/EC, which – next to the Directive 2011/83/EU – was implemented in the Consumer Rights Act (Maciejewska-Szałas 2015, p. 36).

regulates, among others, the obligations of the trader concluding a contract with the consumer<sup>4</sup>. Given that the Directive implemented in the Act of law introduces full harmonisation, the provisions of the Civil Code on contracts and the obligations applicable in relation to specific contracts will be interpreted in accordance with the Directive (Bagińska 2015, p. 7). At the same time, the provisions contained in such contracts, less favourable to the consumer than the provisions of the Consumer Rights Act, are invalid, and in their place shall be applied the provisions of the Act. It is also important that the consumer cannot waive the rights provided for in the Consumer Rights Act (art. 7 of Consumer Rights Act)<sup>5</sup>.

Given the above, it is important to define the subjective scope of the Consumer Rights Act. This scope has been determined by the legislature in a negative way, by enumerating the contracts in relation to which provisions of the Act will not apply. The analysis of the catalogue of exclusions thus becomes necessary for the proper presentation of the subjective scope of the Consumer Rights Act. The subject matter of this article will be not so much an overall analysis of the types of contracts that have been excluded from the application of the Consumer Rights Act, but rather an attempt to diagnose whether, and to what extent, the regime of the Act does not apply, in addition to contracts relating to rights in immovable property. In addition, it appears advisable to also pay attention to whether the regulations that shape these exemptions in the Consumer Rights Act reflect the intention of the European legislature expressed in the Directive.

## **2. The Catalogue of the Contracts Excluded from the Regime of the Consumer Rights Act**

The catalogue of the contracts which have been excluded from the regime of the Consumer Rights Act was included in the content of art. 3 and art. 4 of the Consumer Rights Act<sup>6</sup>. The scope of art. 3 of the Consumer Rights Act includes

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<sup>4</sup> According to the Directive, the Consumer Rights Act was based on the principle of properly informing the consumer about the content of the future contract and its consequences. The information obligations contained in the Act relate to all contracts, not only those concluded by the trader with the consumer away from buss premises or at a distance.

<sup>5</sup> The Directive is mandatory in nature, and its aim to protect the interest of the weaker contracting party in the process of restricting freedom of contracts (Mokrysz-Olszyńska 2013, p. 85).

<sup>6</sup> As indicated in the doctrine, the legislature decided to divide the exceptions to the application of the Consumer Rights Act into two separate provisions because they came from different sources. The exclusions referred to in art. 3 of the Consumer Rights Act were previously contained in the Act on consumer rights protection and liability for damage caused by a dangerous

contracts over which the Act is not binding, while art. 4 of the Consumer Rights Act contains a catalogue of contracts which are partially excluded<sup>7</sup>.

Under art. 3 paragraph 1 of the Consumer Rights Act, the provisions of the Act do not apply to contracts:

1) relating to social services, social housing, childcare, support for families and persons permanently or temporarily in need, including long-term care<sup>8</sup>;

2) relating to gambling<sup>9</sup>;

3) concluded with a trader undertaking frequent and regular tours during which a trader supplies foodstuffs, beverages and other articles intended for current consumption in the household, to the place of residence, stay or employment of the consumer;

4) relating to the carriage of persons, with the exception of art. 10 and art. 17;

5) concluded by means of automatic vending machines or automated points of sale;

6) concluded with the service provider referred to in art. 2 paragraph 27 point a of the Telecommunications Act, with a public machine in order to use such a machine or concluded in order to perform a single connection by telephone, Internet or fax by the consumer<sup>10</sup>;

7) relating to health services provided by healthcare professionals to patients in order to assess, maintain or improve their health, including prescriptions, issuance and provision of medicinal products and medical devices, regardless of whether or not they are provided via healthcare facilities;

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product; in turn, the exemptions contained in art. 4 were provided for in the Act on special conditions of consumer sales and on the amendment to the Civil Code (Koralewski 2014, p. 11). It seems, however, that the intention of the legislature was associated with distinguishing the contracts to which the provisions of the Act are in part applicable from contracts which were entirely excluded from the regime of the Act.

<sup>7</sup> With respect to the contracts referred to in art. 4 paragraph 1 of Consumer Rights Act this exclusion is conditional. According to this provision, the contracts referred to therein shall be governed by the provisions of Chapter 2 of the Consumer Rights Act unless separate regulations provide otherwise. Such a solution, different from the total exclusion from the regime of the Directive of the contracts relating to rights in immovable property, as adopted in the Directive, results from the application by the Polish legislature of the prerogative provided for in recital 13 of the Directive. According to recital 13, the Member States have retained their competence to regulate in the national laws contracts not covered by the scope of the Directive.

<sup>8</sup> This exclusion applies to all services covered by the provisions of the Act on social welfare of 12 March 2004, i.e. Journal of Laws of 2015, item 163 with amendments.

<sup>9</sup> As described in the Act of 19 November 2009 on gambling, i.e. Journal of Laws of 2015, item 612 with amendments.

<sup>10</sup> Act of 16 July 2004 Telecommunications Law, Journal of Laws of 2014, item 243 as amended.

- 8) concluded in relation to a tour, as referred to in the Act on tourist services<sup>11</sup>;  
9) referred to in art. 1 paragraph 1 of the Timeshare Act<sup>12</sup>;  
10) off-premises contracts, if the consumer is required to pay an amount not exceeding fifty zloty.

The group of contracts completely excluded from the regime of the Act include also sales contracts made in enforcement proceedings and bankruptcy proceedings in connection with the liquidation of the bankrupt estate (art. 3, paragraph 2 of Consumer Rights Act).

In turn, art. 4 of Consumer Rights Act includes the contracts which have been in principle excluded from the application of the Act in part. According to art. 4 paragraph 1 of Consumer Rights Act, the Act does not apply to contracts relating to the creation, acquisition and transfer of the ownership of immovable property or other rights in immovable property as well as to contracts for rental of accommodation for residential purposes, with the exception of the provisions of Chapter 2, which are applied if separate regulations do not provide otherwise. On the other hand, according to art. 4 paragraph 2 of Consumer Rights Act, the Act shall not apply to contracts relating to financial services, except for contracts for financial services concluded at a distance, to which the provisions of Chapters 1 and 5 apply<sup>13</sup>.

### **3. The Subjective Scope of art. 4 Paragraph 1 of Consumer Rights Act**

#### **3.1. General Remarks**

As follows from the analysis of the content of art. 3 and 4 of Consumer Rights Act, one of the types of contracts excluded from the regulation under the Act are agreements concerning rights in immovable property. These exemptions are substantially included in art. 4 paragraph 1 of Consumer Rights Act, but they

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<sup>11</sup> Act of 29 August 1997, Journal of Laws of 2014, item 196.

<sup>12</sup> Act of 16 September 2011, Journal of Laws No 230, item 1370.

<sup>13</sup> In particular: banking operations, consumer credit agreements, insurance operations, contract of acquisition or redemption of the units of open investment fund participation or of specialised open investment fund participation and the purchase or acquisition of investment certificates of open investment funds and the purchase or acquisition of investment certificates of closed investment funds, payment services.

are also regulated by art. 3 paragraph 1 point 9 of Consumer Rights Act, which mentioned the contracts referred to in art. 1 paragraph 1 of the Act on Timeshare<sup>14</sup>.

The exemptions included in art. 3 and 4 of Consumer Rights Act formulate exceptions to the application of the Act, which must be interpreted strictly<sup>15</sup> and, therefore, the content of the regulations that shape these exceptions must be precise. It should, in fact, unambiguously lay down how to determine the type of contracts to which the provisions of the Act will not apply or will apply to a limited extent. In such a context, it is worth analysing the content of the regulations affecting the exemptions from the regime of the Act, in relation to the contracts regulating rights in immovable property. This analysis should also take into account to what extent the exceptions listed in the Consumer Rights Act reflect the intention of the European legislature expressed in the Directive.

### **3.2. The Problem of the Interpretation of the Content of art. 4 Paragraph 1 of Consumer Rights Act**

In accordance with art. 4 paragraph 1 of the Consumer Rights Act, the Act does not apply to contracts relating to the creation, acquisition and transfer of the ownership of immovable property or other rights in immovable property as well as to contracts for the rental of accommodation for residential purposes, with the exception of the provisions of Chapter 2, which are applied if separate regulations do not provide otherwise. The analysis of the contents of this provision implicates that it can be interpreted differently.

Firstly, one could argue that the legislature indicates that it refers to the exclusion of contracts connected with the establishment, acquisition or transfer of all property rights of immovable property of nature of rights in rem. In turn, with regard to obligation rights (rights in personam), the exclusion applies only to contracts for the rental of accommodation for residential purposes. Accordingly, the exemptions from the regime of the Act will apply to contracts for the creation, acquisition or transfer of the ownership of real property, perpetual usufruct and limited rights in rem. Bearing this interpretation in mind, doubt arises as to whether the provision applies only to contracts of disposing character or also

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<sup>14</sup> To some extent such contracts are also covered by the inclusions contained in art. 3 paragraph 1 point 1 of the Consumer Rights Act, which refers to social services as well as in art. 3 paragraph 1 point 8 of the Consumer Rights Act, which refers to the exemption of tourist services.

<sup>15</sup> In this way, under the EU regulations which are the subject of implementation, for example the judgment in case C-215/08 (E. Friz GmbH), point 32: “In this regard, it should first be noted that, according to the settled case law, the exceptions to the norms of the European Union law aimed at protecting consumers must be interpreted strictly (see in particular, judgment of 13 December 2001 in the case C-481/99 Heininger, Rec. s. I-9945, point 31)”.

to contracts that oblige to dispose of real estate<sup>16</sup>. In respect to obligation rights (rights in personam), the exemption will apply only to the right of the rental of accommodation for residential purposes. Therefore, contracts for the rental of accommodation for non-residential purposes, contracts of the lease of lands or buildings will remain outside the scope of the exclusion. The exclusions will neither apply to other obligation contracts, even if they are relating to residential accommodation, such as lending or leasing for the purpose of harvesting fruit.

Secondly, it can be argued that the content of said provision should be interpreted in a different way, namely that the regulations of the Consumer Rights Act do not apply (with the exception of the regulations contained in Chapter 2 of the Consumer Rights Act) to any contracts having as their object the rights in immovable property (both right in rem as well as right in personam), provided, however, that in terms of the leases, the issue in fact concerns only the exclusion of the contracts for the rental of accommodation for residential purposes. In terms of the application of the Act, there would remain (in reference to the lease contracts), only the lease of accommodation for purposes other than residential ones.

A literal interpretation of the provision leads to the conclusion that the first position should be treated as the correct one. Accordingly, the legislature exempts from the regime of the Consumer Rights Act the contracts of character rights in rem and from the scope of obliging contracts (rights in personam) the legislature excludes only the contract for the lease of the accommodation for residential purposes. This understanding of the content of art. 4 paragraph 1 of the Consumer Rights Act would be supported by the application, both in the content of art. 3f of the Directive as well as in the content of art. 4 paragraph 1 of the Consumer Rights Act, of the word “and”, representing the equivalent of the phrase “as well as”.

### **3.3. The Wording of Art. 4 Paragraph 1 of the Consumer Rights Act in Light of the Intention of the European Legislature**

The adoption of such an interpretation of art. 4 paragraph 1 of the Consumer Rights Act leads to another question: whether the wording of art. 4 paragraph 1 of the Consumer Rights Act is a correct reflection of the assumptions of the European legislature. This issue should be analysed by examining both the appropriate exclusions specified in the Directive, as well as the intentions of the European legislature, expressed in paragraph 26 of the recitals of the Directive.

In respect of the provisions of the Directive, it is justified to draw attention to art. 3 paragraph 3 of the Directive, which contains a catalogue of contracts

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<sup>16</sup> The view according to which this provision applies both to the contracts of a disposing character and to obliging contracts has been expressed by W. J. Kocot and J. M. Kondek (2014, p. 9). The concerns in this regard are raised by B. Lanckoroński (2014, p. 247).

to which it does not apply, and in particular to points e, f and i of this provision. According to these regulations, the following contracts have been excluded from the regime of the Directive:

1) contracts relating to the creation, acquisition and transfer of the ownership of immovable property or rights in immovable property (art. 3 paragraph 3 point e of the Directive);

2) contracts for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes (art. 3 paragraph 3 point f of the Directive);

3) contracts drawn in accordance with the laws of the Member States, by the state official, having a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer concluded the contract only after careful legal consideration and with knowledge of its legal scope (art. 3 paragraph 3 point i of the Directive).

At the same time, attention should be drawn to the intentions of the European legislature expressed in recital 26 of the Directive, according to which “Contracts relating to the transfer of immovable property or of rights in immovable property or to the creation or acquisition of the ownership of immovable property or rights in it, contracts for the construction of new buildings or the substantial conversion of existing buildings as well as contracts for the rental of accommodation for residential purposes are already subject to a number of specific requirements in national legislation. Those contracts include, for instance, sales of immovable property still to be developed and hire-purchased. The provisions of this Directive are not appropriate to those contracts, which should be, therefore, excluded from its scope of application (...)”<sup>17</sup>.

It follows from the above that the aim of the European legislature was to create a catalogue of exclusions involving contracts, which were previously regulated by provisions that contain detailed rules on consumer protection, as well as the rights and obligations of the trader and the consumer being the parties to such contracts. Therefore, due to the existence of such a separate system of consumer protection, excluding certain contracts from the application of the Directive, and thus from the Consumer Rights Act that implements it, would be justified. As indicated in the doctrine, it would be difficult to accept such an interpretation of the provisions

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<sup>17</sup> In a subsequent part of recital 26, the European legislature indicated that a substantial conversion is a conversion comparable to the construction of a new building, for example where only the façade of an old building is retained. Service contracts, in particular those related to the construction of annexes to buildings (for example a garage or a veranda) and those related to repair and renovation of buildings, other than substantial conversion, should be included in the scope of this Directive, as well as contracts related to the services of real estate agents and those related to the rental of accommodation for non-residential purposes.



of the Consumer Rights Act which would cover the legal relations already regulated in detail in another act (Ciepła & Szczytowska 2014). In this context, the above should be connected to the legislation in force in the Polish legal system. In particular, attention should be paid to the content of the Act on the protection of the rights of the purchaser of a dwelling or a detached house<sup>18</sup> (hereinafter: Development Act) and the Act on the protection of the rights of tenants, housing resources of municipalities and amending the Civil Code<sup>19</sup> (hereinafter: the Act on the protection of the rights of tenants). It is also reasonable to take into account the following regulations: the Civil Code in relation to the participation of public officials at the conclusion of the contract<sup>20</sup>, the Act on ownership of accommodation<sup>21</sup> or the Act on housing cooperatives<sup>22</sup>.

### **3.4. Contracts Relating to Rights in Rem in Immovable Property**

The doctrine indicates that contracts on the creation, acquisition or transfer of the ownership to real property or rights in immovable property have been excluded from the application of the Consumer Rights Act, due to the Development Act in force in Polish law as well as on account of regulations in the Civil Code that introduce the obligation to establish the rights in rem in the form of a notarial deed (Koralewski 2014, p. 11).

It should be noted at this point, nevertheless, that the Polish legislature has not decided to introduce exclusions of an unconditional nature, relating to the contracts concluded with the participation of a public official responsible for acting with impartiality and independence (art. 3 paragraph 3 point i of the Directive). As follows from the European Commission's guidelines on the Directive, this provision should be implemented by Member States in such a way that would ensure that the transposed national legislation is not applicable to all types of contracts drawn up by such entities as notaries. In this scope, the Polish implementation of the Directive is incomplete and entails specific effects. Basically, the creation or acquisition of rights in rem to immovable property,

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<sup>18</sup> Act of 16 September 2011, Journal of Laws of 2011, No 232, item 1377.

<sup>19</sup> Act of 21 June 2001, i.e. of 2016, item 8.

<sup>20</sup> Act of 23 April 1964, i.e. Journal of Laws of 2014, item 121 as amended. In particular, the provisions of art. 155, art. 158, art. 232, art. 244 on the transfer of real estate ownership, governing the contract of perpetual usufruct and transfer of this right, and the provisions relating to the creation of other limited property rights.

<sup>21</sup> Act of 24 June 1994, i.e. Journal of Laws of 2000, No 80, item 903 as amended. In particular, the provisions on the contract for the establishment of separate ownership of premises.

<sup>22</sup> Act of 15 December 2000, i.e. Journal of Laws of 2013, item 1222 as amended, regarding the cooperative ownership right to premises.

namely ownership, perpetual usufruct or limited property rights, should take place on the basis of a contract that requires a notarial deed form. However, due to the absence of the aforementioned exclusion, any contracts relating to rights in rem in immovable property, concluded in the form of a notarial deed, will not be excluded from the regime of the Act unconditionally but only partially. In fact, the provisions of Chapter 2 of the Consumer Rights Act will apply to such contracts, if the provisions governing a given type of contract do not set forth otherwise. Further, the introduction into the the Consumer Rights Act of the exclusion corresponding to the exclusion regulated in art. 3 paragraph 3 point i of the Directive would result in excluding not only contracts for the validity of which the provisions of law provide, for example, the form of a notarial deed, but also contracts that do not have such a legal requirement; however, they would be indeed concluded in the form of a notarial deed.

At the same time, art. 3 paragraph 3 point f of the Directive was also not reflected in the Consumer Rights Act, insofar as it did not generate the exclusion from the application of this Act to the contracts for the construction of new buildings or for the substantial conversion of existing buildings. The Polish legislature decided, therefore, that all contracts for construction or renovation works are subject to the regime of the Consumer Rights Act to the full extent. Note, however, that the intention of the European legislature was to exclude from the regime of the Act the contracts that were already regulated in the national system, and which contain the regulations that constitute the system of consumer rights protection. One such act is the Development Act. When analysing the content of this Act, and in particular art. 1 and art. 22 point 18, it may be noted that the *essentialia negotii* of the development contract include “a commitment of a developer to construct a building, separate residential premises and to transfer to the purchaser the ownership of the premises and the rights necessary to use the premises”. The intentions of the European legislature are not reflected in this case.

The doctrine draws attention to the fact that the national legislature did not have reasonable grounds to separate the object of a development contract by excluding from the application of the Directive only the contracts that relate to the creation, acquisition and transfer of the ownership of immovable property or rights in immovable property without simultaneous exclusion of contracts for the construction of new buildings (Ciepła & Szczytowska 2014). However, as a consequence, the question of to what extent the Consumer Rights Act applies to development contracts was assessed inconsistently. Some contend that the act does not include development contracts or preliminary development contracts (reservation contracts), but rather applies to preliminary contracts of sale, which are signed for permissible investments. According to other views, a literal interpretation of art. 4 paragraph 1 of the Consumer Rights Act stipulates that the

provisions of Chapter 2 of the Consumer Rights Act will apply to the conclusion of a development contract (Leśniak 2015, p. 28). At the same time, however, it can be argued that if the subject of a development contract is, among others, the construction of buildings, where construction contracts are governed by the provisions of the Consumer Rights Act to their full extent, due to the inability of separating the object of a development contract, the provisions of the Consumer Rights Act will apply to such a contract in their entirety.

### **3.5. Contracts Relating to Rights in Personam in Immovable Property**

As has been noted, the interpretation of art. 4 paragraph 1 of Consumer Rights Act indicates that with regard to contracts that form obligation rights (rights in personam) to immovable property, the application of the Act has been excluded only in the case of contracts for rental of accommodation for residential purposes. Lease agreements for harvesting fruit, lending or rental agreements other than the rental of accommodation for residential purposes will be covered by the scope of the Consumer Rights Act. The doctrine assumes that such an exclusion stems from the fact that in the system of national law there applies an act of law that regulates in detail the protection of the consumer at the conclusion of such a contract. In such a situation it is emphasised, therefore, that the legislature has excluded the lease contract for the accommodation for residential purposes from the scope of the Consumer Rights Act because the provisions of the Act on the protection of the rights of tenants include a special system for protecting the parties of the leasing contract and, therefore, any additional application of the Consumer Rights Act to such contracts would be redundant (Koralewski 2014, p. 11).

Nevertheless, certain doubts arise in the context of the above issues. Firstly, the Act on the protection of the rights of tenants regulates the principles and forms of the rights of tenants, whereas the term “tenant” is understood as the tenant or a person using the premises on another legal basis other than for ownership. The regulations of this Act are, therefore, also applicable in the situation of lending residential premises. Thus, if the legislature intended to exclude from the regime of the Consumer Rights Act only leasing contracts, then the contract of lending residential premises will be governed both by the provisions of the Act on the protection of the rights of tenants as well as by the regulations of the Consumer Rights Act<sup>23</sup>. At the same time, however, the regulations of the Directive, and consequently the national legislation transposing the latter, should not apply

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<sup>23</sup> B. Lanckoroński (2014, p. 247) indicates that limiting obligation contracts only to the contract of lease of residential accommodation raises particular doubts in terms of the contract of lending residential accommodation.

to contracts of a gratuitous character<sup>24</sup>, and therefore the contract of lending accommodation for residential purposes should also be excluded from the regime of the Consumer Rights Act. However, the Polish legislature opted for a different approach to contracts concluded at a distance and off-premises contracts than the one set forth in the EU's definition. In particular, it did not include the introduction of the condition of non-gratuitous character of contracts. This led to the scope of the application of the regulation of the Consumer Rights Act being extended to non-gratuitous contracts as well<sup>25</sup>. Accordingly, if the intention of the European legislature was to exclude the contract of lending the accommodation for residential purposes, which was realised with the help of a clear indication of the lease contract and the exclusion of non-gratuitous contracts, this has not been adequately reflected in the Consumer Rights Act.

Secondly, doubts concerning interpretation are generated by the use, on the part of the national legislature, in the content of art. 4 paragraph 1 of the Consumer Rights Act, of the term "lease of accommodation" and not lease of premises. If, when following the intention of the European legislature, the exclusion from the regime of the Consumer Rights Act was to apply to contracts already regulated in a specific manner in the national system, the national legislature should have adequately expressed it in the content of the regulation of the Consumer Rights Act. It should therefore be noted that the Act on the protection of the rights of tenants includes a definition of premises. Given this, doubt may arise as to whether the exclusion under art. 4 paragraph 1 of the Consumer Rights Act applies only to the contract of the lease of the accommodations defined in the Act on the protection of the rights of tenants as premises or whether it will apply to a broader catalogue of lease contracts. For example, according to art. 2 paragraph 1 point 4 of the Act on the protection of the rights of tenants, the concept of premises does not include accommodation used for short-term stays, in particular those located, for example, in dormitories or boarding houses. The doctrine indicates that contracts of lease of accommodation excluded in the Act on the protection of the rights of tenants from the concept of the premises do not fall, therefore, within the scope of the exclusion of art. 4 paragraph 1 of the Consumer Rights Act. In relation to such contracts, the Consumer Rights Act will be fully applicable (Lubasz 2015, p. 74). It seems, however, that the lack of wording in art. 4 paragraph

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<sup>24</sup> The condition for the application of the Directive is the payment by the consumer of a price in exchange for the performance rendered by the trader, pursuant to art. 2 points 5 and 6 of the Directive.

<sup>25</sup> As indicated in the doctrine, the adopted solution is a violation of art. 4 of the Directive, according to which Member States may not maintain or introduce in their national laws provisions diverging from those laid down in the Directive, including more or less stringent provisions, to ensure a different level of consumer protection (Lubasz 2015, p. 62).

1 of the Consumer Rights Act: “the lease of premises for residential purposes”, causes the exclusion contained in that provision to cover a wider spectrum of lease contracts than only premises as laid down in the Act on the protection of the rights of tenants. In addition, the formulation “the lease of accommodation for residential purposes” may raise the question of whether the scope of the exclusion does not cover single-family houses, or even residential buildings, as well.

The problem of excluding contracts relating to rights in personam from the regulations of the Consumer Rights Act does not apply, however, only to such contracts as lease contracts, lending contracts or lease contracts with the right to harvest fruit. It applies to all relations of an obligatory nature relating to immovable property. For example, this problem will concern a contract, often concluded between the trader (the developer) and the consumer, for the division of the property to be used (*quoad usum* contract). With regard to this contract, the essence of the problem will focus on heterogeneous views of its legal nature. Assuming that such a contract creates a relationship of an obligatory nature between the parties, which is an unnamed legal relationship with enhanced effectiveness<sup>26</sup>, it must be deemed that it will be regulated by the provisions of the Consumer Rights Act<sup>27</sup>. However, if it is recognised that this is a contract relating to rights in rem (Drozd 2007, pp. 76–77), it would need to be assumed that the regulations of the Consumer Rights Act will be only partially applicable to it.

#### **4. Contracts Relating to Rights in Immovable Property, Covered by the Timesharing Act**

As has been indicated, the exclusions relating to the contracts for the rights in immovable property were regulated not only in the content of art. 4 paragraph 1 of the Consumer Rights Act. These contracts are also regulated by art. 3 paragraph 1 point 9 of the Consumer Rights Act, according to which the exclusion applies to contracts referred to in art. 1 paragraph 1 of the Act of 16 September 2011 on timesharing.

However, unlike in art. 4 paragraph 1 of the Consumer Rights Act, the exclusion contained in art. 3 paragraph 1 point 9 poses no doubts about its interpretation. It corresponds to the intention of the European legislature expressed in paragraphs

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<sup>26</sup> In respect to the purchaser of the share, provided that he knew about such a contract or could have known about it.

<sup>27</sup> The legal nature of a *quoad usum* contract is disputed. Most of the doctrine recognises, however, that this contract creates an unnamed legal relation of obligation between the parties. See, for example (Kostański 2004, p. 34; Mielcarek 1965, pp. 1236 and 1239; Krajewski 1968, p. 38; Durzyńska 2011, p. 246). For more on this subject, see (Warciński 2011, pp. 37–38).

26 and 32 of the Directive recitals, as well as to the content of the regulation that provides for exclusions of its application. Accordingly, pursuant to art. 3 paragraph 1 point h of the Directive, it shall not apply to contracts that fall within the scope of the Directive of the European Parliament and Council 2008/122/EC of 14 January 2009 on the protection of consumers with respect to certain aspects of timeshare, long-term holiday product, resale and exchange contracts. Such exclusion is anchored in the content of paragraph 32 of the recitals of the Directive, according to which “the existing European Union legislation, concerning, *inter alia*, (...) timeshare contracts, contains numerous rules on consumer protection. Therefore, this Directive should not apply to contracts in those areas”.

The wording of art. 3 paragraph 1 point 9 of the Consumer Rights Act thus fully corresponds to the idea of excluding from the scope of the Directive, and consequently from the domestic legal acts implementing it, contracts that have already been adequately regulated in the laws of the Member States. In the Polish legal system such an act is the Timesharing Act, which implements the Directive 2008/122/EC<sup>28</sup>. This Act of law contains detailed rules on consumer protection, the rights and obligations of the trader and the consumer as the parties to such contracts and the effects of the consumer withdrawing from such contracts. Thus, on account of the existence of a separate consumer protection system, the contracts referred to in art. 1 paragraph 1 of this Act were excluded from the regime of the Consumer Rights Act. This exclusion applies to:

1) timeshare contracts – namely contracts under which the consumer acquires, against consideration, the right to use, in the periods specified in the contract, at least one premises, when such a contract is concluded for a period longer than one year. Note here that a timeshare contract is a special type of contract for the use of residential buildings or parts thereof during a specified period of time. The object of such a contract may be movable or immovable property<sup>29</sup>, where timesharing may take the form of the right of an obligation or property character – a specific type of use (art. 20 of Timesharing Act)<sup>30</sup>;

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<sup>28</sup> Directive of the European Parliament and of the Council of 14 January 2009, Official Journal of the European Union, series L 33 of 3 February 2009.

<sup>29</sup> However, the Act introduces restrictions on the possibility of establishing movables as the subject matter of the contract. The subject of the contract may be only movable items on which it is possible to allocate accommodation (ships or car trailers).

<sup>30</sup> Timesharing is characterised by a number of peculiarities in relation to the typical contract of use regulated in the Civil Code. The text of art. 20 of Timesharing Act defines the Civil Code provisions whose application has been excluded from the timeshare contract. The rights under a timesharing contract, unlike those in a typical contract of use, are transferable and do not expire with the death of the authorised natural person or as a result of a failure to exercise them for at least 10 years.

2) contracts for long-term holiday stay. This is a contract under which the consumer acquires, against consideration, the right to receive discounts or other benefits relating to accommodation, when such a contract is concluded for a period of longer than one year<sup>31</sup>;

3) agency agreements in timeshare resale or long-term holiday product. These are contracts under which the trader undertakes, against consideration, to perform legal or factual actions aiming at the acquisition or disposal by the consumer of the rights under timeshare or under the contract of a long-term holiday product;

4) contract on participation in an exchange system. Namely contracts under which the trader provides to the consumer, against consideration, the access to an exchange system. Under such a system the consumer acquires the right to use the accommodation or the right to acquire other services provided by the trader in exchange for allowing other consumers to use the accommodation which is the subject of his timeshare contract.

## **5. Conclusions**

The scope of the Consumer Rights Act, implementing the Directive, has been deemed flawed by the legislature, insofar as it enumerates contracts to which the provisions of the Act will not apply. One type of contract covered by the catalogue of exclusions is the contract concerning rights in immovable property. Because all exceptions to the application of the act of law should be interpreted strictly, the content of the provisions regulating these exceptions must be precise. In this context, there has been presented an analysis of the wording of the articles, affecting the exemptions from the regime of the Consumer Rights Act, of contracts relating to rights in immovable property. This analysis was carried out not only to determine whether the content of the provisions in question clearly shows what specific contracts have been excluded from the regime of the Consumer Rights Act. It also was done to determine whether the rules that shape these exclusions in the Consumer Rights Act reflect the intention of the European legislature expressed in the Directive.

As the analysis showed, the content of the regulations affecting the exclusions regarding contracts for the rights in immovable property can be interpreted inconsistently, which causes doubts as to what types of contracts this Act of law fully applies to, and which contracts and to what extent they have been excluded from its regime. It is impossible to accede that these regulations contain the

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<sup>31</sup> Such a contract may also provide for the consumer's right to purchase services related to travel, in particular the right to take advantage of the premises, the right to purchase transport services or to purchase other services (art. 3 of the Timeshare Act).

correct reflection of the intention of the European legislature. The Consumer Rights Act differs from the Directive in that it excludes from its application contracts concerning rights in immovable property. That exclusion results in the Act covering gratuitous contracts, such as contracts to lend residential premises. It also brings about the need to undertake a complicated analysis of whether and to what extent the contract regulated in detail in other legislation is also covered by the regulations of the Consumer Rights Act (e.g. a development contract)<sup>32</sup>.

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<sup>32</sup> At this point one should therefore agree with the view that “the application of the Consumer Rights Act is a difficult task due to vague terms used in it, as well as on account of its relation to other acts of law and its imperfect implementation, requiring often the interpretation of this Act in the light of the Directive 2011/83/EU” (Lubasz 2015, p. 18).



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## **Umowy dotyczące praw do nieruchomości w świetle dyrektywy 2011/83/UE oraz implementującej ją ustawy o prawach konsumenta**

(Streszczenie)

Ustawa o prawach konsumentów z dniem 30.05.2014 r. implementuje do polskiego porządku prawnego dyrektywę Parlamentu Europejskiego i Rady 2011/83/UE z dnia 25.10.2011 r. w sprawie praw konsumentów. Katalog umów, do których mają zastosowanie przepisy ustawy o prawach konsumentów, został oznaczony przez ustawodawcę w sposób negatywny, poprzez wyliczenie umów, wobec których przepisy ustawy nie mają zastosowania. Przedmiotem artykułu uczyniono próbę zdiagnozowania, czy i w jakim zakresie spod reżimu ustawy wyłączone zostały umowy dotyczące praw do nieruchomości, jak też to, czy regulacje kształtujące te wyłączenia stanowią odzwierciedlenie intencji ustawodawcy europejskiego wyrażonych w dyrektywie. W celu zweryfikowania celu badania analizie poddane zostały przepisy ustawy, które tworzą wyłączenia umów dotyczących praw do nieruchomości. Jak wykazała przeprowadzona analiza, treść przepisów kształtujących wyłączenia w zakresie umów dotyczących praw do nieruchomości może być interpretowana niejednolicie, co powoduje, że powstają wątpliwości dotyczące tego, do jakiego rodzaju umów ustawa ma zastosowanie w całości, a które umowy i w jakim zakresie wyłączone są spod jej reżimu. Wykazano dodatkowo, że nie sposób przyjąć, iż regulacje te zawierają prawidłowe przełożenie intencji ustawodawcy europejskiego.

**Słowa kluczowe:** prawo cywilne, umowy, nieruchomość, stosowanie prawa, implementacja dyrektywy.