

Personalized agreement — a new contractual model^{*}

K. Południak-Gierz

Jagiellonian University in Cracow,
24, Gołębia st., Kraków, 31-007, Poland

For citation: Południak-Gierz, Katarzyna. 2020. “Personalized agreement — a new contractual model”. *Vestnik of Saint Petersburg University. Law* 4: 1009–1021. <https://doi.org/10.21638/spbu14.2020.411>

In consumer e-commerce, personalization of the content of an agreement in accordance with expectations, traits and circumstances of a particular person has become a common practice. In order to adequately address this new phenomenon, it is crucial to determine how the legal system should perceive consumer contracts concluded via the Internet with the use of personalization tools. For this purpose, the European Union perspective is adopted. Peculiarities of personalized agreements are varied. The entrepreneur has access to a vast amount of data on consumers and he is able to use it to his benefit by personalizing means, time and content of communication sent while forming a contractual bond with the consumer. In contrast, the consumer is not familiar with the scope and the utility of the data that the trader is processing. Also, personalization practices are aimed at inspiring trust in the trader, which, in sum, make the consumer especially exposed to manipulation. As a result, the asymmetry between the parties deepens. Personalization can be, therefore, perceived as a marketing technique. However, due to its impact on the contractual relationship, it is justified to explore also whether it could be treated as a new type of contract or an emerging contractual model. The analysis suggests that the phenomenon should be considered as another step in the evolution of consumer contracts — personalization, to a certain extent, supersedes standardization of mass turnover in the online environment.

Keywords: personalization, consumer law, e-commerce, big data, profiling, contracts, business to consumer, Internet, granular law.

1. Introduction

1.1. New technologies in the consumer market

Currently, the economic model founded upon standardization is being abandoned. The use of big data technology enables the collection and processing of vast amounts of data. One of its results is the enhanced profiling of Internet users (Bosco et al. 2013, 9). Mass contracts are being replaced by personalized agreements that match the individual characteristics of a counterparty. For this purpose, the user is profiled at the pre-contract stage. After analyzing previously obtained data, the entrepreneur generates a tailored offer, adjusting its form, content and method of delivery to the features of its addressee (Kaptein, Parvinen 2015, 9).

The following article is a part of the research conducted within the framework of project no. 2016/21/N/HS5/00167, ‘Personalized agreements in the light of civil law’, grant financed by the Polish National Science Centre

© Санкт-Петербургский государственный университет, 2020

In consumer e-commerce, personalization¹ of an agreement's content has become a common practice (Kaptein, Parvinen 2015, 7). The goal of this article is to verify how the changes in marketing techniques based on the application of big data tools and client profiling should be perceived by the legislature. Without it, further research on the private law reaction (both current and future) towards these contracts' is premature. The starting point of the study is, therefore, a description of the phenomenon being the contractual relationship between a profiling entrepreneur, and a profiled consumer, arising from the conclusion of an agreement (not necessarily via the Internet) between these entities. As a result, the main practical and legal issues related to the use of consumer profiling and contract personalization are identified, distinctive features of agreements between the profiler and the profiled are indicated. These specific characteristics may be an argument for their separate regulation. Thus, two alternative solutions are considered: to recognize personalized agreements as a new type of contract or to see them as a new contractual model, replacing standardized contracts in the online environment. The theoretical analysis is supplemented with the assessment of the impact of the personalization in consumer contracts on the effectiveness of the current consumer protection legal framework.

1.2. Contract law framework — the European Union law approach

Web users, who agree to personalization, in return for hindered freedom and privacy gain time, comfort and individualization. A tension appears between one's freedom to decide on their privacy or scope of self-determination and traditional values of consumer law, contractual loyalty, right to privacy and autonomy (Helberger 2016, 139). The European Union (EU) legislature touches upon this issue in regulation 2016/679 (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC², by allowing profiling and then in directive 2019/770 (motive 24 of Directive (EU) 2019/770) of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services³ by broadening its scope of applicability onto contracts where the consumer does not pay a price but provides personal data to the trader instead. These laws suggest the scope of information obligations associated with the initiation of the personalization process (Motive 42, 60, 61, Art. 4.11 GDPR) and list sanctions for improper or lacking contract performance⁴. They fail, however, to address

¹ The terms personalization and customization are not equivalent concepts. Personalization means matching the characteristics of the subject through a system in accordance to the data on a person. In this configuration, this person remains passive. In case of customization, the system enables a person to independently match the characteristics of the subject.

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Accessed August 22, 2020. <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

³ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Accessed August 22, 2020. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32019L0770>.

⁴ Art. 13–14 Directive 2019/770. Accessed August 22, 2020. <https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX:32019L0770>.

private law sanctions for the lack of information on personalization or formulate clear rules on the interpretation of a personalized agreement (Południak-Gierz 2020a).

It can be argued that profiling and personalization should be seen merely as a new marketing technique which fairness might be assessed against the unfair commercial practices and norms (in EU Member States — laws implementing 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 permissibility — under EU Competition Law (Townley, Morrison, Yeung 2017). This approach, however, does not allow one to address the core difficulties related to the determination of rights and obligations of the parties to personalized contract, namely: what the pre-contractual obligations of the entrepreneur are⁵, what should be taken into account when interpreting the content of such agreement⁶, should the performance stay in conformity with the explicit wording of the agreement, the expectations of the consumer or rather the standard needs that can be decoded from the data processed by the entrepreneur⁷. Nevertheless, before moving to the assessment of the reaction of contract law towards personalized agreements, it is worth investigating the phenomenon itself, as not only specific contract law norms on personalized agreements between the profiler and the profiled are lacking, but also a clear categorization of this phenomenon.

2. Basic research

2.1. *Game changers: consumer profiling and contract personalization*

The personalization of offers has become possible and effective through the development of big data and customer relationship management systems (a set of tools and mechanisms for client communication which includes tools for automating core business processes and analyzing customer behavior based on collected data). Trader's activity, previously based on concluding numerous separate, singular contracts, has transformed into a continuous process. The purpose of collecting the most accurate information about each customer is to maximize the consumer life cycle, in particular by stimulating his needs, encouragement to purchase additional goods or using supplementary services, that are adjusted to his individual expectations.

This profiling, however, is not the same as the individualization of consumers. It does not allow for shaping the individual marketing strategy for each customer. It implies only assigning customers to groups characterized by specific parameters. The power of the model is determined not only by effective segmentation of the population, but also by the specific consumer approach. Thus, consumers are treated as individuals, not a collective

⁵ If the entrepreneur knows, that the consumer is buying a cartridge that is incompatible with its printer, should he inform him? (Busch 2016, 234; Busch 2019, 315–319) If the data on the consumer suggest that she is pregnant, is the entrepreneur obliged to warn her if she is ordering medicine potentially harmful to the child?

⁶ During contract interpretation, what does constitute the point of reference when determining the legitimate expectations of the consumer?

⁷ If the consumer is not aware of his vulnerability and orders a good that can be highly harmful to him, should the entrepreneur provide him with the chosen item or a different one (in the pregnancy case — provide a substitute drug which is innocuous for the fetus)?

body (though CRM systems are developing to uniquely identify Internet users: Kaptein, Parvinen 2015, 26).

A contractual relationship shaped in the context of an agreement between a profiling entrepreneur and a profiled consumer is extraordinary due to several reasons. The profiler disposes a vast amount of consumer data and sophisticated tools to analyze these data. He is able to use this information when planning marketing strategies and, therefore, maximize his chances of concluding an agreement. Also, the relationship between the trader and the consumer changes — trust becomes its vital element. Due to these particularities, the legal categorization of the phenomenon as well as the assessment of the legal situation of the parties in a contractual relationship, formed by the conclusion of personalized agreement, turns out to be problematic (Południak-Gierz 2018; Południak-Gierz 2019, 164–170).

2.2. Data on the consumer and a trader's knowledge

As a rule, the knowledge of the party can influence the contract's content and, subsequently, the scope of the liability (Schulze, Zoll 2018, 214–216). Determining that the entrepreneur who uses personalization tools has knowledge about the characteristics, situation and needs of the consumer can, therefore, significantly modify the legal situation of both parties.

The first question is whether the fact that an entrepreneur processes data on a client is tantamount to being aware of certain characteristics or knowing the specifics of the consumer's situation.

The fact that in the law of obligations it is assumed that the state of consciousness and knowledge can influence legal obligations of a person becomes particularly evident during the interpretation of the contract's content — especially under the legitimate expectation standard. The purpose stipulated in the contract either arising from the circumstances (in which the contract was concluded) or its intended use as well as the purpose, which the consumer indicated to the seller while concluding the contract (the seller failed to make a reservation for such an intended use), can shape the content of the agreement (Art. 2.2b Directive 1999/44/WE⁸; Art. 6b Directive 2019/771⁹). Therefore, during the interpretation of the contract, circumstances that are known to the trader could, to some extent, be taken into account. Their spectrum depends on data used during profiling and establishing which expectations of the consumer in regard to the trader's behavior could be considered reasonable in the light of the information on the personalization the consumer was provided with. This solution, however, neither corresponds with the facts nor allows for achieving the desired consumer protection standard.

Firstly, both the collection and the processing of data are automated. An entrepreneur, being either a natural person or natural person acting as an organ of a legal person, cannot be familiar with all the pieces of information processed within the system, it is not physi-

⁸ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Accessed August 22, 2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31999L0044>.

⁹ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Accessed August 22, 2020. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32019L0770>.

cally possible. To claim that the entrepreneur was aware of all the details on the consumer, he should be attributed knowledge on every parameter that was processed by the profiling tool that he uses. Then, should we construct an irrebuttable legal presumption, which would always be untrue, that the trader knows all the data stored in his system? Such a presumption can be seen as incompatible with the postulate of the rationality of law.

On the other hand, collected data allows for deducing certain traits of a person which are used to choose a marketing strategy, and even leveraged for singular business decisions (whether to send the offer at all, what its content should be, when and how it should be sent). Therefore, the entrepreneur uses the tools to process the data into information and then turn them into knowledge that is used in an automated manner while conducting business activities. Processing and subsequent use of data is done through the electronic systems of the entrepreneur and to his own benefit. It can be argued that the one benefitting from the use of a tool should also bear the costs associated with its application, including liability for malfunctions. Thus, any activity conducted automatically, even if to some extent autonomous, should be attributed to the trader. Also, if the trader benefits from collecting and processing consumer data, he should as well bear the associated costs and fulfil corresponding obligations. In light of the above, it seems justified from the axiological point of view to consider the trader as being aware of the information processed by the system in use as well as the results of such processing. Hence, when establishing the point of reference for the interpretation of the contract, the professional party should be considered as knowing not only the data in the personalizing system but also the information that can be deduced from it during a well-performed big data analysis.

The abovementioned approach, though unacceptable in the light of the current provision of both the Directive 1999/44 and Directive 2019/771), could be the most beneficial for the consumer. By accepting the wide interpretation of the term 'trader's knowledge', a legal fiction is created. It opens the possibility of attributing the risk-based liability to the trader, in a structurally similar manner as in the case of a sales warranty. Every entrepreneur who uses personalization would have to consider that the assessment of compliance with a contract's content will be made taking into account all data collected and processed by the computer system leveraged. This will lead to a significant expansion of the scope of liability. What is more, in this regard it is not the consumer's expectations that are protected as he might not know that his personal data is processed or might be unable to foresee the effects of this processing. In this model, the objectively reasonable standard of performance is granted. This is especially justified in the case of consumer contracts where protecting the autonomy of the will of the parties does not effectively restore contractual balance (Węgrzynowski 2011, 303; in the context of the negative description of a good: Zoll 2012, 173).

Though this solution may be seen as potentially detrimental to the trader (wider liability), in practice it will grant the weaker party merely an illusion of protection. This is because the consumer lacks access to the data-processing algorithms and possible effects of data processing (the consumer may be aware of the data collection process, but the specific variables used during personalization will constitute a business secret) (on lesser factual risk of liability for defective goods caused by the burden of proof of defect: Bańczyk 2017, 149). Even if the mechanism would theoretically adjust the content of the contract to the required standard, the protected entity would not know about it. Then, to impede such construction from being void, an efficient verification mechanism would be required.

Regardless of the contract law reaction, a new aspect of information asymmetry between the entrepreneur and the consumer is to be observed in the case of personalized agreements. The professional party possess a vast database on the individual consumer and tools for its processing that make it possible to strengthen the entrepreneur's impact on the decision-making process of the other party. On the contrary, the consumer has limited knowledge on the personal data that is processed by the professional, their possible usefulness and one's own vulnerability in this scenario.

2.3. Volatility of the agreement's content

Profiling and personalization affect features of an offered product or service (Kaptejn, Parvinen 2015, 16), but also lead to the transformation of the relationship between the entrepreneur and the consumer (Helberger 2016, 139).

Firstly, the content sent to potential clients varies in many ways, depending on the methodology used by the entrepreneur or his purpose. Generally, differentiation is a result of applied segmentation variables; commonly, these are characteristics of a person (the factors considered at the segmentation stage may be demographic — e. g. age, sex, income, psychographic — personality type, preferences, etc. or behavioral — e. g. prejudices, sports, hobbies). Generic behavioral targeting of advertisements and interest-based advertising, established on the segmentation of an ad group according to the behavior of its members, becomes common as well as creating profiles based on the previous activity of users on the portal (the history of visited subpages). The possibility of identifying a user's approximate location empowers location-based marketing — e. g. reaching out to the customer at the time when he is probably looking for a particular good or passes by a certain store¹⁰. The above correlations are widely used, moreover, they are easily noticeable by an average network user.

What is slightly more difficult to observe is that the prices of services and products are subjected to profiling (on dynamic and personalized pricing see: Zuiderveen Borgeusius, Poort 2017; Maggiolino 2017; Graaf 2019; Bourreau, Streeel 2018). The decisive element for the contract price may be transaction history (profile usage, email, avatar), place of residence (where the consumer uses the web) and the type of software or hardware (Mattioli 2012). The price of the subject of contract may vary depending on the group the consumer was assigned to. For instance, the price of the same object offered to a person who uses a Mac computer tends to be noticeably higher than one offered to a user of a Windows-based PC.

Also, other elements influencing the content of agreement can differ — e. g. elements of standard contracts. This practice is already applied in insurance contracts (Saporito 2014, 124). A clear example is usage-based car insurance: pay as you drive (pay for the distance you travel), pay how you drive (the cost depends on the driver's abilities and habits). The insurance fee depends on the type of vehicle used, time, distance travelled, behavior

¹⁰ In this regard, adopted strategies include: sending offers matching a consumer's place of residence, offers that address consumer behavior in a mobile application (search for a specific product), use of geofencing to locate and attract customers (for example, target people in close proximity to the shop), location-based marketing inside the store (notification with the advertising leaflet sent when walking by store, SMS with a discount code for the article) and display of matched advertisements on Real-Time Bidding (RTB) (purchase of real-time advert space) (Rezaei 2017, 38; Sayedi 2017).

of the driver and area where the vehicle is used. Analogous methods of determining benefits, fees or even the availability of a particular offer for a person may potentially be used in other insurance sectors. Analysis of data from health care databases and data from people's physical activity tracking devices (e. g. pedometers) may, for example, provide a basis for assessing the costs and availability of health or life insurance.

The volatility of a contract's content may influence the effectiveness of consumer protection mechanisms at least at two levels — when verifying the content of the contract and when assessing fairness of the entrepreneur's practice.

If the content of the contract is generated for every person and based on his or her characteristics, then it is difficult to assess whether it could be regarded as a standard contract. As a result, the protective rules on the incorporation of standard terms might not be applicable. Secondly, the mechanism of control of unfair contractual terms might not function properly since it can be claimed that in the online environment, negotiations are replaced by personalization — thus the personalized contractual clauses might not be regarded as unilaterally imposed by the trader (Południak-Gierz 2019, 164–170).

The effects of profiling and personalization are evident not only during analysis of the way a particular contract is concluded or its content, but also when examining the relationship between the entrepreneur and the consumer.

2.4. The changing perception of the counterparty — trust factor

Typically, the consumer's weaknesses are listed as ignorance (a passive consumer who does not care about his own interests), necessity (the needs of a person can only be fulfilled in a certain way, e. g. by the purchase of goods or services from the sole company that currently offers them — a person is forced by circumstances to accept the trader's conditions) and trust (Thal 1988, 31–32).

Until now, the weakness of the consumer resulting from the trust bestowed upon the entrepreneur was noticed mainly in relations *uberrimae fidei*: fiduciary relationship (Barnhizer 2005, 147), in case of financial services (Tereszkiewicz 2015), including insurance and agency. Recently, however, the trust factor has turned out to be a cornerstone for business activities conducted via the Internet. Having a reputational capital becomes *a sine qua non* condition of conducting business online as one of the main problems an internet entrepreneur faces is a low level of trust between network users. Numerous marketing techniques, aimed at maximizing consumption and enhancing profits, are founded on establishing a stable trust relationship between the professional and the consumer. The relationship is intended to be long-lasting, based on the knowledge of the professional and client's trust. Personalization allows for imitating intimate personal relationships; this causes the consumer to have an illusion that the trader is close to him, knows his needs, reacts to changes in his situation and acts as an engaged advisor.

There are three main fundamentals of trust (Furner, Serino, Smatt 2005, 2; Stoecklin-Serino, Paradise 2009, 2–3, 13): calculation, knowledge and identification. Calculation trust is based on the assumption that a person behaves opportunistically, provided that it is cost-effective and feasible. If one's opportunistic behavior is unlikely, it inspires confidence. Trust based on knowledge appears when the person has proven himself trustworthy. Identification trust develops in relations where parties understand each other and anticipate mutual expectations or needs (McAllister 1995, 25, 31).

Developing trust through the high quality of services provided requires significant effort and time. As a result, consumer's confidence in the entrepreneur is often built not only by positive experiences, but also by a variety of marketing and behavioral techniques (Stoecklin-Serino, Paradise 2009, 6). Use of personalization makes it possible to build trust based on individualization (Komiak, Benbasat 2006).

Effective personalization enables accurate selection of content depending on the situation, characteristics and preferences of a client. This increases the likelihood of the client being convinced that the choice of content depends on his interests, not the needs or goals of the other party (entrepreneur) (Komiak, Benbasat 2006, 945). Generally, this should lead to the belief that the personalized advice or recommendation received is unbiased. Therefore, it is justified to bestow trust on an entrepreneur.

Additionally, if the personalizing tool shows well-adjusted content, then another element, which is helpful for establishing a trust relationship will appear — familiarity (Komiak, Benbasat 2006, 946). If the customer has a good personalization experience and never experienced unfair treatment nor was presented with untrue information, he can presume that the future content will be trustworthy. This, in turn, will encourage him to skip its future verification. The client may not seek independent autonomous decision-making, but rather may choose to rely on the suggestions of the personalization system. It is the entrepreneur who searches for offers, selects the most adequate ones and adjusts them in order to match the expectations of potential customers. The consumer does not need to browse the web and can remain idle as he is sent adjusted offers that are selected by the system.

In conclusion, an intimate relationship between the trader and the consumer can be mimicked, which enhances cognitive and emotional trust (Komiak, Benbasat 2006, 943). Putting such strong pressure on inspiring consumer's confidence implies that even in contracts that do not belong to the *uberrimae fidei* category, the consumer becomes convinced that the trader (credible and predictable) will not act against his interests but in a manner that is beneficial to the consumer, in accordance with commonly accepted standards. In such cases, the entrepreneur is not legally obliged to pay particular attention to the interests of the other party, and the consumer's expectations remain unprotected. Once it becomes possible to identify weaknesses and irrational tendencies in an individual's behavior and then exploit them in trust-based marketing strategy, a consumer's susceptibility to manipulation rises (Helberger 2016, 151; Bar-Gil 2018, 217).

This aspect of personalization of consumer contracts hinders equally the effectiveness of the individual and of the standardized autonomy-of-will protection measures. In the case of the former (mainly regulation on mistake, fraud and threat), the protective mechanisms are inadequate for safeguarding consumer interests due to the core characteristics of this protective model (Południak-Gierz 2020b, 323). This inadequacy deepens with personalization. As a rule, in order to benefit from the individual protection, the protected entity must be aware of the impact the personalization had on him (e. g. whether he was tricked into a contract he would not have concluded unless being subject to a particular personalization technique) and exercise his right to avoid legal consequences of the contract concluded under the vice of consent. The premises of protection require an analysis of the aim and intent of the other party, which is, *per se*, difficult, and the consumer in case of a dispute, must have the means to prove it. Another issue is that in the case of consumer contracts, litigation costs will often discourage the weaker party from engaging into the court proceeding.

On the other hand, the standardized protection framework, provided for in the consumer law, also turns out to be less effective in the case of personalized agreements. It is especially visible in regard to protection granted by the unfair commercial practices regulation (Directive 2005/29/EC)¹¹ and its Polish implementation by the Act on Competition and Consumer Protection, Journal of Laws 2020.1076 consolidated text with changes¹² and the Act on Counteracting Unfair Market Practices Journal of Laws 2017.2070 consolidated text¹³. In this instance, the standardization of the premises is the main obstacle. The point of reference in this model is an average consumer and the personalization mechanisms are designed to address an individual's peculiarities (Calo 2014, 996, 999, 1010) — the personalized content should be highly persuasive only for the addressee. Thus, the practice should not have the potential to materially distort market behavior of an average consumer (Południak-Gierz 2019, 171–173; Wagner, Eidenmüller 2019, 594). Another issue is that the personalization technology makes it possible to exploit irrationality and misperceptions of an individual e. g., by providing content in a manner that objectively cannot be considered misleading but, due to the bias of the addressee, will likely be misunderstood. Finally, under the unfair commercial practices framework, a subject of control is a specific, isolated practice. Yet, in the online environment the user is usually exposed to a bundle of practices. Though each of them could not endanger one's autonomy, the fact that they are correlated increases their effectiveness. As a result, jointly, they may strongly limit an individual's autonomy. (Południak-Gierz 2019, 173)

2.5. Definition and legal categorization of the phenomenon

Personalized contracts are characterized by several distinctive features. These can be observed during the analysis of a single agreement (the influence of the trader's knowledge on the content of the contract) and while observing the relationship between the trader and the consumer (the impact of the personalization on a consumer's trust and expectations). The above allows for differentiation of a descriptive category of contracts and the scope of legal relations that have common features: a personalized contract is an agreement that is designed by the entrepreneur to match the individual characteristics, preferences, or situation of the consumer and gives, or is likely to give, him the impression that the relationship with the trader is based on trust and knowledge.

Is it a new type of contract? To distinguish a type of contract it is crucial to demonstrate that there are particular objects of performance (Szostak 2012, 63–64) and a personalized agreement does not stand out because of these. From the typological point of view a personalized contract will usually be considered a sales or services contract, but it can also be shaped otherwise e. g., as an innominate contract. Therefore, we are not dealing with the emergence of a new type of contract.

¹¹ 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. Accessed August 22, 2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>.

¹² Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów. Accessed August 22, 2020. <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20070500331>.

¹³ Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym. Accessed August 22, 2020. <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20071711206>.

Interesting conclusions can be drawn by making a legal assessment of the phenomenon through the prism of the evolution of contracts. Firstly, private law emerged as a highly individualized system, designed to attribute its subject with broad autonomy in shaping their legal situation while contracting with others (Schulze, Zoll 2018, 42; Mularski, Radwański 2019, 7–8, 13). The emergence of mass production and intensification of the exchange of goods and services in the XIX century made the model of the individual contract inadequate in light of the requirements of economic turnover (Łętowska 1974, 152–153; Pyrzyńska 2019, Art. 384, I.1. On the development of standard terms in the context of Polish law; Bańczyk 2016, 176–190). A simple, typified and quick-to-apply instrument was needed as it would allow for the intensification of trade activities. Individually negotiated contracts were replaced by unilaterally formulated proposals of the contract. The other party, usually the weaker one, could either agree to it without having any influence on its content or renounce concluding a contract. This standardization in commerce forced legislature to introduce protective standards, developed as an answer to common biases and growing asymmetries in private relations — mostly in consumer-to-entrepreneur ones (Twigg-Flesner 2010, 321–322; Schulze, Zoll 2018, 153–155; Hellwege 2018, 509, 511–513).

Nowadays, with the use of personalization technologies based on big data, re-individualization of contracts becomes possible. Concluding a personalized agreement is not preceded by negotiation (Południak-Gierz 2019, 164), and there is no dialogue between the trader and the customer. Yet, personalization plays a similar role. It aims at matching the content, communication channel and the time of interaction with specific characteristics of a customer. Therefore, individual features of the weaker party once again shape the content of the contract. In conclusion, personalized contracts may be considered a new contractual model, replacing standardized contracts in the online environment.

3. Conclusions

There are two main points to be made regarding the reaction of the law towards the appearance of personalized agreements in online consumer trade. First, the legal analysis of the subject of research leads to the conclusion that the phenomenon should be considered as another step in the evolution of consumer contract — personalization to a certain extent supersedes standardization in the online environment. This study does not confirm the thesis that the personalized agreement could constitute a new type of contract. Second, the new contractual model has peculiar characteristics. The key characteristics are the entrepreneur having extensive knowledge on the consumer and the consumer's trust bestowed upon the professional party.

Nevertheless, the appearance of a new contractual model does not constitute the sole prerequisite for legislative intervention. The legal situation of the parties of personalized agreement seems unclear in light of current provisions of private law. The main doubts are associated with the content of a contract, rights and obligations of the parties, admissibility of personalization in light of regulation on unfair commercial practices, efficiency of the current model of consumer protection and the positive effect of the actual legal framework on maintaining a contractual balance between the parties of personalized agreement. Also, in the case of an online consumer transaction, the value of the subject of contract is usually relatively low. Thus, developing a coherent line of case law, particularly

in higher courts, seems unlikely. The presented argumentation supports the interference of the legislature.

The regulation on personalized agreements should allow for limiting the growing asymmetry between parties. While decoding the content of the contract, it should be possible to take into account the uniqueness of the relationship between the entrepreneur and the consumer. The main factors should be the knowledge of the profiler, and justified expectations and trust of the profiled. The cornerstone of the regulation should be attributing the entrepreneur's knowledge on the data processed by the system used for personalization. Furthermore, the aspect of overall consumer's trust and potential persuasive power of personalization should be addressed. Therefore, it is justified to impose higher loyalty standards in the case of personalized contracts, which should be useful in drawing the line between sophisticated and advanced market practices and aggressive ones. To achieve this aim, the data processed by the trader as well as the typical outcome of their processing should constitute a point of reference while decoding the content of the contract. Such a template should ideally encompass, in particular, the information that can be deduced from the data processed by the entrepreneur and depart from actual expectations of the consumer. The expectations of the consumer as well as vulnerability caused by trust should, on the other hand, be taken into account when verifying fairness of behavior of the personalizing entity e. g., under regulation on unfair commercial practices framework.

References

- Barnhizer, Daniel D. 2005. "Inequality of Bargaining Power". *University of Colorado Law Review* 76: 139–241.
- Bańczyk, Wojciech. 2017. *Alokacja ryzyka zmiany okoliczności podczas wykonywania długoterminowej umowy o dzieło i o roboty budowlane — w kierunku umowy rozwijającej się*. Kraków, Wydawnictwo Uniwersytetu Jagiellońskiego.
- Bańczyk, Wojciech. 2016. "Sposoby ochrony 'słabszej strony' umowy zawieranej za pomocą wzorca w polskim prawie zobowiązań XX i XXI wieku". *Przegląd Prawniczy Uniwersytetu Warszawskiego* 1: 165–210.
- Bar-Gill, Oren. 2018. "Algorithmic Price Discrimination When Demand Is a Function of Both Preferences and (Mis)perceptions". *The University of Chicago Law Review* 86: 217–254.
- Bosco, Francesca, Cafiero G. D'Angelo, Elena Ferraris, Valeria Y. Suloyeva. 2013. "Defining Profiling". SSRN. Working paper no. 9. Accessed August 22, 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366564.
- Bourreau, Marc, Alexandre de Streel. 2018. "The Regulation of Personalized Pricing in the Digital Era". *O. N. E.* Accessed August 22, 2020. [https://one.oecd.org/document/DAF/COMP/WD\(2018\)150/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)150/en/pdf).
- Busch, Christoph. 2016. "The Future of Pre-Contractual Information Duties: From Behavioural Insights to Big Data". *Research Handbook on EU Consumer and Contract Law*, ed. by Christian Twigg-Flesner, 221–240. Cheltenham, Northampton, Edward Elgar Publ.
- Busch, Christoph. 2019. "Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law". *University of Chicago Law Review* 86: 309–331.
- Calo, Ryan. 2014. "Digital Market Manipulation". *The George Washington Law Review* 82: 995–1051.
- Furner, Christopher P., Catharina M. Serino, Cindi Smatt. 2005. "Making it personal: How personalization affects trust over time". *Proceedings of the 38th Annual Hawaii International Conference on System Sciences*. Washington. <https://doi.org/10.1109/HICSS.2005.398>.
- Graaf, Tycho de. 2019. "Consequences of Nullifying an Agreement on Account of Personalised Pricing". *Journal of European Consumer and Market Law* 8 (5): 184–193.
- Helberger, Natali. 2016. "Profiling and targeting consumers in the Internet of Things — A new challenge for consumer law". *Digital Revolution. Challenges for Contract Law in Practice*, eds Reinard Schulze, Dirk Staudenmayer, 135–161. Nomos Verlag, Baden-Baden. <https://doi.org/10.5771/9783845273488-135>.

- Hellwege, Phillip. 2018. "Right of Withdrawal in Distance and Off-Premises Contracts". *Commentaries on European contract laws*, eds Nils Jansen, Reinhard Zimmermann, 505–585. Oxford, Oxford University Press.
- Kaptein, Maurits, Petri Parvinen. 2015. "Advancing E-Commerce Personalization: Process Framework and Case Study". *International Journal of Electronic Commerce* 19 (3): 7–33. <https://doi.org/10.1080/10864415.2015.1000216>.
- Komiak, Sherrie, Izak Benbasat. 2006. "The Effects of Personalization and Familiarity on Trust and Adoption of Recommendation Agents". *MIS Quarterly* 30 (4): 941–960.
- Łętowska, Ewa. 1974. "Problematyka ogólnych warunków i wzorów umów w świetle poglądów doktryny obcej". *Studia Prawnicze* 3: 123–177.
- Maggiolino, Mariateresa. 2017. "Personalized prices in European competition law". *Bocconi Legal Studies Research Paper*, Res No. 2984840. Accessed February, 10 2020. https://www.academia.edu/33434806/PERSONALIZED_PRICES_IN_EUROPEAN_COMPETITION_LAW.
- Mattioli, Dana. 2012. "On Orbitz, Mac Users Steered to Pricier Hotels". *The Wall Street Journal*. Accessed February 13, 2020. <https://www.wsj.com/articles/SB10001424052702304458604577488822667325882>
- McAllister, Daniel J. 1995. "Affect- and cognition-based trust as foundations for interpersonal cooperation in organizations". *Academy of Management Journal* 38 (1): 24–59. <https://doi.org/10.5465/256727>.
- Mularski, Krzysztof, Zbigniew Radwański. 2019. "Zagadnienia ogólne czynności prawnych". *Zbigniew Radwański, Andrzej Olejniczak. Prawo cywilne — część ogólna*, 5–60. Warszawa, C. H. Beck.
- Południak-Gierz, Katarzyna. 2018. "Personalization of information duties. Challenges for big data approaches". *European Review of Private Law* 26 (3): 297–309.
- Południak-Gierz, Katarzyna. 2019. "Consequences of the Use of Personalization Algorithms in Shaping an Offer — A Private Law Perspective". *Masaryk University Journal of Law and Technology* 2: 161–187. <https://doi.org/10.5817/MUJLT2019-2-2>.
- Południak-Gierz, Katarzyna. 2020a. "Sanctions for lack of fulfilment of obligation duties. Searching for an adequate regulatory model for personalized agreements". *European Review of Private Law* 28 (4): 817–839.
- Południak-Gierz, Katarzyna. 2020b. *Wady oświadczenia woli w umowach zawieranych na internetowym rynku konsumenckim*. Warszawa, C. H. Beck.
- Pyrzyńska, Agnieszka. 2019. "Kommertarz Art. 384". *Kodeks cywilny. Tom II. Komentarz. Art. 353–626*, ed. by Maciej Gutowski. Warszawa, C. H. Beck.
- Rezaei, Sajad. 2017. *Apps Management and E-Commerce Transactions in Real-Time*. Malaysia, IGI-Global AEBR.
- Saporito, Patricia L. 2014. *Applied Insurance Analytics: A Framework for Driving More Value from Data Assets, Technologies, and Tools*. Upper Saddle River, FT Press Analytics.
- Sayed, Amin. 2017. "Real-Time Bidding in Online Display Advertising". SSRN. Accessed February 10, 2020. <http://dx.doi.org/10.2139/ssrn.2916875>.
- Schulze, Reinard, Fryderyk Zoll. 2018. *European Contract Law*. München, C. H. Beck; Oxford, Hart; Baden-Baden, Nomos.
- Stoecklin-Serino, Catharina, David Paradise. 2009. "An Examination of the Impacts of Brand Equity, Security, and Personalization on Trust Processes in an E Commerce Environment". *Journal of Organizational and End User Computing* 21: 1–36. <https://doi.org/10.4018/joec.2009010101>.
- Szostak, Ryszard. 2012. "Problem systematyki umów obligacyjnych w nowym kodeksie cywilnym". *Transformacje Prawa Prywatnego* 1: 61–75.
- Tereszkiewicz, Piotr. 2015. *Obowiązki informacyjne w umowach o usługi finansowe*. Warszawa, Wolters Kluwer Polska.
- Thal, Spencer Nathan. 1988. "The inequality of bargaining power doctrine: the problem of defining contractual unfairness". *Oxford Journal of Legal Studies* 8 (1): 17–33. <https://doi.org/10.1093/ojls/8.1.17>.
- Townley, Christopher, Eric Morrison, Karen Yeung. 2017. "Big Data and Personalized Price Discrimination in EU Competition Law". *Yearbook of European Law* 36: 683–748. <https://doi.org/10.1093/yel/yex015>.
- Twigg-Flesner, Christian. 2010. "Goods Must Be in Conformity with the Contract". *Cases, materials and Text on Consumer Law*, eds Hans-W. Micklitz, Jules Stuyck, Evelyne Terryn, 320–336. Oxford, Portland, Oregon, Hart Publishing.

- Wagner, Gerhard, Eidenmüller Horst. 2019. "Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions". *The University of Chicago Law Review* 86: 581–609.
- Węgrzynowski, Łukasz. 2011. *Ekwiwalentność świadczeń w umowie wzajemnej*. Warszawa, Wolters Kluwer.
- Zoll, Fryderyk. 2012. "Problem negatywnego ustalenia cech rzeczy sprzedanej — w oczekiwaniu na wspólne europejskie prawo sprzedaży". *Transformacje Prawa Prywatnego* 2: 167–174.
- Zuiderveen Borgesius, Federik, Joost Poort. 2017. "Online Price Discrimination and EU Data Privacy Law". *Journal of Consumer Policy* 40 (3): 347–366.

Received: February 19, 2020
Accepted: September 2, 2020

Author's information:

Katarzyna Południak-Gierz — PhD in Law; katarzyna.poludniak@uj.edu.pl