Legal Transfers in Europe Today: Still Modernisation Through Transfer?

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Summary
Tomasz Giaro coined the term “modernisation through transfer” to describe the process of a wholesale reception of Western European law in Central Europe in the 19th and early 20th century. Undoubtedly, the concept correctly described the process. The enquiry of the present paper focuses on whether legal transfers in today’s Europe can also be explained by the same paradigm, or are there differences. This preliminary study focuses on private law only and attempts at illustrating the problem by resorting to three concrete case studies: unfair terms, consumer sales and supply of digital content. It concludes that whilst in the 19th century the dynamics of legal transfers was characterised by bilateralism (donor state-recipient state) and by one-sidedness (reception only), today’s legal transfers in Europe are characterised by multilateralism (inclusion of European law as an intermediate player), multidimensionalism and two-sidedness (the donor state become ultimately also a recipient state). Nonetheless, the centre-periphery dynamic plays its role as is illustrated by the lack of legal transfers originating from Central Europe. This latter element is a strong aspect of continuity with the 19th century “modernisation through transfer” – Central Europe still is only a recipient of legal models.

Key words: legal transfers, modernisation, legal culture, private law

1. Introduction
Alan Watson in his ground-breaking work on *Legal Transplants* introduced the idea that legal change occurs mainly through borrowing from
other legal systems⁴. Today, the notion of “legal transfers” (or “legal transplants”) is a commonplace notion in comparative legal studies⁵. We can speak of a “legal transfer” if the legal and political elite of some countries (recipient states) decide to borrow legal solutions from other countries (donor states). The reasons for resorting to legal transfers are manifold. Essentially, legal transfers can be voluntary (receptio voluntaria) or they can be forced (receptio involuntaria). The notion of “force” should be understood here broadly, as encompassing both naked military force (as the introduction of the Code Napoleon in territories occupied by the French Grand Army), as well as more subtle forms of domination in international relations, which we can call “political” and “economic” force. In the two latter situations, the reception of legal transfers can be treated as a form of political or economic conditionality. Foreign investments, admissions to an international organization or signature of a bilateral treaty can be made conditional on the reception of certain legal arrangements. Such arrangements can encompass both private law institutions (e.g. property and contract law as a precondition of investments) and public law institutions (e.g. the so-called “Rule of Law” framework³).

The term “modernization of law” inevitably creates a connotation with so-called “modernization studies” as opposed to post-colonial studies. It contains a value judgment, whereby one legal system (the one which existed in the recipient state) is judged as outdated, whilst another legal system (the one which is the object of a legal transfer from the donor state) is judged as more “modern”. This allows to speak of “modernization through transfer” (Modernisierung durch Transfer), a term coined by T. Giaro⁴. As a matter of fact, Giaro studied the reception of Western

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² See e.g. G. Ajani, Sistemi giuridici comparati (2nd ed. Torino: Giappichelli, 2006), pp. 33–50. See also: J. Husa, A New Introduction to Comparative Law (Oxford: Hart, 2015), p. 107: “The great majority of comparatists continue to use legal transplant either solely or in parallel to other conceptualisations. […] [I]t would seem that Watson’s original concept has become rooted to the theory and terminology of comparative law […]”.


⁴ T. Giaro, Modernisierung durch Transfer – Schwund osteuropäischer Rechtstraditionen, (in:) T. Giaro (ed.), Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert (Frankfurt am Main: Vittorio Klostermann, 2006) 300–301. Giaro points out that the transfer of Western European law to Central Europe in the 19th century served to
European law in Central and Eastern European countries in the 19th and 20th centuries as part of a large-scale international research project\(^5\). It is an undeniable fact that the legal systems of CEE countries were, during the 19th and 20th century, exclusively recipient states. Whilst not all of them lost their legal autonomy (e.g. Hungary retained its customary civil law until 1959), nonetheless they still fell within the orbit of Western legal science (mainly – the Pandectist School). Did this wholesale reception of French, German and Austrian law in Central and Eastern Europe amount to a “modernization”? As I indicated above, using this term presupposes a value judgment\(^6\). There is nothing inherently wrong in making such judgments in the humanist and social sciences, such as in legal science, provided that the premises for making such a judgment are clearly and transparently spelled out, rather than concealed. Let me limit myself only to Polish law, treating it as a synecdoche of the region. In answering the question whether the reception of the *Code civil*, and later the ABGB and BGB in ethnically Polish lands during the course of the 19th century was a “modernization”, one must compare these legal systems (French, Austrian and German) with the law previously in force. Even if we limit ourselves only to a purely internal legal point of view, and evaluate the law from the perspective of its transparencity, clarity, comprehensiveness and uniformity, the progress is obvious. This is because, first of all, Poland did not receive Roman law in the Middle Ages (also for political reasons) and, secondly, Polish law prior to 1795 was fragmented both regionally and *ratione personae*. There was no comprehensive codification of the law, most of it was customary and chaotic. Hence, the reception was undoubtedly a form of modernization.

Therefore, we can agree with Giaro’s claim that in the 19th century CEE countries witnessed a “modernization through transfer”. Let us now turn to the main topic of this paper, namely whether in today’s Europe we can also speak of “modernization through transfer”. More specifically, is it possible to observe legal transfers in today’s Europe and if yes, can they be called a form of modernization of the law. And, if that is the case, how does today’s modernization through transfer compare to that of the 19th century?

In order to answer this question, I will inevitably resort to a case study. First of all, I will limit myself to private law only and will make no

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claims for public law. Secondly, within private law I will illustrate my argument by resorting to three case studies – concrete legal institutions which were (or are) the object of legal transfers in today’s Europe. These are: unfair terms in consumer contracts, consumer sales and contracts for supply of digital content.

2. Unfair Terms in Consumer Contracts

The traditional position of private law, still inherited from Roman law and en vogue in the liberal era of the 19th century, was the freedom of contract. Although from the outset it was, from the socio-economic point of view, a legal fiction (or a form of legal ideology), it was cherished by lawyers who stood by it. Things began to change at the turn of the 19th and 20th century, when in French legal science R. Saleilles formulated the concept of a “contract by adhesion” (Contrat d’adhésion) whilst in German legal science L. Goldschmidt was theorising the notion of “general terms of contracts” (Allgemeine Geschäftsbedingungen). Although already in Roman law an economically and socially powerful party could impose its terms upon the weaker party, it was with the rise of mass contracts that legal scientists began to analyse the problem. Initially, German courts protected weaker parties through a flexible application of the geneal clause of Sittenwidrigkeit (contra bonos mores) in § 138 BGB and the general clause of Treu und Glauben (bona fides) in § 242 BGB. It was only in 1976 that a special

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7 Undoubtedly, in the latter area a lot of legal transfers occurred in Europe after 1945 (and especially after 1989), in particular with regard to the reception of the Kelsenian model of constitutional justice (introduced first in Austria, then exported to Germany and Italy, later to France, and after 1989 – to CEE countries). The same can be said about other public law legal transfers, such as fundamental rights (both as regards their catalogues, and as regards specific jurisprudence interpreting those rights) or the principle of proportionality.


9 See e.g.: K. Kolańczyk, Prawo rzymskie (5th ed., Warszawa: Wydawnictwa Prawnicze PWN, 1997), p. 400 (with regard to locatio conductio): “An actual equality of the parties (…) with regard to [locatio conductio] contracts seems to have been rather an exception. (…) [T]he Roman jurists were far from taking into account and protecting the interests of weaker parties. (…) [M]embers of the ruling class could easily dictate the terms of contracts to their contracting parties, who were in a permanently in duress”.

statute codified this case law. Simultaneously, legal developments were taking place in France and in the UK. In 1977, the Unfair Terms Act was adopted in the UK, and in 1978, a statute known as loi Scrivener was adopted in France.

By 1976, all three countries already had special statutes addressing the problem of unfair terms. However, they differed. Thomas Wilhelmsson has identified three different approaches: the standard-form contract model, which combats unfair terms in standard contracts, be they commercial or consumer transactions (German law); the consumer protection model, which protects consumers from unfair terms, regardless if they are standard or negotiated, but does not protect commercial parties (French law) and the sweeping “general fairness model” of the Nordic countries, which strives at the fairness of all contracts. The approach of the UK and its Unfair Contract Terms Act 1977 could be described as the “exclusion clauses model”, as it encompassed only the protection (mostly for consumers) against terms excluding the business’s civil liability. Hence, at the end of the 1970s, we can speak of four models. Other European countries, such as the Mediterranean ones or Central Europe did not have any legislative model of protecting consumers against unfair terms. Although admittedly there was some (limited) case-law on the matter in Poland, one can rather agree with Ewa Łętowska that courts did not make significant efforts to protect consumers. Importantly for us, there was no legislative act (or part of the Civil Code) that would cover that issue.

At the beginning of the 1990s, the European Commission proposed to approximate (harmonize) national laws on unfair terms. The result was the Unfair Terms Directive enacted in 1993, which combined the

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11 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen vom 9 Dezember 1976 (BGBl I 3313). See also Kańska, Ochrona, p. 79.


15 On the inclusion of individually negotiated consumer contracts in the French model see: Kańska, Ochrona, p. 100.


German and French approaches. From the German approach, the Directive took the principle that only standard-term contract (not negotiated ones) are subject to judicial review of unfairness\textsuperscript{19}, as well as the substantive standards of judicial review of the terms: the standard of good faith (\textit{bona fides}) and the requirement of the significant imbalance to the detriment of the consumer\textsuperscript{20}. From the French approach the Unfair Terms Directive took the principle that only consumer contracts are subject to review. However, the UK approach that only clauses excluding liability of the business\textsuperscript{21} are subject to review was not taken over. Neither was the Nordic model taken over, whereby all contracts are subject to review. Hence, one can say that a legal transfer from French and German law to EU law took place. At a later stage, when the Directive was implemented, the Franco-German legal transfer was imposed on all EU member states, also those which joined the EU later on (in 2004, 2007 and 2011). For many countries, this was the first legislation dealing with unfair terms. Other countries had some kind of legislation\textsuperscript{22}, but had to adapt it to the minimum standard of the directive.

If we look upon the UTD from the perspective of the dynamics of legal transfers, we immediately note a difference to the 19\textsuperscript{th} century unilateral legal transfers (e.g. from Germany to Poland, from France to Romania, from Austria to Czechia etc.). The legal transfer in today’s Europe includes a new player – the EU legislature. The scheme of the transfer can therefore be illustrated by the following graph:

\textsuperscript{19} The original proposal (published in OJ 1990, C 243) did not provide for this limitation, but extended to all types of contracts (following the French approach).

\textsuperscript{20} Art. 3 (1) Directive 93/13. See Kańska, \textit{Ochrona}, p. 79. The original proposal (published in OJ 1990, C 243) contained a list of alternative criteria of unfairness, which already included both significant imbalance and violation of good faith (see art. 2 (1)).

\textsuperscript{21} The UK Unfair Terms Act 1977 was enacted specifically “to impose further limits on the extent to which under the law of England and Wales and Northern Ireland \textit{civil liability} for breach of contract, or for negligence or other breach of duty, \textit{can be avoided by means of contract terms} and otherwise, and under the law of Scotland \textit{civil liability can be avoided} by means of contract terms” (Unfair Terms Act 1977, preamble, emphasis added).

What is immediately visible is that in today’s Europe legal transfers pass through the filter of EU law, and also that many legal models are mixed together in order to form a new legal unit, which will be the object of a transfer to other countries.

3. Consumer Sales Directive
According to Bastiaan van Zelst who did comprehensive research on the drafting of sales law instruments, the Consumer Sales Directive is modelled on the Vienna Convention on the International Sale of Goods. Indeed, there are very close similarities between the two texts, even when it comes to wording and structure of individual provisions. Therefore, we can speak here of a legal transfer from international law (Vienna Convention) to EU law, and from EU law to the laws of the Member States. Let us look upon two aspects of the Consumer Sales Directive which are most characteristic, namely the buyer’s remedies and the time-limit for bringing the claim. The Vienna Convention, prepared by UNCITRAL and adopted at a diplomatic conference little modifications, was intended to be a compromise between the Common Law world and the Civil Law world. The starting positions of both legal families on seller’s liability are diametrically different.

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The Civil Law jurisdictions adopted solutions from Roman law. In Roman law, seller’s liability for latent defects was created as a special form of liability based on two actions granted in the edict of the Curulian Edils – the *actio redhibitoria* and the *actio quanti minoris*. These two actions were initially limited to the sale of slaves and draught animals, but under Justinian they became available for any sale of goods. The *actio redhibitoria* allowed the buyer, upon discovering hidden defects, to rescind the sale and claim the price (giving back the object bought). Both actions covered not only hidden defects, but also any specific promises made by the seller as to the quality of the goods (*dicta promissave*), even if they were made informally (*dictum in venditione*).

The *actio quanti minoris* allowed the buyer, upon discovering hidden defects, to demand a reduction in price (and keep the defective object bought). Both actions were independent of any fault or even knowledge on the side of the seller – they imposed strict (objective) liability for hidden defects, which differentiated them from the *bona fide* liability of the *actio empti* (based on the seller’s fault). Roman law was liberal and it gave the buyer free choice between the remedies.

In classical Roman law, the *actio redhibitoria* became extinct after 6 months, and the *actio quanti minoris* – after 12 months.

This Roman solution was received by the *ius commune* and later into our modern Civil Codes. Hence, buyers could demand either a rescission (and total refund) or a price reduction. Nonetheless, the buyer-friendly regime of Roman law (freedom of choice between the remedies) was limited in the writings of some *ius commune* authors, who would admit the *redhibitoria* only if the buyer had not bought the goods had he known about the defect. National codifications began to admit a claim for specific performance and give it priority over the two actions of the *aediles*. Notably,

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29 Longchamps de Berier’, *Skargi edylów*, 430. If the seller knew about the defect and concealed it on purpose, the *actio empti* was available.


33 This was done first in the Prussian *Landrecht* of 1794. Also the French *code civil* of 1804 provided, in Article 1642-1 that if the seller undertakes to repair the goods,
the German BGB stayed – until very recently – faithfully by the Roman law tradition, allowing only rescission or price reduction, at the buyer’s choice, within a 6-month deadline from the conclusion of the contract and not providing a remedy of repair or replacement. The choice belonged to the buyer (as in Roman law) and not to the seller. Neither of the actions allowed for specific performance to be claimed (repair or replacement) and it too European legal systems a long time to allow for specific performance claims. Our Polish Code of Obligations 1933 was a pioneer in this respect, allowing for specific performance. However, this relief somewhat weakened the position of the buyer, because he could not refuse specific performance if the seller without delay accomplished a specific performance remedy (repaired or replaced). To my mind, if the buyer insists on a total refund, he should not be denied this remedy, as it is based also on the loss of trust in the buyer and/or in the quality of the specific goods. If I buy a bottle of wine in shop A, and the wine turns out to be sour, I want to get my money back and buy wine in shop B, instead of getting another bottle from the same batch (which I now distrust) from the same wine merchant (whom I no longer trust after the unpleasant incident).

Furthermore, for the Civil Law tradition an important distinction is between latent (hidden) and patent defects. The two *actiones aedilium curulium* apply only to the hidden defects. If a defect is not hidden, it should have been noticed by the buyer.

As to the position of English law, the Sale of Goods Act 1979 provided that goods must correspond to their description given by the seller, and – under certain circumstances – that they are “merchantable” and fit for purpose which is implied in the contract of sale. If any of these “conditions” was breached, the buyer could “repudiate the contract, reject the goods and claim damages, or (...) claim damages only”. As Zimmermann comments, this legal regime is “distinctly different” from the Roman law approach.

the buyer may not rescind or demand a partial refund. Also the Austrian ABGB of 1811 allowed rescission only if the repair would be disproportionate as a remedy. See: Longchamps de Bérier, *Skargi edylów*, pp. 432–433.


The Vienna Convention, in an attempt to create a compromise between Common Law and Civil Law approaches, provides a new quality. First of all, it allows claims for specific performance\textsuperscript{38} – something foreign both to the traditional Civil Law and traditional Common Law approaches. The buyer can claim substitute goods (replacement) if the defect amounts a to a fundamental breach. According to Article 25 CISG: “A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. “ Secondly, the remedy of repair, is available normally “unless this is unreasonable having regard to all the circumstances”.

The buyer may avail himself of the equivalent of actio redhibitoria only if the breach is fundamental\textsuperscript{39}. This is a serious limitation in comparison to Roman law, but it follows the pattern of (English) common law. As to actio quanti minoris under the Vienna Convention, it is allowed unless the buyer has accomplished a repair/replacement remedy\textsuperscript{40}. Under the Vienna Convention, the buyer cannot, therefore, refuse the performance of a specific performance remedy and demand a partial refund, provided that the specific performance (cure) is performed without delay. This is similar to the position of the Polish Code of Obligations 1933.

As to the conceptual distinction between latent and patent defects, it is not known to the Vienna Convention. Instead of speaking of “defects” it speaks of “lack of conformity”.

\textsuperscript{38} Art. 46 CISG: “(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter”.

\textsuperscript{39} Article 49 CISG: “(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed”.

\textsuperscript{40} Article 50 CISG: “If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price”.
As to the time-limit for bringing the claims, the Vienna Convention prescribes a Civil Law two-year deadline, taken directly from the Roman law.

Now, as I mentioned above, the Consumer Sales Directive is, according to Van Zelst, modelled on the Vienna Convention. However, we see here certain differences, and they are to the detriment of the buyer. First of all, under the Vienna Convention, the buyer can rescind and demand a full refund if the breach is fundamental – without allowing the seller to cure. Under the Consumer Sales Directive, the buyer must always allow the seller to cure, and only if that is impossible or impracticable, or if the seller does not cure in a reasonable time, may the buyer resort to the classical aedilian remedies. However – and here the Consumer Sales Directive follows both CISG and the English Common Law – the *actio redhibitoria* is not allowed if the non-conformity is minor (ie if it does not amount to a fundamental breach, to use the CISG and Common Law terminology).

The Consumer Sales Directive, once adopted, was implemented in all EU Member States. Despite being a minimum harmonization directive, allowing the Member States to provide for a better level of consumer protection, most of them have implemented the directive verbatim. Some countries, like Germany (in 2002) and Poland (in 2014), decided even to overhaul their sales law to follow the model of the Consumer Sales Directive. For Polish consumers, the implementation of the Consumer Sales Directive meant a deterioration of their contractual rights, and especially the loss of the right of immediate termination. The UK legislature has been more generous to its consumers, and the Consumer Rights Act not only allows to rescind the contract (termination at short notice) if the goods are faulty, but also does not prescribe a period of extinction of the claim, subjecting it to a 6-year limitation period. Some other jurisdictions, like the Netherlands, Finland and Portugal have also been more generous to consumers with regard to the period of legal warranty.

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41 Article 39 (2) CISG.

42 See, for Poland, the ustawa z dnia 30 maja 2014 r. o prawach konsumenta [Act of 30.5.2014 on consumer rights] (“Journal of Laws” of 2014, item 827 as amended) which modified Title XI of Book III of the Civil Code.

43 Prior to the implementation of the Consumer Sales Directive (initially in 2002), consumers had a free choice between four remedies: rescission and total refund; partial refund; replacement (in case of generic goods), repair (in case of specific goods, provided that the seller is a producer or is authorised to repair by the producer) (see Rozporządzenie Rady Ministrów z dnia 30 maja 1995 r. w sprawie szczegółowych warunków zawierania i wykonywania umów sprzedaży rzeczy ruchomych z udziałem konsumentów [Regulation of the Council of Ministers of 30.5.1995 regarding detailed terms of conclusion and performance of the sale of movable goods to consumers], (“Journal of Laws” no. 64 item 328 as amended).

Let us now reflect upon the Consumer Sales Directive in terms of legal transfers. What is the donor legal system? The principal donor system is the CISG. Therefore, we see first a legal transfer from international law to EU law. Then, from EU law to the Member States.

Fig. 3. Scheme of legal transfers on consumer sales

INTERNATIONAL LAW → EU LAW → MEMBER STATES’ LAW

Notably, however, the legal position of the buyer became weakened in comparison to the CISG.

4. Contracts for supply of digital content
The third and final case study I wish to address here are contracts for the supply of digital content. Digital content is a broad notion which encompasses any kind of content in digital form, especially computer programmes, mobile applications, as well as text, video and audio files (e-books, digital films, digital music etc.)\(^{45}\). Digital content for consumers started to appear already in the 1980s, but it was only with the digital revolution at the turn of the 1990s and 2000s that it started to become one of the principal types of consumer goods. Today, nobody watches a film on VHS, and only few privileged individuals listen to music on vinyls. Most people will download films and music, and some conservatists would buy DVDs and CDs (or copy them from friends or borrow them). The significance of smartphones and computers – filled with digital content – does not require any additional comments.

From a technological standpoint, digital content is undoubtedly a new phenomenon. But is it really new from an economic point of view, and should it be treated as new from a legal point of view? Economically speaking, there seems to be little difference between buying an e-book or a hard copy, or between buying a vinyl LP or a CD. The consumer gains access to culture, for which he pays to the producer (who might, but also might not, share some of the money with the real author). Therefore, some legal systems, such as notably the Austrian, German and Dutch, started treating the supply of digital content \textit{per analogiam} to the supply of goods. For the Austrians it was very easy, as they have retained the old Roman definition of \textit{res (Sache)} which encompasses both \textit{res corporales}

and res incorporales. So, they had no problem in including digital content (which is intangible – incorporalis) in the definition of sales. The Germans, who restricted their definition in 1900 in the BGB, had to add a special rule on the application of sales rules to digital content (a rule which the Polish legislator refused to add to our Civil Code). And the German courts started applying the rules on hire (locatio conductio) to digital content on their own initiative. In the Netherlands, likewise a legislative intervention allowed to apply traditional rules on tangible goods to digital content. These three success stories of applying rules on sale or hire of res corporales to the new res digitales show the flexibility and robustness of the Roman Law tradition today.

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47 § 453 BGB.


50 With regard to sale of digital content on a durable medium, the ordinary rules on sale are applicable. With regard to sale of digital content without any durable medium (i.e. downloaded), a legislative intervention from March 2014 made the rules of the Civil Code on consumer sale applicable (see: Wet van 12 maart 2014 tot wijziging van de Boeken 6 en 7 van het Burgerlijk Wetboek, de Wet handhaving consumentenbescherming en enige andere wetten, Staatsblad 2014, No. 140). As regards the streaming of digital content (e.g. watching a movie on-line), the rules on the services contract are applicable (Wet van 4 juni 2015 tot wijziging van de Boeken 6 en 7 van het Burgerlijk Wetboek, in verband met verduidelijking van het toepassingsbereik van de koopregels van titel 7.1 BW, Staatsblad 2015, No. 220). See Rafal Mańko, Contracts for supply of digital content to consumers, European Parliamentary Research Service Briefing, PE 581.980 (June 2016), 3. Available at SSRN: https://ssrn.com/abstract=2769960, (19.3.2018). I would like to thank Prof. Marco Loos for kindly clarifying the position of Dutch law to me.

The UK legislature, however, chose a different path and created a new type of contract – the contract for supply of digital content. This new type of nominate contract was created in the Consumer Rights Act 201552 which regulates also two other types of consumer contracts: sale of goods and provision of services.

The European legislature initially intended to follow the continental path and include digital content in the rules on sale – this was done in the proposal for a Common European Sales Law53 (an optional instrument, which was to be available to the contracting parties but which was not supposed to replace national law). However, after withdrawing the CESL in December 2014, the Commission decided to split the subject-matter of CESL into two new proposals, unveiled in December 2015 – one on on-line and other distance sale of goods54, and another one on supply of digital content55 (which, incidentally, also covers digital services).

What is interesting from the perspective of legal transfers, is that the Commission actually borrowed the principal rules of the proposed Directive on supply of digital content from the the UK Consumer Rights Act

What they borrowed is, primarily, the very idea of creating a new type of contract, and secondly, a whole set of detailed rules. If the Digital Content Directive becomes enacted – which, at present, seems quite probable, we will witness a legal transfer from the English Common Law, through EU law, to all the Member States. And, paradoxically, it is also possible that this legal transfer will become accomplished once the donor state (UK) is no longer an EU Member.

In schematic terms, the legal transfer in question can be presented as follows:

Fig. 4. Reception of the UK model of regulating digital contracts

UK \rightarrow EU \rightarrow EU MEMBER STATES

5. Conclusions
In the 19th century, the phenomenon of “modernization through transfer” in CEE was based on a unilateral reception of legal models from the centre, and their implementation in the periphery. This was also true of receptions of Western law elsewhere, such as Swiss law in Turkey or German law in Japan. Also the colonial transfer of legal models, occurring in all countries subject to European imperialist rule, was unilateral.

If we compare that to today’s situation of legal transfers in contemporary Europe, we can note, above all, that the transfers are, in principle, no longer simple and unilateral. They no longer follow the pattern “from state A to state B”, but a third element occurs – the EU legislature. Of course, Member States still borrow laws from each other, as for instance occurred in the case of the Lithuanian Civil Code, apparently modelled on Dutch solutions. Nonetheless, it seems that the dominant trend in the transfer of legal models in Europe includes a third party – the EU legislature. Due to the specific features of the EU legislative process, the model adopted at EU level is usually a compromise between various national legal systems (Unfair Terms Directive). Or, as in the case of the Consumer Sales Directive, it can be inspired by international law (CISG). However, we still can discern situations in which a model comes from one country and is then intended to be spread across the EU (Digital Content Directive).

We can say that Alan Watson’s insight that legal development takes place mainly through borrowing remains valid in today’s Europe. However, this borrowing has become more complex than before. It entails an element of mixing and an element of supranationality. Returning to the classification of transfers mentioned at the outset, we can say that legal transfers done via EU law are involuntary ones. Member States may not refuse to implement an EU directive, or they will face proceedings before the Court of Justice. This applies also to MS which voted against, or to those which must implement old directives, adopted many years or even decades before accession. In the latter case, actually, the implementation – i.e. the acceptance of the legal transfer – is included in accession conditionality. Therefore, Poland adopted the Unfair Terms Directive in 2000, and the Consumer Sales Directive in 2002 – still before accession.

Concluding, we can say that today’s legal transfers are usually “chain transfers”, and involve more actors on the way. Secondly, they are “multilevel transfers” in that the legal solutions taken from country A or B first go “upwards” (to global law or to EU law) before going “downards” to other national laws. And, paradoxically, this can lead to “back-and-forth transfers”, as was the case, for instance, with France and Germany implementing the Unfair Terms Directive into their domestic legal systems. Although the directive was inspired directly by their laws, it did not reflect exactly the one or the other, hence the need for implementing legislation. The legal transfer, paradoxically, “returned to the sender” but in a modified form.

Nonetheless, the centre-periphery dynamic plays its role as is illustrated by the lack of legal transfers originating from Central Europe. None of the three legal solutions studied above takes it origin in Central or Eastern European laws, and I am not able to quote any specific legal institution originating in our region which would be taken over by EU law and later spread across the EU. This latter element is a strong aspect of continuity with the 19th century “modernisation through transfer” –

Central Europe still is only a recipient of legal models. The only example of a legal transfer from our region which was received by Western law has been, hitherto, the lifetime contract (*umowa dożywocia*), received from the customary law of Polish nobility by the Austrian ABGB. The singularity of this example is striking. In these terms, nothing seems to have changed.