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H. Consumer Sales Directive (99/44)

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Executive summary

1. Transposition deficiencies

All the member states have taken the steps necessary to amend their domestic law to give effect to the requirements of Directive 99/44. The Directive is a minimum harmonisation measure and allows the member states to adopt or retain legislation which provides a higher level of protection to consumers, and it is possible to identify many such instances where domestic law departs from the standard required by the Directive. In some cases, this has been a deliberate decision by the national legislator, in others it appears to be a side-effect of the failure to transpose particular aspects of the Directive. There are some instances where a member state, in departing from the standard set by the Directive, has fallen below the minimum standard, and there may consequently be transposition deficiencies in this regard. For example:

- Art. 1 para. (4) (partial definition of ‘sale’ to include contracts for goods to be manufactured) - uncertainty about correct transposition in CZECH REPUBLIC, GREECE, MALTA and UNITED KINGDOM, although likely that this situation is also covered.
- Art. 2 para. (1): no general ‘conformity’ requirement in UNITED KINGDOM (although functional equivalent exists), or in SLOVAKIA.
- Deviations from conformity standard in GERMANY (by prioritising party agreement); LITHUANIA (reference to sources of public statements), CZECH REPUBLIC (no reference to sample, description, or specific purpose); UNITED KINGDOM (not all aspects of conformity mentioned in domestic law, such as performance, although unlikely to come to different result).
- Art. 2 para. (2) lit. (d). not transposed in CZECH REPUBLIC.
- Art. 2 para. (5) (installation): variations in BULGARIA (minor omission that should not lead to different interpretation), LITHUANIA, SLOVENIA, SPAIN and UNITED KINGDOM which appear to fall short of what is required.

- Art. 3 – no price reduction where repair/replacement provided with significant inconvenience in GERMANY.
- Art. 3 para. (3): the UNITED KINGDOM and the NETHERLANDS apply the proportionality test in Art. 3(3) to compare repair not only with replacement (or vice versa), but also with the other remedies of price reduction/rescission. No transposition in LATVIA, LITHUANIA, PORTUGAL and SLOVENIA.
- Art. 3 para. (4) ('free of charge'): GERMANY permits deduction to take account of period during which consumer had use of goods before replacement; reference made to ECJ to see if in accordance with Directive.
- Art. 5 para. (3) (reversed burden) not transposed in LATVIA.
- Art. 7 para. (2): incomplete transposition in UNITED KINGDOM.

2. Enhancement of protection

a. Use of options

The Directive provides 4 options in the Articles, as well as two “soft options” via the Recitals. Generally, options have met with a mixed response, and there is no instance where the vast majority of the member states have opted for or against a particular option.

- Art. 1 para. (3) (exclusion of second-hand goods sold at public auction) was exercised only by 10 member states, with 17 not doing so.
- Art. 5 para. (2) grants the option to require notification of a lack of conformity within 2 months, used by 17 member states, but not by 10.
- The option in Art. 7(1) (reduced period for second-hand goods) was applied by 15 member states, whereas 12 chose not to use it.
- 14 member states have used the option in Art. 6(4) (language of guarantees).
- Some member states have expressly adopted provisions based on Recital 18 (suspension of two-year period), e.g., CZECH REPUBLIC, HUNGARY, MALTA, SPAIN.
- Some have also adopted measures following Recital 15 (period-of-use deduction in case of rescission).

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There is therefore a degree of diversity in the use made of these options, with no option being overwhelmingly adopted or rejected.

b. Use of minimum clause (i.e. more stringent provisions in the field covered by the Directive)

The minimum harmonisation clause has featured extensively in the measures transposing the Directive.

- A number of member states have, given a consumer the free choice between the 4 remedies.
- In some countries, there are longer time periods applicable (FINLAND, IRELAND, UNITED KINGDOM).
- A number of legislators took no steps to implement Art. 2(4), which could also be explicable on the basis of minimum harmonisation (CZECH REPUBLIC, LATVIA, LITHUANIA, PORTUGAL and SLOVENIA); others have only transposed some of the exclusions (LUXEMBOURG, FRANCE, GREECE). In ITALY, the consumer must be aware of the correction.
- No transposition of Art. 3(6) (no rescission for minor lack of conformity) in CZECH REPUBLIC, ESTONIA, PORTUGAL, SLOVENIA and UNITED KINGDOM.
- Some of the new member states have retained their system of mandatory guarantees (HUNGARY, SLOVENIA), or have more extensive rules in place (AUSTRIA, ESTONIA, FINLAND, LATVIA, MALTA). Note inadvertent impact in UNITED KINGDOM.

In many instances, the minimum harmonisation clause was relied upon where domestic law already exceeded the standard set by the Directive, making it unnecessary to adopt specific provisions to implement aspects of the Directive. Consequently, there remains a noticeable degree of variation between the member states.

c. Extension of scope

It is possible to identify extensions of scope in the majority of member states. This has generally been achieved either by broadening the definitions of “consumer”, “seller” or “consumer goods” in the implementing legislation, or by applying the provisions of domestic law to transactions other than consumer sales.

d. Other measures enhancing consumer protection (i.e. more stringent provisions in fields not covered by the Directive)

- Additional factors to clarify operation of “conformity with the contract” test, such as instructions (HUNGARY), spare parts (CYPRUS), or packaging (DENMARK, ESTONIA, SWEDEN and FINLAND).
- Direct liability of producer (FRANCE, BELGIUM, PORTUGAL, LATVIA, LITHUANIA).
- The domestic laws of all the member states provide for damages as an alternative or additional remedy in cases of non-conformity.

3. Inconsistencies

- Some member states have implemented a “negative presumption” of conformity, i.e., goods are not presumed to be in conformity unless the criteria stated are met (GREECE, NETHERLANDS, PORTUGAL, SLOVENIA). Others do not refer to a presumption at all (FRANCE, MALTA).
- The time at which conformity is to be assessed also varies, with some member states relying on the passing of risk as the crucial time, sometimes linked with delivery. The notion of delivery itself is not defined and remains unclear.
- The method for calculating a price-reduction is unclear – both a flat-rate and proportionate reduction approach are possible.
- Art. 4 (right of redress) is vagueness, leaving a considerable degree of interpretation to the member states in giving effect to its provisions.

4. Consumer protection gaps

One gap identified in this analysis is that the relationship between the remedies in Art. 3 and the right to damages is not made clear, leaving scope for uncertainty. The Directive does not address the position of computer software. There are also no provisions on the need to maintain spare parts (necessary for effective repair), no on after-sales services. There are also no provisions dealing with the particular difficulties of cross-border enforcement.

5. Potential barriers to trade

A number of possible barriers to trade could be identified. The first, a barrier on the consumer-side, may be the lack of any provision on cross-border enforcement. A second possible barrier is the fact that, in some member states, there is direct liability of a producer, whereas in the majority, there is not. Finally, the different interpretation and application of the Directive's provision through national law in the courts of the member states may bring about further barriers, although there is as yet not sufficient evidence of this.

6. Conclusions and recommendations

The following matters could be considered as part of reviewing the Directive:

- Options: It is apparent that all options have been used by some of the member states, but in no instance has there been an overwhelming tendency to use, or to disregard, any of the options given in the Directive. Consequently, no clear recommendation regarding the removal of any of the options can be given.
- Definition of 'consumer' (refer to the general discussion of this matter).
- Definition of 'seller' (refer to the general discussion of this matter).
- Definition of 'goods', in particular whether software and other digital products should be included in the definition. A related question is whether any licenses associated with the supply of software, or other digital products, should be covered by the rules of this Directive, too – for example, when the license is not extensive enough. It may

not be possible to address this issue in the context of this Directive, but there may be questions of drawing the line in the correct place if digital products are to be included in the definition of ‘goods’.

- Clarification in the text of the Directive that the proportionality criterion should not permit a comparison of repair/replacement with price reduction, to avoid confusion on this matter.
- Clarification of who bears the burden of proof in respect of some of the provisions (e.g., Art. 2 para. (3)).
- Right of redress for the seller: consider whether this could be clarified further, and consider, in particular, whether a clear ‘action directe’ approach could be adopted.
- The introduction of direct producer liability, and, possibly, distribution network liability, could be considered again. In the context of the internal market, it may be particularly important that a consumer can seek a remedy from somebody based in his own country. The Directive does not address this matter at present, and it should be considered if a system of producer liability, possibly combined with distribution network liability, should be adopted.
- The relationship of the remedies in Art. 3 and the national rules on the award of damages: it may be considered whether the Directive should address this. That would raise the questions which forms of damage should be covered. Broadly speaking, 4 heads of damages can be identified: (i) Equivalence (to the remedies in the Directive); (ii) consequential losses; (iii) loss of profit; and (iv) additional costs incurred as a result of buying replacement. This matter may best be considered once the *Common Frame of Reference* has been completed.
- Related supply transactions: there are other supply transactions, such as hire-purchase or conditional sale, as well as hire and leasing, which are frequently used by consumers buying more expensive goods. Conditional sale may be included within the scope of the Directive, although the position is not clear. Other supply transactions were explicitly excluded during the legislative process leading up to the adoption of the Directive, but this could bring about the different treatment of similar transactions. The nature of the risk in the context of a hire or leasing arrangement is different from that in sale, or conditional sale; nevertheless, it may be desirable to consider including a wider range of transactions within the scope of the Directive.

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I. Member state legislation prior to the adoption of the Consumer Sales Directive

All the current member states (EU25) had legislation applicable to the sale of goods to consumers in place before the adoption of Directive 99/44 in July 1999. However, there was a significant degree of variation in this existing legislation, possibly because of the fundamental nature of sales contracts in the general law of contract in many countries. The following is a brief, and not by any means exhaustive, overview of the situation as it was before the Directive 99/44 was adopted.

At the outset, it needs to be observed that there was a basic difference between countries adhering to the difference between specific and generic goods that stems from ROMAN LAW (“Gattungskauf” vs “Stückkauf”) and those, which do not. This distinction was once present, in a moderate form, in the common law but largely lost through developments from the 19th century onwards. The approach to seller liability under these two regimes varied.

In terms of the areas covered by the Directive, a fundamental distinction may be drawn between countries, which had already adopted legislation specifically dealing with consumer sales contracts, and countries that relied upon a general legislative framework covering all types of sales, including consumer sales. General rules applied, for example, in BELGIUM, BULGARIA, CYPRUS, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, MALTA, and the UNITED KINGDOM.

In the Central and Eastern European countries among the new member states (EU10), there were largely only general civil codes, which applied and did not contain specific consumer provisions (e.g., CZECH REPUBLIC, ESTONIA). Until 1999 in BULGARIA there were only general rules on sales contracts, which were also applicable to consumer sales contracts. When the Law on Consumers’ Protection and Trade Regulation came into force in 1999 special provisions for consumer sales contracts were introduced, and the general provisions for consumer protection were also applied. In 2006 the new Law on Consumer Protection came into force and the provisions of the Directive 99/44 were implemented. In LATVIA, an early version of the Consumer Rights Protection Law of 1992 had introduced basic rules on consumer sales, but these fell short of the requirements of the Directive 99/44. A similar situation arose in LITHUANIA, where a 1994 law introduced consumer protection provisions

that supplemented the Civil Code of 1964. In POLAND, the law contained provisions applicable only in consumer transactions, making the obligations of the seller more precise and indicating to the consumers how exactly they could obtain remedies.¹ In ROMANIA, on the one hand general rules on contractual and extra-contractual liability applied. On the other hand though, specific provisions in different Government Ordinances/Decisions granted particular rights to consumers. For instance, the vendor had to give certain information on the product and was obliged to replace certain products or reimburse their value at the consumers' request under certain conditions.² Likewise in regard to quality deficiencies.³ Specific rules also existed concerning the obligations of the undertakings as to the sale of goods of extensive use directed at consumers.⁴

Among those which had adopted consumer-specific rules, some only provided a few additional provisions rather than a detailed separate framework on consumer sales. Thus, in AUSTRIA, the Consumer Protection Law restricted the variations that could be made to the applicable legal rules by permitting an agreement whereby the seller could (i) avoid termination/price reduction by providing conforming goods within a reasonable time; and (ii) avoid price reduction by repairing the fault. In GREECE, a seller of new durable consumer goods was required to provide a written guarantee to a consumer.⁵ Such guarantees had to be of a duration in proportion to the life expectancy of the product, and for which there were minimum standards. The law in IRELAND⁶ included a specific right for consumers to request a replacement for non-conforming goods. In PORTUGAL, Law 24/9 on Consumer Protection offered some consumer-specific rules in addition to the civil code. The law in SPAIN required mandatory guarantees for durable goods and stipulated the minimum content of guarantees;⁷ moreover, the Spanish civil code had also adopted the Roman law distinction between specific and generic goods. In SLOVENIA, the general sales law rules applied, with only few modifications by the Consumer Protection Act.⁸ Apart from seller's responsibility for material defects, a parallel regime of mandatory guarantees for the so called "technical goods" was

¹ Regulation on the conditions of concluding and executing contracts of sale of movable goods involving consumers of 30 May 1995 (now repealed) which supplemented the Civil Code provisions on legal guarantees.

² Articles 14(1), 20(2) of Government Ordinance no. 21/1992.

³ Government Decision no. 665/1995.

⁴ Government Decision no. 394/1995.

⁵ Article 5 of the Law 2251/1994 on Consumer Protection.

⁶ Section 53(2) of the Sale of Goods Act 1980.

⁷ Article 11 of the Law 26/1984 of July 19 on Consumer Protection.

⁸ Consumer Protection Act 1998.

provided for by the general rules⁹ and further specified in the Consumer Protection Act. SWEDEN had also adopted a Consumer Purchase Act, which is a separate and complete piece of legislation.

In the UNITED KINGDOM, modifications had been made to certain provisions of the Sale of Goods Act 1979, e.g., by restricting sec. 15A on slight breaches of contract to non-consumer cases with the effect that consumers could exercise their right of termination even where there had only been a minor non-conformity.

Others had adopted rules, which were broadly similar to those eventually introduced by Directive 99/44, such as DENMARK,¹⁰ FINLAND,¹¹ NETHERLANDS,¹¹ and SLOVAKIA.¹²

There were also variations in the standard of conformity that was applied, and the factors that would be relevant in considering whether goods were in conformity with the contract; nevertheless, there were common requirements such as basic fitness for purpose. In some countries, such as FRANCE¹³ (where there were separate provisions on non-conformity with the contract)¹⁴ or MALTA,¹⁵ existing rules focused on latent defects.

Moreover, the remedies that were made available in cases of non-conformity varied. Some member states already made available remedies such as repair and replacement in their domestic laws, including BULGARIA,¹⁶ DENMARK,¹⁷ FINLAND,¹⁷ NETHERLANDS,¹⁸ SLOVENIA,¹⁹ and SPAIN.²⁰

Before implementation, therefore, there was a significant difference between the laws of the member states. To some extent, variations continue to exist even after the transposition

⁹ Obligations Code Art. 481 – 487.

¹⁰ Consumer Protection Act 20.1.1978/38.

¹¹ Civil Code.

¹² Consumer Protection Act 1998.

¹³ Article 1641 et seq. of the Civil Code.

¹⁴ Article 1604 of the Civil Code.

¹⁵ CC Art. 1424 et seq (Chapter 16 of the Laws of Malta).

¹⁶ Government Decision no. 665/1995.

¹⁷ Consumer Protection Act 20.1.1978/3.

¹⁸ Civil Code.

¹⁹ Obligations Code and Consumer Protection Act 1998.

²⁰ Article 11 para. (3) of the Law 26/1984 of July 19 on Consumer Protection.

because of the methods of implementation chosen. Thus, in some instances, changes were made to the existing civil code or sales law, whereas in other instances, specific consumer protection provisions were adopted (perhaps most notably in ITALY, where a new consumer code was adopted in 2005). For example, in MALTA, specific rights in relation to consumer and trader transactions were enacted as part of the Consumer Affairs Act.²¹ These rights were in addition to the rights that already existed under the Civil Code, and prevail over all other laws to the extent that they are more favourable to the consumer.²²

²¹ Part VIII Consumer Affairs Act.

²² Ibid. Art. 92.

II. Scope of application

1. General scope

The Directive applies to contracts for the sale of consumer goods by a seller to a consumer. These definitions define the scope of the Directive.

It may be observed at the outset that few member states have restricted their implementing legislation to the exact scope specified by the Directive (IRELAND being one of them). Most go beyond its scope in some respects, often because their domestic law makes no clear-cut distinction between consumer and non-consumer sales.

In AUSTRIA, the rules are significantly broader, covering B2B and C2C sales as well as B2C, and there is no restriction to tangible movable items. The CZECH REPUBLIC relies on its civil code that applies to all types of contract, and the implementation of the Directive has been undertaken in a rather haphazard fashion, creating some doubt as to whether it has been transposed adequately. GERMANY took the need to implement the Directive as an impetus for a wider reform to its law of obligations, and contract law in particular. The Civil Code in GREECE was amended and applies rules based on the Directive to all sales transactions, not only to consumer sales. In HUNGARY, the implementation of the Directive resulted in the creation of separate rules for consumer and non-consumer transactions. ITALY has extended the rules to contracts which are similar to contracts of sale, i.e., contracts for exchange and supply, work and materials, and all other contracts for the supply of consumer goods to be manufactured.²³

2. Definition of ‘consumer’

A consumer is “any natural person who ... is acting for purposes which are not related to his trade, business or profession” (Art. 1(2)(a)). Member states which follow this definition of

²³ Article 128(1) of the Consumer Code.

“consumer” are BELGIUM, CYPRUS,²⁴ ESTONIA, IRELAND, ITALY, LUXEMBOURG and NETHERLANDS.

In respect of IRELAND, it should be noted that for the purposes of the general Irish sale of goods legislation, a similar definition to the UNITED KINGDOM’s “dealing as a consumer” (mentioned below) is used.²⁵

In many member states, there are variations on the definition of “consumer”, which has generally the effect of broadening the overall scope of protection. In AUSTRIA, there is no express definition of “consumer”, but instead this notion is defined negatively as someone not a business.²⁶ In BULGARIA, consumer is defined as any natural person who acquires products or uses services not intended for commercial or professional purposes, and any natural person who, as a contract party under this Law, operates outwith the limits of his commercial or professional capacity.²⁷ In the CZECH REPUBLIC, a “consumer” is a person not acting within the scope of its commercial and business activity.²⁸ DENMARK includes legal persons within the definition.²⁹ In FINLAND, the concept is defined in FINLAND as “a natural person who purchases consumer goods primarily for the other purpose than to his/her professional purposes”.³⁰ GERMANY includes an employee during the course of his employment within the scope of the domestic legislation.³¹ GREECE refers to any individual or legal entity for whom/which goods or services offered on the market are intended, or who/which makes use of these goods or services, provided that this individual or legal entity constitutes the end recipient of the goods or services.³² HUNGARY also applies its legislation to both natural and legal persons acting as contracting party outside his/her economic or professional activities.³³ LATVIA has broadened the definition slightly by including any natural person who is expressing his/her desire to buy, buying or could buy goods or use services for the purposes,

²⁴ Article 2 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law.

²⁵ Section (3) of the Sale of Goods Act 1980.

²⁶ Article 1 para. (1)/(2) of the Consumer Protection Law.

²⁷ Law on Consumer Protection, Additional Provisions, § 13 no. 1.

²⁸ CC Art. 52(2).

²⁹ Article 4 para (a) of the Consolidated Act.

³⁰ Chapter 1(4) of the Consumer Protection Act.

³¹ CC Art. 13.

³² Article 1(4)(a) of the Law on Consumer Protection.

³³ CC Art. 685 lit. (d).

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which are not related to his/her business or professional activities.³⁴ The law in LITHUANIA³⁵ does not use the term “consumer” but “buyer” in the Civil Code; in the Law on Consumer Protection, a slightly wider definition of “consumer” can be found: any natural person who expresses an intention to buy, buys and uses goods or services for his personal, family or household needs not related to business or profession.³⁶

MALTA deals with the issue of goods being transferred to another person after they have been bought by including in the definition of consumer a subsequent owner or beneficiary of the goods who has been expressly or tacitly authorized or permitted by the consumer – being the ‘original’ purchaser of the goods – and who has consumed or benefited from the goods provided to the consumer by the trader. Moreover the Consumer Affairs Act also empowers the Minister responsible for consumer affairs after consultation with the Consumer affairs Council to extend the definition of ‘consumer’ to other classes or categories of persons.³⁷

ROMANIAN law does not only apply to natural persons but also to organised groups of natural persons”, which seems to be narrower than the Directive.³⁸ POLAND does not use the term “consumer” but instead “buyer”, which is defined as a physical person buying goods for a purpose not related to professional or economic activity.³⁹ In PORTUGAL, a consumer is a person who receives goods or services not for professional use from a person who is professionally or commercially active with a view to economic gain.⁴⁰

SLOVAKIA also deals with subsequent owners of the goods, albeit in a limited manner, by defining consumer as a “natural person buying products or services for personal use, including for members of that person’s household”.⁴¹

³⁴ Article 1(1), sent. 3 of the Consumer Rights Protection Law.

³⁵ CC Art. 6.350(1).

³⁶ Article 2(1) of the Law on Consumer Protection.

³⁷ Article 2 of the Consumer Affairs Act.

³⁸ Article 2(1)(a) of Law no. 449/2003 regarding the sale of products and associated guarantees states that a consumer is “any natural person or group of natural persons constituted in associations who, acting for purposes not related to his trade, business or profession, buys, obtains, uses or consumes products within the contracts covered by this law”.

³⁹ Article 1(1) of the Act on detailed terms and conditions of consumer sales and on the amendment of the Civil Code.

⁴⁰ Article 1(1) of the Decree-Law 67/2003.

⁴¹ Article 2(1)(a) of the Act on Consumer Protection.

In SLOVENIA, a person has to be acting “outside his profession or profit-making activity”.⁴²

SPAIN relies on its general definition, which includes legal persons, but beneficiary has to be the final recipient of the goods; moreover, there is no reference that the person must be acting for purposes not related to his trade; instead, the law excludes from the definition of “consumer” those who are not final recipients of the goods, and acquire or use these with the aim of integrating them in production, transformation, commercialisation processes.⁴³ The legislation in SWEDEN applies where goods are purchased mainly for non-professional purposes.⁴⁴

In the UNITED KINGDOM, there are two definitions: the first is found in the Unfair Contract Terms Act 1977 and provides a definition of consumer for the purposes of the legislation on the sale and supply of goods (“dealing as consumer”: person not acting in the course of a business contracting with a person acting in the course of a business; in the case of legal persons, goods must be ordinarily supplied for private use);⁴⁵ the second only applies in respect of the provisions implementing Art. 6 on guarantees (“any natural person who is acting for purposes which are outside his trade, business or profession”).⁴⁶ Both definitions are wider than those under the Directive.

FRANCE does not have a specific definition of “consumer”, relying instead on case-law developments. The main criterion in order to decide whether a transaction falls within the scope of consumer legislation is that there must be no link between the contract and the professional activity of the buyer.

Definition of “consumer” as in Directive	Variation on definition of “consumer”	No specific transposition
BE, CY, EE, IE, IT, LU, NL (7)	AT, BG, CZ, DK, FI, DE, EL, HU, LV, LT, MT, PL, PT, RO, SK, SL, ES, SE, UK (17)	FR (1)

⁴² Article 1(2) of the Consumer Protection Act.

⁴³ Article 1(3) of the Law on guarantees in the sale of consumer goods.

⁴⁴ Article 1(4) of the Consumer Purchase Act.

⁴⁵ Section 12 of the Unfair Contract Terms Act.

⁴⁶ Regulation 2 of the Sale and Supply of Goods to Consumers Regulations 2002.

3. Definition of ‘seller’

A seller is “any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession” (Art. 1(2)(c)). No specific transposition was made in AUSTRIA. Those who apply the definition of “seller” are BELGIUM (omitting “under a contract”), BULGARIA (with the addition “under a contract of sale” and the variation concerning “in the course of his professional or business operations”), CYPRUS, DENMARK, FRANCE, GREECE, IRELAND, LATVIA, LUXEMBOURG, NETHERLANDS, ROMANIA, SPAIN and SWEDEN.

In respect of BELGIUM, it should be noted that the Explanatory Note of the Consumer Sales Act cross-refers to the concept of ‘seller’ in the Trade Practices Act that includes non-profit associations. It remains unclear whether the definition of seller in the Consumer Sales Act also includes such associations, although there is a general tendency in Belgian law to interpret the definition of ‘seller’ broadly.

Again, variations exist in many countries. In the CZECH REPUBLIC, a “seller” is “a person acting within the framework of its commercial and other business activity”.⁴⁷ ESTONIA also uses the term “trader”.⁴⁸ FINLAND has a more detailed definition which includes a natural person as well as a private or a public legal person, who, in order to gain income or other economic interest, offers, sells or otherwise provides consumer goods for payment.⁴⁹ GERMANY includes associations etc. not pursuing an activity for economic gain.⁵⁰ In GREECE, the definition also includes public enterprises.⁵¹

HUNGARY has not defined “seller”, but the definition of “consumer contract” refers to the consumer’s contracting party as a person acting within scope of his economic or professional

⁴⁷ CC Art. 52(2).

⁴⁸ Article 2(2) of the Consumer Protection Act.

⁴⁹ Chapter 1 (5) of the Consumer Protection Act.

⁵⁰ CC Art. 14.

⁵¹ Article 1 (3) of the Law 2251/1994.

activities.⁵² In ITALY, public legal persons included.⁵³ In LITHUANIA, a seller is a person selling goods on premises intended for business purposes or outside them,⁵⁴ or a person engaged in trade.⁵⁵

MALTA also utilises definition of “trader” from the Maltese Commercial Code; moreover, the Minister for Consumer Affairs can designate any other person or category of persons as a “trader”.⁵⁶

In POLAND, there is no specific definition, but legislation applies to sales conducted “in the course of business”. PORTUGAL also no express definition, but it follows from the definition of consumer that a seller is a person who is professionally or commercially active with a view to economic gain and provides goods and services.

In SLOVENIA, the contract need not fall within seller’s commercial activity.⁵⁷ This is also the case, in some instances, in the UNITED KINGDOM, where any seller (including private individuals) are caught for some purposes; mainly, however, the law applies where a seller is selling in the course of a business, although the goods sold need not be the goods usually sold by that seller.⁵⁸

In SLOVAKIA the definition of seller (an entrepreneur who sells products or provides services to a consumer),⁵⁹ relies on the general definition of ‘entrepreneur’ in Art. 2(2) of the Slovakian Commercial Code.

Definition of “seller” as in Directive	Variation on definition of “seller”	No specific transposition
BE, ⁶⁰ BG, CY, DK, FR, EL,	CZ, FI, DE, EE, IT, LT, MT,	AT, HU, ⁶¹ PL, PT (4)

⁵² CC Art. 685(3).

⁵³ Article 128(2)(b) of the Consumer Code: “any natural or legal, public or private person who, under a contract ... sells consumer goods in the course of his trade, business or profession”.

⁵⁴ Article 2(2) of the Law on Consumer Protection of Lithuania.

⁵⁵ CC Art. 6.350(1).

⁵⁶ Article 2 of the Consumer Affairs Act.

⁵⁷ Article 1(3) of the Consumer Protection Act.

⁵⁸ Section 12 of the Unfair Contract Terms Act, and the CA judgment in *Stevenson v Rogers* [1999] 1 All ER 613.

⁵⁹ Article 2 para. (1) lit. (b) and para. (3) of the Act on Consumer Protection.

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IE, LV, LU, NL, RO, ES, SE (II)	SK, SL, UK (I0)	
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4. Definition of ‘consumer goods’

“Consumer goods” are “any tangible movable item, with the exception of goods sold by way of execution or otherwise by authority of law; water and gas where they are not put up for sale in a limited volume or set quantity; and electricity” (Art. 1 para. (2) lit. (b)). Those who apply the same definition of “goods” are BELGIUM, BULGARIA,⁶² CYPRUS, FRANCE, HUNGARY,⁶³ IRELAND, LUXEMBOURG, POLAND, and SWEDEN.

Variations exist in many member states. In particular, a number have not made use of the specific exclusions listed in Art. 1(2)(b): DENMARK, ESTONIA,⁶⁴ FINLAND,⁶⁵ GERMANY (which also includes water and gas supplied through the mains),⁶⁶ LATVIA,⁶⁷ MALTA (“any tangible moveable item of property”),⁶⁸ PORTUGAL (which also extends the law to immovables),⁶⁹ and SLOVAKIA (includes electricity and gas supplied to consumers).⁷⁰ Initially, the legislation in ITALY did not include a reference to ‘tangible’ and therefore the legislation extended to intangible goods, but this was changed and the definition now only applies to tangible goods, whether or not they need to be assembled.⁷¹ In LITHUANIA, there are no exclusions from the definition of goods itself;⁷² however, the provision of water, electricity and gas is excluded from the relevant parts of the Consumer Protection Act,⁷³ and the practical effect is to follow the definition of the Directive. NETHERLANDS defines goods only as tangibles,⁷⁴ although the rules concerning tangible goods can be applied to non-tangible goods to the extent that this is

⁶⁰ Omitting only “under a contract”.

⁶¹ Definition implicit in notion of “consumer contract”.

⁶² Article 104(3), § 9 Additional Provision Law on Consumer Protection.

⁶³ CC Art. 685(e).

⁶⁴ Article 2(3) of the Consumer Protection Act.

⁶⁵ Chapter 1 Art. 3 Consumer Protection Act.

⁶⁶ CC Art. 90 and Art. 474(1).

⁶⁷ Article 1(1), sent. 6 of the Consumer Rights Protection Law .

⁶⁸ Article 72(1) of the Consumer Affairs Act.

⁶⁹ Article 1(2) of the Decree Law 67/2003.

⁷⁰ Article 2(1) (f) of the Act on Consumer Protection.

⁷¹ Article 128(2)(a) of the Consumer Code.

⁷² Article 2(5) of the Law of Consumer Protection).

⁷³ Article 1(2) of the Law of Consumer Protection.

⁷⁴ CC Book 7, Art. 5(1) and Book 3, Art. 2.

possible.⁷⁵ ROMANIA uses the term “product” and has added the reference that the final destination of the product is “the individual or common consumption or use”.⁷⁶ SLOVENIA has adopted a broader definition of goods and does not define consumer goods separately. SPAIN has added a reference that the goods must be “aimed at the private consumer”.⁷⁷ The UNITED KINGDOM relies on the existing general definition of “goods”, which is broader.⁷⁸ No specific transposition was undertaken in AUSTRIA, because the relevant law applies to all types of goods. In GREECE, a broader definition can be found.⁷⁹ There also appears to be no definition of “consumer goods” in the law of the CZECH REPUBLIC.

Definition of “consumer goods” as in Directive	Variation on definition of “consumer goods”	No specific transposition
BE, BG, CY, FR, HU, IE, LT, ⁸⁰ LU, PL, SE (9)	CZ, DK, DE, EE, FI, IT, LV, MT, NL, PT, RO, SK, SL, UK (13)	AT, EL, CZ (3)

a. Exclusion of goods sold at public auction from the meaning of “consumer goods” (Art. 1 para. (3))

Article 1 para. (3) of the Directive permits member states to exclude from the definition of “consumer goods” second-hand goods sold at public auction which individuals have the opportunity of attending in person. SPAIN has introduced a more limited exclusion, referring only to “administrative auctions”.⁸¹ In the UNITED KINGDOM, this option has been exercised, not by amending the definition of “goods”, but rather by modifying the definition of “dealing as consumer”, and a natural person (individual) will now not regarded as dealing as a consumer in these circumstances.⁸²

⁷⁵ CC Art. 7:48.

⁷⁶ Article 2 (1)(b) of Law no. 449/2003.

⁷⁷ Article 1(2), sent. 2 of the Law on guarantees in the sale of goods for consumers.

⁷⁸ Section 61(1) of the Sale of Goods Act 1979.

⁷⁹ Article 6(2), sent. 2/3 of the Consumer Protection Law.

⁸⁰ Note text above.

⁸¹ Article 2(1), sent. 2 of the Law on guarantees in the sale of goods for consumers.

⁸² Section 12(2) Unfair Contract Terms Act. A legal person will not be regarded as a consumer where the goods in question are sold by auction or competitive tender, irrespective of whether the goods are second-hand or whether there was an opportunity to attend “in person” (presumably by sending a representative).

Other countries, which have made use of this option, are BULGARIA,⁸³ FINLAND, FRANCE, GERMANY, GREECE, HUNGARY and ROMANIA. SWEDEN had already established the position that auction sales where the consumer is present would be “as is” sales, giving rise to no conformity obligation, and this position continues to exist. It can therefore be said that Sweden also falls into the category of countries, which provide for this exception.

However, most countries have not exercised this option (AUSTRIA, BELGIUM, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, IRELAND, ITALY (but the prior usage of the goods must be taken into account and faults resulting from the normal use of the goods (‘wear and tear’) are excluded),⁸⁴ LATVIA, LITHUANIA, LUXEMBOURG, MALTA, NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, and SLOVENIA)

Option in Art. 1 para. (3) used	Option in Art. 1 para. (3) not used
BG, FI, FR, DE, HU, EL, ES ⁸⁵ , RO, SE, UK ⁸⁶ (<i>10</i>)	AT, BE, CY, CZ, DK, EE, IE, IT, LV, LT, LU, MT, NL, PL, PT, SK, SV (<i>17</i>)

5. Definition of ‘sale’

There is no complete definition of sale, although contracts involving the “supply of consumer goods to be manufactured or produced” are also treated as contracts of sale for the purposes of the Directive (Art. 1(4)). Many countries have employed the extended notion of “sale” relying on Art. 1(4), and give effect to this in their jurisdiction.

The provision in Art. 1 para. (4) produced specific amendments in DENMARK (previously limited to instances where seller supplied predominant part of materials), FINLAND, and PORTUGAL (work & materials, and hire). In ESTONIA, the definition of “contract of sale” includes contracts for goods to be manufactured or produced, unless the person to whom the

⁸³ Article 104(3) Law on Consumer Protection.

⁸⁴ Article 128(3) of the Consumer Code.

⁸⁵ Limited use made of this option.

⁸⁶ Option exercised by restricting the definition of “consumer”, rather than “goods”.

finished item is to be supplied provides a substantial part of the materials necessary for the manufacture/production.⁸⁷ In the latter case, the contract will be regarded as one for works. This appears to be narrower than the Directive; however, it should be noted that the Estonian legislation applicable to works contracts (services) contains corresponding provisions on conformity and remedies to those applicable to contracts of sale. The relevant provision of the CZECH legislation also seems narrower, referring only to contracts of sale or work & materials, but not stating clearly that goods to be produced are included;⁸⁸ however, no evidence of practical problems resulting from this difference is available.⁸⁹ GREECE appears to have made an oversight in its transposing legislation and has not amended relevant parts of the Civil Code to reflect the requirements of this provision. This provision was not transposed separately in LITHUANIA; however, the general definition of consumer goods already includes goods to be manufactured and there is consequently no gap in Lithuanian law in this regard.⁹⁰ The same is true of LATVIA. In BULGARIA “sale” has not been defined separately, but the effect of Bulgarian law is that it covers these additional transactions. In MALTA, there is no specific definition of ‘sale’, with the Consumer Affairs Act requiring traders to deliver goods in conformity with the contract of sale.⁹¹ In POLAND, this wider notion of sale posed one of the greatest difficulties in the transposition process; eventually, the Civil Code was amended to ensure that this provision is given adequate effect.⁹² In SLOVENIA, the Consumer Protection Act also applies to consumer services insofar as possible,⁹³ and therefore no separate transposition of Art. 1 para. (4) has been made. The UNITED KINGDOM has not changed its definition of sale, but has amended legislation that might apply in the circumstances subject to Art. 1 para. (4) to ensure uniform application of the new rules.

III. Consumer protection instruments

⁸⁷ Article 208 of the Law of Obligations Act.

⁸⁸ CC Art. 52.

⁸⁹ See also CC Art. 588.

⁹⁰ CC Article 6.306(1) provides that things which form the subject matter of a contract of purchase-sale may be “either existing things, owned or possessed by the seller, or things to be manufactured or acquired by the seller in future ...”.

⁹¹ Article 73(1) of the Consumer Protection Act. CC Art. 1346 et seq. specifically defines the sale as a contract whereby one of the contracting parties binds himself to transfer to the other a thing for a price, which the latter binds himself to pay to the former.

⁹² See Article 14 para. (3)-(5) of the Act on specific terms and conditions in consumer sales.

⁹³ Article 38 of the Consumer Protection Act.

1. Conformity with the contract

In this section, the main aspects regarding the transposition of Art. 2 of the Directive will be examined.

a. “Conformity with the contract” requirement in general (Art. 2)

aa. Requirement to deliver conforming goods

The basic requirement is that the seller must deliver goods which are in conformity with the contract (Art. 2(1)), given effect to accordingly in many member states (BELGIUM, BULGARIA,⁹⁴ CYPRUS, CZECH REPUBLIC, DENMARK (supplementing existing rules), ESTONIA, FINLAND (relies on existing general test), FRANCE, HUNGARY, IRELAND, ITALY, POLAND, ROMANIA, SLOVENIA, SPAIN, and SWEDEN). The UNITED KINGDOM refers to “conformity” only in the context of the new remedies, but also uses a negative expression.⁹⁵ There is, however, no general conformity requirement in UK law (see below).

bb. Presumption of conformity

The majority of those member states, which have given effect to Art. 2, have adopted the presumption that goods are in conformity if they meet the criteria specified in Art. 2(2). However, a number of countries have chosen to express this requirement in a negative way, i.e., goods are presumed not to be in conformity unless they meet the criteria stated. This is the case in GREECE, NETHERLANDS, PORTUGAL and SLOVENIA.

AUSTRIA does not express its implementing provision in terms of a “presumption”, but does otherwise include the factors from Art. 2(2).⁹⁶ The law in FRANCE is also not expressed in terms of a presumption; rather, there is a requirement that in order for goods to be in conformity with the contract, they must be fit for their usual purpose, and correspond to any characteristics individually negotiated.⁹⁷ Rather than stating that there is a presumption that

⁹⁴ Article 105(1) Law on Consumer Protection.

⁹⁵ Section 48F Sale of Goods Act 1979.

⁹⁶ CC Art. 922.

⁹⁷ Article L. 211-5 of the Consumer Code.

the goods are in conformity with the contract is they comply with the requisites as state in Art. 2(2) of the Directive, the law in MALTA requires the trader to ensure that the goods conform with such requisites.⁹⁸ Similarly, the NETHERLANDS does not use presumptions, and requires a buyer to prove (i) the parties' agreement regarding the goods; (ii) what he could expect from the goods; (iii) what has been shown as a sample or model; and that the goods do not correspond to these matters.⁹⁹

cc. Criteria for presuming conformity (Art. 2 para. (2) lit. (a)-(d) generally)

Conformity is presumed if the goods correspond with the requirements of Art. 2(2). Again, member states have generally transposed the criteria giving rise to this presumption, although there is greater variation.

GERMANY did not transpose the aspects of "conformity" in Art. 2(2) verbatim, nor did it follow the general approach. Instead, the starting point for establishing conformity is the express agreement as to quality reached between the parties.¹⁰⁰ Only where there is no express agreement do the criteria corresponding to Art. 2(2) of the Directive come into play. Moreover, in that list, "descriptions" are restricted to those given only by the seller, and sales by sample or model are not listed expressly. Finally, the criteria are not regarded as cumulative, but are ranked in priority instead. This arrangement may conflict with the requirements of the Directive.

In LITHUANIA, there is no reference to the ways how the seller, the producer or his representative could make public statements - particularly in advertising or on labelling. In the CZECH REPUBLIC, no reference is made to sample or model in the national legislation, nor is there any mention of description given by the seller, or the purpose for which the consumer requires the goods, as aspects of conformity.

Whilst IRELAND has implemented Art. 2 para. (2) as per the Directive, under the general sale of goods legislation other factors are enumerated in the legislation, or have been identified by

⁹⁸ Article 73(1) of the Consumer Code.

⁹⁹ CC Book 7 Art. 9, Art. 17(1).

¹⁰⁰ CC Art. 434(1), sent. 1.

case law. For example, section 14(3) of the Sale of Goods Act 1893 refers to goods being fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. Based on case law, ‘other relevant circumstances’ has been held to include resale price, relative incidence of repairs, and cosmetic defects. Further, safety in relation to motor vehicles is expressly addressed by the legislation.¹⁰¹ In SLOVAKIA, there appears to be no reference to the “conformity” requirement as such; instead, goods must be of “usual quality”.¹⁰² To this, the Civil Code adds that goods must correspond with the seller’s description, and also possess the quality stipulated by the contract or legal regulations.¹⁰³ In SPAIN, all 4 elements are considered except where one is inapplicable in the circumstances of the particular case. In LATVIA, Art. 2(2)(b) has been transposed with the addition of a proviso that this factor will not be relevant where there was not reasonable for the consumer to rely on the specific competence and opinion of the seller.¹⁰⁴

Some member states have added additional factors. Thus, in CYPRUS, aspects of the quality of goods include the availability of spare parts, accessories and specialised technicians, where required; safety; reasonable durability in time and use; appearance and finish; and the non-existence of defects. In BULGARIA Art. 2(2)(b)-(d) has been transposed almost literally.¹⁰⁵ However, to Art. 2(2)(c), a criterion has been added that the goods should also correspond with the characteristics set by the parties to the contract.¹⁰⁶ Moreover, in the transposition of Art. 2(2)(a), Bulgarian law simply states consumer goods have to comply with the description given by the seller as a sample or model, omitting the words “and show the qualities of the goods”, although this omission may not affect the practical application of this provision in Bulgaria.¹⁰⁷ The implementing provision in LUXEMBOURG expressly refers, as an additional criterion, to “characteristics agreed between the parties”.¹⁰⁸ DENMARK includes “durability”

¹⁰¹ Section 13 of the Sale of Goods Act 1980.

¹⁰² Article 3(c) of the Act on Consumer Protection.

¹⁰³ CC Art. 496.

¹⁰⁴ Article 14(1), sent. 3 of the Consumer Rights Protection Law.

¹⁰⁵ Article 106 no.(1),(3),(4) of the Law on Consumer Protection.

¹⁰⁶ Article 106 no.(1) of the Law on Consumer Protection.

¹⁰⁷ Article 106 no.(2) of the Law on Consumer Protection.

¹⁰⁸ Article 4 lit. (a) of the Consumer Sales Law.

and “proper packaging” in the list of relevant factors.¹⁰⁹ In addition, it provides that there is a lack of conformity if the seller neglected on his own initiative to give the consumer information relevant to the consumer’s assessment of the goods and which the seller knew or should have been aware of.¹¹⁰ In ESTONIA, “proper packaging” is also a relevant factor, and when goods are not packaged in a way that would be usual for such goods, or in a manner inadequate to preserve and protect the goods, there will be a lack of conformity with the contract.¹¹¹ Packaging which is proper in relation to the goods concerned is also a relevant factor in SWEDEN. FINLAND also makes packaging a relevant factor, if proper packaging is necessary to preserve or protect the goods; in addition, specific requirements imposed by law regarding the characteristics of the goods can be a relevant factor, except where the buyer intended to use the goods for a purpose where such requirements are of no significance.¹¹²

HUNGARY provides a more detailed list of factors, and an additional requirement is that the supplier of goods has to mark these suitably for identification, and provide all the necessary information and instructions for proper use, in accordance with the provisions of legal regulations and professional standards.¹¹³

In POLAND, a distinction is made between two situations: (i) where qualities of the goods are individually negotiated; and (ii) other transactions. In the first case, a presumption of conformity arises where the goods correspond with the seller’s description or a sample shown to the buyer, as well as where the goods are fit for the purposes stated by the buyer before conclusion of the contract (unless the seller explained that this purpose was not possible).¹¹⁴ In the latter case, goods are presumed to conform if they are fit for normal purpose and have the qualities common for goods of the same type; they comply with expectations concerning this type of goods based on public statements by the seller, producer or his representative, as well as labeling or advertising.¹¹⁵

¹⁰⁹ Article 75a(2) of the Consolidated Act on Sale of Goods.

¹¹⁰ Article 76(1) of the Consolidated Act on Sale of Goods.

¹¹¹ Article 217(1),(2) sub-para. (5) of the Law of Obligations Act.

¹¹² Article 5:12 of the Consumer Protection Act.

¹¹³ CC Art.277.

¹¹⁴ Article 4(2) of the Conditions of Consumer Sales.

¹¹⁵ Article 4(3) of the Conditions of Consumer Sales.

The UNITED KINGDOM does not have an identical list of factors, but takes corresponding items into account. There is a requirement that where goods are sold with reference to a description, they must correspond with this description (limited by case-law to essential commercial characteristics which a buyer might rely upon),¹¹⁶ and by sample, for this to be relevant. The main test is that “goods must be of satisfactory quality”.¹¹⁷ There is then a list of factors that may be considered: (a) fitness for all the purposes for which goods of the kind in question are commonly supplied; (b) appearance and finish; (c) freedom from minor defects; (d) safety; and (e) durability. The satisfactory quality test does not make reference to “performance” of the goods, but can be interpreted in line with the Directive. There is also no reference to installation instructions, although, again, case-law indicates that shortcomings in installation instructions could be considered as a relevant circumstance.

dd. Time at which conformity is assessed

Article 2 para. (1) requires that goods must be in conformity with the contract when they are delivered by the seller. The majority of the member states have adopted this provision, but there are variations in some countries.

It is noteworthy that GREEK law assesses whether goods are in conformity with the contract at the time risk passes from seller to buyer.¹¹⁸ In POLAND, the relevant time is the time of delivery (i.e., the time of transfer of possession from the seller to the buyer), rather than the time of concluding the contract,¹¹⁹ as is the case in LUXEMBOURG.¹²⁰ The position is similar in the UNITED KINGDOM, although the law was amended to equate passing of risk with the time of delivery.¹²¹ In HUNGARY, the “time of performance” is regarded as the relevant time.¹²²

¹¹⁶ Section 13(1) of the Sale of Goods Act 1979.

¹¹⁷ Section 14(2) of the Sale of Goods Act 1979.

¹¹⁸ CC Art. 522.

¹¹⁹ Article 7 Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

¹²⁰ Article 4, sent 2-3 of the Consumer Sales Act.

¹²¹ Section 20(4) and 32(4) of the Sale of Goods Act 1979.

¹²² CC Art. 305(1).

b. Public Statements and exclusions (Art. 2 para. (2) lit. (d) and Art. 2 para. (4))

A particular factor in the Directive is that public statements regarding the good can be taken into account in assessing their conformity, although the seller can escape liability in a number of defined circumstances.

This provision was new to many member states. Both the main requirement and the seller's defences have been transposed in accordance with the Directive in most of the member states (although not in the CZECH REPUBLIC). In respect of Germany, which has transposed this provision as required, it should be noted that "public statements" are ranking lower in priority than other factors in establishing conformity with the contract. In the UNITED KINGDOM, these provisions were transposed by making public statements a "relevant circumstance" for considering whether goods meet the statutory standard of "satisfactory quality".

Article 2 para. (4) provides for three circumstances when a seller will not be liable for public statements made by another person in the distribution chain. This has been implemented by most member states.¹²³ The implementation of Art. 2(2)(d) and Art. 2(4) in the CZECH REPUBLIC seems to be only partial, and none of the exclusions from Art. 2(4) appear in the legislation.¹²⁴

Those which have not transposed Art. 2(4) are LATVIA, LITHUANIA, PORTUGAL and SLOVENIA. In LITHUANIA, the justification for this appears to be that it increases consumer protection. Similarly, SLOVENIAN law does not provide an express rule by which the seller could evade liability in these circumstances.

In LUXEMBOURG, only the first situation (seller could not reasonably have been aware of the statement) is mentioned. The two other factors (seller not bound by public statements if, by the time of conclusion of the contract the statement had been corrected, or the decision to buy the consumer goods could not have been influenced by the statement), are not mentioned.¹²⁵ The same is true of FRANCE¹²⁶ and GREECE.¹²⁷ In contrast, DENMARK imposes liability of the

¹²³ In SLOVAKIA, this appears to be contained in Art.8 para 4 of the Act on Advertising.

¹²⁴ CC Art. 616(2).

¹²⁵ Article 3, sent. 3 of the Consumer Sales Act.

¹²⁶ Article L. 211-6 of the Code de la Consommation.

¹²⁷ CC Art. 535(4).

seller even when he did not know and could not reasonably have been aware of the statement.¹²⁸ In ITALY, the exclusions may be narrower than under the Directive, because the consumer must have been aware that a public statement had been corrected at the time the contract was made.¹²⁹ In BULGARIA, the third situation in which the seller shall not be bound by public statements (the consumer could not have been influenced by the statements) is transposed slightly differently. Rather than considering whether the consumer's decision to buy the good could not possibly have been influenced by the statement, it is necessary to show that the decision was actually not so influenced.¹³⁰ This raises the burden of proof for the seller in this regard.

c. Exclusion of matters of which consumer is aware (Art. 2 para. (3))

Again, this has been transposed as required in many member states (BELGIUM, BULGARIA,¹³¹ CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY,¹³² GREECE, HUNGARY, IRELAND, ITALY, LATVIA, MALTA, NETHERLANDS, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN, and SWEDEN¹³³).

This provision has not been transposed expressly in AUSTRIA. In respect of manufacturing contracts, it is provided that where the customer has provided materials that are clearly unsuitable, or has given instructions that are clearly incorrect, the supplier is not liable for the damage provided that he has warned the customer about this problem.¹³⁴ Moreover, the existing provision in CC Art. 928 excludes "obvious shortcomings"¹³⁵ from the scope of the seller's liability, except where there has been fraudulent concealment of the shortcoming, or an express confirmation that this shortcoming is not present in the goods. It has been argued that this should extend to matters known to the buyer before conclusion of the contract.¹³⁶

¹²⁸ Article 76(1) of the Consolidated Act on Sale of Goods.

¹²⁹ Article 129(4) of the Consumer Code.

¹³⁰ Article 107 no.(3) of the Law on Consumer Protection.

¹³¹ Article 109 of the Law on Consumer Protection.

¹³² German law may have a shortcoming: if Art. 2 para. (3) is intended to be applied objectively, then CC Art. 442 para. (1), referring to "unawareness caused by gross negligence" is inadequate for utilising a subjective test. This may, however, not lead to substantial differences in practice.

¹³³ Article 17(1), Art. 19(3) Consumer Purchase Act.

¹³⁴ CC Art. 1168a, sent. 3.

¹³⁵ "Mängel, die in die Augen fallen" – transl. roughly as "faults apparent to the naked eye".

¹³⁶ M.Gruber, "Die Umsetzung der Verbrauchsgüterkaufrichtlinie in Österreich", in M.Schermaier (ed.), *Verbraucherkauf in Europa* (Munich: Sellier, 2003), p.154.

This provision does not appear to be less favorable to a consumer than the Directive, and so this approach seems unproblematic. In the CZECH REPUBLIC, there is no mention of matters of which the consumer “could not reasonably be unaware”, and the final sentence of this paragraph is transposed by stating that the lack of conformity was caused by the consumer.¹³⁷ In HUNGARY, if a recipient of goods (including a consumer) has accepted performance whilst aware of a breach, a subsequent claim based on that breach is precluded except where the right to do so has been expressly retained.¹³⁸

In LITHUANIA, the reference to a lack of conformity having its origin in materials supplied by consumer has been omitted.¹³⁹ A more restricted exclusion operates in the UNITED KINGDOM, where matters, which would mean that goods are not of “satisfactory quality”,¹⁴⁰ are not considered if the (consumer) buyer inspected the goods and that inspection ought to have revealed the problem, or which were specifically drawn to the buyer’s attention before the contract was made. This approach is more favourable towards a consumer. It also only applies with regard to “satisfactory quality”, but does not apply to compliance with description or sample, nor fitness for particular purposes.

d. Provision on goods to be installed (Art. 2 para. (5))

Under the Directive, the installation of goods is part of a contract of sale and incorrect installation can mean that goods are not in conformity with the contract.

Most member states have transposed these requirements in accordance with the Directive (AUSTRIA, BELGIUM, BULGARIA, CZECH REPUBLIC, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, NETHERLANDS, POLAND, PORTUGAL, ROMANIA and SWEDEN). In LATVIA,¹⁴¹ there is an additional condition regarding installation instructions: goods will also be presumed not to be in conformity with the contract where the installation instructions have not been provided in

¹³⁷ CC Art.616(3).

¹³⁸ CC Art.316.

¹³⁹ Article 6.327(2) of the Civil Code.

¹⁴⁰ The “satisfactory quality” criterion is only one of the aspects of conformity, broadly corresponding to Art 2.2(d).

¹⁴¹ Article 28(5) Consumer Rights Protection Act.

the official language (i.e., Latvian) and the installation by the consumer has rendered the goods non-conforming. The same is the case in CYPRUS.

LITHUANIA has not introduced a specific rule in this regard, nor have SLOVENIA AND SLOVAKIA. In SLOVENIA, it is possible that the Consumer Protection Act will also cover this situation under the provisions dealing with services, but the situation is insufficiently clear to confirm that this would be so. SPAIN does not include part of Art. 2(5) (product intended to be installed by consumer). In GREECE, incorrect installation itself can give rise to liability on the seller, even if this has not caused a non-conformity.¹⁴² The UNITED KINGDOM does not refer to inadequate installation instructions (although it is possible that case-law could take this into account when applying the “satisfactory quality” test; there is case-law in respect of safety guidelines and user instructions), and incorrect installation is dealt with under sec. 13 of the Supply of Goods and Services Act 1982, requiring the seller or his representative to have acted without reasonable care before a consumer is entitled to complain of a lack of conformity.

2. Consumers’ rights in cases of non-conformity

a. Consumers’ rights in cases of non-conformity in general (Art. 3)

Article 3 states the remedies which are to be available to a consumer where there is a lack of conformity in the goods. Initially, the consumer’s choice is between repair and replacement; however, where these are impossible, or cannot be provided within a reasonable time or without significant inconvenience to a consumer, it is possible to ask for price reduction or (in the case of non-minor lacks of conformity) rescission of the contract.

aa. Implementation of the remedies

All the member states now provide for the remedies in Art. 3 of the Directive. That provision has been transposed as required in many member states, although in some countries, there are variations. These are highlighted below.

¹⁴² CC Art. 536(1).

bb. Consumer choice between remedies

Art. 3 envisages that a consumer has an initial choice only as between repair and replacement, followed by price reduction or rescission. This approach has been implemented in AUSTRIA, BELGIUM, BULGARIA,¹⁴³ CZECH REPUBLIC, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, MALTA, NETHERLANDS, POLAND, ROMANIA, SLOVAKIA, SPAIN, SWEDEN and the UNITED KINGDOM.¹⁴⁴ In both IRELAND and the UNITED KINGDOM, a consumer has the choice between invoking the remedies under the national legislation transposing Art. 3, or to rely on the remedies available under general sale of goods legislation.

A different solution was adopted in LATVIA. Here, a consumer has a choice between all 4 remedies initially; however, once 6 months from the date of concluding the contract of sale have elapsed, the hierarchy envisaged under Art. 3 of the Directive is applicable.¹⁴⁵ In GERMANY, it seems that a consumer is not able to ask for a price reduction where a repair or replacement was provided only with significant inconvenience to the consumer. GREECE does not follow the hierarchical structure of Art. 3, instead making all the remedies available alongside one another. Also, in LITHUANIA and PORTUGAL, a consumer has a free choice among all 4 remedies. Similarly, in SLOVENIA, a consumer can choose between all 4 remedies, although rescission is not available unless a seller has at least had a reasonable time to effect repair or replacement.

¹⁴³ Article 113(1) of the Law on Consumer Protection determines a period of one month as from the date the complaint was filed by the consumer to bring the goods into conformity with the contract of sale. If this is not done during this period, the consumer can choose price reduction or rescission.

¹⁴⁴ Note that in the UNITED KINGDOM, provisions to implement Art. 3 were introduced as Part 5A of the Sale of Goods Act 1979, but these operate alongside the existing rules which *int.al.* grant a consumer a right to terminate the contract if he does so within a reasonable time of delivery.

¹⁴⁵ Article 28(1)-(3) of the Consumer Rights Protection Act.

b. The “disproportionality” criterion (Art. 3 para. (3))

Article 3(3) applies a proportionality element to consider whether a particular remedy is available. It is not entirely clear whether this applies only to an assessment as between “repair” and “replacement”, or also permits a consideration of price reduction/rescission.¹⁴⁶

Most countries have transposed the requirement as per the Directive, without further clarifying the scope of this criterion (AUSTRIA, BELGIUM, BULGARIA,¹⁴⁷ CYPRUS, DENMARK, ESTONIA, FRANCE, HUNGARY, IRELAND, ITALY, MALTA, ROMANIA, SLOVAKIA, SPAIN, and SWEDEN). In CYPRUS, it may be inferred from the national legislation transposing the Directive that it applies this test only between repair and replacement.

The transposition in GERMANY applies the test only as between repair and replacement. In the CZECH REPUBLIC, the test applies only between repair and replacement, but the criteria for establishing whether a remedy is not proportionate have not been included in domestic legislation. The UNITED KINGDOM states expressly that price reduction/rescission can also be comparator remedies. In the NETHERLANDS, a different wording from Art. 3(3) has been used, which does seem to permit a broader comparison. In LUXEMBOURG, a variation to the test has been adopted, according to which a seller is obliged to bring goods into conformity with the contract unless this is impossible or disproportionate.¹⁴⁸ The consumer has the choice between repair or replacement unless one of them would cause excessive burden to the seller if compared to the other. It is not immediately clear if this is less favourable to consumers than the Directive itself. The transposition in FINLAND does not appear to use the phrase “disproportionate”, referring instead to “unreasonable costs” for the seller as a bar to requesting a particular remedy.¹⁴⁹ However, this is not a serious flaw, because “disproportionality” is defined in Art. 3(3) of the Directive in the terms adopted by the Finnish legislation, and there is consequently no substantive difference from the Directive.

¹⁴⁶ See *Twigg-Flesner*, “English Sales Law After the Implementation of Directive 99/44/EC on Consumer Sales – Back to the Drawing Board?” (2003) 1 *Gemeinschaftsprivatrecht* 12-21; cf. *Bianca*, “Artikel 3” in Grundmann & Bianca (eds.), *EU-Kaufrechtsrichtlinie: Kommentar* (Schmidt, 2002).

¹⁴⁷ According to grammatical and logical interpretation it can be argued that the proportionality element only applies to the choice between repair and replacement and that it is irrelevant for price reduction and rescission.

¹⁴⁸ Article 5(2) of the Consumer Sales Act.

¹⁴⁹ Chapter 5 § 18 of the Consumer Protection Act.

POLAND also mentions only the criteria for establishing disproportionality, rather than the term itself.

No express transposition was made in LATVIA and LITHUANIA. PORTUGAL and SLOVENIA do not include the proportionality test, either. There is no transposition in GREECE (following from its decision not to arrange the remedies in a hierarchical order), although this criterion can be inferred from CC Art. 540(1)(1).¹⁵⁰

ba. Impossibility

The Member States have generally included the “impossibility” criterion in their domestic legislation. ROMANIA has added a provision to its law that a “remedy shall be deemed to be impossible if the seller does not have an identical product for replacement”.¹⁵¹ However, in SLOVENIA, the right to either remedy is not restricted at all on the basis of “impossibility”.

c. “Free of charge” (Art. 3 para. (4))

A remedy has to be provided free of charge, and the seller has to bear the cost of postage, labour and materials, as well as other relevant costs. This definition has been transposed using the same criteria as the Directive in AUSTRIA, BELGIUM, BULGARIA, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, MALTA, POLAND, PORTUGAL, ROMANIA, SLOVAKIA,¹⁵² SPAIN, SWEDEN,¹⁵³ and UNITED KINGDOM. No express transposition was made in LITHUANIA.

In the CZECH REPUBLIC, the reference is only to “free of charge”, without further elaboration.¹⁵⁴ THE NETHERLANDS do not spell out the matters covered by “free of charge”. The same is the case in GREECE, where the law uses the phrase “without any cost to the consumer” instead.¹⁵⁵ FRANCE states that a remedy must be provided “without any cost to the

¹⁵⁰ See *Aitiologiki Ekthesi* II, 5, Mpexlivanis, *Dikaio Epixeiriseon kai Etairion* 2003, p 625, Fn. 43.

¹⁵¹ Article 11(3) of Law 449/2003 regarding the sale of products and associated guarantees.

¹⁵² CC Art. 509(1) and Art. 599(2).

¹⁵³ Article 26(3) of the Consumer Sales Act.

¹⁵⁴ CC Art. 622(1).

¹⁵⁵ CC Art. 540.

buyer”.¹⁵⁶ In SLOVENIA, the rule is that the consumer is entitled to reimbursement of his costs.¹⁵⁷ In LUXEMBOURG, it is also only stated that the remedy must be provided without charge, but the specific elements from Art. 3(4) of the Directive are not transposed.¹⁵⁸ Similarly in LATVIA, where it is provided as an alternative that the consumer can be compensated for the costs incurred in eliminating the non-conformity.

A controversial issue exists in GERMANY and has become the subject of a preliminary reference to the European Court of Justice under Art. 234 EC. German law provides that a seller is entitled to an allowance for any period of use of the goods which a consumer has had before a remedy was provided (“Nutzungsschädigung”).¹⁵⁹ Recital 15 admits the possibility of this practice in the case of rescission (see ‘f’, below). German law, however, applies this also where a consumer is entitled to a replacement. The BGH [Bundesgerichtshof] doubts whether this provision is compatible with Art. 3(4) of the Directive, according to which a remedy should be provided free of charge and has referred this question to the ECJ for a preliminary ruling.¹⁶⁰

d. Time limits on seller’s liability

aa. Two-year time period

Article 5 para. (1) of the Directive specifies that a seller is liable for a lack of conformity which arises within two years of delivery. This has been transposed as per the Directive in AUSTRIA, BELGIUM, BULGARIA, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, ITALY, LATVIA, LITHUANIA,¹⁶¹ LUXEMBOURG, MALTA, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, and SWEDEN.

¹⁵⁶ Article L. 211-11 of the Consumer Code.

¹⁵⁷ Article 37c(2) of the Consumer Protection Act.

¹⁵⁸ Article 5(2) of the Consumer Sales Act.

¹⁵⁹ CC Art. 439(4), referring to CC Art.346-348.

¹⁶⁰ BGH [Bundesgerichtshof], decision (Beschluss) of 16 August 2006, VIII ZR 200/05, NJW 2006, 3200.

¹⁶¹ Except where a guaranteed quality term is specified.

However, in CZECH law, there is a variation depending on the type of goods being sold: for consumer goods, it is 24 months; for groceries, it is 8 days; for feedstuff, it is three weeks, and for animals it is 6 weeks.¹⁶²

Not all member states have introduced this particular provision. Those who have introduced different rules are FINLAND, IRELAND and the UNITED KINGDOM. Both IRELAND and the UNITED KINGDOM simply rely on the general limitation period for commencing a legal action for a breach of contract.

BELGIUM has introduced the rule, but there is an extension to this for certain types of defects (all the variations are discussed at IV.1.d, below). Moreover, on 1 September 2006, a proposal to amend the relevant Belgian legislation was presented, according to which the two-year period will start to run from the time of delivery, except where the seller has failed to inform the consumer about his legal rights. If such information is not given until later, then the two-year period will not start until this information has been provided. Belgian law would therefore impose an information obligation on the seller to ensure that consumers are adequately informed of their legal rights.

SPAIN has also introduced the two-year time period,¹⁶³ although there is also a three-year limitation (prescription) period beyond which no action can be brought.¹⁶⁴ THE NETHERLANDS have not implemented this period, although a general two-year limitation period applies (see IV.1.d, below).

bb. Option: reduced period for second-hand goods

Article 7 para. (1), sent. 2 provides that member states may permit the parties to the consumer sales contract to agree on a shortened period of liability for second-hand goods. This has been given effect to in AUSTRIA,¹⁶⁵ BELGIUM,¹⁶⁶ CZECH REPUBLIC,¹⁶⁷ CYPRUS,¹⁶⁸ ITALY,¹⁶⁹

¹⁶² CC Art. 620(1).

¹⁶³ Article 9(1) of the Law 23/2003 on consumer sales.

¹⁶⁴ Article 9(3) of the Law.

¹⁶⁵ Article 9(1), sent. 1 and 2 of the Consumer Protection Act.

¹⁶⁶ Article 1649*quater* (1) of the Act on the protection of consumers in respect of the sale of consumer goods.

¹⁶⁷ CC Art. 626(3).

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GERMANY,¹⁷⁰ HUNGARY,¹⁷¹ LUXEMBOURG,¹⁷² POLAND,¹⁷³ PORTUGAL,¹⁷⁴ ROMANIA,¹⁷⁵ SLOVAKIA,¹⁷⁶ SLOVENIA,¹⁷⁷ SPAIN,¹⁷⁸ and SWEDEN (this follows indirectly from the provision concerning the sale of goods as is, which is restricted, but where second hand goods are purchased at auction the situation is different).¹⁷⁹

MS using option in Art. 7(1)	MS not using option in Art. 7(1)
AT, BE, CZ, CY, DE, IT, HU, LU, PL, PT, RO, SK, SL, ES, SE (<i>15</i>)	BG, DK, EE, FI, FR, EL, IE, LV, LT, MT, NL, UK (<i>12</i>)

cc. Option: duty to notify lack of conformity within 2 months

Article 5 para. (2) of the Directive grants member states the option to provide that a consumer must notify a seller of a lack of conformity within a period of two months from the date on which the consumer detected this.

A majority of the member states has chosen to implement this option. They are: BULGARIA, CYPRUS, DENMARK, ESTONIA, FINLAND, HUNGARY, ITALY, LITHUANIA, MALTA, THE NETHERLANDS, POLAND, PORTUGAL, ROMANIA,¹⁸⁰ SLOVAKIA, SLOVENIA, SPAIN, and SWEDEN.¹⁸¹

In BELGIUM, there is no duty to notify a lack of conformity within the specific period, but the parties are able to specify a notification period, which cannot be less than two months, and may stipulate the consequences where the agreed notification period has not been complied with.¹⁸² Moreover, the consumer has to act within one year (even where the two-year period

¹⁶⁸ Article 13(2) of the the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law.

¹⁶⁹ Article 134(2) of the Consumer Code.

¹⁷⁰ CC Art. 475(2).

¹⁷¹ CC Article 308(4).

¹⁷² Article 6(7) of the Consumer Sales Act.

¹⁷³ Article 10.1 of the Act on specific terms and conditions of consumer sale and amendments to the Civil Code.

¹⁷⁴ Article 5(2) of the Decree Law 67/2003.

¹⁷⁵ Article 22(2) of Law 449/2003.

¹⁷⁶ CC Art. 620(2).

¹⁷⁷ Article 37b(2) of the Consumer Protection Act.

¹⁷⁸ Article 9(1), sent 2 of the Law on Guarantees in the Sale of Goods for Consumers.

¹⁷⁹ Article 17 of the Consumer Purchase Act.

¹⁸⁰ Article 17 of Law 449/2003.

¹⁸¹ Article 23 of the Consumer Purchase Act.

¹⁸² CC Art.1649 *quarter* (2).

would not have expired by then). In DENMARK, the period starts when the consumer has actually discovered the lack of conformity. In FINLAND, the consumer has to notify the trader within a reasonable time, which will be at least two months.¹⁸³ This restriction does not apply where the seller has been grossly negligent or has not acted in good faith.¹⁸⁴ This is also the case in DENMARK. In HUNGARY, a consumer needs to inform the seller within “the shortest time permitted by the prevailing circumstances”, which is deemed to have been so made if it is done within two months.¹⁸⁵ In MALTA, the period starts from the point when the consumer actually discovered the non-conformity, rather than when he should have discovered it. Furthermore, it is sufficient to demonstrate compliance with this requirement if the notification to the seller is sent by judicial letter or by registered mail. In THE NETHERLANDS, notification is required within a “due period of time” after discovering the defect, which is stated to be “timely” if made within a period of two months. However, there appears to be some flexibility beyond that period in the sense that a “due time” could be more than two months.¹⁸⁶

In POLAND, the two-month notification period has been implemented. It further provides that it is sufficient to send a written statement to this effect before this period expires.¹⁸⁷ In addition, the Minister of Economy together with the Minister of Agriculture, after obtaining an opinion of the Head of the Office for the Protection of Competition and Consumers, has the power to specify shorter periods for food products, considering their durability.¹⁸⁸ Similar to Belgium, Poland also states that a consumer can only enforce his rights if he takes action within one year of discovering the lack of conformity.¹⁸⁹

In SPAIN, no sanction flows from the fact that notification has not been made within the two months required; more significantly, there is a presumption that the consumer did notify within the two-month time period, and the burden is on the seller for demonstrating that

¹⁸³ Chapter 5 Art. 16 of the Consumer Protection Act.

¹⁸⁴ Chapter 5 Art. 16(2) of the Consumer Protection Act.

¹⁸⁵ CC Art. 307(1).

¹⁸⁶ CC Art. 7:23.

¹⁸⁷ Article 9(1) of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

¹⁸⁸ Article 9(2) of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

¹⁸⁹ Article 10.2 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

notification had, in fact, been made outside this period. In SLOVENIA, the consumer is also required to describe the defect and to enable the seller to examine the goods. In SLOVAKIA, in contrast, the consumer appears to be under an obligation to notify immediately.¹⁹⁰

Member states that have chosen not to make use of this option are AUSTRIA, CZECH REPUBLIC, FRANCE, GERMANY, GREECE, IRELAND, LATVIA, LUXEMBOURG and the UNITED KINGDOM.

MS using option re notification	MS not using option re notification
BG, CY, DK, EE, FI, HU, IT, LT, MT, NL, PL, PT, RO, SK, SL, ES, SE (<i>17</i>)	AT, BE, CZ, FR, DE, EL, IE, LV, LU, UK (<i>10</i>)

dd. Recital option: suspension of two-year period¹⁹¹

Recital 18 provides that member states may provide for a suspension of the two-year period in Article 5(1) and any corresponding domestic limitation periods for bringing an action, where the seller attempts to repair or replace non-conforming goods, or is in negotiations with a consumer over a settlement. In BELGIUM, the period is suspended during negotiations over a remedy and whilst repair/replacement is being carried out. In BULGARIA, the period is also stopped whilst the goods are repaired or replaced, or whilst negotiations for a settlement of the dispute between the seller and the consumer are in progress.¹⁹² In FRANCE, the period is suspended only when the buyer uses the extended guarantee.¹⁹³ In the CZECH REPUBLIC¹⁹⁴ and SLOVAKIA, the period between claiming a remedy and receiving conforming goods is excluded from the two-year period. In HUNGARY, the period is suspended during the time when the goods are repaired and the consumer is unable to use them.¹⁹⁵

¹⁹⁰ CC Art. 599(1).

¹⁹¹ Few national correspondents have reported that domestic law has adopted a specific rule in response to Recital 18.

¹⁹² Article 115(2) of the Law on Consumer Protection.

¹⁹³ Article L. 211-16 of the Consumer Code.

¹⁹⁴ CC Art. 627.

¹⁹⁵ CC Art. 308(3).

Under the law in MALTA, the two-year period is suspended for the duration of negotiations carried on between the trader and the consumer with a view to an amicable settlement.¹⁹⁶ SPAIN has also introduced provisions to this effect, and the period is suspended where the consumer has asked for repair (from return of goods to seller until redelivery to buyer) or replacement (from requesting this until arrival of replacement goods).¹⁹⁷

In ROMANIA, no provision has been introduced. In LATVIA, no provision has been introduced, although the practice is that the period is extended proportionally when a problem arises. In ESTONIA, there is no provision on the suspension of the two-year period; there is, however, a provision suspending the period during which a guarantee is applicable whilst a remedy is being sought under the guarantee.¹⁹⁸

ee. Presumption of non-conformity during first 6 months

Article 5(3) introduces a presumption of non-conformity at the time of delivery where a latent non-conformity manifests itself within 6 months of delivery. Most member states have transposed this rule correctly (AUSTRIA, BELGIUM,¹⁹⁹ BULGARIA, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, ITALY, LATVIA, LUXEMBOURG, MALTA, NETHERLANDS, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN and the UNITED KINGDOM).

No transposition was undertaken in LITHUANIA. In FINLAND, the 6-month period starts with the passing of risk, rather than the time of delivery.²⁰⁰ As risk generally does not pass until delivery, this is not problematic in most cases; however, a delay in delivery for reasons attributable to a consumer may result in risk passing to him if the seller has done everything necessary to be in a position to effect delivery.²⁰¹

¹⁹⁶ Article 78 of the Consumer Affairs Act.

¹⁹⁷ Note additional rules on additional periods during which new lacks of conformity may appear, as set out at IV.1.c, below.

¹⁹⁸ Article 230(1) of the Law of Obligations Act.

¹⁹⁹ Note that the proposal of 1 September 2006 would delay the start of this 6 month period if the consumer was not given information about it at the time of delivery until such information has been provided.

²⁰⁰ Chapter 5 Art. 15(2) of the Consumer Protection Act.

²⁰¹ Chapter 5 Art. 16 of the Consumer Protection Act.

In LUXEMBOURG, POLAND and SLOVENIA, there is no mention of the restriction in Art. 5(3) that the presumption does not apply where this would be incompatible with the nature of the goods or the nature of the lack of conformity. In the UNITED KINGDOM, the presumption only applies to consumer contracts and only in respect of the new remedies introduced in Part 5A of the Sale of Goods Act 1979²⁰² (implementing Art. 3). For the existing remedies, which remain available, the presumption does not exist and the burden of proof falls on the consumer even during this initial 6-month period. A similar problem exists in IRELAND, where the existing Sale of Goods legislation remains in force alongside the implementation of the Directive.

The approach adopted in PORTUGAL is very generous towards consumers: here, the reversed burden of proof applies throughout the two-year period from delivery, rather than merely the 6-month period envisaged under the Directive.²⁰³

In GERMANY, there have been several decisions by the Federal Supreme Court on the application of the reversed burden of proof. Thus, it has been held that this reversal applies even where a lack of conformity was identifiable at the time of purchase, except where it was so obvious that a consumer not knowledgeable in respect of the particular subject matter would have discovered the defect.²⁰⁴ Moreover, the fact that a third part has installed the goods does not negate the applicability of the reversed burden.²⁰⁵

e. No rescission for ‘minor’ lack of conformity (Art. 3 para. (6))

This provision has been implemented in most member states, although some member states have chosen not to transpose Art. 3(6) of the Directive (no rescission where lack of conformity is minor). They are CZECH REPUBLIC, ESTONIA, PORTUGAL, SLOVENIA, and the UNITED KINGDOM. The effect of this is that in these countries, a consumer could rescind the contract where the seller has not repaired/replaced the goods even where the lack of conformity is minor. However, in Slovenia, according to Art. 458(3) Obligations Act, a minor

²⁰² And Part 1B of the Supply of Goods and Services Act 1982.

²⁰³ Article 3(2) of the Decree Law 67/2003.

²⁰⁴ BGH (DE) VIII ZR 363/04, 14 September 2005.

²⁰⁵ BGH (DE) VIII ZR 21/04, 22 November 2004.

defect is not regarded as a defect at all and the relevant legislation would also not be triggered. The effect is therefore akin to that pursued by Art. 3(6). In the United Kingdom, existing provisions of the Sale of Goods Act 1979 had preserved a right of termination in cases of minor defects where the buyer is a consumer,²⁰⁶ and the government adhered to its policy of not reducing existing levels of consumer protection by not transposing Art. 3(6). In contrast, IRELAND excludes the right of rescission under the national legislation implementing the Directive where the non-conformity is minor, but the consumer retains a right of termination under general sales law, which extends to a minor lack of conformity.

In DENMARK, the general rule is that the consumer has no right of rescission if the lack of conformity is minor.²⁰⁷ An exception is made if the seller does not complete a repair or replacement within reasonable time, free of charge and without any significant inconvenience for the consumer; in such a case the consumer is entitled to rescind the contract even if the lack of conformity is minor.²⁰⁸

The law in LATVIA, provides that a non-conformity will be deemed to be minor if this has been confirmed by an expert-examination organized according to the procedures specified in regulatory enactments.

The question of when a non-conformity is minor has already been considered by the courts in several of the member states. Thus, the AUSTRIAN Supreme Court has held that the accumulation of several defects - which would be minor if looked at individually – means that the lack of conformity is no longer ‘minor’.²⁰⁹ A further decision by that court stated that in order to consider whether a non-conformity is ‘minor’ it was not just the severity of the defect itself but also the proportionality of the consequences of rescinding the contract compared to the lack of conformity that had to be considered.²¹⁰

²⁰⁶ Section 15A of the Sale of Goods Act 1979 – no right to reject and terminate where breach is minor and buyer is not dealing as a consumer.

²⁰⁷ Article 78(1) of the Consolidated Act on Sales of Goods.

²⁰⁸ Article 78(4) of the Consolidated Act on Sales of Goods.

²⁰⁹ OGH [Oberster Gerichtshof; AUSTRIA], 7 Ob 194/05p, 28 September 2005.

²¹⁰ OGH [Oberster Gerichtshof; AUSTRIA], 8 Ob 63/05f, 21 July 2005.

In GERMANY, it has been held that, in the case of a used car, a lack of conformity would be regarded as minor if the cost of removing the lack would be less than 3% of the purchase price.²¹¹ Furthermore, it has been held that where a seller has deliberately concealed the defect, it will also generally not be regarded as minor.²¹²

f. Rescission and period-of-use allowance²¹³

Recital 15 states that member states may provide that where a consumer is entitled to a reimbursement of the purchase price, a deduction may be made to take account of the use the consumer has had of the goods since delivery to him. This has been transposed in a number of member states, including GERMANY, ITALY,²¹⁴ and the UNITED KINGDOM (only in respect of rescission under Part 5A).

In GERMANY, the literature has debated an apparent conflict between the fact that a remedy has to be provided free-of-charge and that it is possible to make a deduction to take account of the use the consumer has had of the goods. This deduction may also be made where the consumer is given a replacement, which effectively means that the consumer has to make a payment in addition to the contract price when non-conforming goods are replaced (see also comments regarding Germany at ‘c’ above).²¹⁵

In ESTONIA, where a seller provides a replacement, the consumer (and any other buyer) is required to return the non-conforming goods to the seller.²¹⁶ This is made subject to the general rules in the Law of Obligations Act regarding the return of items provided under the contract in the case of withdrawal.²¹⁷ Perhaps of only significance in this context is Art. 189 para. (4), which provides that “if a thing subject to return or delivery has deteriorated and such deterioration is not the result of the regular use of the thing, the decrease in the value of the thing shall be compensated for”. This suggests that a consumer is not required to pay a

²¹¹ OLG Düsseldorf ZGS 04, 197.

²¹² BGH [Bundesgerichtshof] NJW 2006, 1960.

²¹³ Not all national correspondents have reported whether domestic law has or has not adopted a specific rule in response to Recital 18.

²¹⁴ Article 132(8) of the Consumer Code.

²¹⁵ CC § 439(4).

²¹⁶ Article 222(3) of the Law of Obligations Act.

²¹⁷ Article 189-191 of the Law of Obligations Act.

period-of-use allowance to the seller, but if there has been deterioration above and beyond that to be expected from normal use, the consumer may have to compensate the seller. In BULGARIA and ROMANIA, a specific provision does not exist. However, the general rules in the civil code apply.

g. Calculation of price reduction²¹⁸

A difficult question that has arisen in the wake of the Directive is which method of calculation should be applied to price reduction. It seems that there are various approaches, which may lead to different results in practice (although in monetary terms, these differences will generally be small). If the CISG were to serve as a model, then the so-called ‘proportionate reduction’ of the purchase price model would apply. According to this approach, the price would be reduced by the same ratio as the value of the goods as delivered is in relation to the value they would have had if they had been in conformity with the contract. A simpler calculation would be to reduce the price according to the difference between the value of the goods as delivered and the value they would have had if there had been no lack of conformity.

In GERMANY, the price reduction is calculated by multiplying the value of the non-conforming goods and the price, and dividing the result by the value which conforming goods would have had. The NETHERLANDS also apply a proportionate reduction of the purchase price, as does HUNGARY.²¹⁹ SLOVENIA also applies the proportionate reduction approach; the relevant moment for comparison is the time of conclusion of the contract (the ratio is the relation between value of the goods without defect and goods with defect at the time of conclusion). SPAIN is a further country using proportionate price reduction.²²⁰

Many countries do not provide specific rules (these include MALTA, UNITED KINGDOM, ROMANIA²²¹, BULGARIA).

²¹⁸ Only limited information about this issue was available at the time of writing.

²¹⁹ CC Art. 306(1)(b).

²²⁰ Article 8 of the Law 23/2003 on consumer sales.

²²¹ The calculation of price reduction therefore shall rest upon the relevant public authority.

3. Guarantees

The provisions on guarantees in Art. 6 require that guarantees must be legally binding, that certain information is provided, and that guarantees remain binding even where the rules in Art. 6 have not been complied with.

These provisions have generally been implemented in identical or very similar format in all the member states. Guarantees generally take effect as a form of contractual obligation. No transposition of Art. 6(2)-(5) was undertaken in LITHUANIA. In BULGARIA, Art. 6(3) has been transposed with the slight deviation that the consumer has to be provided with the guarantee in writing. This obligation is not limited to cases where the consumer requests the guarantee in this particular form.²²²

MALTESE law goes beyond the requirements of Art. 6 by providing further substantive rules on guarantees.²²³ HUNGARY and SLOVENIA continue to use mandatory guarantees (see below, IV.1.e). Slovenian law does not provide direct transposition measures for Art. 6(1), but the binding nature of a voluntary guarantee (as opposed to the mandatory guarantees) is covered by existing legislation.²²⁴ Voluntary guarantees have to be in writing, and must contain information about the name and place of business of the seller/producer, the guarantee statement, the minimum duration of the guarantee.²²⁵ The requirement to include a reference to the consumer's legal rights is missing, which can cause problems because of the existence of mandatory guarantees. In respect of the consumer's remedies under a guarantee, the hierarchy of consumer's remedies under a guarantee resembles that under the Directive: first repair and replacement, then (if the latter are not effected within reasonable time), rescission or price reduction. There is also a right to damages.

The UNITED KINGDOM has transposed most aspects of Art. 6 in new legislation, except the first indent of Art. 6(2), on which there is already longstanding legislation which makes it a criminal offence to fail to mention a consumer's legal right under sale of goods legislation.²²⁶

²²² Article 118 of the Law on Consumer Protection.

²²³ See section IV.1.e, below.

²²⁴ See by Art. 481 of the Obligations Code and Art. 15b-21 of the Consumer Protection Act.

²²⁵ Article 18 of the Consumer Protection Act.

²²⁶ Article 4-5 of the Consumer Transactions (Restrictions on Statements) Order 1976.

In respect of guarantees given by a seller, the law in FINLAND provides that a seller will not be liable if the fault was the result of an accident, or the inappropriate handling of the goods or another circumstance attributable to the buyer.²²⁷

Article 6 para. (4) permits member states to require that guarantees are provided in a particular language. This option has not been exercised by AUSTRIA, CZECH REPUBLIC, FINLAND, FRANCE, GERMANY, IRELAND, LATVIA, NETHERLANDS (believing this provision to be “too complicated”), POLAND, ROMANIA and SLOVAKIA.

It has been implemented in BULGARIA (Bulgarian),²²⁸ CYPRUS (official language, provided that also an official language of the EU), DENMARK (Danish), ESTONIA, GREECE (Greek) HUNGARY (Hungarian), ITALY (Italian), LUXEMBOURG (choice between French and German), MALTA (one of the official languages, i.e., English or Maltese), PORTUGAL (Portuguese), SLOVENIA (Slovenian), SPAIN (at least Spanish) and the UNITED KINGDOM (English). LITHUANIA has not transposed this provision, relying instead on its general law requiring all commercial documents to be in Lithuanian. SWEDEN has not made use of the option in Art. 6 (4).²²⁹ In BELGIUM, a rule applies according to which the language of the region where goods marketed must be used in guarantee documents, as well as labeling.²³⁰ A similar situation arises in POLAND.²³¹ In ITALY, the law provides additionally that the font-size of the Italian text must not be smaller than the font size of the text of any other language.²³²

Option on language used	Option on language not used	Other language rule applicable
BE, BG, CY, DK, EE, EL,	AT, CZ, FI, FR, DE, IE,	LT, PL (2)

²²⁷ Chapter 5 Art. 15a of the Consumer Protection Act.

²²⁸ In the law there is no language requirement for the guarantee. It is only required that the content shall be clear and comprehensible. But it is a general rule that the seller shall give the consumer information on the product and if this is in writing it shall be in Bulgarian.

²²⁹ During the implementation process in Sweden it was, however, held by the Government that a requirement to provide guarantees in a particular language (i.e. Swedish) already followed from Art. 6 (2) ("plain intelligible language").

²³⁰ Article 13 of the Act on trade practices and consumer information and protection.

²³¹ It should be noted that although no express requirement for guarantees to be provided in the Polish language is provided in the Act on detailed terms and conditions of consumer sales and on the amendment of the Civil Code., according to Article 3 para. (1) of the Act the seller is obliged to provide the buyer with the information needed to correctly and fully use the product. This information should be clear, understandable and unambiguous, and it should be in Polish language.

²³² Article 133(4) of the Consumer Code.

HU, IT, LU, MT, PT, SL, ES, UK (14)	LV, NL, RO, SK, SE (11)	
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Article 6 para. (5) has not been transposed in SPAIN. In the UNITED KINGDOM, special enforcement powers have been given to the Office of Fair Trading and Weights and Measures Authorities for a failure by a person giving a guarantee to comply with the rules on guarantees in Regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002 (implementing Article 6).²³³ In AUSTRIA, a failure to comply with the rules on guarantees can give rise to a claim for damages.

4. The Right of redress

Art. 4 envisages that a final seller can in turn bring a claim against the person or persons liable in the contractual chain. This may either require the final seller to bring a claim against his immediate contractual supplier, or it might permit the seller to claim directly against the person liable (i.e., responsible for the defect).

Steps to include a specific provision to reflect the requirements of Art. 4 where taken in CYPRUS, ESTONIA, FINLAND, GREECE, FRANCE, HUNGARY, ITALY, LATVIA, MALTA,²³⁴ ROMANIA²³⁵ and POLAND.

In FRANCE, general contract law should apply to these claims (“selon les principes du code civil”),²³⁶ and it is up to the courts to develop the circumstances in which such a claim should succeed. In FINLAND, the final seller has a claim against a business at an earlier level in the supply chain. This is subject to a number of exclusions: (i) the defect is the result of circumstances which arose after the earlier business had already supplied the goods; (ii) the final seller bases his claim on a statement made by someone other than the business; or (iii) an amount exceeding the price reduction/refund which the final seller could have claimed from the business on the same grounds.²³⁷

²³³ Regulation 15(6)/(7) of the Sale and Supply of Goods to Consumers Regulations 2002.

²³⁴ Article 77 of the Consumer Affairs Act.

²³⁵ Article 15 of Law 449/2003.

²³⁶ Article L. 211-14 of the Consumer Code.

²³⁷ Chapter 5 Art. 31 of the Consumer Protection Act.

In BULGARIA, the final seller can claim damages either against the contracting party who caused the non-conformity or directly against the producer, if the producer is responsible for the non-conformity of the goods.²³⁸ In ITALY, it seems that an action may be brought directly against the person responsible, although this is subject to a time-limit of one year from providing a remedy to the consumer. In MALTA, the final seller normally has to exercise his right of action within 6 months.²³⁹ In the NETHERLANDS, a seller has a claim against the immediately previous seller. It is possible to claim compensation, except where the claimant was aware of shortcomings in the goods. These rights cannot be excluded. In PORTUGAL, a claim must be brought within 5 years of supply, and also no later than two months after providing a remedy to the consumer. A previous supplier will not be liable for matters, which only arose after the goods had been supplied to the seller. In SPAIN, the final seller must take action within one year from completing the remedy for the consumer and can claim against the person actually responsible for the lack of conformity. It should be noted that this course of action is similarly open to a producer (there is direct producer liability in Spain), who might claim against a seller if the latter is actually responsible for the non-conformity.

Many member states take the view that a claim should follow generally applicable contractual principles: AUSTRIA, BELGIUM, CZECH REPUBLIC, CYPRUS, DENMARK, IRELAND, LITHUANIA, SLOVENIA and UNITED KINGDOM. Some of these (Czech Republic, Denmark, Ireland, Lithuania, Slovenia, Sweden, United Kingdom) have therefore taken no steps to transpose this provision.

In AUSTRIA, a claim by a final seller or intermediary has to be brought within two months of providing a remedy towards the consumer/subsequent buyer, and is limited to the value of the purchase price. There is an absolute limitation period of 5 years. In BELGIUM, any terms restricting the liability towards the seller who is liable to a consumer for a lack of conformity resulting from an act/omission by a previous seller in the contractual chain, are ineffective in relation to the consumer.²⁴⁰ In GERMANY, the final seller has a claim against his supplier for

²³⁸ Article 116 of the Law on Consumer Protection.

²³⁹ CC Art. 1431.

²⁴⁰ CC Art. 1649 *sexies*.

compensation, although this provision is restricted to “new goods”, rather than all the consumer goods subject to the Directive.

In IRELAND and the UNITED KINGDOM, where no specific implementation of this provision was made, the claim may follow the contractual chain, but there are difficulties with this approach: the ground which may have given rise to the final seller’s liability towards the consumer may not be available to the seller in bringing a claim against his contractual supplier, and the seller may therefore be left without a basis of claim. Moreover, reasonable exclusion/limitation clauses could further restrict the seller’s attempt to obtain redress.

LITHUANIA also did not expressly transpose this rule, but general rules of civil law apply. There also does not appear to be a clear rule for SLOVAKIA. Nothing was done to implement this rule in SLOVENIA.

5. Mandatory nature of the provisions

Article 7 para. (1) states that any contract term excluding or restricting a consumer’s rights under this Directive before a lack of conformity is drawn to the seller’s attention will be ineffective. All the member states, except LATVIA, have adopted provisions giving effect to this provision, or rely on existing provisions, which have this effect.

Moreover, Article 7(2) makes the provisions of this Directive mandatory, i.e., the choice of the law of a non-EU member state must not deprive consumers of the protection under this Directive. This has been given effect in most member states, but there are some variations in respect of this provision. Thus, in CYPRUS, a proviso has been added according to which the choice of a non-member state law will only then be void if that law provides a lower level of protection than under the law implementing the Directive, and/or the consumer had, at the time of the conclusion of the contract, his habitual residence in Cyprus or another member state and the contract was concluded or performed in Cyprus or another member state.²⁴¹ In GREECE, if a case involving a sale of goods to consumers is brought before a Greek court, Greek provisions must be applied irrespective of any choice of law clause if Greek law would

²⁴¹ Article 14 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law of 2000.

provide a higher level of protection.²⁴² In BULGARIA, a contract clause which states that the law of a non-member state is applicable and which thereby prevents the Law on Consumer Protection from being applied, is void, irrespective of whether the chosen law would grant the consumer the protection required by Directive 99/44.

In a number of countries, no specific steps towards implementing this provision have been taken (FINLAND, LATVIA, LITHUANIA, and SLOVENIA), although it seems that there are equivalent rules already in place coming to a similar result.

The only country in respect of which there are serious shortcomings is the UNITED KINGDOM. It relies on existing provisions in the Unfair Contract Terms Act 1977,²⁴³ but these only have the effect that this Act will apply notwithstanding a choice of law clause. The Act only prevents the use of a choice of law clause to evade its application. Consequently, a choice-of-law clause selecting a non-Member State law would render ineffective a term seeking to exclude the controls under the Unfair Contract Terms Act. However, the same clause *would* have the effect of excluding the legislation implementing the Directive. UK law therefore does not ensure the application of the legislation implementing the Directive where a non-EU law is chosen. Moreover, even this provision does not apply where the contract is an international supply contract (i.e., where goods to be carried across borders; or offer & acceptance occur in different countries; or goods to be delivered to a state other than where offer and acceptance took place).

IV. Use of the minimum harmonisation clause (Art. 8 para. (2))

1. Higher level of protection for consumers

Some member states have relied on Art. 8(2) in order to retain existing rules which are more generous towards consumers than those in the Directive (CYPRUS, DENMARK, FRANCE, HUNGARY, UNITED KINGDOM). In GERMANY, the implementation of the Directive initiate an extensive reform of the entire law of obligations (“Schuldrechtsreform”), and the conformity requirement is applicable to all contracts of sale. Other provisions introduced to comply with

²⁴² Article 5(5), sent 3 of the Law 2251/1994.

²⁴³ Section 26 and 27 of the Unfair Contract Terms Act 1977.

the Directive also extend to other contracts, which may result in a general increase of the level of protection outside the field of consumer sales, although this may depend on the extent to which the provisions are interpreted in accordance with the Directive in a non-consumer case. In IRELAND, the consumer can rely on the rules implementing the Directive as well as other legislation applicable to the sale of goods; it is possible that existing rules may provide better protection to consumers although no case-law to support this is available at the time of writing.²⁴⁴ In the United Kingdom, some changes were made in respect of contracts of hire, hire-purchase, and other contracts involving the supply of goods, but only in respect of the rules corresponding to the conformity requirement.

a. Scope of application

The AUSTRIAN legislation extends the rules in the Directive significantly beyond its scope, and applies these also to purely private (“consumer-to-consumer” sales) and business-to-business sales. Moreover, the limited definition of “goods” in Art. 1(2)(b) has not been transposed and the Austrian legislation applies not only to goods, but also to immovables.²⁴⁵ In DENMARK, the definition of “goods” has also not been restricted and it includes all the matters listed as exclusions in Art. 1(2)(b);²⁴⁶ moreover, the Danish law applies to all types of sales with the exception of real estate. HUNGARIAN law extends beyond the sale of goods and also includes the provision of services.

In PORTUGAL, immovables are included in the scope of the implementing legislation. In SLOVENIA, the objective scope of application of the legislation has not been limited to consumer goods as defined in the Directive, and the exclusions in Art. 1(2)(b) have not been transposed. SPAIN excludes only goods sold through “judicial sales”, rather than all sales “by way of execution or otherwise by authority of the Law”, and the option to exclude goods sold at public auction (Art. 1 para. (3)) is limited to “administrative auctions”.

²⁴⁴ Regulation 3(1) and 3(3) of the ECR SI 11/2003.

²⁴⁵ CC Art. 922.

²⁴⁶ Article 76(1),(3) of the Sales of Goods Act.

As discussed above, there are variations in the definition of “consumer”. This is wider e.g., in GERMANY, and can include activities during a person’s employment;²⁴⁷ also, some companies are treated as consumers in some instances.²⁴⁸ Legal persons can also be consumers in SPAIN insofar as the goods are not to be used for production and the recipient is the final user of the goods. Similarly, in the UNITED KINGDOM, a professional or a company may be treated as a consumer provided that the goods in question are of a type ordinarily supplied for private use or consumption.²⁴⁹

The ROMANIAN definition of “consumer” includes not only any natural person, but also groups of natural persons. Also, as noted above, ROMANIA uses the term “product” and has added the reference that the final destination of the product is “the individual or common consumption or use”. Romanian Law 449/2003 also excludes the assets sold following confiscations from the definition of the products. The Romanian law also offers an extended definition of the producer.

In the NETHERLANDS, the rules extend to contracts of barter,²⁵⁰ and there is an extension also to intangible goods.²⁵¹ Some provisions are available to non-consumers.²⁵² Similarly, in SLOVENIA, the rules on consumer sales are also applied to contracts for services.²⁵³

aa. Liability of the producer

Some countries extend liability towards the consumer for a lack of conformity beyond the immediate seller and impose this on the producer.

In FRANCE (‘action directe’) and BELGIUM²⁵⁴ (kwalitatieve rechten / droits qualitatifs), the courts, in case-law developed under the Civil Code, have created the possibility for a buyer to sue any previous supplier in the chain of distribution in contract, thereby permitting a

²⁴⁷ CC Art. 13.

²⁴⁸ It had been thought that those founding a new business may also be covered, but this has now been rejected by the Federal Supreme Court: BGH [Bundesgerichtshof] NJW 2005, 1273.

²⁴⁹ Section 12 of the Unfair Contract Terms Act [UK].

²⁵⁰ CC Art. 7:50.

²⁵¹ CC Art. 7:47.

²⁵² CC Art. 7:17, 7:21(1)-(3) and 7:23(2).

²⁵³ Article 38 of the Consumer Protection Act.

²⁵⁴ CC Art. 1615; Cass. 5 December 1980, *Arr. Cass.* 1980-81, 382 en *Pas.* 1981, I, 398.

consumer to sue not only the final seller, but also a distributor or producer. All the parties in the distribution chain are jointly liable towards the buyer, but there is a possibility for the seller actually sued to seek an indemnity from the party actually responsible for the loss.²⁵⁵

In PORTUGAL, liability can also be imposed on the producer or the producer's representative in the area where the consumer lives.²⁵⁶ This is subject to a range of defences, some of which appear to resemble those found in Directive 85/374.²⁵⁷ A claim against a producer is also possible in LATVIA (at the consumer's choice)²⁵⁸ and LITHUANIA. SPAIN also permits a consumer to claim directly against a producer for repair or replacement of non-conforming goods, where it would be impossible or excessively costly for the consumer to pursue the seller (but the consumer cannot claim price reduction or rescission as against the producer). Case law appears to accept a degree of joint and several liability of seller and producer.

In SLOVENIA, the producer is not liable for a non-conformity of the goods as such. However, as noted earlier, there is a parallel regime of mandatory guarantees for the "proper functioning" of so-called "technical goods". The list of the goods, which must be sold with a guarantee, is very extensive. The minimum time-limit of a guarantee is one year. Both the producer and seller are liable under such guarantees.

b. Conformity requirement

DENMARK has retained a rule requiring the seller to disclose to the consumer any information relevant to the consumer's assessment of the goods of which the seller was aware or ought to have been aware.²⁵⁹ The duty of disclosure developed in the law in FRANCE is also very strong, particularly in the consumer context. POLAND has a general rule requiring a seller to

²⁵⁵ See e.g., *S. Whittaker*, *Liability for Products*, Oxford: Oxford University Press, 2005, p. 96-98.

²⁵⁶ Article 6 Decree Law 67/2003.

²⁵⁷ These are: the non-conformity is based on statements about the goods or their fitness for purpose made by the final seller; the goods have not been used for their normal purposes; the producer did not put the goods into circulation; taking account of all the circumstances, it was not possible to identify the non-conformity before putting the goods on the market; the goods were not made for sale or with a view to financial gain; the goods were not made in the course of the producer's professional activity, or were put on the market more than 10 years previously.

²⁵⁸ Article 28(1) of the Consumer Rights Protection Law.

²⁵⁹ Correspondent's Report, page 4.

provide all the required information to a buyer;²⁶⁰ moreover, a seller must confirm in writing all the important contract terms where the contract is one sale by instalments, to order, based on a sample, involving a trial period or in excess of PLN 2,000.²⁶¹ For other sales, the consumer can ask for written confirmation of the contract.²⁶² The seller must provide user instructions in Polish, and the goods must feature information about the name of the goods, producer or importer, country of origin, safety and compliance marks, and information about relevant licenses.²⁶³ In BULGARIA, the producer has to provide instructions if the product includes dangerous ingredients, if technical knowledge is important for its use or if the consumer should be aware of special provisions. The seller shall provide information on the product before the conclusion of the contract to help the consumer decide whether to conclude the contract. If the information on the product is in writing, it shall be in Bulgarian.

Additional factors which can render goods non-conforming have been introduced or retained in several countries. In FINLAND and CYPRUS, incorrect user instructions and a failure of the goods to correspond with applicable regulations can result in the goods being deemed defective.

In the NETHERLANDS, there are specific provisions regarding the use of samples or models; where this is done, it is presumed that the goods delivered should conform with the sample, unless the seller can prove that what had been shown to the consumer was a mere indication.²⁶⁴ Moreover, it is not necessary for the seller to have “accepted” the particular purpose, but also where that purpose was foreseen in the contract.²⁶⁵

In MALTA, if the goods are of a nature which makes it likely that maintenance or the replacement of parts may be required, then the trader is required to make available for “a reasonable time” such replacement parts and appropriate repair services. The trader or

²⁶⁰ Article 2.1 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

²⁶¹ Article 2.2 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

²⁶² Article 2.3 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

²⁶³ Article 3.1 and Art. 3.5 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

²⁶⁴ CC Art 7:17(4).

²⁶⁵ CC Art 7:17(2).

producer can escape from this obligation if he expressly and in writing informs the consumer before the conclusion of the contract that he does not supply such replacement parts or repair service.²⁶⁶

In SLOVENIA, there appears to be no possibility for the seller to avoid his liability for public statements (as per Art. 2(4) of the Directive), which has the effect of increasing consumer protection, but it is assumed that this was rather the result of poor implementation. However, as noted, several other countries have also not implemented Art. 2(4) (LATVIA, LITHUANIA, PORTUGAL). Note also that LUXEMBOURG, GREECE and FRANCE only include the first of the three defences for the seller.

According to the ROMANIAN consumers' code, the consumer has the right to be entirely, correctly and precisely informed on the essential characteristics of the products and services, with a view to improving the decision of the consumer with regard to meeting his needs and ensuring that, as a consumer, he is better informed.

The UNITED KINGDOM relies on its pre-existing rules regarding the notion of conformity, although there is also a special definition of conformity for the purposes of the new remedies introduced for consumer transactions only. That definition is broader than the Directive, referring to the "implied terms in sec. 13, 14 or 15" of the Sale of Goods Act 1979 and any *express term of the contract*. This could significantly broaden the circumstances that could give rise to a lack of conformity. It also seems to be the case that in respect of particular purposes made known by the buyer, UK law is more favourable than the Directive by allowing a purpose to be made known by implication as well as expressly, and not requiring acceptance by the seller, but rather reasonable reliance on the seller's skill or judgment. There is also a more detailed list of factors to be considered in establishing the goods' conformity with the contract.

The exclusion in Art. 2(3) of the Directive is only given a limited effect in respect of the UNITED KINGDOM's requirement that goods must be of satisfactory quality, and only covers

²⁶⁶ Article 93 of the Consumer Protection Act.

matters specifically drawn to the buyer's attention. In GREECE, the exclusion applies only where the consumer had actual knowledge of the lack of conformity.

c. Remedies

GREECE did not adopt the two-stage hierarchy of remedies, and all 4 remedies are available, subject to restrictions. This is also the case in LITHUANIA and PORTUGAL.

As noted above, some member states have chosen not to transpose Art. 3(6) of the Directive, which would deprive a consumer of the right to rescind the contract where the lack of conformity is minor (CZECH REPUBLIC, ESTONIA, PORTUGAL, and the UNITED KINGDOM). In these countries, the right to rescind the contract is therefore available in a wider range of circumstances. SLOVENIA has also not implemented this provision, but under national legislation in that country, a minor defect is not regarded as a defect at all, and the end result is in line with Art. 3(6).

In most member states, it remains possible to bring a claim for damages/compensation instead of, or as well as, a claim under the provision implementing Art. 3. Thus, in AUSTRIA, a claim in damages is possible, in particular for consequential losses arising from a lack of conformity in the goods. In BELGIUM, there is a right to claim compensation for any losses suffered as a result of the defective performance of the contract.²⁶⁷ It remains unclear whether the distinction as to the scope of the compensation operated by CC Art. 1645 and 1646, based on whether the seller at the time of the sale was aware of should have been aware of the latent defect, also applies in case of consumer sales. In that regard, it must be submitted that the Belgian Court of Cassation, in presence of a professional seller, applies the presumption that he was or should have been aware of the defects.²⁶⁸ A right to damages is also stated explicitly in FRANCE.²⁶⁹ In GERMANY, damages remain available, but this depends on a degree of fault on the part of the seller.

²⁶⁷ CC Art.1649 *quinquies*.

²⁶⁸ Cass. 19 September 1997, *Arr. Cass.* 1997, 840 en *Pas.* 1997, I, 883.

²⁶⁹ Article L. 211-11 of the Consumer Code.

Compensation for losses or payment of a contractual penalty is also available in LATVIA. In MALTA, damages are available for consequential losses suffered as a result of the lack of conformity in the goods; moreover, compensation for ‘moral’ damages (capped at one hundred Maltese liri) may be claimed for any ‘pain, distress, anxiety and inconvenience’.²⁷⁰

In the CZECH REPUBLIC, the consumer is entitled to replacement of goods or termination (rescission) of the contract even if the goods are repaired, should the consumer not be able to use the goods properly due to the occurrence of defects following repair, or due to a greater number of defects.²⁷¹

In HUNGARY, a consumer is entitled to withhold a proportion of the purchase price until repair or replacement has been completed.²⁷²

In the NETHERLANDS, a consumer is also entitled to demand delivery of any missing parts.²⁷³ Furthermore, if a seller in the Netherlands fails to repair the goods within a reasonable time, the consumer can ask a third party to do so and hold the seller liable for the costs.²⁷⁴ The same is the case in FINLAND, SWEDEN and DENMARK.

SPAIN permits a consumer to opt for rescission/price reduction where *either* of repair/replacement is not available, rather than where *both* are unavailable. A failure to cure the lack of conformity using repair or replacement grants the consumer the choice of all three remaining remedies.²⁷⁵ Moreover, damages are also available as a further remedy.

SLOVENIA gives the seller 8 days within which to implement a remedy (or a written reply if there is a dispute regarding the consumer’s claim), rather than relying on the notion of “reasonable time”. In BULGARIA, the seller has to bring the goods into conformity with the contract of sale within one month as from the date the consumer complained. After this period the consumer may rescind the contract, reduce the price or claim damages.

²⁷⁰ Article 21(2) of the Consumer Protection Act.

²⁷¹ CC Art. 622(2).

²⁷² CC Art. 306(4)-(5).

²⁷³ CC Art.7:21(1).

²⁷⁴ CC Art. 7:21(6).

²⁷⁵ Article 6 and 7 of the Law 23/2003 on consumer sales.

In IRELAND and the UNITED KINGDOM, a consumer can exercise the general right available in all contracts of sale to reject goods that do not comply with the implied terms and terminate the contract, provided that the consumer is not deemed in law to have accepted the goods. In addition, the consumer can rely on the general provisions to claim damages, which includes both the loss of value in the non-conforming goods and reasonably foreseeable consequential losses.

d. Time limits

In BELGIUM, the two-year period in Art. 5 para. (2) has been introduced and applies both to identifiable and latent defects. Once the two-year period has expired, the existing Belgian rules regarding latent defects remain applicable, and these are not subject to a specific time-limit.²⁷⁶

In FINLAND, the liability of a trader is without time-limit, rather than being restricted to two years.²⁷⁷ Similarly, in the NETHERLANDS, the two-year period has not been implemented; however, the starting point for the limitation period (which is two years) is the moment of notification of the non-conformity to the seller, and not that of delivery.

HUNGARY appears to permit an extension of this time limit if there is an “excusable reason”, especially where the lack of conformity, due to its character or the nature of the goods, does not appear until later. If goods are to be used on a long-term basis (durable goods), the time period is three years.²⁷⁸

As noted above, SPAIN suspends the two-year period whilst the goods are being repaired or replaced. In addition, goods, which have been repaired/replaced, are subject to 6-month period during which a seller will be liable for any further lack of conformity.²⁷⁹

²⁷⁶ CC Art.1649 *quater* para. (5) CC.

²⁷⁷ It is argued in the preparatory works that if one for example buys a car, there could be a hidden defect that appears after two years. Nevertheless, there may be procedural rules which can limit the liability of the seller.

²⁷⁸ CC Section 308/A.

²⁷⁹ Article 6, rules c and d, re of the Art. 9 of the Law 23/2003 on consumer sales.

IRELAND and the UNITED KINGDOM have not introduced a specific time limit, and instead relies on the general limitation period for a breach of contract, which is currently 6 years.

As already noted above, PORTUGAL has extended the reversed burden of proof from the 6 months required by the Directive to the full period of two years, and is therefore significantly more generous to consumers than required.

e. Guarantees

In AUSTRIA, the transparency obligation in Art.6 has been extended to cover guarantees for which a consumer has to pay separately (so-called “extended warranties”).²⁸⁰ SPANISH law also applies to such guarantees; in addition, it imposes slightly more extensive information obligations. Additional rules on guarantees are also found in GERMANY, where there is a general provision on guarantees not limited to consumer transactions,²⁸¹ combined with no-fault liability.²⁸² In BULGARIA, the guarantee must be provided to the consumer in writing.

In ESTONIA, there is a presumption that a guarantee grants the consumer the right to repair or replacement, that a new guarantee of the same duration will be issued for goods replaced under the guarantee, and that the guarantee period is extended where items are repaired, by the time taken to effect this.

In FINLAND, the guarantee must put the consumer into a more advantageous position than under sales law. Moreover, a trader is liable for guarantees given by a producer unless this is expressly excluded at the time of sale.

HUNGARY has retained its system of binding guarantees, which were introduced by government decree and provide a statutory regulation of guarantees going beyond the rules in Art. 6 of the Directive. The prior regime of so-called “binding guarantees” continues to apply.

²⁸⁰ Article 9b of the Consumer Protection Act.

²⁸¹ CC Art. 443.

²⁸² CC Art. 276(1), sent. 1.

These are “guarantees” which must be given by law and are regulated by a Government decree.²⁸³

In LATVIA, a guarantee must provide something in addition to the Consumer Rights Protection Law and other regulatory enactments. A seller must not reduce the scope of a guarantee given by the manufacturer, and to shorten the time period of the guarantee. Moreover, it is prohibited to use the word ‘guarantee’ or other words of a similar meaning if the guarantee does not conform to the conditions of Art. 16 of the Consumer Rights Protection Law.

In MALTA, there are more detailed information obligations, including provisions requiring information about transferability to subsequent owners of the goods, and, where this is not provided, an automatic presumption that guarantees are so transferable. Furthermore, no fee for dealing with a consumer claim under a guarantee may be charged unless this is stated expressly in the guarantee.²⁸⁴ If there has been a recall of goods by the manufacturer, the guarantee period is automatically extended.²⁸⁵ The guarantor is unless stated in the guarantee required to assume the cost of any carriage of goods in the performance of the guarantee.²⁸⁶ The duration of the guarantee is automatically extended for period equal to the period during which the goods remain in the possession of the guarantor during the course of the execution of the guarantee.²⁸⁷ Furthermore, even where a third party should provide a remedy under the guarantee, the guarantor remains bound to his obligations towards the consumer.²⁸⁸ The court may make an order requiring the guarantor to comply with the obligations undertaken in a guarantee, to take remedial action to observe the terms of the guarantee, or to perform his obligations imposing a civil penalty for each day of non-compliance.²⁸⁹

In SLOVENIA, rules of mandatory guarantees continue to exist. There is a considerable overlap with the legal rights made available under the Directive. Guarantees have a minimum duration of one year, and there is an obligation on the producer to keep spare parts beyond that period.

²⁸³ Government Decree 153/2003 on binding guarantees of durable goods.

²⁸⁴ Article 86 of the Consumer Affairs Act.

²⁸⁵ Article 88 *et. seq.* of the Consumer Affairs Act.

²⁸⁶ Article 87 of the Consumer Affairs Act.

²⁸⁷ Article 88 of the Consumer Affairs Act.

²⁸⁸ Article 89 of the Consumer Affairs Act.

²⁸⁹ Article 91 of the Consumer Affairs Act.

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A consumer is entitled to compensation for the period during which he could not use the goods.

The method of implementation chosen by the UNITED KINGDOM has had an unexpected effect. If the person giving the guarantee repairs defective goods under the guarantee, then a failure to repair the goods with reasonable care can permit the consumer to claim against the guarantor for up to 6 years (and therefore beyond the expiry of the guarantee). Similarly, any new parts provided during the repair, or goods replaced under the guarantee, have to meet the general rules on conformity (the implied terms), and a consumer may be able to claim for up to 6 years if a latent fault, which existed at the time of the replacement, manifests itself.²⁹⁰

V. General comments on adequacy of implementation of the Directive

1. Difficulties encountered during the transposition process

Correspondents were asked to point out any particular difficulties that, in their view, were encountered during the process of implementing this Directive. The main challenge, identified by several correspondents, has been to absorb the specific rules introduced by the Directive into an existing system of sales law. The use of concepts in the Directive, which were unfamiliar to particular domestic legal systems, posed a significant hurdle in the transposition process. A related difficulty has been the drafting style of the Directive: there are some ambiguities (e.g., regarding Art. 3(3) or Art. 4), which caused difficulties during the implementation process.

Some correspondents raised very specific questions of interpretation, some of which might be clarified by amending the Directive, although others may better be left to interpretation by the courts, particularly the European Court of Justice.

²⁹⁰ This is the effect of Regulation 15(1) SSGCR 2002, combined with the rules in the Supply of Goods and Services Act 1982.

Questions were raised about the scope of the various definitions, and where exactly the limits of the terms “consumer”, “seller” and “consumer goods” were. The question of the status of computer software is not addressed, for example; nor is the position of animals.

A major difficulty for many member states has been the “right of redress” in Article 4. This has given rise to a significant body of academic literature, with quite divergent opinions regarding the scope of this section. Thus, correspondents have noted that there is an ambiguity in Article 4 regarding the extent of the member states’ obligations to introduce a specific right of redress (i.e., can they rely on existing contract law with consequent use of exclusion clauses; must they introduce an absolute right for the final seller, but leaving the nature of his claim and procedural matters only for domestic law?)

In some countries, the hierarchy in the remedies, and the relegation of “rescission” to a remedy of last resort has been the cause of concern. Where a right to terminate the contract is available immediately, this permits a consumer who has lost confidence and wishes to take his business elsewhere to do so, whereas the system in the Directive requires the consumer to give the seller a further opportunity to perform his obligations.

2. Gaps in the Directive

Correspondents were asked for their opinion as to whether they perceive there to be any gaps in the Directive in its current format. Several issues were identified. As noted, there are clear difficulties with the drafting style of the Directive, and there are some ambiguities in the text itself.

The Directive uses the notion of “delivery”, but does not address aspects of this concept, such as late delivery and delivery of the wrong quantity. Some member states take the view that “quantity” could be regarded as an aspect of conformity, for example.²⁹¹

There are also no provisions on the right to claim damages/compensation, which therefore remains a matter for domestic law – and the relationship between such domestic rules and the

²⁹¹ But see the views of *Tenreiro*, “La proposition de directive sur la vente et les garanties des biens de consommation”, *Revue européenne de droit de la consommation*, 187 [1996].

remedies in the Directive remains unclear. Moreover, the consequences of exercising the right to rescind the contract remain unclear.

The Directive only imposes liability on the final seller. This has been commented on negatively by a number of correspondents. A major criticism is that the Directive is designed to encourage consumer participation in the internal market, but then does not promote obtaining redress by widening the parties against whom a consumer might enforce his rights. As a minimum, the liability of the producer is proposed (although there exist arguments in favour of a wider “network liability”).

It is also apparent from some country reports that there remains an issue about the treatment of “after-sales” services, with some countries requiring the availability of spare parts for a period of time after sale, and others requiring at least some information about the availability of after-sales services or spare parts.

In this regard, there appears to be a degree of incoherence between the Directive and the Eco-Label Regulation.²⁹² In order to qualify for an eco-label, it is often necessary to provide a guarantee of minimum duration. Moreover, spare parts and after-sales services are also often required.

VI. Conclusions and recommendations

The following matters could be considered as part of reviewing the Directive:

- Options: It is apparent that all options have been used by some of the member states, but in no instance has there been an overwhelming tendency to use, or to disregard, any of the options given in the Directive (see table at end of this section). Consequently, no clear recommendation regarding the removal of any of the options can be given.
- Definition of ‘consumer’ (refer to the general discussion of this matter).
- Definition of ‘seller’ (refer to the general discussion of this matter).

²⁹² Regulation 1980/2000.

- Definition of ‘goods’, in particular whether software and other digital products should be included in the definition. A related question is whether any licences associated with the supply of software, or other digital products, should be covered by the rules of this Directive, too – for example, when the licence is not extensive enough. It may not be possible to address this issue in the context of this Directive, but there may be questions of drawing the line in the correct place if digital products are to be included in the definition of ‘goods’.
- Clarification in the text of the Directive that the proportionality criterion should not permit a comparison of repair/replacement with price reduction, to avoid confusion on this matter.
- Clarification of who bears the burden of proof in respect of some of the provisions (e.g., Art. 2 para. (3)).
- Right of redress for the seller: consider whether this could be clarified further, and consider, in particular, whether a clear ‘action directe’ approach could be adopted.
- The introduction of direct producer liability, and, possibly, distribution network liability, could be considered again. In the context of the internal market, it may be particularly important that a consumer can seek a remedy from somebody based in his own country. The Directive does not address this matter at present, and it should be considered if a system of producer liability, possibly combined with distribution network liability, should be adopted.
- The relationship of the remedies in Art. 3 and the national rules on the award of damages: it may be considered whether the Directive should address this. That would raise the questions which forms of damage should be covered. Broadly speaking, 4 heads of damages can be identified: (i) Equivalence (to the remedies in the Directive); (ii) consequential losses; (iii) loss of profit; and (iv) additional costs incurred as a result of buying replacement. This matter may best be considered once the *Common Frame of Reference* has been completed.
- Related supply transactions: there are other supply transactions, such as hire-purchase or conditional sale, as well as hire and leasing, which are frequently used by consumers buying more expensive goods. Conditional sale may be included within the scope of the Directive, although the position is not clear. Other supply transactions were explicitly excluded during the legislative process leading up to the adoption of the Directive, but this could bring about the different treatment of similar transactions.

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The nature of the risk in the context of a hire or leasing arrangement is different from that in sale, or conditional sale; nevertheless, it may be desirable to consider including a wider range of transactions within the scope of the Directive.

Overview: Use of options by the member states

<u>Member State</u>	<u>Art. 1 para. (3)</u>	<u>Art. 5 para. (2)</u>	<u>Art. 7 para. (1)</u>	<u>Art. 6 para. (4)</u>
AT			✓	
BE			✓	✓
BG	✓	✓		✓
CY		✓	✓	✓
CZ			✓	
DK		✓		✓
EE		✓		✓
FI	✓	✓		
FR	✓			
DE	✓		✓	
EL	✓			✓
HU	✓	✓	✓	✓
IE				
IT		✓	✓	✓
LV				
LT		✓		
LU			✓	✓
MT		✓		✓
NL		✓		
PL		✓	✓	✓
PT		✓	✓	
RO	✓	✓	✓	
SK		✓	✓	
SL		✓	✓	✓
ES	✓	✓	✓	✓
SE	✓	✓	✓	293
UK	✓			✓

²⁹³ During the implementation process in Sweden it was, however, held by the Government that a requirement to provide guarantees in a particular language (i.e. Swedish) already followed from Art. 6 (2) ("plain intelligible language").

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