

NEW WARRANTY REGULATIONS FOR ONLINE SHOPS ANTE PORTAS

Under the current legal situation regarding cross-border business transactions, operators of online shops must provide individual platforms for each EU member state to fulfill all specific national legal requirements. Notwithstanding the technical capabilities of the internet today, it is still not possible to provide just one general online shop for the whole European area. According to the "Flash Eurobarometer 396, 2015" survey, 39% of businesses selling online but not cross-border quote different national contract laws as one of the main obstacles to cross-border sales.

Thus, on December 9th, 2015 the European Commission presented a proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods (COM (2015) 635) as part of the strategy to implement a European digital single market (COM (2015) 192). With this directive the European Commission seeks to achieve that provider of online shops are able to focus their online business into one single platform for the European area as well as to ensure that consumers are able to purchase goods digitally in the EU under harmonized legal standards. By eliminating the key contract law-related barriers hindering cross-border trade, the rules put forward in the proposals will reduce the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law.

Context of the proposed directive (COM (2015) 635) is the online sale of goods, the purchase of tangible movable items including standard mass products as well as individualized produced goods. This directive does not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content, neither it applies to distance contracts for provision of services. Furthermore, where a sale contract provides both for the sale of goods and the provision of services this directive applies only to the part relating to the sale of goods.

The focus of this proposal for a directive (COM (2015) 635) is to fully harmonize the warranty laws for consumers regarding the distance sale of goods. It is topic of a discussion if the new warranty law should be used for stationary trade as well.

The fully harmonization of conformity criteria for the goods, of the hierarchy of the remedies, available to consumers and of the periods for the reversal of burden of proof and the legal guarantees are provided by the new warranty law.

According to article 4 to 7 proposal for a directive (COM (2015) 635) the conformity of the goods would be assessed not only with regard to the contract terms but also a combination of objective (e.g. terms of fitness for the purpose, normal qualities and performance capabilities) and subjective criteria (e.g. quantity, quality, description), unless the parties have agreed otherwise. The time the conformity of goods must be

completed is at the same time as the transfer of risk, where the consumer or a third party, designated by the consumer, including a carrier, commissioned by the consumer, obtains control over the goods.

Finally, paragraph 3 of article 8 shifts the burden of proof for the absence of lack of conformity to the seller for a period of two years. However, the burden of proof shall be modifiable, if it is incompatible with the nature of the goods or with the nature of the lack of conformity.

Article 9 proposal for a directive COM (2015) 635 lists the remedies for lack of conformity the consumer has available by fully harmonizing the order in which remedies could be exercised. In a first step the consumer should be entitled to have the goods repaired or replaced within a reasonable time and without any significant inconvenience. According to article 11 proposal for a directive COM (2015) 635 the option to choose between those two remedies is not given if the option chosen would be disproportionate compared to the other option available, impossible or unlawful. In a second step the consumer should be entitled to a price reduction (Article 12 provides guidance as to how to calculate the price reduction) or to terminate the contract (reverse transaction) where the lack of conformity is not or cannot be remedied through repair or replacement. The consumer shall exercise the right to terminate the contract by notice to the seller given by any means. The article 9 proposal for a directive COM (2015) 635 also provides the consumer with the right to withhold performance until the goods are brought in conformity.

Article 13 proposal for a directive COM (2015) 635 regulates the modalities for and the consequences of exercising the right to terminate the contract (reverse transaction). The consumer should enjoy this right solely if other ways to remedy that lack of non-conformity are not feasible or have failed. In the case of reverse transaction the restitution of price and goods must be executed immediately by both sides, but not later than 14 days.

Article 14 proposal for a directive COM (2015) 635 maintains the time limits of two years for the availability of the remedies. Compared to the directive on certain aspects of the sale of consumer goods and associated guarantees (directive 1999/44/EC) the proposal for a directive does not provide the option that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller which must not be less than one year. Thus, a national time limit for the availability of the remedies cannot be less than two years, but more. With this option of time limit extension within national laws the EU member states are allowed to differ from the directive, which leads to another lack of harmonization of warranty laws in the EU.

Besides regulation of remedies Article 15 proposal for a directive COM (2015) 635 provides transparency requirements as to the commercial guarantees issued by the sellers, for instance as to the form for delivery and the content a guarantee statement should have. Moreover, Article 15 states that the guarantee is binding for the seller in

accordance with the conditions which are contained in advertisements, pre-contractual information and in the guarantee statement. It clarifies that where conditions which are for instance advertised differ from those included in the guarantee statement the more advantageous to the consumers should prevail.

Right now the proposal for a directive is still under survey, a specific time for when this proposal should be realized is not set up yet. The Austrian warranty law will face the following changes if the proposal will be established in the current form: until now remedies for lack of conformity had to be claimed jurisdictionally according to para 933 ABGB; with this proposal for a directive the consumer should be entitled to exercise the right to terminate the contract by notice to the seller given by any means. Another change is that the consumer should be entitled to use the remedy of reverse transaction also in cases where the lack of conformity is minor; this is explicitly excluded according to para 932 sec 4 ABGB. Furthermore the enforcement of the proposed directive would shift the burden of proof in favor of the consumer for the whole time of warranty of two years; according to para 924 the current burden of proof is limited to a time of six months after the receipt of the good.

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