

REFLECTIONS ON THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

COSTEL STANCIU*
SORIN-GEORGE TOMA**

Abstract

In the European Union all members states have already transposed Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees into national law. In Romania, the state, through its legislative institutions, the Parliament and the Government, and through those who take care of market surveillance, in our case the National Authority for Consumer Protection, should ensure the consumers a high level of protection. The aims of our paper are to render in brief the legislative framework related to the consumer protection and to clarify a number of issues regarding: the distinction between products that benefit a 2 years legal warranty and those for which the legal warranty is limited to the average duration of use (household products); the legal warranty for second-hand products; the importance for the consumer of the presumption of the product's noncompliance; the situations that involve repair, replacement, appropriate price reduction, contract resolution; the deadline for the product to be repaired; the issue of replacement parts when product repair is in warranty or post-warranty; hidden vices. The methodological approach was based on the literature review. Our paper contributes to a better understanding of the sale of consumer goods and associated guarantees and provides a platform on which to build further studies on the same subject.

Keywords: *commercial guarantee, legal warranty, goods, consumer, lack of conformity*

Introduction

As we are living in a consumer society, many different businesses and service providers offer guarantees. That is why many products we purchase may come with a manufacturer's guarantee. A guarantee is generally provided by manufacturers whereas the warranty is given by most of the retailers or distributors.

In the European Union all members states have already transposed Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees into national law. Consumers have certain rights vis-a-vis the manufacturers and the sellers in the case of non-conformity of the goods.

In Romania, the state, through its legislative institutions, the Parliament and the Government, and through those who take care of market surveillance, in our case the National Authority for Consumer Protection, should ensure the consumers a high level of protection.

Our study focuses on the consumer protection domain. The aims of our paper are to render in brief the legislative framework related to the consumer protection and to clarify a number of issues regarding: the distinction between products that benefit a 2 years legal warranty and those for which the legal warranty is limited to the average duration of use (household products); the legal warranty for second-hand products; the importance for the consumer of the presumption of the product's noncompliance; the situations that involve repair, replacement, appropriate price reduction, contract resolution; the deadline for the product to be repaired; the issue of replacement parts when product repair is in warranty or post-warranty; hidden vices. The methodological approach was based on the literature review.

* Associate Professor, Ph.D., "Nicolae Titulescu" University, Bucharest (e-mail: costelstanciu@yahoo.com).

** Professor, Ph.D., Faculty of Administration and Business, University of Bucharest.

The paper is organized as follows. The second chapter of the paper deals with the conceptual framework of the main aspects regarding the sale of consumer goods and associated guarantees, emphasizing some of the main issues derived from the European legislation. This is followed by conclusions.

Aspects of the sale of consumer goods and associated guarantees

In the old Member States of the European Union (all ten of them), the notion of guarantee is understood as the commercial guarantee offered voluntarily by the business operators - manufacturer, importer or seller - to the consumer.

Such thing was motivated by the existence of competition on the market, fact which led the business operators to take a series of measures including this guarantee which is offered voluntarily, the ultimate purpose being to provide consumers with the best possible product markets.

As time passed by, consumers within these states were discontent because of the products purchased and the fact that these commercial guarantees were either functioning with deficiencies or simply did not exist for certain groups of products or certain manufacturers, importers, distributors.

In this situation, the European legislator had to draft a directive to impose certain conditions regarding the sale of consumer goods and associated guarantees. Thus, the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees was enacted.

Basically, this Directive stipulates that the guarantees, in the sense of certain voluntary commercial operations, become mandatory for the one who declared them so that consumers can have a legal basis in case of failure to fulfil obligations provided under them.

Another important concept stipulated in the Directive is the one regarding the consumers' right to benefit without additional costs of the restoring, replacement or the reimbursement of the product value should these non-conformities occur within 2 (two) years from date of purchase.

In Romania, the situation is slightly different meaning that, until the entry into force of Law no. 449/2003 on sales of consumer goods and the associated guarantees transposing the provisions of the Directive mentioned above, the Romanian consumer had used only to the existence of the mandatory guarantees required by the law, guarantees which differed according to the nature of the product, namely periods up to two years for durable products depending on the classification within certain groups (see Government Decision no. 394/1995 currently repealed), respectively 30 days for the immediate use products (e.g., the Government Decision no. 665/1995 - currently repealed).

It is true that, in certain situations, depending on market development, as well as the increase of competition on certain segments, some business operators offered commercial guarantees - in the European sense of the term - which were higher than the minimum required by law.

Given the data presented above, it results that we currently need a change in the way of approaching this issue, including the consumers' mentality, but also the business operators' mentality, with the purpose of addressing this issues in the European sense. This will cause the Romanian consumers some difficulties in understanding as it will be complicated to distinguish between guarantee - a voluntary commitment undertaken by the business operator but legally binding on the offeror under the conditions laid down in the guarantee statement and the associated advertising, the seller's liability if lack of conformity occurs within a period of two years from the date of delivery of the product or hidden vice for whose repairing it is necessary to resort to the procedures set forth in the Government Ordinance no. 21/1992 supplemented, where appropriate, with provisions of the Civil Code.

One should also bear in mind that in the event that any lack of conformity is occurring within six months from the date of delivery of the product is considered to have existed at the time of delivery, hence for this case the consumer is not required to demonstrate, with evidence that the product is without conformity. However, in the period from six months to two years, the seller is has

the same rights as the consumer and within the presumption of lack of conformity the obligation to prove that the product was without conformity belongs to the consumer.

From a legal perspective, this normative act covers all types of consumer products, with few exceptions – goods that are sold after being confiscated or seized under a court enforcement procedure or based on any other document that is issued by court authorities, as well as the water and gas which are not packed in limited amounts or in a fixed amount and electric power. However, there will be cases of products for which there are specific laws, for instance food products for which the concepts of validity and date of minimum durability are applied.

We are also mentioning the fact that Law no. 449/2003 is a general law regulating the issue of guarantees, but certain normative acts may set forth specific regulations as follows:

- The durable products must mandatorily have certificates of guarantee, thus they will have a guarantee that is legally binding (Government Ordinance no. 21/1992 – Article 20);
- The refillable lighters must mandatorily have a written guarantee from the manufacturer for at least 2 (two) years for each lighter (Article 1, letter a – Order no. 10/2007) on trading on the market of child-resistant lighters, as well as the interdiction to trade fantasy lighters (the joint order of the National Authority for Consumer Protection and the National Agency for Fiscal Administration).

In terms of scope, it refers to products, including those made upon order and the said products must be compliant with the specifications included in the contract of sale as stipulated under Chapter II of Law no. 449/2003.

Law no. 296/2004, regarding the Consumer's Code gives the definition of contracts on point 14 of the Annex, namely the contracts between traders and consumers which include warranty certificates, order details, invoices, bordereau or delivery certificates, bills, tickets which contain stipulations or references to general present conditions. Given the provisions of Government Emergency Ordinance no. 28/1999 on the obligation of economic agents to use electronic cash registers, namely the provisions of Article 1 paragraph 2: “The economic agents described under paragraph (1), hereinafter referred to as users, are required to issue fiscal tax receipts using electronic devices and hand them to the clients. Upon clients request, users will issue a fiscal invoice” – therefore it results that a consumer may request at any time, a fiscal invoice together with the electronic tax receipt.

Therefore, we can conclude that, under the Law no. 449/2003, the tax receipt is enough to be considered contract.

Moreover, Article 5 of Law no. 449/2003 clearly stipulates the conditions in which the products are considered to be compliant with the contract of sale, for instance the case where the products comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model or the situation where the products are fit for the purposes for which goods of the same type are normally used.

Law no. 449/2003 on sales of consumer goods and the associated guarantees came into force on January 1, 2007 and the Law transposes into Romanian legislation the Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees repealing Article 14, paragraph 1 and Article 20 paragraph 2 of Government Ordinance no. 21/1992 and Government Decision no. 665/1995 on the replacing, repair and reimbursement of the equivalent value for products with quality deficiencies.

1.Scope

Law no. 449/2003 shall apply to all the contracts of sale of goods concluded between economic agents, physical or legal entities, and consumers, physical or legal entities.

The product, as defined by law, represents any movable tangible item whose final intended purpose is to be consumed or used individually or collectively, including those that are purchased under a contract of sale of goods that will be produced or processed.

The following categories of movable goods do not fall under the present Law:

- Movable incorporeal goods: shares, bonds, etc.
- Movable goods sold:
 - After being confiscated;
 - After being seized under a court enforcement procedure;
 - Based on any other document that is issued by court authorities.
- the water and gas which are not packed in limited amount or in a fixed amount (bottles, gas bottles, other recipients);
 - electric power;
 - second-hand movable goods that are sold through public auction in a procedure that consumers can attend personally. The exclusion is justified by the fact that the consumer's presence at public auction allows the consumer the opportunity to choose knowingly. This is not valid should the consumer not be able to attend the auction personally, therefore, goods purchased in this situation will fall under this law.

The consumer is defined as any natural person or group of natural persons who get together in associations that purchase, acquire or consume products for purposes that do not fall within the sphere of is commercial or professional activity.

Two clarifications need to be made here. First of all, the law uses the generic formula of "group of natural persons formed in associations". In this case, we are referring to the legal entities constituted under the Government Ordinance no. 26/2000 on associations and foundations, meaning associations, federations and foundations.

Secondly, the provision regarding the "commercial and professional activity" applies only to the natural persons, as associations in a generic sense are non-profit legal entities that cannot carry on such activities.

The category of natural persons who purchase, acquire, use or consume products within their professional activity may include the following:

- persons with liberal professions such as doctors, lawyers, etc.
- persons who acquire by themselves the necessary means in carrying out their professional activity within companies where they are hired.

The seller is defined as any natural or legal person authorized - companies, cooperative societies, natural persons engaged in independent economic activities and authorized family associations – that as part of its activity sells products under a contract with the consumer.

The producer may be the following:

- an economic operator that produces a finished product or a component of a product
- an economic operator that produces raw material;
- an economic operator that applies its name, trade mark or another distinctive sign on a product;
- an economic operator that reconditions a product;
- an economic operator or distributor that modifies and changes through its activity the characteristics of a product;
 - the representative who is registered in Romania of an economic operator who is not headquartered in Romania, or, if there is no such representative, the importer of that product;
 - an economic operator that imports products in order to perform a sale, rent or
 - leasing operation at a later time or any other form of distribution which is specific to running a business;
 - the distributor of the imported product, in the event that the importer is unknown, even if the producer's name is specified;

- the distributor of the product, in the event that the importer cannot be identified, if the distributor fails to notify the injured person about the importer's identity, within 30 days from the request thereof.

2. The legal guarantee – obligation of conformity with the contract

The Law establishes an obligation for the seller to deliver goods which are in conformity with the contract of sale and to be held liable for any lack of conformity existent at the time of the delivery.

Conformity

Products should be considered as being in conformity with the contract provided:

- a) they are suitable to the description made by the seller and has the same qualities as the products presented them by the seller as a sample or model;
- b) the products satisfy any specified purpose requested by the consumer, purpose made known and accepted by the seller at the conclusion of the sale;
- c) products are suitable for the purposes for which they are normally used products of the same type;
- d) they present the quality and normal performance parameters, which the consumer can reasonably expect, given the nature of the product and public statements regarding the specific characteristics thereof, made by the seller, by producer or his representative, particularly by advertising or by the product label registration.

The seller will be liable also for the lack of conformity resulting from the situation in which the product purchased by the consumer is incorrectly installed by the seller, while the installation is stipulated in the contract as an obligation of the seller. The same thing applies for the situation in which the product intended to be installed by the consumer that was incorrectly installed due to deficiencies in the operating instructions.

Seller's Liability

The seller is liable to the consumer for any lack of conformity which exists at the time the goods were delivered and the consumer has the right to require the seller to bring the product into compliance without additional costs and he can choose he wants the product to be brought into conformity, either by replacement or repair, or by price reduction or rescission of the contract.

The seller will bear all the necessary costs incurred to bring the products into conformity, including the postage expenditures, labour, materials, transportation or technicians' trip to the consumer's residence.

A. The consumer has the right to choose how he wants the product to be brought into conformity, by repair and replacement of the product with no additional costs, provided that the means chosen are not disproportionate or impossible:

- a) A redressive measure is considered disproportionate if it imposes unreasonable costs on the seller in comparison with the other redressive measure, taking into account the value of the product, with the lack of conformity, the importance of the lack of conformity and any possible inconvenience caused to the consumer.
- b) The replacement is considered impossible if the seller does not have an identical product for replacement, which means that the product is no longer manufactured nor available on the market.

The redressive measure, repair or replacement of products must be brought out in a reasonable period agreed between the consumer and the seller, and without any significant inconvenience for the consumer, taking into account the nature of the product and the purpose for which it was purchased.

B. The consumer is entitled to the proper price reduction or rescission of the contract in any of the following cases:

- a) the consumer has not received neither repairing or replacing the product;

- b) the seller has not take the remedy measure within a reasonable time;
- c) the remedy measure is causing significant inconvenience for the consumer.

Should the lack of conformity be minor, the consumer cannot request the rescission of the contract.

Duration of legal guarantee of conformity

The seller's liability in terms of guarantee of conformity is engaged if the lack of conformity occurs within 2 (two) years calculated from the date of product delivery. For used products, the consumer may agree with the seller to reduce the term of two years, but not less than one year after product delivery.

For the consumer's benefit, the law stipulates a rebuttable presumption, meaning that any lack of conformity occurring within 6 months from the date of delivery of the product is considered to have existed at the time of delivery, except for the cases when the presumption cannot be invoked as it is incompatible with the nature of the product or the lack of conformity.

The presumption of the lack of conformity means that if such lack of conformity occurs within the first six months from the delivery of the product, all the consumer has to do is to prove that the product was lack of conformity at handing. In this case, the seller can defend himself if he can prove that the defect did not exist or it was impossible to exist at the date of the delivery.

However, should the lack of conformity occur outside the period of six months, the consumer is the one who will have to prove, together with the real lack of conformity, its existence at the time of delivery of goods.

The consumer must inform the seller of the occurrence of the lack of conformity within 2 months from the date when the consumer has notice it. If the consumer does not notify the seller within this period, he will not be able to request the remedy of lack of conformity, nor the seller's liability.

A final observation must be made regarding the periods of two years and six months. As we have seen, the law does not refer to the date of noticing the lack of conformity, but to the moment of its occurrence. Therefore, if the lack of conformity occurs within the mentioned time limits, but is claimed after these periods, but within the two months period, the liability of the seller will be engaged. However, in practice, the consumer will have to prove that the lack of conformity has occurred within the two years period, or, if applicable, the six months period.

Removal of the seller's responsibility

A. If the public statements are made by the manufacturer of his representative, the seller will not be held responsible should he prove that he did not know them and could not have, in reasonably, know them.

For this situation, the law does not indicate who is responsible for the lack of conformity of the product. Therefore, the consumer will be able to recover the loss through the tort liability of the manufacturer under Articles 998-999 of the Civil Code.

B. Also, the seller will not be held responsible for the public statements, regardless their origin, the manufacturer or his representative, should he prove that:

- The public statements made by the manufacturer or his representative were corrected at the time of conclusion of the contract of sale.
- The decision to buy the product could not be influenced by the public statements in question.

C. Also, the seller will not be held responsible for the situations in which at the time of concluding the contract, the consumer knew or could not, in reasonably, be unaware of the lack of conformity or such lack has its origin in the materials supplied by the consumer.

Limitation or exclusion of liability of seller

The contractual agreements or provisions that stipulate the limitation or exclusion of the seller's obligation for conformity are null of right.

3. Guarantee for hidden vices

Under Article 25 of Law no. 449/2003, the rights of consumers, as described hereunder, shall be exercised without harming any other rights that consumers may invoke as per the other legal provisions that govern the contractual or non-contractual accountability.

Given these provisions, the consumer has the right to choose the legal grounds in terms of engaging the seller's liability from the obligation of conformity with the contract provided by Law no. 449/2003 and the obligation of guarantee for hidden vices regulated under Articles 1352-1360 of the Civil Code.

In order for the seller to be held responsible under the guarantee for hidden vices, three cumulative conditions must be met:

a) *the vice is hidden*. The seller is not responsible for apparent vices of which the consumer was able to convince by himself. Apparent vices are those which can be known by the consumer through the usual means of verification, an attentive checking of the goods. If the vice was communicated by the seller to the consumer, then the vice is not considered hidden.

b) *the vice have existed at the time of conclusion of the contract*.

c) *the vice is serious*, which means the product is improper for the usage to which is intended by nature or according to agreement or the use value of the product is reduced so much that in consumer's knowledge of the facts, the consumer would not have bought or have paid a lower price.

The consumer is the one who must prove the cumulative existence of the three elements. Also, the consumer may require either the rescission of the sale, or the price reduction, provided all the conditions are satisfied.

The statute of limitation of actions for rescission of the sale and price reduction is six months from the date of finding the vice, and if it turns out that vices were cunningly hidden by the seller, the term is three years. In both cases, the vice must be discovered within one year from the date of delivery of goods.

4. Commercial Guarantee

Under Law no. 449/2003, consumers may benefit from a commercial guarantee offered by the seller. Such guarantee is legally binding for the offeror, under the conditions set forth in the statements concerning the guarantee and or in the associated advertising.

The commercial guarantees should include mentions of the consumer rights which are provided by law and attesting clearly that these rights are not affected by the granted guarantee. Also, the commercial guarantee must contain the mandatory clauses concerning the identification elements of the product, the warranty term, ways to ensure the guarantee - maintenance, repair and replacement, including the name and address of the seller and the name and address of the specialized service.

The commercial guarantee must be written in simple and understandable terms. If the consumer requests so, the guarantee must be given in writing or on any durable medium support which is available and accessible for the consumer.

Should the conditions described above are not complied with, the guarantee remains valid and in this case the consumer can use the statements made by the seller or manufacturer and may require from the seller the compliance of the obligations laid down in these statements.

Conclusions

The idea that consumers have to have rights has been evident at least since the 20th century. In order to ensure consumers a high level of protection, the European Union has understood the need to create a legislative framework. Establishing minimum quality standards and equal rules for consumer sales and guarantees for the common European market have become an important issue starting with the mid 1970s. As Romania has been a member of the European Union since 2007, the national legislation in force has to comply with the Community's minimum requirements on consumer protection.

Our paper contributes to a better understanding of the sale of consumer goods and associated guarantees and provides a platform on which to build further studies on the same subject.

References

- Commission of the European Communities. Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers' liability, 2007, accessed January 12, 2013, http://ec.europa.eu/consumers/cons_int/safe_shop/guarantees/CSD_2007_EN_final.pdf.
- ECLG/020/05, Interim Report on Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.
- Comment faire jouer la garantie – Georges Picard, 60 millions de consommateurs no. 401, January, 2006.
- Deak, F. *Treatise of Civil Law. Special Contracts*. Bucharest: Actami Publishing House, 1998.
- Grundmann, S. Consumer Law, Private Law: How can the Sales Directive and the Sales Convention be so Similar? *European Business Law Review*, 14/2003, pp. 237-257.
- Kingissep, M. The European Consumer Sales Directive- the Impact on Estonian Law. *Juridica International*, XIV/2008, pp. 219-227.
- The European Parliament and the Council of the European Union. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, accessed January 9, 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:171:0012:0016:EN:PDF>.