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Dr. Csaba Sári

**Eu Legislation on Consumer Protection, with special regard to the
Directive 1999/44/EC (Sale of Consumer Goods and associated
Guarantees)**

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**EU Legislation on Consumer Protection, with Special Regard to the
Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods
and Associated Guarantees**

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EU Legislation on Consumer Protection, with Special Regard to the Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees

Abstract

Consumer protection is requested from ancient times, however, it became a really emphasized issue in legislation only in the second half of the 20th century. In Section I of this research paper I will briefly sum up the most important economic theories in relation to the necessity of consumer protection. In Section II I will examine two very frequent questions related to this issue namely, the reasons for consumer protection and the costs thereof. Through the presentation of the law system of several American and European countries, I intend to survey the history and development of consumer law in Paragraph 1 of Section III. In Paragraph 2 of the same Section I will mention the most important respects of international consumer law, while the respective European regulation will be investigated in Section IV. I laid special emphasis on the European Directives concerning consumer protection, among which Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees has an outstanding importance. I am going to analyse this Directive in Paragraph 3 of Section IV, examining the purposes, the scope and the single provisions thereof in detail, as well as the measurements taken by the member states in order to implement the provisions of the Directive in their own legislation.

I. Economic theories on consumer protection¹

Abuse of traders' rights, this way also the need for consumer protection is as old as trade. Although consumer protection became a really important and emphasized issue in legislation only in the second half of the 20th century as a feature of welfare states, the sources thereof date from ancient times. Regarding the sources of consumer protection, it is worth summing up the views of the single economic schools and of great economists belonging to these schools on the market, the consumers and the relationship between sellers and consumers.

¹ This paragraph was written on the basis of Judit FAZEKAS: Consumer Rights, Consumer Protection (edited by Közgazdasági és Jogi Könyvkiadó Rt., Budapest in 1995), hereinafter: Fazekas

1. Adam Smith and the classic liberal economy

"The Wealth of Nations" written by Adam Smith in 1776 established economics as an autonomous subject and launched the economic doctrine of free enterprise. This school examined the consequences of economic freedom in detail, covering concepts like the role of self-interest, the division of labour, the function of markets, and the international implications of a laissez-faire economy. Smith laid down the intellectual framework explaining the free market. He is most often recognized for the expression "the invisible hand," which he used to demonstrate how self-interest guides the most efficient use of resources in a nation's economy, with public welfare coming as a by-product. To underscore his laissez-faire convictions, Smith argued that state and personal efforts to promote social welfare are ineffectual compared to unbridled market forces.

According to this school, the main duty of the state is to provide an environment suitable for economic growth, i. e. to contribute to progression by failing to influence the economy. The key figures of this theory are consumers, who have the ability to choose among goods and services independently and reasonably, consequently they determine the extent of production by their choices. The laissez faire existing among producers prevent producers from determination of prices of products, thus prices are influenced actually by decisions of consumers.

2. Keynesism

In his essay written in 1926 (The End of Laissez-Faire), John Maynard Keynes emphasized that free market and consumers' possibilities of choice were restricted by international trusts and other great companies. Keynes criticised Smith's theory on the invisible hand and refused the concept of laissez faire as well. According to his economic school, the state must intervene in economy as consumption is determined by great international trusts, which often abuse their position to the detriment of consumers.

3. Economy of welfare states

Welfare states and the economic school relating to them were developed between the two world wars. This school stated that social security and education must be provided by the state

for each citizen, by the means of the redistribution of goods directed by the state. The economists of this school emphasized the importance of economic, social and cultural rights. According to welfare economy, states should intervene in economy in order to provide citizens with equal rights and chance to obtain goods and services because these rights and chances are different in relation to the various consumer groups.

4. Neoclassic school

The neoclassic school criticised the welfare theory regarding the duty of the state in respect of intervention in economy. According to the doctrine of Milton Friedman of the so-called Chicago school, state intervention in economy deprives individuals from their freedom, while freedom of market contributes to both economic growth and freedom of individuals. As the economic policy of welfare states was in most cases accompanied by budgetary deficit, inflation and slowdown in economic growth, the extension of state intervention must be decreased. The representatives of this school accept state intervention only to the extent necessary for a basic level of security.

It can be seen that the concept of consumer protection appeared in the Keynesian theories and became more emphasized in the schools of welfare states, which played an outstanding part in the development of consumer law. Naturally, all the economists concerned in the issue of consumer protection were aware of the pro and contra arguments, however, they attached different importance to the various factors influencing the position of consumers, this way the suggestions regarding the respective regulation are also different.

II. Two frequent questions in relation to consumer protection

1. Reasons for consumer protection

The subject of the reasons for necessity for consumer protection is one of the subjects most commented on relating to the issue of consumer protection. John Goldring gives a great summary of these reasons and of the necessity of consumer protection law:

“Consumers have sought protection through legislation because the general laws and market forces have failed to provide it. Many consumer protection laws either relate to the terms and conditions of contracts that consumers make with suppliers for the supply of goods and services, or to conduct intended to encourage the making of such contracts (marketing, packaging, advertising and provision of information). Previous laws, especially the law of contracts, assumed that the parties to contracts are legally equal in terms of power and information. In substance, in real markets, almost invariably consumers have markedly less power and information than suppliers. The law deems the action of a consumer in buying a commodity to be the making of a contract - in theory a free, consensual act. In practice, the legal consequences are attributed to the action by the law without any consideration of what the consumer actually knows or wants. The common law of contracts simply cannot afford consumers the protection they probably would seek if they were rational, fully informed, and equal in economic power to the supplier. Because contract law offers an inadequate basis for an equitable legal transaction, it must be modified by legislation in order to afford greater protection to consumers than they can negotiate individually for themselves.”²

Obviously, from economic aspect consumers are of a much weaker position than producers and sellers, and this way their facilities for bargaining are rather restricted. The enforcement of consumer’s rights may come up against financial, psychological and other difficulties and in many cases a procedure for enforcement of consumer’s rights does not result in either the appropriate sanctioning of violation or the sufficient redress of the consumer’s grievance. As written by Goldring, consumers are generally not in the possession of all information necessary to make right decisions in relation to products and services, and even if they are, it often happens that for some (primarily financial) reasons they do not choose the product which they would choose *“if they were rational, fully informed, and equal in economic*

² John GOLDRING: Consumer Protection, the Nation-State, Law, Globalization, and Democracy, hereinafter: Goldring

power” to producers and sellers. Spread of new types of sale (e. g. supermarkets, self-service shops) during the second half of the 20th century resulted in that consumers’ lack of information can not be rectified by people working in such shops, either (as neither these workers are in possession of the respective information). Moreover, consumers are usually not aware even of their rights and of the possibilities to enforce these rights. The representation of consumers’ interests faces difficulties as consumers do not form a homogeneous social group. It should be noted, however, that during the last fifty years more and more non-governmental organisations have appeared representing and safeguarding consumer’s rights. These groups are primarily established to influence legislation concerning consumer protection as *“consumer protection laws enable the correction of market failures and the redress of inequalities of information and power”*.³

As a consequence of the above listed reasons, the main objective of the respective legislation is to help consumers as they participate in markets under far more detrimental conditions than producers and sellers.

With regard to the above, the following statement of Dilip Sinha may seem to overestimate the possibilities of consumers:

*“In a competitive economic environment the consumer has to exercise his choice either in favour of or against the goods and services. His choice is going to be vital and final. He should realise his importance and prepare himself to exercise his rights with responsibility.”*⁴

As written above, consumers’ possibilities for choice are rather limited, however, the purpose of the respective law is to counterbalance these limits. This is a general characteristic of several similar fields of law. As Goldring writes:

*“Where structural inequalities exist, (as between employers and employees, or between manufacturers and consumers) many communities, acting democratically, decided that some minimum protections are required for proper social functioning, regardless of what the parties agree. They have therefore limited the theoretical autonomy of the parties to make contracts.”*³

3 Goldring

4 Dilip SINHA: A new era in consumerism (Special issue with the Sunday Magazine, October 31, 1999)

Autonomy of the parties always means a situation favouring those with the greater wealth and power, consequently the use by one party of its economic power to the detriment of the other must be prevented by law.

2. Costs of consumer protection⁵

Having the reasons for consumer protection taken into account, we must raise the question that always arises in relation to this issue: who must bear the costs deriving from legal rules more and more favourable for consumers? The answer is of course: consumers. One can not be astonished at the fact that traders charge consumers with the expenses deriving from the stricter rules to the highest possible degree, this way the prices of products are increased by these additional costs. Nevertheless, the widened legal protection is favourable for consumers for the above listed reasons even if they must bear the considerable costs deriving therefrom.

⁵ This paragraph was written on the basis of Dr. Lajos VÉKÁS: EC Directive on Consumer Sale and its Implementation into the Hungarian Civil Law (Magyar Jog, Issue 11 of 2000, pages 646 – 660)

III. Regulation of consumer protection

1. Legislation of various states⁶

The necessity of legal rules to protect consumers has been subsisting since commerce exists. Even the laws of the ancient world contained rules concerning this issue. It must be noted, however, that consumers' interests have actually been represented and safeguarded since the sixties of the 20th century. In the present paragraph I intend to give a brief summary on the history of consumer law in the USA and several European countries in order to examine the development of this field. (I note that as for the European countries, I will not mention the national measurements taken on the basis of the directives of the European Union in the present Paragraph. I will examine this issue in Section IV.)

1.1. United States of America

The first legal provision in order to protect consumers was the one against postal fraud enacted in 1872, followed by the first act on food in 1900. The Federal Trade Commission Act enacted in 1914 was an important stage in respect of development of consumer protection. The Federal Trade Commission, set up by the above act was established primarily to control whether market participants observe the competition law rules. Practically, it still dealt mainly with consumer protection issues as more than half of the complaints submitted to the Commission related to unfair advertisements. As of 1938, labelling of products has been prescribed so that consumers be properly informed of the characteristics of the products.

The legislation concerning consumer protection got a great impulse in the sixties as a result of great scandals in relation to certain dangerous products (e. g. medicines). It was also very important that the consumer movement got a boost and moral support from U.S. President John F. Kennedy in the historic declaration in Congress⁷ on 15 March 1962, declaring that consumers form the most important but the less heard economic group. Kennedy stated that legal provisions must be enacted in order to provide consumers with the following four basic consumer rights:

1. the right to know;
2. the right to be safe;

⁶ Fazekas

3. the right to choose; and
4. the right to be heard.

Declaration of the basic consumer rights accelerated legislation on consumer protection and resulted in that consumers are better and better informed and more effectively protected in the U.S. since the sixties of the 20th century. (I hereby note that following the above mentioned declaration, 15 March in each year is celebrated as World Consumer Rights Day.)

1.2. United Kingdom

Following World War II it became obvious that the traditional economic policy of market protection obstructs the competitiveness of the British industry. Consequently, the Restriction Fair Trade Act was enacted in 1956 and the so-called Molony Committee was established in 1959 in order to prepare suggestions for protection of the “consuming public”. The report prepared by the Molony Committee determined the future legislation on consumer protection to a great extent. Various acts were passed in the seventies and in the eighties in relation to the rights and duties of sellers and consumers and to the quality protection of goods. The most important step was the enacting of the Consumer Protection Act in 1987, containing provisions on product liability, product safety and information relating to products and prices.

1.3. France

At the beginning of the 20th century several acts were passed serving the protection of consumers concerning the areas of food adulteration, misleading advertisements and seller’s guarantee for hidden defects. Following 1970 consumer protection became a more frequent issue in the French legislation, shown by the acts of the seventies and eighties on exact indication of prices, huckstery, labelling, unfair contract terms and protection of consumers’ health and safety. The comprehensive Act on Consumer Protection was passed in 1993 following many political and theoretical disputes.

Regarding organisational direction, between 1981 and 1983 the Ministry of Consumption was the supreme state organisation governing consumerism. Since 1983 various state and civil

7 Referred to by Sinha

organisations have been established to represent consumers' interests and to assist consumer groups with the enforcement of their rights.

1.4. Scandinavian States

Scandinavian countries traditionally have intended to establish a welfare state providing equality on the highest possible level and satisfying not only minimum requests. The systematic legislation concerning consumer protection in Sweden was started in 1970 by enacting the Commercial Act prohibiting misleading advertising and selling of products unsuitable for use. In the seventies further acts were passed concerning unfair contract terms and unfair market activities, while market courts were established to decide the respective legal disputes and the ombudsman of consumers began to perform activities in order to take measures against those breaching consumer protection law.

1.5. Germany

Three outstanding steps of the German consumer protection law were the Act on Unfair Business Terms passed in 1976, the Medicine Act enacted in the same year and the Act on Product Liability, which was passed in 1990 on the basis of the respective EU directive. Many organisations for consumer protection have been established in the last two decades, supported by the German government even financially so that consumers be informed of their rights properly and their rights be enforced more effectively than earlier. (I hereby note that the Directive 1999/44/EC had a great effect on German consumer law and its implementation was linked with the reform of the whole German contract law. As written by Peter Rott: "*The implementation of Directive 1999/44/EC has turned German sales law on its head, and it has also led to a major reform of the general contract law.*"⁸)

As a summary of the respective legislation in the various states, we can state that economic policy of well-developed western societies following World War II indicated the acknowledgement of the importance of consumers' rights and consumer protection. Despite the fact that conservative governments generally prefer neoclassic economic theory, protection of consumers and rules enacted previously in this issue have been respected by such governments as well. Thus, it can be stated that as of the sixties of the 20th century,

⁸ Peter ROTT: German Sales Law Two Years After the Implementation of Directive 1999/44/EC

consumer protection forms an integral part of the economic policy in well-developed states in North America and Western Europe, independently from the current governmental circumstances.

2. International consumer law, guidelines of the United Nations

As from the second half of the 20th century, the issue of consumer protection has been regulated also by the various bilateral and multilateral international treaties and conventions.

Among the respective sources of international law, the Declaration passed by the General Assembly of the United Nations in 1985 must be underlined⁹. The Declaration listed the following purposes to be achieved by means of consumer protection law:

“(a) To assist countries in achieving or maintaining adequate protection for their population as consumers;

(b) To facilitate production and distribution patterns responsive to the needs and desires of consumers;

(c) To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;

(d) To assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;

(e) To facilitate the development of independent consumer groups;

(f) To further international cooperation in the field of consumer protection;

(g) To encourage the development of market conditions which provide consumers with greater choice at lower prices.”

The same objectives have appeared in the consumer protection law of nation states and further international communities. Since 1985 also the European Community has been enacting laws in order to protect consumers. I am going to analyse this issue in detail in Section IV below.

⁹ Referred to by Sinha

IV. Consumer law of the European Community

1. The beginnings¹⁰

It is well-known that the purpose of the establishment of the European Economic Community was to realise the free movement of goods, persons, services and capital and to establish an economic system based on competition. The concept of “consumer” appeared only in four sections of the Treaty of Rome creating the European Economic Community in 1957, however, these provisions did not expressly aim at the enforcement of consumers’ rights. It can be stated that consumer protection was not among the objectives of the Treaty of Rome.

The request for effective consumer protection arose in the EU only from the beginning of the seventies. A Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy was passed on 14 April 1975 stating the basic rights of consumers and indicating the areas to be primarily regulated so that consumers’ rights can be protected and enforced effectively (indication of prices, unfair contract terms and advertising). In the following years further community programmes were introduced, aiming at a more effective legislation in respect of this area of law.

2. Directives on consumer protection

The legislation of integration purposes is especially important in the area of consumer protection in the European Community. Namely, transactions by private individuals as consumers play a significant role in the creation and maintenance of the internal market as the free movement of goods, persons, services and capital is realised not only through transactions of persons acting in the course of business but also in the way that individuals – as consumers - purchase goods either in the territory of another Member State or in their own country from a trader of another Member State. This latter case is facilitated by the general use of electronic trade that makes even easier to purchase goods from a trader resident in another Member State. If the respective law of the single Member States are different, it will cause difficulties for consumers and does not contribute to the establishment of internal market by any means. The necessity of both judicial harmonisation and consumer protection

¹⁰ Fazekas

resulted in the enacting of legal rules providing a uniform minimum level of protection for consumers in each Member State.¹¹

Regarding the sources of the European consumer law, Article 94 of the Treaty establishing the European Community authorises the Council to issue directives acting unanimously for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. According to Article 95 the Council may adopt measures for the sake of establishment of the internal market; in this case a qualified majority is sufficient to the decision. The authorisation regarding especially the approximation of laws governing consumer contracts is linked with Article 95. Namely, Article 153 of the Treaty states that the Community shall contribute to the attainment of the objectives referred to in Paragraph 1 through measures adopted pursuant to Article 95 in the context of the completion of the internal market and through measures which support, supplement and monitor the policy pursued by the Member States. Regarding the objectives to be achieved by means of consumer protection, Paragraph 1 of Article 153 states:

“In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.”

In a general sense, directives mean a practical compromise between the necessity of regulation on the Community's part and the sovereignty of member states. Directives determine obligations for member states in respect of the goals to be achieved and the member states are free to choose means, methods and procedures that will result in the achievement of the goal determined by the respective directive. Member states may decide whether it is necessary to enact new national laws or it is sufficient to amend the respective law being already in effect. This way, member states enact national legal rules in accordance with the provisions of the directive if necessary. The type of the legal rule creating the conformity with the directive, however, can be determined by the single member states. As a consequence, directives are the most important means of approximation of national laws of the member states.

¹¹ Vékás

The most important directives in relation to consumer protection are the following¹²:

- (i) Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, amended by Directive 1999/34/EC of the European Parliament and of the Council;
- (ii) Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products;
- (iii) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises;
- (iv) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, amended by Council Directive 90/88/EEC and by Directive 98/7/EC of the European Parliament and of the Council;
- (v) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;
- (vi) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;
- (vii) Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis;
- (viii) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, amended by Directive 2002/65/EC of the European Parliament and of the Council;

¹² Vékás

- (ix) Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests;
- (x) 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.

The Directive 85/374/EEC on product liability is different from the other directives mentioned above as it does not prescribe a uniform minimum level of protection but determines the maximum scope of the product liability and compulsorily defines the liability burdening manufacturers and importers for damages caused by their products. It means that during the implementation the member states could not deviate from the provisions of this directive even for the benefit of consumers.

The rest of the directives mentioned above has a common characteristic of serving consumer protection by providing consumers with minimum rights determined by statutory provisions. Accordingly, Article 8 (2) of the Directive 1999/44/EC, to be examined in detail in Paragraph 3 of the present Section, states:

“Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.”

During the implementation of such directives the member states may provide the consumers with broader rights than prescribed by the directives, however, they can not limit them to less rights. This cogency is unilateral, as member states may deviate from the directives' provisions only for the benefit of consumers. Such type of regulation is quite strange in civil law, which is traditionally based on contractual freedom. This is the most important reason why member states are reluctant to amend their national civil code in accordance with the European directives relating to consumer protection. They rather enact special national legal rules governing this issue.¹³

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3. Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees

The most important directive with regard to the subject matter of the present research paper is 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 (hereinafter referred to as the Directive). The reason why I regard this Directive as somewhat more significant than the others is that it regulates a number of issues in relation to consumer contracts occurring much more often in our everyday life than the issues governed by others. A further argument reinforcing the importance of the Directive is that it exerted a great influence on the respective law of the member states and also of states which were only candidates for EU membership when the Directive took effect. (I hereby refer to both the major reform of the German contract law and the amendment to Hungarian law concerning the whole issue of deficient performance and associated guarantees.)

3.1. Purposes of the Directive

Article 1 of the Directive states: *“The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.”*

The main purposes of the Directive detailed in Paragraphs 1-5 of the Preamble are:

- to contribute to the achievement of a high level of consumer protection;
- to achieve that consumers being resident in one Member State be free to purchase goods in the territory of another Member State on the basis of a uniform minimum set of fair rules governing the sale of consumer goods;
- to change the legal situation that laws of the Member States concerning the sale of consumer goods are somewhat disparate, with the result that national consumer goods markets differ from one another and that competition between sellers may be distorted;
- to pass legal rules considering that consumers who are keen to benefit from the large market by purchasing goods in Member States other than their State of residence play a fundamental role in the completion of the internal market;

- to prevent artificial reconstruction of frontiers and the compartmentalisation of markets;
- to achieve minimum harmonisation of the rules governing the sale of consumer goods, the development of the sale of goods through the medium of new distance communication technologies risks being impeded; and
- to strengthen consumer confidence and enable consumers to make the most of the internal market.

3.2. Scope of the Directive

The material scope of the Directive applies to the sale of consumer goods. The question, the answer to which defines the personal scope of the directive, hereby arises: who can be regarded as consumer? According to Paragraph 2 (a) of Article 1 the expression “consumer” means “*any natural person who, in the contracts covered by the Directive, is acting for purposes which are not related to his trade, business or profession*”. According to Paragraph 2 (b) of the same article “consumer goods” mean “*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,*
- *electricity.”*

Article 1 (3) states that Member States may provide for that the expression "consumer goods" does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person. Such an exception may avoid complicated disputes deriving from purchase of e.g. period furniture or other similar consumer goods at public auction.¹⁴

The scope of the Directive is widened by the provision stating that “*contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive*”, i. e. the Directive must be applied to supply contracts and certain types of service agreements. (However, the Directive does not apply to relating repair services, except for the lack of conformity resulted in from incorrect installation of consumer goods, if installation forms part of the contract of sale of the goods, and the goods were

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installed by the seller or under his responsibility. This is the case also when the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.)

3.3. Provisions of the Directive

In the present Paragraph I am going to examine the issues regulated by the Directive in detail as follows.

3.3.1. Lack of conformity

Article 3 (1) contains the provision which is the basis of many further rules concerning sale of consumer goods and generally sale and purchase agreements stating: *“The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.”* Similarly to CISG (United Nations Convention on Contracts for the International Sale of Goods; Vienna, 11th April 1980), the fact that *“the seller must deliver goods to the consumer which are in conformity with the contract of sale”* (Article 2 (1)) is the starting point of the Directive in relation to lack of conformity. The Directive sets up a rebuttable presumption in relation to the goods’ conformity with the contract in Article 2 (2) as follows:

“Consumer goods are presumed to be in conformity with the contract if they:

- (a) 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;*
- (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;*
- (c) are fit for the purposes for which goods of the same type are normally used;*
- (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.”*

All the above requirements must be met upon performance of the contract. The consumer may theoretically rebut this presumption by proving that although the goods meet the above

requirements, in the concrete case they are still in no conformity with the contract. This case is not too realistic, though as the Directive includes quite a detailed set of requirements consequently, it is rather difficult to imagine a case where the consumer goods meet the requirements stated in Article 2 (2), and they are still defective.¹⁵

According to Article 2 (3), *“there shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.”*

Accordingly, a seller can be released from the liability not only if the consumer was aware of the defect but also if he “could not reasonably be unaware” thereof. It would be obviously unfair towards the sellers if consumers were not be obliged to act with the due care expected in general. It is also important, however, that consumers should not be bound by stricter obligations than this measure: failing to recognise the defect should not be charged to consumers if the defect can be recognised only in possession of special knowledge of the given goods. The same applies to defects originating in materials supplied by the consumer. In such case, namely, it would be even unreasonable to make the seller liable for the defect which did not arise through his fault. If the consumer supplies the material to be worked on, he is expected to be aware of the features thereof.

So that the regulation be not unfairly detrimental for sellers, Article 2 (4) states that *“the seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:*

- shows that he was not, and could not reasonably have been, aware of the statement in question,*
- shows that by the time of conclusion of the contract the statement had been corrected, or*
- shows that the decision to buy the consumer goods could not have been influenced by the statement.”*

Similarly to Paragraph 3, also this paragraph defines a provision, the contrary to which would result in an unfair regulation in respect of sellers. Namely, these exemptions generally concern public statements made by the producer (and not the seller), i. e. sellers can not be

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expected to be bound by and liable for public statements made by a person independent from them provided that any of the above conditions is met.

3.3.2. Six months' presumption

In order to strengthen the legal position of consumers, the Directive sets up a presumption in relation to the origin of the lack of conformity. Article 5 (3) states:

“Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.”

This provision seems to be rather generous for consumers, and it is one of the reasons why Edwoud Hundius regards the consumer contract concluded on the basis of the Directive as “purchase without risk”. Namely, notwithstanding the latter exemption (concerning primarily perishable goods and technical defects), such reversal of the general burden of proof means that in case the defect becomes apparent within six months from the date of delivery, the consumer must prove only that the defect is existing at the date of its announcement; while it is the seller who must prove that the defect in question (or the reason therefor) arose following delivery of the good.

3.3.3. Rights of the consumer, remedies

In relation to the remedies available in case of deficient performance, Article 3 (2) states: *“In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.”*

3.3.3.1. Repair and replacement (second performance)

Similarly to the respective national regulations of many countries, the Directive sets up a hierarchy of remedies, within which repair and replacement are located in the first place,

while price reduction and rescission of the contract can be chosen by the consumer only if the conditions defined in Article 3 are fulfilled.

We must note that such hierarchy of remedies is contrary to classic Roman law, according to which the purchaser was entitled either to demand the reduction of price (*actio quanti minoris*) or to rescind the contract (*actio redhibitoria*) in case of a deficient performance. The Directive prefers repair and replacement, i. e. remedies resulting in actual performance of the contract (called "second performance" by several authors¹⁶). In such cases, the consumer finally gets the product that he would have liked to get upon the first performance of the contract.

Paragraph 3 determines the order of the possible remedies as follows:

"In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate." Accordingly, it is the consumer who is entitled to choose between repair and replacement provided that the chosen remedy is possible and proportionate.

In order to avoid disputes of interpretation, the expressions "free of charge" and "disproportionate" are specified by the Directive. Paragraph 4 states that *"the terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials."* As for the meaning of the word "disproportionate", Paragraph 3 states:

"A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:

- the value the goods would have if there were no lack of conformity,*
- the significance of the lack of conformity, and*
- whether the alternative remedy could be completed without significant inconvenience to the consumer."*

The practical purpose of this quite complicated provision is that in the majority of the cases goods of minor value be replaced, while goods of great value be repaired.

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In relation to both of the above remedies (i. e. repair and replacement) it is prescribed that *"any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods."*

3.3.3.2. Price reduction and rescission

In consequence of the hierarchy of remedies, price reduction and rescission of the contract can be chosen by the consumer only under the condition that the requirements defined in Article 3 are met. Paragraph 5 states:

"The consumer may require an appropriate reduction of the price or have the contract rescinded:

- if the consumer is entitled to neither repair nor replacement, or*
- if the seller has not completed the remedy within a reasonable time, or*
- if the seller has not completed the remedy without significant inconvenience to the consumer."*

Regarding the calculation of "appropriate reduction of the price", German law has specified an exact formula:

*"The purchase price is reduced in the ratio which the value of the item free of defects would, at the time of the conclusion of the contract, have had to the actual value."*¹⁷

The Directive provides consumers with the possibility to choose between the reduction of the price and the rescission of the contract in case any of the conditions listed in Paragraph 5 is met. Only Paragraph 6 contains a restriction in relation to the right of rescission stating that *"the consumer is not entitled to have the contract rescinded if the lack of conformity is minor"*.

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3.3.3.3. Claim for damages

The Directive does not contain provisions concerning the claim for damages enforced in consequence of a deficient performance. This issue can be regulated by member states free of restrictions within their own competence. In relation to this issue it must be noted that in the national contract law of several countries a difference is made between damages suffered merely by the fact that the product was defective (this is in fact the defect itself, e. g. the water-supply is defective) and damages incurring in further properties as a consequence of the given defect (e. g. the walls and wallpapers get soaked through due to the defect of the water-supply). This is a frequently discussed question and one can find opinions contrary to each other in both the legal literature and the judicial practice. As a general tendency we can state that claims for damages originating in the mere fact that the product was defective generally can be enforced within the same deadline as the remedies available upon deficient performance (repair, replacement, price reduction and rescission), while the latter damages can be successfully claimed within the general limitation period of claims, which is generally longer than the deadline for guarantee claims. In other words it means that someone who failed to enforce his claims provided by the law for the case of deficient performance can not enforce these claims as claims for damages following expiry of the deadline defined for enforcement of the above remedies. This solution is obviously reasonable and forces also the buyers to act with due care and not to delay in the enforcement of their rights.

3.3.4. Time limits

In relation to time limits regarding the enforcement of consumer's rights provided by the Directive, Article 5 (1) states:

“The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.”

This provision is to strengthen the legal position of consumers. The time limit for the enforcement of consumer claims must be at least two years in each member state. (I note repeatedly that member states may deviate from the provisions of the Directive for the benefit

of consumers, i. e. they may prescribe longer time limits in their national law.) Furthermore, the Directive makes it possible that in respect of enforcement of consumer claims the member states combine limitation periods, which may be suspended or interrupted with time limits following the expiry of which such claims can not be enforced any more. Concerning the previous limitation periods, point 18 of the Preamble of the Directive states:

“Member States may provide for suspension or interruption of the period during which any lack of conformity must become apparent and of the limitation period, where applicable and in accordance with their national law, in the event of repair, replacement or negotiations between seller and consumer with a view to an amicable settlement.”

3.3.5. Second-hand goods

Concerning the time limits in relation to second-hand goods, Article 7 (1) entitles the member states to enact national rules different from the general provisions of the Directive:

“Member States may provide 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 than that set down in Article 5(1). Such period may not be less than one year.”

The reasons, why the time period for enforcement of consumer rights in case of second-hand goods may be shorter than generally, are well-known. Defects of second-hand goods may not be judged on the same basis as those of brand new goods. Consumers buying second-hand goods must count on that the product may have defects deriving from the pure fact that it has been previously used by other persons.

The possibility of deficient performance and the liability of the seller, however, can not be excluded by the mere fact that the given product was bought at second-hand. Also second-hand goods must be suitable for proper use, with regard to the circumstances of the sale and of the features of the product, which the buyer could be reasonably aware of. Nevertheless, a shorter time limit for enforcing guarantee claims concerning such goods is obviously reasonable.

3.3.6. Consumer's obligation to inform the seller of the defect

“Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.” (Article 5 (2))

The reasons for this provision are the same as written in Paragraph 3.3.1. of the present paper in relation to consumers' obligation to act with due care. It would be unfair if a consumer, who does not inform the seller for a long period of the recognised defect, could enforce his rights under the same conditions as he would have acted with due care. Therefore, it is reasonable to prescribe such obligation for consumers. However, the Directive does not contain obligatory provisions in this respect but it delegates this issue to the regulation competence of the single member states.

3.3.7. Guarantees

The purpose of the provisions concerning guarantees is to avoid that consumers be misled by seller's promises expressed either in the guarantee statement or in the respective advertisements. It must also be ensured that the enforcement of rights provided to consumers by the Directive can not be hindered by producers or sellers. To achieve these goals, Article 6 contains the following provisions:

“1. A guarantee shall be legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising.

2. The guarantee shall:

- state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee,*
- set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.*

3. On request by the consumer, the guarantee shall be made available in writing or feature in another durable medium available and accessible to him.”

All these provisions emphasize the importance of consumer protection: consumers must be informed of their rights and of the conditions of the enforcement of such rights in detail. It is also very important that guarantees deriving from the Directive may not prevent consumers from enforcing their rights, which are due to them on the basis of the national legislation of their own country (e. g. guarantees provided by law and claims for damages).

5. Should a guarantee infringe the requirements of paragraphs 2, 3 or 4, the validity of this guarantee shall in no way be affected, and the consumer can still rely on the guarantee and require that it be honoured”.

Obviously, the infringement of the above requirements by producers or sellers may not have the result that consumers lose the rights and guarantees provided by the Directive. For this reason it was necessary to state that such infringements do not affect the rights and guarantees due to consumers.

3.3.8. Right of redress

As written in Paragraph 3.2. of the present paper, the material scope of the Directive applies to the sale of consumer goods, i. e. to the relationship between the seller and the consumer. However, it must also be considered that products generally come from producers to consumers through a chain of contracts and the contract of consumer sale is in most cases only the last element of this chain. If the final seller has no possibility to enforce his right of redress against the previous members of the chain of contracts, he must bear all the consequences of stricter sanctions of consumer protection set up by the Directive. This would be undoubtedly unjust, with regard to the fact that generally it is not the final seller to be held liable for the defect of the product, which has been produced or wrapped by other persons, and forwarded to him through the above mentioned chain of contracts. In such case, the final sellers would obviously increase the prices in order to make consumers pay for the stricter liability. In certain respect this would result in the realisation of just the opposite of the objectives of the Directive listed above.¹⁸ Therefore Article 4 provides the final seller of the product with the right of redress against the producer and previous sellers in the same chain of contracts if the final seller's liability to the consumer sources from the act or omission by the latter persons.

¹⁸ Vékás

“Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.”

It can be seen that for the above reasons the Directive expresses the intention to provide the final sellers with the right of redress, however, the legal form of this right and further details of the respective provisions must be defined by the member states.

3.3.9. Binding nature of the Directive

So that the provisions of the Directive serving the benefit of consumers be realised, Article 7 (1) states:

“Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.”

It must also be prevented that consumers be deprived of the protection provided by the Directive in a way that the law of a third country with rules more favourable for sellers is defined as applicable. Therefore, Article 7 (2) orders the Member States to *“take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.”*

3.3.10. National law and minimum protection

As written above in Paragraph 2 of Section IV of the present paper in relation to the minimum level of protection, Article 8 (2) entitles the Member States to *“adopt or maintain in force*

more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.” Regarding the national law of the Member States, Article 8 (1) states:

"The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability."

It must be emphasized, however, that such national rules must provide the consumers with a protection to at least the same level as provided by the Directive.

3.4. Criticism

The Directive provoked a vast body of literature and articles criticising and interpreting it. Even those who criticise the Directive acknowledge that the objectives listed above are reasonable, however, they regard some of its provisions as protecting consumers exaggeratedly. Dr. Lajos Vékás, chairman of the Hungarian Codification Committee established to prepare the new Hungarian Civil Code, refers to **Edwoud Hondius** in this respect, who regards the consumer contract concluded on the basis of the Directive as “purchase without risk”.

Most criticism concern the fact that the Directive regulates minor details and this way it is necessarily defective in some respects. The reason for this is the restricted competence of the EU to pass legal rules governing civil law.¹⁹ Furthermore, it has been proved to be difficult to approximate the national legal traditions and rules of the member states. As Paragraph 7 of the Preamble states, *“the principle of conformity with the contract may be considered as common to the different national legal traditions;”* however, *“in certain national legal traditions it may not be possible to rely solely on this principle to ensure a minimum level of protection for the consumer.”* This fact is also borne out by the provisions entitling the member states to regulate certain legal institutions within their own competence. Such provisions concern e.g. the right of redress (Article 4), the consumer’s obligation to inform the seller of the defect (Article 5 (2)) and the deadline of the enforcement of the claim in case of second-hand goods (Article 7).

¹⁹ Vékás

3.5. Implementation of the Directive

The Directive was passed on 25 May 1999 and took effect on 07 July 1999, which is the date of its publication in the Official Journal of the European Communities. Article 11 (1) obliged the Member States to *"bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2002."* As eight Member States did not fulfil this obligation in due time, the European Commission sent so-called Reasoned Opinions to the governments of Belgium, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

In order not to be inordinately circumstantial, it is enough to state that the above member states have implemented the Directive in their national law system since the issuance of these Reasoned Opinions. Furthermore, the Directive was implemented by not only these 15 countries but also by the ten states having joined the European Union on 01 May 2004, though these latter countries were not member states on the date of publication of the Directive in the Official Journal of the European Communities, i. e. on 07 July 1999. However, all states applying for a membership in the Union were highly required to harmonise their national law with that of the European Union. The issues to be regulated by the candidate states in accordance with the respective rules of the Union were defined in detail in the treaties on the accession concluded between the European Union on one side and the single applicant states on the other. Among other issues, also consumer law of the applicant states was prescribed to be harmonised with the respective EU provisions. Accordingly, the states, which joined the European Union on 01 May 2004 (like Hungary) implemented the Directive in their national law before their accession.

As a consequence of the above, the provisions of the Directive have already been implemented in the national law of each present member state, this way the high level of consumer protection aimed at by the Directive is hoped and expected to be realised in the near future.

Budapest, 15 September 2005

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PUBLICATIONS

Product Liability and Warranty (Newsletter of BALÁZS & HOLLÓ Law Firm, Issue 7, January – June, 2005)

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I have been working at BALÁZS & HOLLÓ Law Firm since 01 September 2004. I regularly deliver lectures at the presentations of our law firm in both Hungarian and English.

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