

SALE OF GOODS AND ASSOCIATED GUARANTEES IN THE ROMANIAN AND EUROPEAN LEGISLATION

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Abstract:

In a market economy there are needed certain rules for products, services and commercial practices in order to satisfy consumer's requirements, while ensuring the free movement of goods and services as well as fair competition.

The seller is obliged to deliver to the consumer only products which are in accordance with the contract of sale.

In case of non-conformity, the consumer is entitled to have the goods brought into conformity free of charge by repair or replacement, or an appropriate price reduction or rescission of the contract for those goods.

Consumer policy in the European Union enables European citizens to shop safely in all Member States.

Because the internal market must guarantee the free movement of goods, persons, services and capital, there was a need for a common set of minimum rules of consumer protection valid regardless of where the purchase of goods is made in the Community.

When a customer has purchased a product, the Community legislation requires that the product he receives corresponds to what he, the buyer, expressly or implicitly agreed to buy, that is to what is provided in the contract between seller and consumer. Obviously, the product must be used in a normal way.

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General Considerations

In a market economy there are needed some rules for products, services and commercial practices capable of meeting consumer demands while ensuring the free movement of goods and services as well as fair competition.

In the process of harmonization of the national legislation with that of the Community, was adopted the Law No. 449/2003² which transposes into the Romanian legislation the Directive no.1999 / 44 / EC on certain aspects of the sale of consumption goods and associated guarantees.

The European Union's Directive no.1999/44/EC regarding certain aspects of the sale of goods and their associated guarantees, establishes principles in the field so these can be adopted in various legal systems of the Member States and which can be applicable in case in the contract between the seller and buyer there were not provided minimum protection terms for the consumer³.

The purpose of the Directive is to bring closer the provisions with legal power, and the administrative provisions of the member states regarding certain aspects of the sale of consumption goods and associated guarantees, for ensuring a minimum and even level of the consumer's protection in the internal market's context.

The Directive defines in art. 1, consumer goods which, means any tangible movable item, except:

- goods sold by forced execution or in another way, by the authority of the law;
- the water and gas, when they are not offered for sale in a limited volume or set quantity;
- the electricity.

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² Law 449/2003 on the sale of goods and associated guarantees, republished M.Of.nr.347 / 06.05.2008 as amended by Ordinance 174/2008 published in M.Of.nr.795 / 27.11.2008.

³ European Union Directive nr.1999 / 44 / EC on certain aspects of the sale of consumer goods and associated guarantees. Official Journal L 171, 07/07/1999 P. 0012-0016.

Considering the European approach of the issue, based on the experience of the advanced market economy, in which the responsibility which derive from guarantees are established, the new regulation contributes to a more efficient organization of the economic environment in Romania.

The economic agents will show a concrete and long-term concern for product quality, increasing their chances to meet internal and external competition.

Given that consumers will feel more protected from unpleasant situations that may arise during the usability of products, including those used, their trust in the products, manufacturers and retailers will increase, developing this way a relationship with beneficial effects on market development.

The conformity of products

According to Article 2 of Directive nr.1999 / 44 / EC conformity with the contract means that:

- The seller must deliver goods to the consumer in accordance with the sales contract¹.
- Consumer goods are presumed to be in accordance with the contract if:
 - a) they comply with the description given by the seller and possess the qualities of the goods which the seller has presented to the consumer as a sample or model;
 - b) are appropriate for any particular purpose for which the consumer requires them and which he made known to the seller at the 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) they 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 by the seller, the manufacturer or its representative, particularly in advertising or on labelling.

It is not considered to be nonconformity if, at the conclusion of the contract, the consumer was aware or could not reasonably have been aware of non-compliance or where non-compliance has its origin in materials supplied by the consumer.

The seller shall not be bound by public statements, in accordance with the provisions of subparagraph d), where:

- he shows that he was or could not have reasonably been, aware of the statement in question;
- demonstrates that the statement had been corrected before concluding the contract or
- Demonstrates that the decision to buy the consumer goods could not have been influenced by the statement.

Any lack of conformity resulting from the incorrect installation of the consumer goods shall be considered as a lack of conformity of the goods if installation forms part of the sales contract and the goods were installed by the seller or under his responsibility. This provision applies also where 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.

According to article 5 of Law No. 449/2003, the seller is obliged to deliver goods to the consumer which are in conformity with the contract of sale.

It is considered that the products are in accordance with sales contract if:

- a) they correspond to the description given by the seller and have the same quality as the products that the seller has presented to the consumer as a sample or model;

¹ Seller - natural or legal person authorized, in its work, to sell products under a consumer contract.

b) they correspond to any specific purpose requested by the consumer, purpose made known to the seller and accepted by him, in the conclusion of the sale;

c) they correspond to the purposes for which they are normally used in products of the same type;

d) by being of the same type, show quality parameters and normal performances in which the consumer can reasonably expect, given the nature and public statements on the specific characteristics thereof, made by the seller, the producer or his representative, particularly in advertising or inclusion in label.

The seller is obliged to deliver to the consumer only products which are in accordance with the contract of sale.

If at the time of conclusion of the contract of sale the consumer knew or could not have reasonably been aware of this lack of compliance, or if the lack of conformity has its origin in materials supplied by the consumer, it is not considered to be a lack of compliance.

Seller is not liable for public statements referred to in letter d) in any of the following, if he proves that:

a) he did not know and could not have reasonably to know the statements in question;

b) the statement was corrected at the time of conclusion of the contract of sale;

c) the decision to buy the product cannot be influenced by the public statements in question.

Any lack of conformity resulting from incorrect installation of the goods shall be deemed equivalent to a lack of conformity of goods if installation forms part of the contract of sale of goods and the products were installed by the seller or under his responsibility.

It is considered lack of compliance also where the product is intended to be installed by the buyer and the incorrect installation of the product is due to a shortcoming in the installation instructions.

Consumer rights

According to Article 3 of Directive nr.1999 / 44 / EC, the seller is responsible to the consumer for any lack of conformity upon delivery.

In case of non-conformity, the consumer is entitled to have the goods brought into conformity free of charge by repair or replacement, or an appropriate price reduction or rescission of the contract for those goods.

First, 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 it is impossible or disproportionate.

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 of goods, where there would be no non-compliance;

- the significance of non-compliance and

- Whether the alternative remedy could be completed without significant inconvenience for the consumer.

Any repair or replacement shall be completed within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods.

The consumer may require an appropriate reduction of the price or rescission of the contract:

- If the consumer is not entitled to repair or 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.

The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

According to Article 9 of Law No. 449/2003, the seller is responsible to the consumer for any lack of conformity existing at the time the goods were delivered.

A consumer is any individual or group of individuals constituted in associations, that buy, acquires, uses or consumes products outside of his business or trade.

The product is a good mobile material whose final destination is individual or collective consumption or use.

By Law No. 449/2004 there are covered issues concerning the sale of products, including custom-made products to be purchased under a contract for the sale of products to be manufactured or processed and their guarantees to ensure consumer protection.

Not subject to Law No. 449/2004 is real estate, goods which are sold after being seized goods subject to enforcement proceedings or on any other document issued by judicial authorities, water and gas that are not packaged into only a limited amount or a fixed amount, and electricity.

There are also not subject to these provisions used goods that are sold through public tender procedure, at which the consumer has the opportunity to participate personally.

I. The seller is responsible to the consumer for any lack of conformity existing at the time the goods were delivered.

According to article 10 of Law 449/2003, in the absence of compliance, the consumer has the right to require the seller to bring the product into conformity free of charge by repair or replacement, or to receive a corresponding reduction in price or terminate the contract for this product.

Repair means to bring the product into conformity with the contract of sale.

In case of lack of conformity, the consumer has the right to ask the seller first of all to repair or has the right to request exchange, in each case without charge, unless the measure is impossible or disproportionate.

A remedy shall be considered disproportionate if it imposes costs on the seller which are unreasonable compared to the other reparatory measure, taking into account:

a) the value that the products would have had if there was no lack of conformity of;

b) the importance of the lack of conformity;

c) whether the other reparatory measure could be achieved without significant inconvenience to the consumer.

A reparatory measure shall be considered impossible if the seller can not provide the identical product for replacement or repair parts, including due to lack of equipment or related technology.

Any repair or replacement of products will be made within a reasonable period of time mutually agreed in writing between the seller and the consumer, and without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which he requested the products. The time period shall not exceed 15 calendar days after the buyer has informed the seller of the lack of conformity of the product.

For product repair, in it will be installed only in new parts.

The term free of charge refers to all costs necessary to bring the goods into conformity, including postage costs, transportation, handling, diagnostics, expertise, removal, installation, labour, materials used and packaging.

II. To have a corresponding reduction in price or rescission of the contract for these products.

The consumer may require an appropriate reduction of the price or terminate the contract in any of the following cases:

a. unless he does not benefit any repair or replacement of the product.

b. whether the seller has not taken the reparatory measure in a reasonable period of time;

c. whether the seller has not taken the reparatory within a reasonable time limit agreed between the seller and the consumer, without significant inconvenience for the consumer.

The consumer may terminate the contract if no request product conformity is minor.

Establishing non-compliance and the degree of severity is consistent with the national standards and other normative acts.

Consumer Rights under Law No. 449/2003 shall be exercised without prejudice to any other rights which the consumer may invoke under other legal provisions governing contractual or non-contractual responsibility.

If the contracting parties choose as law applicable to the contract, the law of a State which is not part of the European Union and the contract has a close connection with Romania or other European Union member states where the law no. 449/2003 has provisions more favourable to the consumer there shall be applied the latter.

Guarantees

According to Article 6 of Directive nr. 1999 / 44 / EC, a guarantee must give rise to legal obligations to the offeror on the terms set by the guarantee statement and associated advertising.

The guarantee:

- mentions that under national legislation governing the sale of consumer goods, the consumer has legal rights and states that those rights are not affected by the guarantee;
- Showcases in a plain, intelligible language the contents of the guarantee and essential information needed for making claims under the guarantee, notably the duration and territorial scope of the guarantee and the name and address of the guarantor.

To consumer demand, it shall be available in writing or feature in another durable medium available and accessible to him.

Under the rules of the Treaty, the Member State where there are sold consumer goods may provide that its territory guarantee be drafted in one or more languages, of his choice of the official languages of the Community.

Should a guarantee infringe the requirements mentioned, the validity of this guarantee shall not be affected in any way, and the consumer can rely further on the guarantee and require that it be honoured.

If security parameters that define the product are forced, certainly by precise rules, supervised by the authorities with specific tasks by fields of activity other parameters that define quality and those declared by the label affixed to the product, advertising or other such means are covered by guarantees.

The warranty is basically a way in which sellers and manufacturers implicitly commit to sell products that must maintain the parameters that determine the value of the initial use, so which must comply with the contract of sale and other liabilities of the seller, without requesting from the consumer additional costs given that he uses it according to the instructions for use.

Trough this law it is introduced a new system providing guarantees to consumers, being for the first time in introduced Romanian legislation a commercial guarantee, replacing the legal guarantee.

The warranty is any commitment by the seller or manufacturer to the consumer, without requiring additional costs, refund of the price paid by the consumer, repair or replacement of the product purchased, if it does not meet the conditions set forth in the statements warranty or advertising related.

From a legal perspective, the guarantee is binding on the offerer under the conditions specified in the warranty statements and related advertising.

The guarantee must:

a. include references to the legal rights of the consumer and stating clearly that these rights are not affected by the warranty; b. to specify identification elements of the product, warranty period, the average duration of use, how to ensure guarantee - maintenance, repair, replacement and deadline for achieving them, including the name and address of the seller and the specialized unit of service; c. guarantee must be written in simple and easy to understand terms.

If the warranty does not comply with these provisions, the validity would not be affected because the buyer has the right to ask the seller, to fulfil the conditions contained in the declarations warranty.

At the request of the consumer guarantee shall be provided in writing or in any durable medium available and accessible. Not doing so is a contravention.

Are null and void, contract terms or arrangements between the seller and the consumer before the lack of conformity to be known by the consumer and notified to the seller, that limit or eliminate, directly or indirectly, consumer rights.

In case of products used, the consumer and the seller may agree to shorten the deadline of two years, but not less than one year after delivering the product.

The liability of to the seller

The seller is the authorized natural or legal person who, in its work, sells products under a consumer contract Law No. 449/2004 defines two types of liability:

- Responsibility for consumer product complies with the specifications of the contract of sale;
- Responsibility for consumer product complies with the obligations under the guarantee and related advertising.

The seller is responsible to the consumer for any lack of conformity existing at the time the goods were delivered.

According to article 16 of Law 449/2003, the seller's responsibility is engaged if the lack of conformity occurs within 2 years, calculated from the delivery of the product.

After the expiry of two years, consumers can claim remedy or replace products that can be used for the purpose they were made as a result of hidden defects occurring in the average duration of use.

Latent defect is a defect of the quality of the product delivered or service rendered that was not known and could not be known by the consumer through the usual means of verification.

For products whose average period of use is less than two years, the period of two years shall reduce to this period.

The average use is the time span, established in normative technical documents or declared by the manufacturer or agreed between the parties, in which durable use products must maintain the functional characteristics, whether the conditions of transport, handling, storage and operation.

In case of used products, the consumer and the seller may agree to reduce the period but not less than one year from the date of delivering the product.

The consumer must inform the seller of the lack of conformity within two months from the date on which it established.

Lack of conformity becomes apparent within six months from the delivery of the product is presumed to have existed at the time of delivery unless the presumption is incompatible with the nature of the product or lack of compliance.

Action in regression

According to Article 4 of Directive nr.1999 / 44 / EC, if the final seller is liable to the consumer for non-compliance 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 law.

If the seller is liable to the consumer for lack of conformity resulting from an act or omission of the manufacturer or a trader in the same chain of contracts, the seller has the right to pursue remedies against the charge of non-compliance, with action in regression.

According to Article 15 of Law No. 449/2003, if the seller is liable to the consumer for lack of conformity resulting from an act or an omission of a manufacturer or trader of the same chain of contracts, the seller has the right to head against the charge of non-compliance.

Finding of contraventions and applying sanctions for violation of Law No. 449/2003 shall be made by authorized representatives of the National Authority for Consumer Protection. Contraventions are applicable provisions of Ordinance No. 2/2001 on the legal regime of contraventions¹

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