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The European Consumer Sales Directive — the Impact on Estonian Law

1. Introduction

The European Consumer Sales Directive (directive 99/44/EC[*1] — hereinafter Directive) can be considered an important cornerstone in the consumer legislation adopted by the European Community. This directive is destined to be a milestone on the way to unified European private law. It is aimed at improving the functioning of the internal market and protecting the consumer. In the legal literature there is even argument that the Consumer Sales Directive is not primarily consumer law but not primarily commercial law either. Rather, it is genuine general private law.[*2]

Many of the provisions of the Directive have their origin in the 1980 UN Convention on Contracts for the International Sale of Goods[*3] (hereinafter CISG). The main difference between the Directive and the CISG is that the Directive only deals with consumer sales, whereas this kind of sale has been explicitly excluded from the scope of the CISG.[*4]

The legal basis for the Directive is found in article 95 of the Treaty establishing the European Community, the former article 100A of the Treaty of Maastricht version.

As Estonia has been a member of the European Union since 2004, the national legislation in force has to comply with the Community's minimum requirements.

The idea of establishing minimum quality standards and equal rules for consumer sales and guarantees for the common European market was introduced early on, in 1975, with the Community's first programme for a consumer protection and information policy.[*5] The preamble to the Directive suggests that consumers who are keen to benefit from the large market by purchasing goods in the Member States play a fundamental role in the completion of the internal market and that in the absence of minimum harmonisation of the rules governing the sale of consumer goods the competition between sellers may be distorted (see recitals 1 and 4).

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1 OJ L 171, 07.07.1999.

2 See S. Grundmann. Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be So Similar? – European Business Law Review 2003/14, p. 238.

3 See, on the Web site of the United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

4 S. A. Kruisinga. What do Consumer and Commercial Sales Law Have in Common? A comparision of the EC directive on consumer sales law and the UN Convention on contracts for the international sale of goods. – European Review of Private Law 2001/2&3, p. 179.

5 OJ 1975 C 92/1.

The Estonian consumer sales rules are integrated with the sales regulation in the Law of Obligations Act[*6] (hereinafter LOA). The Estonian legislator in opting for an integrated solution chose a solution that modern codes have adopted before, among them the Dutch code of 1992 and the revised German Civil Code.

The legislator has chosen an option of transposing the Directive into the provisions on sales and contract-of-work law simultaneously. In this choice, the distinction between a sales contract and a contract for work becomes obsolete for the consumer, starting from the proposition that the aim of the legislator was to give consumers a correspondingly broad protection base. The revised Estonian Consumer Protection Act[*7] (hereinafter CPA) now contains only a few provisions of this nature and refers to the LOA.[*8]

2. Definitions and scope of the regulation

The main provisions on consumer sales are found in Chapter 11 of the LOA (comprising sales contract material). The provisions concerning consumer sales apply to contracts concluded by a professional seller (or a trader) with a private consumer.

LOA defines 'consumer sale' as the sale of goods on the basis of a contract of sale wherein a consumer is sold a movable by a seller who enters into the contract in the course of his or her economic or professional activities.

Although most of the consumer sales regulation is centralised in the LOA, it offers only core definitions and opens merely the notion of the consumer. Under the CPA, the consumer is defined as any natural person who performs a transaction not related to an independent economic or professional activity. As such, the definition shall cover all transactions aimed at satisfying consumers' personal and household needs.[*9]

Under Estonian law, consumer protection legislation does not extend in any part to small businesses or not-for-profit legal institutions.

The existing regulation distinguishes between a seller and a trader, defined in different legal acts. A trader is defined in the CPA as a person who offers and sells, or markets in any other manner, goods or who provides services to consumers within the scope of his business or professional activities. A seller is defined in the Trading Act[*10] as any natural person who serves clients on behalf of a trader, or a person who sells goods or provides services outside the economic or professional activities thereof by way of street or market trading.

The CPA does not define 'consumer goods' but supplies a relevant definition for 'goods'. Pursuant to the CPA, 'goods' are movable items a trader sells to a consumer.

It is worth stating that the provisions of the LOA concerning the sale of goods apply to the sale of rights and other objects, including the sale of energy, water, and heat through a network, unless otherwise provided for in the LOA and if this is not contrary to the nature of the object (LOA § 208 (3)).

Estonian sales regulation is applicable both to new and to second-hand goods, and there are no categories of restrictions set forth in the Directive's article 2 (b) concerning sale of electricity, water, or gas in limited volume and goods sold by way of execution. Also, second-hand goods sold at public auction, where consumers have the opportunity of attending the sale in person, are included in the scope of the CPA.[*11]

Goods that still need to be produced are also covered by a higher level of protection unless the customer has supplied a substantial amount of the material needed for final production of the goods. Under the LOA, a consumer contract for services (work) is a contract for services entered into by a contractor acting for the purposes of the contractor's economic or professional activities and a customer who is a consumer where the object of the contract is the provision of a service with regard to a movable of the consumer or the manufacture or production of a movable for the consumer.

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6 Võlaõigusseadus, adopted on 26 September 2001. – RT I 2002, 53, 336 (in Estonian). English translation available at http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30085K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5la%F5igusseadus (25.09.2008).

7 Tarbijakaitseseadus, adopted on 11 February 2004. – RT I 2004, 13, 86 (in Estonian). English translation available at http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40032K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tarbijakaitse (25.09.2008).

8 In Estonian law there does not exist a special Consumer Sales Act as in Sweden and all sales regulation is concentrated to one legal act — LOA.

9 Also the definition of consumer, contained in the Consumer Protection Act, which version was in force until 15.04.2004, referred to "personal needs".

10 Kaubandustegevuse seadus, adopted on 11 February 2004. – RT I 2004, 12, 78 (in Estonian). English translation available at http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X80015&keel=en&pg=1&ptyyp=RT&tyyp=X&query=Kaubandustegevuse+seadus (25.09.2008).

11 See article 2 clause 3 of the Directive.

The concept of producer is defined in two separate legal acts. Under the LOA, a producer is defined as a manufacturer of a material or finished product, a person who claims to be the manufacturer of a product, and also an importer to Estonia or into other member states of the European Union (LOA § 217 (7) and § 1062 (1)). 'Producer' is defined in a parallel manner in the Product Safety Act.*[12] The definition is similar to that given in the LOA but includes, in addition to the above-mentioned persons, a person who reconditions the product; the manufacturer's representative, when the manufacturer is not established in the European Union; and the importer of the product, if there is no representative in the European Union. Also, other professionals in the supply chain may be considered to be producers insofar as their activities may affect the safety characteristics of a product.

3. Legal requirements for consumer goods

The only provisions on legal requirements for consumer goods are found in the LOA's regulation of sales and contracts for services (work).

It is important to note that, despite the general principle of freedom of contract, the regulation of consumer sales in the LOA has a mandatory nature, as the law prescribes that agreements that are related to the legal remedies to be used in the case of a breach of contract and which derogate from the provisions of the law to the prejudice of the consumer are void (LOA § 237 (1) and § 657 (1) for consumer contract for services). In other words, the rights of the consumer as a buyer are of a binding nature, and they may be neither waived nor restricted in advance.

3.1. Conformity of goods

The requirement of conformity with the contract is one of the central provisions of the Directive and inspired by article 35 of the CISG.

The LOA requires that goods and also documents related to goods and delivered to a purchaser conform to the contract, in particular, in respect of quality, quantity, type, description, and packaging.

As are the Directive's minimum standards, the requirements are cumulative and non-exhaustive: § 217 of the LOA includes a list of types of non-conformities, which apply to all kind of sales. In addition to the list found in article 2 of the Directive, the LOA treats goods as being non-conformant with the contract if the movable is not packaged in the manner usual for such goods or adequate to preserve and protect the goods. Also goods shall be treated as non-conformant if third parties have claims or other rights that they may exercise with respect to the goods or the use thereof is hindered by provisions of legislation of which the seller was aware or ought to have been aware. The same requirements apply when the object of the sale is the right to possess goods.

In the case of consumer sales, consumers' reasonable expectations as well as public statements made by the seller, producer, or previous seller or by another retailer of the goods in question should be taken into account in examination of defects (LOA § 217 (2) paragraph 6)).*[13]

This seems to resemble article 2 (2) d of the Directive, which requires taking into account any statements concerning the characteristics of the goods, which includes all public statements made by the producer, importer, and final seller. Expressed public statements bind the seller unless he proves that he was not bound by the statements. Usually advertisements ordered by the producers or importers may be assumed to be known to the final seller to the same extent that they are known to the consumer.*[14]

Incorrect installation is deemed to be equivalent to lack of conformity arising from the goods (LOA § 217 (5)).

Mandatory requirements for consumer information, labelling of goods, instruction manuals, and indication of prices of consumer goods are specified in the CPA. Strict requirements for labelling of goods do not apply to

[12] Toote ohutuse seadus, adopted on 24 March 2004. – RT I 2004, 25, 167 (in Estonian). English translation available at http://www.legaltext.ee/text/en/X80038.htm (25.09.2008).

[13] For example see Consumer Complaints Committee decision 7-1/4816/267-05 from 31 October 2005, available at at http://tka.riik.ee/?id=3104 (7.03.2008) (in Estonian).

In this case mobile phone stopped to work in a relatively low humidity environment.

In the time of the conclusion of contract the seller gave to the consumer any information about cautions related to humid environment. The Committee found that the seller could not prove that the mobile phone sold to consumer reaches normal expections of the consumer.

[14] See also LOA § 217 (3), which restricts the liability of the seller. The liability of a seller in the case of statements made by the seller, producer or previous seller of the good or another retailer specified in § 217 (2) 6) of the LOA does not apply if the seller was not aware or did not need to have been aware of the statement or if the seller proves that the statement had been withdrawn or changed by the time of entry into the contract or that the statement did not affect the purchase of the thing.

second-hand goods unless warnings and precautions related to the use or destruction of the goods are necessary for ensuring safety and to protect consumers' health and property.

Similar regulation protects the consumer in the case of contracts for work. Under a consumer contract for services, the work must be of the quality that is usual for such work and what the customer may reasonably have expected on the basis of the nature of the work and considering the declarations made publicly by the contractor with respect to the particular qualities of the work — in particular, in advertising the work or on labels — unless the contractor proves that the declarations had been modified by the time of entry into the contract or that the declarations did not affect entry into the contract (LOA § 641 (2) paragraph 5).

3.2. Time limits for exercise of the rights

In the case of lack of conformity of goods, Estonian legislation gives the consumer a legal guarantee for a term of two years, which equals the minimum term required by the Directive. Pursuant to LOA § 218 (2), the seller is liable for any lack of conformity of an item that becomes apparent within two years of the date of delivery of the goods to the purchaser. This legal guarantee is established in the law only for consumers, and whether there is any legal guarantee for other purchasers remains unclear.*[15]

When a consumer makes his purchasing decision, he usually relies on the information given to him by the seller and/or the producer or previous seller or that provided by another retailer. Which of them owes responsibility to the consumer in this situation?

Primary liability for non-conforming goods rests with the party selling them to the consumer (LOA § 218 (1)). Therefore, the consumer has no right to choose whether to sue the manufacturer or the seller, or both, unless otherwise agreed by contract. An exception to this general rule is stipulated in LOA § 1044 (3), which gives the consumer the right of choice in the case of personal damages (i.e., where death, bodily injury, or harm to a person's health is caused as a result of the violation of a contractual obligation). Other members of the supply chain are not responsible to the consumer, irrespective of their statements and influence on the purchase process.*[16]

However, the above-mentioned two-year legal guarantee period is not available for all goods, as the durability of the goods depends upon the nature of the goods. To fall under the guarantee, the goods must be intended for long-term use, and the consumer's reasonable expectations should be taken into account. Although the existing law does not provide a list of durable items, the legal practice of the Consumer Complaints Committee has adopted a viewpoint from which only items that can be used normally for more than two years are covered by the legal guarantee. Items of this nature may include personal computers, mobile telephones, electrical appliances, furniture, etc.*[17]

For the case of consumer sale, it is presumed by the law that any lack of conformity that becomes apparent within six months of the date of delivery of goods to the consumer existed before the delivery of the goods, unless such presumption is in contradiction with the nature of the goods or the deficiency (LOA § 218 (2) second sentence). For instance, the non-conformity may be caused by damage or abuse of the goods.

The following case from the *Tarbijakaebuste komisjon*, the Estonian Consumer Complaints Committee*[18], demonstrates how the abuse of goods can be detected:

> A consumer bought a mobile phone in July 2006. In December 2006, the phone switched off and stopped working. The consumer therefore demanded that it be repaired free of charge. The seller rejected the claim. The seller refused the repair and, referring to expert opinion, claimed that the phone had been damaged by excessive humidity.

The Consumer Complaints Committee dismissed the claim, arguing that the seller has an obligation to prove, within the first six months from the date of delivery of an item to the consumer, that the item conforms with

[15] The Civil Code of the Estonian Soviet Socialist Republic of 12 June 1964 which was in force until 2002 gave to all buyers (including consumers and business buyers) time-limit of 6 months compulsory guarantee for movable goods and another six months for filing of a pretension — altogether a one-year period.

[16] This proposition seems not to be in conflict with article 4 of the Directive which entitles the final seller to pursue remedies against the person(s) liable in the contractual chain. A similar provision is prescribed in § 228 of LOA, which states that in the event of consumer sales, if the seller is liable for any non-conformity it is presumed that the seller may claim compensation for damage caused thereto from the corresponding person in accordance with the relationship between them and to the extent of the liability of the seller to the consumer. There are no provisions in Estonian law concerning manufacturer´s and seller's joint liability ahead the consumer.

[17] For examples see Consumer Complaints Committee decisions 7-1/1169-67 from 16.04.2007 (mobile phone). Available at http://tka.riik.ee/?id=3138 (7.03.2008) (in Estonian); 7-1/11882-70 from 23.04.2007 (laptop computer). Available at http://tka.riik.ee/?id=3138 (7.03.2008) (in Estonian); 7-1/1912-86 from 28.05.2007 (furniture). Available at http://tka.riik.ee/?id=3138 (7.03.2008) (in Estonian); 7-1/5364-176 from 13.11.2007 (vacuum cleaner). Available at http://tka.riik.ee/?id=3528 (7.03.2008) (in Estonian).

[18] Consumer Complaints Committee was founded in June 2004 for settlement of consumer complaints under the CPA outside court system (see §§ 22–37 of CPA).

the contract. The seller has fulfilled his obligation by ordering expert opinion. The committee was of the view that the expert opinion is reliable, and therefore it rejected the buyer's claim.*[19]

In accordance with § 218 (2) LOA, it is presumed that the seller has sold goods not conforming with established requirements. So the seller has to prove clearly that the lack of conformity is not induced by production deficiencies. This provision seems to imply that the consumer does not have to check anything in the first six months after delivery. If he claims non-conformity of the good, it is presumed that any defect existed at the time of delivery.*[20]

After the above-mentioned six-month time limit has passed, the presumption of conformity is a general rule and the consumer has to prove that the defect derives from the producer.

Time limits are prolonged by the time for which the goods are being repaired. The limitation period for claims against the eliminated deficiency begins anew as of the repair of the goods. If the goods or any part thereof is replaced, the limitation period begins upon delivery of the substitute item by the seller (LOA § 231 (4)).

Under the Directive, the purchaser has an obligation to notify the seller of the lack of conformity in reasonable time after he becomes or should become aware of the lack of conformity. For consumer sale, this reasonable time is limited to two months from the moment the consumer becomes aware of the lack of conformity (LOA § 220 (1) second sentence). The following case from the Estonian Consumer Complaints Committee demonstrates how the two-month time limit has been interpreted:

> A consumer bought a white-coloured leather handbag in March 2006. She used the handbag for about two months and then packed it away with winter clothes at the end of May. After more than four months (in October), she unpacked the handbag and then discovered a defect — the bag was dirty. Thereafter she notified the seller, who rejected the claim.

The Consumer Complaints Committee also dismissed the claim, arguing that the consumer should have discovered the non-conformity while packing the handbag for storage. Therefore, the consumer was obliged to notify the seller considerably earlier than when she in fact did so.*[21]

This time limit is not, however, absolute in nature, as the consumer may rely on temporary obstacles. However, if the purchaser has a reasonable excuse for the failure to give notice in time, he may still rely on the lack of conformity, but remedies are available only in a limited extent and include price reduction and compensation for damages (LOA § 220). It should be noted that the compensation for damages in this situation does not cover any loss of profits (LOA § 220 (3)).

3.3. Remedies available

Estonian law provides for a broader set of remedies than the Directive in the case where an infringement of obligation is adjudged to have occurred.*[22] Under LOA § 101 (1), in the case of non-performance by an obligor the obligee may

1) require performance of the obligation;
2) withhold performance of an obligation that is due from the obligee;
3) demand compensation for damage;
4) withdraw from the contract;
5) reduce the price; or
6) in the case of a delay in the performance of a monetary obligation, demand payment of a penalty for late payment.

It is distinctive of the Estonian civil-law system that the full set of remedies are gathered together in the general part of the LOA. The special part of the LOA contains only exceptions from general rules for different types of contracts.

At first sight, it seems that the consumer as a creditor has an option to freely choose appropriate remedies.

[19] See Consumer Complaints Committee decision 7-1/1169-67 from 16 April 2007. Available at http://tka.riik.ee/?id=3138 (7.03.2008) (in Estonian).

[20] Similar approach has been adopted in the Netherlands by E. Hondius, H. Schelhaas. In conformity with the Consumer Sales Directive? Some remarks on transposition into Dutch Law. – European Review of Private Law 2001/2&3, p. 332.

[21] See Consumer Complaints Committee decision 7-1/4890-244 from 10 November 2006, available at http://tka.riik.ee/?id=2951 (7.03.2008) (in Estonian).

[22] A model law for the system of legal remedies of the existing law has been 1980 Vienna Convention on International Sales. For more information see also the explanatory note to the draft of LOA, http://web.riigikogu.ee/ems/plsq/motions.active (7.03.2008) (in Estonian).

The general part of LOA § 101 (2) allows the obligee to resort to any legal remedy separately or resort simultaneously to all legal remedies that arise from the law or the contract and can be invoked simultaneously.*[23]

Although the general part of the LOA gives the consumer the right to choose any available remedy, the sales regulation limits that choice considerably. When one considers sales regulation as a whole, there seems to be a kind of hierarchy in the system of remedies available for the creditor.

Originating from LOA §§ 222 and 224, the consumer's first choice by law is the right to require performance of the obligation. This remedy covers both repair and replacement. As in other civil-law jurisdictions, the Estonian consumer may demand the repair of the goods or delivery of substitute goods from the seller if this is possible and does not cause unreasonable costs or unreasonable inconvenience to the seller (LOA § 222 (1)). In assessing the choice of remedy, the assessor must take into account, *inter alia*, the value of the goods, the significance of the lack of conformity, and the opportunity for the purchaser to acquire elsewhere goods that conform to the contract without inconvenience. The seller may, instead of repairing the goods, deliver a substitute item that conforms to the contract.

When pondering whether to choose repair or replacement, the consumer has to take into account the aim of the law. The Directive states in the Preamble (recital 11) and in article 3, subsection 3 that a remedy shall be deemed to be disproportionate if it imposes costs for the seller that, in comparison to alternative remedy, are unreasonable. In the absence of relevant provisions in Estonian law, the aim of the Directive should be taken into account in assessment of the question in practice. In legal practice, the Consumer Complaints Committee has found that, according to article 3, subsection 3 of the Directive, the seller has a right to choose the remedy that is less expensive for him.*[24]

According to LOA § 222 (4), the seller is the person who incurs the costs related to the repair of the goods or delivery of substitute goods — in particular, costs relating to transport, postage, work, travel, and materials. Therefore, the costs for returning large or heavy goods for repairs must be borne by the seller.

Estonian civil law does not give the consumer an 'indirect right' of repair or replacement by means of awarding damages, which places it in contrast to what is common to English and Scottish law.*[25] The existing remedial system gives the Estonian consumer the right to require performance of the contract as well as to demand compensation for damage.*[26]

If a consumer legitimately requires the repair of an item and the seller fails to repair it within a reasonable time, the consumer may repair the goods himself or have the goods repaired. In the latter situation, the consumer has a right to claim compensation for any reasonable costs incurred thereby from the seller.

Another remedy the consumer may choose is reduction in the purchase price. The use of this remedy is restricted by LOA § 224, which states that, if the seller repairs the goods or delivers substitute goods conforming to the contract, the consumer should not reduce the purchase price. The same rule should be applied if the consumer unreasonably refuses to accept the proposal of the seller concerning the repair of the goods or delivery of a substitute.

The most fundamental remedy available to the consumer is the right of withdrawal. The general part of the LOA lays down as a fundamental principle that a party to a contract may withdraw from the contract only in the case of fundamental breach of contract (LOA § 116 (1)). It seems to be in accordance with the aim of the Directive not to entitle the consumer to rescind the contract if the lack of conformity is minor.*[27]

The sales regulation of LOA § 223 (1) specifies that, *inter alia*, a fundamental breach of a sales contract occurs if the repair or substitution of an item is not possible or fails, or if the seller refuses to repair an item or supply a substitute in reasonable time after the seller is notified of the lack of conformity. In the case of consumer sales, any unreasonable inconvenience caused to the consumer by the repair or substitution of goods is deemed also to be a fundamental breach of contract (LOA § 223 (2)). The Consumer Complaints Committee has found that, under this clause, unreasonable inconvenience is caused to the consumer if there have been three or more unsuccessful attempts to repair the product in question.*[28]

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[23] Estonian legislation supports the position of the European Consumer Law Group wo have insisted that consumers must be entitled to choose freely between all remedies provided by the Directive. See European Consumer Law Group Opinion on the Proposal for a Directive on the Sale of Consumer Goods and Associated Guarantees. – Journal of Consumer Policy 1998 (21), p. 94.

[24] See Consumer Complaints Committee decision 7-1/4323/235 from 22 September 2005. Available at http://tka.riik.ee/?id=3104 (7.03.2008) (in Estonian).

[25] See more S. Watterson. Consumer Sales Directive 1999/44/EC – The impact on English law. – European Review of Private Law 2001/2&3, pp. 209–212.

[26] Under LOA § 101 (2) invoking a legal remedy arising from non-performance shall not deprive the obligee of the right to demand compensation for damage caused by non-performance.

[27] See article 3 subsection 6 of the Directive.

[28] See Consumer Complaints Committee decision 7-1/2852/48-04 from 26 October 2004. Available at http://tka.riik.ee/?id=1699 (7.03.2008) (in Estonian).

The seller shall not rely on an agreement that precludes or restricts the rights of the consumer in connection with lack of conformity of goods if the seller is aware or ought to be aware that the goods do not conform to the contract and fails to notify the consumer of this (LOA § 221 (2)).

In addition to the list of remedies prescribed in article 3, paragraph 2 of the Directive, the LOA gives the consumer the primary right to receive compensation for damage. In the case of non-performance of an obligation by the seller, the consumer may, alongside or in lieu of performance, claim compensation for damage caused by the non-performance, except in cases where the seller is not liable or the damage is not subject to compensation for any other reason provided by law.

The Civil Chamber of the Supreme Court of Estonia has in a decision from 2005 noted that in the case of infringement of the sales contract the buyer has no right to claim simultaneously the right to damages and reduction of the purchase price.[*29] However, this does not mean that the consumer has no right to claim compensation for additional damages.

The consumer may, *inter alia*, claim compensation from the seller for such damage as is caused through the use of an item for purposes other than those originally intended if the damage derived from the seller providing insufficient information to the consumer (LOA § 225). In addition, the LOA, in § 225, provides that the consumer is entitled to compensation for the damage caused to the item itself in consequence of the lack of conformity.

The Directive has been criticised for the absence of traditional remedies such as consequential damages.[*30] However, in Estonian law the liability of the seller is limited in relation to a 'consequential loss' for such damage caused intentionally or due to gross negligence as the party foresaw or should have foreseen as a possible consequence of non-performance at the time of entering into the contract[*31] (LOA § 127 (3)). In other cases, the theory of the purpose of the provision should be applied.

4. Commercial guarantee

4.1. Scope and nature of regulation

The LOA contains special rules for voluntary guarantees offered by a producer or seller (hereinafter commercial guarante'[*32]).

The legal regime for commercial guarantees relies basically on the rules of the Directive. The existing law makes a clear distinction between legal and commercial guarantees. This distinction is based on drawing a line between dispositive guarantee rules and binding guarantee rules. The LOA contains two relevant provisions dealing with dispositive commercial guarantees.[*33]

General conditions concerning commercial guarantees are applicable to both consumer and business sale contracts. A commercial guarantee is, within the meaning of the LOA, a promise made by a seller, previous seller, or producer (warrantor) to replace or repair sold goods, without charge or for a fee, under the conditions prescribed in the warranty or to ensure in other ways the compliance of the goods with the conditions prescribed in the warranty. A commercial guarantee, in order to be enforceable, must afford the consumer a better legal position than do legal rules governing the sale of consumer goods.[*34] For example, some computer-sellers have offered the consumer an option of on-site maintenance service. Despite the fact that a commercial guarantee is a voluntary and unilateral promise, it shall be highly binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising. This principle is expressed clearly in article 6, subsection 1 of the Directive and supported by general principles of contract law found in the LOA.

Traders and producers are required to provide consumers with detailed information concerning, *inter alia*, the guarantee and possibilities for submitting complaints regarding the goods (LOA § 231 (1)).

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29 Decision of the Supreme Court of Estonia 3-2-1-131-05. – RT III 2005, 43, 425 (in Estonian).

30 E. Hondius. Consumer Guarantees: Towards a European Sale of Goods Act. Available at http://w3.uniroma1.it/idc/centro/publications/18hondius.pdf (7.03.2008).

31 The notion of consequential loss is not defined in Estonian law in writing.

32 The notion "commercial guarantee" is used because it is a commercial decision for the seller or producer as to whether to offer it at all, whereas the "legal guarantee" must by law be offered. See also E. Deards. The Proposed Guarantees Directive: Is It Fit for the Purpose? – Journal of Consumer Policy 1998 (21), p. 107.

33 See LOA § 230 and § 231.

34 See also D. Staudenmayer. The Directive on the Sale of Consumer Goods and Associated Guarantees — A Milestone in the European Consumer and Private Law. – European Review of Private Law 2000/4, p. 551.

According to LOA § 230 (3), it is presumed that the seller guarantees the durability of the goods within the period stated.

Where the seller or producer has provided a commercial guarantee, consumers may, within the guarantee period, submit complaints to the seller about defects as specified in the guarantee and that prevent the intended use of the goods. The guarantee period begins such that it runs from the delivery of the goods to the purchaser unless a later time for beginning of the guarantee period is prescribed in the contract or letter of guarantee. If the seller is required to dispatch the goods to the purchaser, the guarantee period does not begin before the goods are delivered to the purchaser (LOA § 230 (2) second sentence).

In LOA § 230 (2), it is stated that the elapsing of the guarantee period is suspended for the time for which the purchaser cannot use the goods on account of a lack of conformity for which the warrantor is applicable.

4.2. Execution of guarantee rights

It is presumed by the law that a guarantee provided by a warrantor covers all defects of the goods concerned that become apparent during the guarantee period (LOA § 230 (3)). Therefore, when in practice the seller informs the consumer in brief terms that, for shoes bought by the consumer, he grants a commercial guarantee of 30 days without any additional information, it must be inferred that the seller has given a full guarantee for the shoes and promises to remove, without restrictions, all defects emerging in the shoes during the guarantee period. If the seller wants to rely on restrictions, he must prove the actual content of the guarantee agreement.

When a seller wants to give a guarantee, he must also lay down the procedural mechanism for exercising the rights. This procedure shall not be unreasonably cumbersome for the purchaser (LOA § 230 (4)). It is clearly worth noting that the commercial guarantee does not preclude or restrict the right of the consumer to exercise other legal remedies arising under the law or on the basis of the contract (LOA § 230 (5)). This means that if the goods are also covered by legal guarantee, the consumer has an opportunity to exercise the rights arising from both a legal guarantee and a commercial guarantee.

The LOA includes a special section (§ 231) concerning additional requirements for consumer guarantees. This section establishes a considerably higher standard of protection of the consumer as compared with other purchasers. Inherited actually from article 6 of the Directive, this provision stipulates the so-called 'requirement of transparency'. To fulfil the binding requirement of transparency, LOA § 231 (1) urges the seller to give the consumer — in an understandable manner — information concerning the subject matter of the warranty and the procedure for exercising the rights arising from the warranty. The Directive specifies this duty by ordering the seller to give the requested information clearly and in plain, intelligible language (Art. 6, paragraph 2, recital 2 of the Directive). Article 6 of the Directive gives to each Member State the right within its own territory to provide that the guarantee be drafted in one or more official languages of the Community. The Estonian CPA expressly dictates that information provided to consumers shall be truthful, understandable, and in the Estonian language (see § 4 (4)). In addition to this, the Language Act[*35] declares that use of the Estonian language is required if it is in the public interest. The act considers consumer protection to be in the public interest (as specified in § 2^1 (2) of the Language Act). A consumer shall be given the opportunity to freely examine the conditions of guarantee before entering into a sale contract. This requirement is often infringed on in legal practice by a seller supplying guarantee information after conclusion of the contract.

The LOA establishes the minimum content of conditions for commercial consumer guarantee (in its § 231 (1)).

According to § 230, the seller is allowed to give requested guarantee information to the consumer in a freely chosen form, even orally. Only in the case of a special request from the consumer need the guarantee be presented to the consumer in writing or via another durable medium that the consumer is able to use.

However, the CPA provides clearly that when goods are sold under a guarantee a document must be handed over carrying at least the date of sale, the price of the goods, and data about the trader (see § 4 (6)). Surprisingly, the seller has no obligation under existing Estonian law to specify the name of each distinct item. Therefore it may be difficult for the consumer to prove that the price is associated with a specific item.[*36]

For consumer sales, it is presumed under LOA § 231 (4) that the guarantee grants the purchaser the right to demand the repair of the goods or delivery of substitute goods without charge during the warranty period; for goods replaced during the warranty period, a new warranty with the same duration as the original warranty will be granted; and if the piece of goods is repaired during the warranty period, the warranty is automatically extended by the length of the time of repair. This presumption is valid until and unless proved otherwise.

[35] Keeleseadus, adopted on 21 February 1995 – RT I 1995, 23, 334; 2003, 82, 551 (in Estonian).

[36] See also Consumer Protection Act § 4 (6).

4.3. After-sales services

The Directive does not contain any provision concerning after-sales services. The exclusion of after-sales services was justified by reference to the principle of subsidiarity. In Estonian law, only one rule concerning after-sales services can be found in the LOA pertaining to consumer sales.

According to LOA § 232, if the purchaser may reasonably expect that services related to the use, maintenance, or repair of the goods will be provided but the seller does not provide such services, the seller shall provide sufficient information to the purchaser at the time of delivery and, at the request of the consumer, after the delivery of the goods regarding the possibilities for using such services. However, the legislator does not bind the seller to warrant to the buyers the existence of appropriate after-sales services and the supply of spares for a minimal time period. Possibly providing indirect support for the consumer, LOA § 23 (1) states that obligations of the parties may arise also from the nature and purpose of the contract and the principles of good faith and reasonableness.

5. Conclusions

Principles from the Directive are transposed simultaneously to sales as well as to the contract-of-work regulation of the LOA. The approach chosen by the legislator gives the consumer a considerably broad protection base. The consumer's reasonable expectations have a decisive role in determining whether the goods or work shall be deemed to conform to the contract or not.

Estonian sales regulation is applicable both to new and to second-hand goods, and there are no restrictions specified in the Directive's article 2 (b) concerning sale of electricity, water, or gas in limited volume and goods sold by way of execution. Also, second-hand goods sold at public auction, where consumers have the opportunity of attending the sale in person, are included in the scope of the CPA.

It is distinctive of the Estonian civil-law system that the full set of remedies are gathered together in the general part of the LOA. The special part of the LOA contains only exemptions from general rules for various types of contracts.

At first sight, it seems that the consumer as a creditor has an option to freely choose appropriate remedies. The general part of the LOA (§ 101 (2)) allows the obligee to resort to any legal remedy separately or resort simultaneously to all legal remedies that arise from the law or the contract and can be invoked simultaneously.[*37]

Although the general part of the LOA gives the consumer the right to choose any available remedy, the sales regulation limits that choice considerably. When one considers sales regulation as a whole, there seems to be a kind of hierarchy in the system of remedies available to the creditor.

Pursuant to LOA §§ 222 and 224, a consumer has as first recourse the right to require the performance of the obligation. This remedy covers both repair and replacement. The consumer may demand the repair of the goods or delivery of substitute goods from the seller if this is possible and does not cause the seller unreasonable costs or unreasonable inconvenience. The sales regulation of the LOA restricts the use of the reduction of price as a remedy by stating that if the seller repairs the goods or delivers a substitute item that conforms with the contract, the consumer should not be entitled to a reduced purchase price.

Usually, a party to a sales contract may withdraw from the contract only in the event of fundamental breach of contract. It seems to be in accordance with the aim of the Directive not to entitle the consumer to rescind the contract if the lack of conformity is minor.

Under Estonian legislation, the liability of the seller is limited in relation to 'consequential loss' for such damage as the party foresaw or should have foreseen as a possible consequence of non-performance at the time of entering into the contract.

In conclusion, it can be said that the Estonian consumer sales law is in conformity with the Directive. There are some minor divergences that do not need to be remedied.

[37] Estonian legislation supports the position of the European Consumer Law Group who have insisted that consumers must be entitled to choose freely between all remedies provided by the Directive. See European Consumer Law Group Opinion on the Proposal for a Directive on the Sale of Consumer Goods and Associated Guarantees. – Journal of Consumer Policy 1998 (21), p. 94.