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Review paper

CONSUMER SALES GUARANTEES IN SERBIAN, CROATIAN, AND SLOVENIAN LAW**

Abstract

Each examined legal order acknowledges the voluntary character of consumer commercial guarantees, complementing the seller's legal liability for the lack of conformity. The peculiarity of Slovenian law is the existence of a mandatory guarantee for the flawless operation of the goods for at least one year, covering the so-called "technical goods" imposed upon the producer. The hierarchy of consumer remedies in the case of the commercial guarantee is three-level in Croatian law: repair is considered primary, replacement secondary, and termination of the contract and price reduction tertiary claims. On the other hand, in Serbian and Slovenian law, there is no obligatory hierarchy between the remedies in this regard. Another essential difference between the examined legal orders concerns the non-existence of a separate institute of the producer's guarantee of durability for certain goods for a certain period in Serbian law, unlike in Croatia and Slovenia.

Keywords: commercial guarantee, mandatory guarantee, consumers

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1. INTRODUCTION

The importance of consumer sales guarantees was underlined in Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (hereinafter referred to as “Directive 1999/44/EC”). The enactment of this Directive, characterized by the minimum harmonization approach (Twigg-Flesner 2008, 407), was considered “the decisive step for establishing the European policy on consumer guarantees” (Wiewiórowska-Domagalska 2012, 45). Its Recital 21 stated that the practice of offering guarantees “can stimulate competition”. It also affirmed that “guarantees are legitimate marketing tools” that “should not mislead the consumer”.

Another stage in the regulation of the consumer’s position in the event of a lack of conformity of the goods with the contract and consumer guarantees is hallmarked by the adoption of Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (hereinafter referred to as “Directive (EU) 2019/771”), that repealed Directive 1999/44/EC. Directive (EU) 2019/771, featured by the maximum harmonization clause, paid due attention to commercial guarantees (Carvalho 2020, 33).

This paper concentrates on the regulation of consumer commercial (contractual) guarantees in Serbian, Croatian, and Slovenian law and the mandatory guarantee as the specificity of Slovenian law. Since Directive (EU) 2019/771 is transposed within Croatian and Slovenian law, the paper also compares the legal regulation in force today with that influenced by Directive 1999/44/EC, with the principal objective to determine whether the recent amendments introduced substantial modifications. In addition, this study aims to compare and determine the similarities, divergences, and peculiarities of the examined national legal systems. In this regard, the Croatian and Slovenian regulations could serve as a model for the Serbian legislator in the future transposition of Directive (EU) 2019/771. Finally, each chapter contains a short introductory part dedicated to legal sources governing the focal issues.

2. SERBIA

2.1. Legal Sources

The rules on the contractual guarantee contained in the Serbian Consumer Protection Act² (hereinafter referred to as “the SrCPA”) are based

² Zakon o zaštiti potrošača [Consumer Protection Act], Službeni glasnik RS [Official Gazette of the Republic of Serbia], No. 88/2021.

on Directive 1999/44/EC. It is worth mentioning that the Serbian Obligations Act¹ (hereinafter referred to as “the SrOA”) also regulates the warranty for the correct functioning of the goods (Art. 501-507), whose application is limited to the category of technical goods (SrOA, Art. 501). Given that the SrCPA is *lex specialis* in consumer matters, its provisions apply to the guarantee given to the consumer. However, if, in a specific case, the protection provided in the SrOA is more beneficial to the consumer’s position than the SrCPA, the consumer should not be prevented from appealing to the SrOA (Jovičić 2018, 720). Namely, the Serbian legal theory argues that the provisions of the SrOA should find their application if they do not diminish the degree of protection granted to the consumer by the SrCPA (Jovičić 2018, 720-721; Karanikić Mirić 2011, 177).

2.2. The Contractual Guarantee

The SrCPA defines a guarantee as any statement where the guarantor makes a promise related to the goods that is legally binding in line with the terms of the statement and related advertising (SrCPA, Art. 53, Sec. 1). For this purpose, the guarantor is the trader, whether the producer, importer, wholesaler, or retailer, who undertakes the obligation to the consumer based on a given guarantee (SrCPA, Art. 5, Sec. 1 (40)). Moreover, the SrCPA determines the producer as an entity:

- 1) that produces or imports finished products, goods, raw materials, or parts in the Republic of Serbia for sale, leasing, or other kind of trade;
- 2) that purports to be a producer by placing his/her name, trademark, or another distinctive sign on the goods;
- 3) trader of a product that does not contain information on the producer if he/she failed to inform the person suffering damage in due time of the identity of the producer or the entity from which the product was bought;
- 4) trader of an imported product that contains information on the producer but not on the importer (SrCPA, Art. 5, Sec. 1 (16)).

¹ Zakon o obligacionim odnosima [Act on Obligations]. Službeni list SFRJ [Official Gazette of the Socialist Federal Republic of Yugoslavia] 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89; Službeni list SRJ [Official Gazette of the Federal Republic of Yugoslavia] 31/93; Službeni list SCG [Official Gazette of Serbia and Montenegro] 1/2003 – Constitutional Chapter and Službeni glasnik RS [Official Gazette of the Republic of Serbia] 18/2020.

Including the producer, importer, wholesaler, and retailer (i.e., seller) among possible guarantors is in the consumer's interest and is necessary for having the most extensive possible number of products on the market (Jo-
vičić 2018, 715). It is worth underlining that the field of application of the guarantee, covering the mentioned entities, is ampler than that of the liability for the lack of conformity, which presupposes the liability of the sole seller towards the consumer. The determination of the possible guarantors, including the extensive interpretation of the producer, is in line with the legal solution contained in Directive 1999/44/EC (Art. 1, Sec. 2 (d) and (e)). However, it is questionable why the Serbian legislator mentions separately the importer without giving any definition to this term since the notion of the producer indubitably incorporates it. It may be stated that the specific mention of this term in the definition of the guarantor is redundant and unnecessary due to the extensive interpretation of the producer. It is susceptible to creating confusion about whether there is any difference between the importer from the definition of the guarantor and the importer embedded in the notion of the producer. Directive 1999/44/EC does not mention the importer as a separate category, i.e., it is encompassed in the notion of the producer (Wiewiórowska-Domagalska 2012, 60).

The guarantor's obligation is connected to the promise he/she made about the goods. Interestingly, the SrCPA does not explicitly require that the promise be given without extra charge. Such an omission may represent a fundamental difference compared to the definition of the guarantee contained in Directive 1999/44/EC.² Namely, the requirement that the undertaking be given "without extra charge" was introduced to distinguish the after-sale services from the guarantee. In that manner, the rules of the mentioned Directive did not apply if the consumer was asked to pay separately for the guarantee (Ninane 2015, 106; Vujisić 2016, 705). It was possible to exclude the application of its provisions by stipulating a symbolic remuneration to be paid by the consumer to the guarantor (Ninane 2015, 106; Stijns 2005, 164-165). Although the SrCPA does not explicitly contain the gratuitousness requirement in the definition of the guarantee, the Serbian legal doctrine suggests an interpretation concordant with the legal solution from Directive 1999/44/EC (Karanikić Mirić 2011, 182).

² In Art. 1, Sec. 2 (e) of Directive 1999/44/EC the guarantee is defined as any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.

Furthermore, the SrCPA does not specify the content of the guarantor's promise concerning the consumer's remedies. On the other hand, Directive 1999/44/EC in Art. 1, Sec. 2 (e) mentions the reimbursement of the price paid, repair, replacement, and handling of consumer goods in any other way. It is worth noting that the Directive did not introduce any hierarchy between these remedies, nor is there any exhaustive list because of the possibility of offering to handle consumer goods in any other way (Wiewiórowska-Domagalska 2012, 76; Vujisić 2016, 708). Albeit the SrCPA is reticent in this regard, it may be stated that nothing hinders the guarantor from providing the consumer the same remedies as those mentioned in Directive 1999/44/EC. However, the guarantor cannot restrict the consumer's rights deriving from the warranty for the lack of conformity (Jovičić 2018, 716). The SrCPA explicitly envisages that any contractual term or declaration of will that directly or indirectly waives or restricts the rights of consumers resulting from that law is null and void (SrCPA, Art. 3, Sec. 2).

The guarantor's promise is legally binding in accordance with the terms of his/her statement and related advertising. This final part of the definition complies with the one contained in Directive 1999/44/EC. The question arises as to how to treat the potential conflicts and divergences between the terms of the statement and the associated advertising. The legal theory dealing with this issue from the point of view of the mentioned Directive adopted a *contra proferentem* approach, allowing the more favourable provision to the consumer's position to prevail (Howells et al. 2018, 199; Wiewiórowska-Domagalska 2012, 86). Consequently, if the guarantee statement is less advantageous to the consumer than the advertising, the latter should be prioritized (Tenreiro in Stijns 2005, 167). Conversely, some voices gave precedence to the guarantee statement, stating that it could correct the advertising (Malinvaud in Wiewiórowska-Domagalska 2012, 86). This conflict is resolved by Directive (EU) 2019/771 in favour of a more advantageous solution to the consumer.³ The interpretation allowing the *contra proferentem* approach should be accepted in Serbian law. It derives from the *favor consumatoris* principle enshrined in the rule that unclear provisions of the contract concluded between the trader and the consumer are to be interpreted in the consumer's favour (SrCPA, Art. 41). The Serbian

³ Art. 17, Sec. 1 (2) of Directive (EU) 2019/771: If the conditions laid out in the commercial guarantee statement are less advantageous to the consumer than those laid down in the associated advertising, the commercial guarantee shall be binding under the conditions laid down in the advertising relating to the commercial guarantee, unless, before the conclusion of the contract, the associated advertising was corrected in the same way or in a comparable way to that in which it was made.

legal theory emphasized the contractual nature of the guarantee (Karanić Mirić 2011, 183).

Another issue directly connected to the related advertising concerns its binding nature if the guarantor was not its author. Namely, it is worth noting that the SrCPA, regulating the conformity of goods, considers the public statements on the specific characteristics of the goods made about them by the seller, the producer, or their representative, particularly on the advertising or the labelling (SrCPA, Art. 49, Sec. 2 (4)). Moreover, it stipulates that the seller is not bound by the mentioned public statements if the seller was not and could not reasonably have been aware of the statement in question or by the time of the conclusion of the contract, the statement had been corrected or the consumer's decision to conclude the contract could not have been influenced by the statement (SrCPA, Art. 51, Sec. 5). These provisions represent the transposition of Art. 2, Sec. 2 (d) and Sec. 4 of Directive 1999/44/EC. The legal theory, interpreting the legal solutions from the Directive, stated that "the regulation does not have to consider the possibility that an entity other than the guarantor would refer to the guarantee in the course of advertising" (Wiewiórowska-Domagalska 2012, 85). However, the possibility of accepting the applicability of the exceptions exonerating the seller from the liability for the public statements of the producer and its representative to the guarantee was left open (Stijns 2005, 167).

The SrCPA emphasizes the importance of the guarantee card, stipulating that it is a document in writing or electronic form or on another durable medium that contains all the information from the guarantee drafted in a plain, intelligible manner, in an easily comprehensible language (SrCPA, Art. 53, Sec. 2). The Serbian legislator did not determine in which language the guarantee card should be drafted (Đorđević 2018, 62). It is worth noting that Directive 1999/44/EC in Art. 6, Sec. 4 allowed the Member States to provide within their own territory that the guarantee be drafted in one or more languages determined from among the official languages of the European Union. Furthermore, the SrCPA in Art. 53, Sec. 4 introduced the guarantor's obligation to issue and deliver to the consumer a guarantee card for the given guarantee. The burden of proof that the guarantee card was delivered to the consumer is placed upon the seller (SrCPA, Art. 53, Sec. 6). Therefore, in the event of a dispute concerning the guarantee, the seller is obliged to demonstrate that he/she handed over the guarantee card to the consumer. The obligation to deliver the guarantee card to the

consumer represents a novelty in Serbian law since the previous SrCPA⁴ subjected its issuance to the consumer's request (SrCPA, Art. 54, Sec. 3).

Regarding the form of the guarantee card, the general rule is that it should be drafted in writing (SrCPA, Art. 53, Sec. 3). However, if the consumer agrees with it, it can also be issued in electronic form or on other durable medium available to the consumer (SrCPA, Art. 53, Sec. 5). For the sake of clarity, it should be mentioned that the SrCPA defines the durable medium as "any instrument that enables the consumer or trader to store data addressed personally to them in a way such data remain accessible for future reference, for a period of time appropriate to the purpose of the data that allows the unchanged reproduction of the stored data, such as paper, e-mail, CD-ROM, DVD, memory card and computer hard disc" (SrCPA, Art. 5, Sec. 1 (44)). The legal solution from Serbian law differs from Directive 1999/44/EC, which in Art. 6, Sec. 3 stipulates that, upon the consumer's request, the guarantee shall be made available in writing or featured in another durable medium available and accessible to him/her. The legal doctrine interpreted this provision as the possibility given to the consumer to demand that the guarantee be communicated to him/her before the conclusion of the sales contract (Stijns 2005, 171). On the other hand, in Serbian law, the guarantee card should be issued and drafted in writing as a general rule in each case, i.e., its issuance in writing is not subject to the consumer's request.

Moreover, the SrCPA explicitly stipulates in Art. 53, Sec. 2 that the guarantee card should contain particularly information on the following:

- 1) the rights at the consumer's disposal based on the law and that the guarantee does not exclude or affect the consumer's rights stemming from the seller's legal liability for the lack of conformity of the goods with the contract;
- 2) the name and address of the guarantor;
- 3) the name and address of the seller if the seller is not a guarantor;
- 4) the date of the delivery of the goods to the consumer;
- 5) information identifying the goods (model, type, serial number, etc.);
- 6) the content of the guarantee, conditions, and procedure for realizing the rights from the guarantee;
- 7) the duration of the guarantee period and the validity area of the guarantee.

⁴ Zakon o zaštiti potrošača [Consumer Protection Act], Službeni glasnik RS [Official Gazette of the Republic of Serbia], No. 62/2014, 6/2016 – other law and 44/2018 other law

Apart from including it in the obligatory content of the guarantee card, the Serbian legislator, in a separate provision, reiterates that the guarantee does not exclude or influence the consumer's rights concerning the conformity of the goods with the contract (SrCPA, Art. 53, Sec. 8). It is worth underlining that in Serbian law, the guarantee is voluntary, i.e., it depends on the free will of the guarantor to grant it (Jovičić 2018, 718). Neither Directive 1999/44/EC established the mandatory nature of the guarantee (Oughton & Willett 2002, 323).

The liability stemming from the lack of conformity of the goods with the contract concerns only the seller as a contracting party in the consumer sales contract. Notwithstanding the existence of the guarantee, the consumer is entitled to request the elimination of the lack of conformity from the seller under the rules establishing the seller's legal liability. The consumer is, therefore, free to choose under which legal title he/she realizes the rights at his/her disposal (Jovičić 2018, 719; Stijns 2005, 170). The consumer's choice to first pursue the available remedies toward the guarantor in concordance with the rules contained in the guarantee cannot be interpreted as his/her renunciation of the rights deriving from the seller's legal liability for the lack of conformity (Ninane 2015, 110).

Finally, the SrCPA, transposing Art. 6, Sec. 5 of Directive 1999/44/EC, makes clear that the infringement of the guarantor's obligations referred to in the abovementioned Art. 53, Sec. 2 does not affect the validity of the guarantee and entitles the consumer to request that the guarantee be honoured in accordance with the given statement (SrCPA, Art. 53, Sec. 7). This rule manifests the ancient civil law principle "*Nemo auditur propriam turpitudinem allegans*" (Karanikić 2011, 183). Moreover, the Serbian legislator introduced a provision prohibiting the misuse of the word guarantee, not included in Directive 1999/44/EC. Namely, the trader should refrain from using that word and any other expression with the same meaning while concluding a sales contract and presenting related sales advertising if the consumer, based on the sales contract, does not obtain more rights compared to those stemming from the trader's legal liability for the lack of conformity of the goods with the contract or other rights granted by the same law (SrCPA, Art. 54). It may be stated that this provision is unnecessary (Nikolić 2018, 62-63) since the SrCPA in Art. 20, Sec. 1 (10) enumerates in the cases of deceptive trade practice presenting rights guaranteed to the consumer by the law as a distinctive advantage that the trader offers the consumer.

3. CROATIA

3.1. Legal Sources

The provisions on the contractual guarantee of the Croatian Obligations Act⁵ (hereinafter referred to as: “the CroOA”) adopted in 2005 were based on Directive 1999/44/EC (Petrić 2006, 92). Directive (EU) 2019/771 is transposed into Croatian law by the amendments to the CroOA in 2021. The specificity of the Croatian regulation is that the provisions on the consumer’s position in the event of a lack of conformity of the goods, including the rules on the contractual guarantee, also apply to the contracts concluded outside the consumer context unless the CroOA explicitly restricts the application of a specific provision to consumer sales contracts (Petrić 2006, 31-32; Slakoper and Nikšić 2022, 534).

3.2. Contractual Guarantee

Before the amendments of 2021, the CroOA did not define the guarantee (the exact term used was the warranty for the proper quality of the sold goods). It is worth underlining that the guarantee could be granted on a voluntary basis by the producer or the seller. The producer was defined as the manufacturer of goods, the importer of goods, and any person purporting to be a producer by placing his/her name, trademark, or any other distinctive sign on the goods (CroOA, Art. 401, Sec. 3.). Thus, the definition of a producer was identical to that of Art. 1, Sec. 2 (d) of Directive 1999/44/EC.

The guarantee given by the producer granted the consumer certain claims to be realized with respect to the seller as well. Namely, if the producer warranted the proper quality of the goods during a certain period of time, commencing from their delivery to the consumer, the consumer was entitled, if the goods lacked the proper quality, to demand from both the seller and the producer to repair the goods within a reasonable time or, if the repair was not done, to replace them with proper goods (CroOA, Art. 423, Sec. 1.). Therefore, the consumer had the liberty of choice, independently deciding from whom to ask for the repair of the goods based on the producer’s guarantee. On the other hand, the guarantee given by the seller did not have any influence on the producer. In that case, the consumer could request the repair to be done within a reasonable time and, subsequently,

⁵ Zakon o obveznim odnosima [Obligations Act], Narodne novine [Official Gazette], No.35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22 and 155/23.

the replacement only from the seller (CroOA, Art. 423, Sec. 2.). It may be stated that the producer's guarantee was more advantageous to the consumer's position than the guarantee given by the seller.

The Croatian legislator introduced the hierarchy of claims deriving from the guarantee. Since the replacement was conditioned by the failure to repair the goods within a reasonable time, it may be inferred that the repair was considered a primary remedy. In contrast, the replacement was a secondary remedy. Interestingly, the consumer could ask for these remedies during the guarantee period, regardless of when the defect appeared (CroOA, Art. 424, Sec. 1.). Therefore, the existence of the defect at the moment of the delivery of the goods to the consumer was not a mandatory condition for their use. The consumer was also entitled to compensation for damage suffered because he/she could not use the goods from the moment of requesting repair or replacement until their fulfilment (CroOA, Art. 424, Sec. 2.). Moreover, the CroOA obliged the seller and the producer to transport the goods to the place where they needed to be repaired or replaced at their expense and, subsequently, to return the repaired or replaced goods to the consumer (CroOA, Art. 427, Sec. 1.). During that period necessary for the realization of repair and replacement, the seller or the producer bore the risk of the goods being destroyed or damaged (CroOA, Art. 427, Sec. 2.).

Furthermore, the consumer was also entitled to termination of the contract or price reduction. These remedies were available to the consumer if the seller failed to repair and replace the goods within a reasonable time (CroOA, Art. 426). It is worth noting that the Croatian legislator subjected the availability of the mentioned remedies to the seller's failure to repair and replace the goods, i.e., the producer was omitted. It seems that the opinion existing in Hungarian legal theory that termination of the contract and price reduction can be obtained solely from the seller since the consumer concluded the sales contract with him/her and paid him/her the price can find its application in this Croatian case (Kemenes in Dudaš 2021, 943). The consumer was also entitled to compensation for damage (CroOA, Art. 426.).

In concordance with Art. 6, Sec. 2 of Directive 1999/44/EC, the CroOA stipulated that the provisions on the commercial guarantee did not exclude the application of rules concerning the seller's liability for the lack of conformity of the goods with the contract (CroOA, Art. 423, Sec. 4.). Additionally, the guarantee had to contain a precise specification that it did not affect other rights that belonged to the consumer based on other legal grounds (CroOA, Art. 423, Sec. 5). Thus, as stated in the chapter devoted to Serbian regulation, the consumer was entitled to choose under which legal

title to demand the fulfillment of his/her rights. The CroOA mandated that the guarantee should have specified the consumer's rights stemming from it (CroOA, Art. 423, Sec. 5). Moreover, in line with Art. 6, Sec. 2 of Directive 1999/44/EC, the guarantee should have set out the essential particulars necessary to the consumer for making claims under the guarantee, notably its duration and territorial scope as well as the name and address of the person who granted it (CroOA, Art. 423, Sec. 6.). However, it was not explicitly required that the guarantee's content be drafted in plain, intelligible language. It is worth underlining that the eventual failure to comply with the obligations regarding the content of the guarantee (the mentioned Art. 423, Sec. 5 and 6) did not affect its validity (CroOA, Art. 423, Sec. 7). The requirement contained in Directive 1999/44/EC that the guarantee needs to be given without extra charge was also omitted in the CroOA.

Finally, the written form of the guarantee was not rendered obligatory since it was binding under the conditions under which it was given. The CroOA explicitly mentioned the warranty certificate, oral statement, and associated advertising without taking a stance in the case of the hypothetical divergences between the terms of the warranty certificate or the oral statement on the one side and the associated advertising on the other (CroOA, Art. 423, Sec. 3). Transposing Art. 6, Sec. 3 of Directive 1999/44/EC, the CroOA enabled the consumer to request that the guarantee be made in writing or another durable medium available and accessible to him/her (CroOA, Art. 423, Sec. 3.).

The implementation of Directive (EU) 2019/771 brought essential novelties. First of all, this institute changed its official name to commercial guarantee (*komercijalno jamstvo*). The same term is also used by the EU legislator in the mentioned Directive. The commercial guarantee is defined as any obligation by which the seller or the producer, in addition to the seller's liability for the lack of conformity of the goods with the contract, are being bound to the consumer to refund the price paid or replace, repair, or service the goods if they do not meet the specifications or other requirements that are set out in the commercial guarantee statement or the relevant associated advertising material available in the moment of or before the conclusion of the contract (CroOA, Art. 423, Sec. 1). The CroOA resolved the potential conflict between the terms of the commercial warranty statement and the associated advertising material. Namely, if the conditions laid out in the former are less advantageous to the consumer than those laid down in the latter, the commercial guarantee is binding under the conditions laid down in the latter unless, before the conclusion of the contract, it was corrected

in the same or comparable way to that in which it was made (CroOA, Art. 423, Sec. 7). This provision represents the transposition of Art. 17, Sec. 1 of Directive (EU) 2019/771.

The mandatory content of the commercial guarantee statement is specified more precisely. Primarily, the requirement that it be expressed in plain and intelligible language, which was omitted before the transposition of Directive (EU) 2019/771, was introduced (CroOA, Art. 423, Sec. 9). Following the letter and spirit of Art. 17, Sec. 2 of the mentioned Directive, the CroOA in Art. 423, Sec. 9 stipulates that it should contain the following:

- 1) a clear statement that the consumer is entitled to remedies deriving from the seller's liability for the lack of conformity of the goods with the contract free of charge and that the commercial guarantee does not affect those remedies;
- 2) the name and address of the guarantor;
- 3) the procedure the consumer has to follow in order to obtain the implementation of the commercial guarantee;
- 4) the designation of the goods to which the commercial guarantee applies;
- 5) the terms of the commercial guarantee.

Furthermore, the commercial guarantee statement is to be provided to the consumer on a durable medium at the latest at the moment of the delivery of the goods (CroOA, Art. 423, Sec. 8). Thus, the Croatian legislator established a general rule applicable to each case that the commercial guarantee statement is incorporated into a durable medium, defined as any instrument that enables the consumer or the seller to store information addressed personally to that person so that he/she can access it during a period that corresponds to the purposes for which the information is intended and that allows the unchanged reproduction of the stored information (CroOA, Art. 399a (9)). However, it is worth noting that non-compliance with the obligations concerning the delivery of the commercial guarantee statement and its mandatory content does not affect the validity of the commercial guarantee (CroOA, Art. 423, Sec. 10).

The CroOA introduced the possibility for the producer to grant the consumer the commercial guarantee of durability for certain goods for a certain period. In that case, the producer is liable directly to the consumer during the entire period of the commercial guarantee of durability for repair or replacement according to the rules contained in Art. 410a (CroOA,

Art. 423, Sec. 3). Therefore, the consumer can choose whether to request repair or replacement from the producer or the seller (Marín López 2019, 19; Cárcamo 2022, 158). Nevertheless, the producer can offer the consumer more favourable conditions in the commercial guarantee of durability statement (CroOA, Art. 423, Sec. 4). These provisions represent the implementation of Art. 17, Sec. 1 of Directive (EU) 2019/771.

The hierarchy of the remedies available to the consumer and the conditions for their use in case of a commercial guarantee given by the producer or the seller remained the same as before the transposition of Directive (EU) 2019/771. Thus, repair, which is to be realized within a reasonable time, continues to be prioritized over replacement. This type of prioritization of the repair may be considered the most important difference compared with the producer's commercial guarantee of durability, where equal merit is given to repair and replacement, with the possibility of granting more advantageous conditions to the consumer.

4. SLOVENIA

4.1. Legal Sources

The peculiarity of Slovenian law has been the existence of voluntary and mandatory guarantees, in addition to the seller's legal liability for the lack of conformity (Možina 2009, 145). The transposition of Directive 1999/44/EC took place in 2002 by amending the Consumer Protection Act, adopted in 1998 (hereinafter referred to as "1998/2002 SloCPA").⁶ The provisions in force today are based on Directive (EU) 2019/771, the implementation of which occurred with the adoption of the novel Consumer Protection Act in 2022⁷ (hereinafter referred to as "2022 SloCPA"). It is worth mentioning that the provisions of the Obligations Act⁸ shall apply to issues not regulated by the 2022 SloCPA (2022 SloCPA, Art. 3, Sec. 1). Due to the similarity of the provisions on the voluntary and mandatory guarantees contained in the 2022 SloCPA to the previous regulation, this chapter will be primarily devoted to the rules in force today, explicitly underlining if they differ from the legal solutions enshrined in the 1998/2022 SloCPA.

⁶ Zakon o varstvu potrošnikov [Consumer Protection Act], Uradni list RS [Official Gazette of the Republic of Slovenia], Nos. 20/98, 25/98, 110/02, 14/13 (official consolidated version), 51/04, 98/04 (official consolidated version), 126/07, 86/09, 78/11, 38/14, 19/15, and 31/18.

⁷ Zakon o varstvu potrošnikov [Consumer Protection Act], Uradni list RS [Official Gazette of the Republic of Slovenia], No. 130/22.

⁸ Obligacijski zakonik [Obligations Code], Uradni list RS [Official Gazette of the Republic of Slovenia], Nos. 83/01, 28/06, 40/07, 97/07 (official consolidated version), and 64/16.

4.2. Commercial and Mandatory Guarantees

The 2022 SloCPA defines the guarantee similarly to the Croatian legislator. Namely, it is each obligation that the seller or producer⁹ undertakes toward the consumer, in addition to the seller's legal liability deriving from the lack of conformity of the goods with the contract, and by which he/she undertakes to repair or replace the goods for the consumer free of charge, refund a part of or entire purchase price when the goods do not meet the specifications or do not have the characteristics set out in the guarantee statement or the associated advertising available at the time of the conclusion of the contract or before it (2022 SloCPA, Art. 89, Sec. 1). Thus, the guarantee can be granted to the consumer by the seller or producer. Its essential characteristic is the gratuitousness connected to the performance of repair or replacement. Consequently, envisaging the consumer's obligation to pay for the realisation of these remedies would exclude the application of the provisions contained in the 2022 SloCPA dedicated to the guarantee (Explanatory Memoranda for the Bill of 2022 SloCPA, Commentary to Art. 89, 117). The Slovenian legislator distinguishes the voluntary (commercial) and the mandatory guarantee (2022 SloCPA, Art. 89, Sec. 2).

In line with Art. 17, Sec. 1 (1) of Directive (EU) 2019/771, the 2022 SloCPA stipulates that the guarantee is binding under the conditions laid down in the guarantee statement and associated advertising available at the moment of the conclusion of the contract or before it (2022 SloCPA, Art. 90, Sec. 1). An eventual conflict between the guarantee statement and the associated advertising, when the terms contained in the latter are more beneficial to the consumer's position than those enshrined in the former, is solved in favour of the associated advertising unless it was corrected in the same or comparable way to that in which it was issued (2022 SloCPA, Art. 90, Sec. 2). Such a legal solution represents the transposition of Art. 17, Sec. 1 (2) of the mentioned Directive. This provision can be considered a novelty since the 1998/2002 SloCPA did not provide a solution for a conflict between the guarantee statement and associated advertising.

⁹ The 2022 SloCPA defines the producer in Art. 4, Sec. 1 (20) as a company that manufactures finished goods or components or obtains basic raw materials or another person that presents him/herself as the producer of the goods with his/her company name, trademark or other distinguishing mark. The importer and distributor of goods not produced in the Republic of Slovenia, the representative office of the producer in the Republic of Slovenia, or any other person appearing to be the producer by marking the goods with their name, brand, or other distinguishing mark are also considered producers.

Moreover, the seller is obliged to hand over the guarantee statement to the consumer for goods for which the guarantee is issued upon delivery of the goods at the latest (2022 SloCPA, Art. 91, Sec. 1). This rule, together with the requirement that it is to be provided to the consumer on a durable medium (2022 SloCPA, Art. 91, Sec. 3), is in concordance with Art. 17, Sec. 2 of Directive (EU) 2019/771. On the other hand, under the 1998/2002 SloCPA, the guarantee statement was to be handed over to the consumer at the moment of the conclusion of the sales contract, in writing, or featured on another durable medium easily accessible to him/her (1998/2002 SloCPA, Art. 16 and Art. 18, Sec. 1).

Concerning the language used in the guarantee statement, it should be plain and intelligible, as required by the abovementioned Art. 17, Sec. 2 of Directive (EU) 2019/771. Interestingly, the Slovenian legislator used the opportunity granted by Art. 17, Sec. 4 of the mentioned Directive to lay down rules on the language in which the guarantee statement is to be made available to the consumer, stipulating that if the goods are intended for sale on the territory of the Republic of Slovenia, it should be drafted entirely in Slovenian (2022 SloCPA, Art. 91, Sec. 3). Therefore, it may be inferred that Slovenia is the only examined country that explicitly determined in which language the guarantee statement is to be drafted. Furthermore, the guarantee statement, as stated in Art. 91, Sec. 2 of 2022 SloCPA, shall contain the following:

- 1) the name and the address of the person issuing the guarantee, i.e., the guarantor;
- 2) the date of delivery of the goods;
- 3) information identifying the goods covered by the guarantee;
- 4) the guarantor's statement that he/she guarantees the properties or flawless functioning (*brezhibno delovanje*) during the warranty period that commences with the delivery of the goods to the consumer;
- 5) the rights available to the consumer if the goods do not meet the specifications or do not have the properties envisaged in the guarantee statement or the associated advertising;
- 6) the procedure to be followed by the consumer to obtain the implementation of the guarantee;
- 7) the deadline for resolving the complaint;
- 8) the duration of the warranty period;

- 9) the territorial validity of the guarantee;
- 10) a clear statement that the consumer is entitled by law to remedies from the seller in the event of a lack of conformity of the goods free of charge and that the guarantee does not exclude these remedies;
- 11) for goods for which the guarantee is mandatory, the time after the expiration of the warranty period during which the guarantor provides the consumer with maintenance, spare parts, and attachments.

It may be stated that the content of the guarantee statement determined in the 2022 SloCPA is more precise than in the 1998/2002 SloCPA. Namely, the specific rights at the consumer's disposal on the basis of the guarantee, the procedure the consumer is obliged to follow in order to obtain the implementation of the guarantee, and the deadline for resolving the complaint were not enlisted among the mandatory content of the guarantee statement in the 1999/2002 SloCPA. It is worth noting that the provision determining the content applies to the voluntary (commercial) and mandatory guarantees. However, the failure to meet the requirements enshrined in Art. 91 does not affect the binding nature of the guarantee for the guarantor (2022 SloCPA, Art. 91, Sec. 4). This rule, favourable to the consumer's position, is the transposition of Art. 17, Sec. 3 of Directive (EU) 2019/771.

The Slovenian legislator, like the Croatian one, in Art. 92, Sec. 1 established the possibility for the producer to offer the consumer a commercial guarantee of durability for certain goods for a certain period under the abovementioned conditions and without prejudice to legal protection based on other regulations. In that case, the producer becomes directly liable to the consumer, joining the seller, for the repair and replacement of the goods during the whole period of the mentioned guarantee in accordance with Art. 82, Sec. (1), (2), (7), (8), (9) of the 2022 SloCPA. The consumer's position can be further strengthened by the opportunity granted to the producer to offer more favourable conditions in the commercial guarantee of durability statement (2022 SloCPA, Art. 92, Sec. 2.). This institute, introduced into Slovenian law as the transposition of Art. 17, Sec. 1 (1) of Directive 2019/771, did not exist in the 1998/2002 SloCPA.

The existence of the mandatory guarantee in the 1998/2002 SloCPA was severely criticized by the Slovenian legal theory. Since it also applied to persons not considered consumers (1998/2022 SloCPA, Art. 21.č), i.e., to commercial contracts, it was stated that there were no justified reasons for the state intervention in contractual relations between the subjects able to take care of their interests and to operate in the market for lucrative reasons

(Možina 2009, 157). It also potentially represented an impediment to the free movement of goods in the internal market (Možina 2009, 162). The mandatory guarantee was deemed an additional burden for sellers and producers in the Slovenian market (Možina 2011, 46). Furthermore, it was considered “a source of inefficiency” because it prevented competition and “a source of moral hazard, opportunism, and negative selection” (Kovač 2012, 113). Since the seller did not have any influence on the final risks, which depended on the consumer’s use of the goods, and the level of protection, the consumer was encouraged to behave opportunistically (Kovač 2012, 113). The Supreme Court of Slovenia also demonstrated its contrariety towards this institute, defining it as “a relic of the past” (Judgement of the Supreme Court of Slovenia, II Ips 1001/2008, 9).

Notwithstanding this harsh criticism, the mandatory guarantee is retained in the 2022 SloCPA. The Explanatory Memoranda explicitly stressed that by preserving the rules on the mandatory guarantee, “the high level of protection enjoyed by Slovenian consumers until now is maintained” (The Explanatory Memoranda for the Bill of 2022 SloCPA, Commentary to Art. 94, 118). Namely, it is stated that retaining this institute is not contrary to the maximum harmonization character of Directive (EU) 2019/771 since Recital 18 stipulates that it should “not affect national laws providing for non-contractual remedies for the consumer, in the event of a lack of conformity of goods, against persons in previous links of the chain of transactions, for example, manufacturers, or other persons that fulfil the obligations of such persons” (The Explanatory Memoranda for the Bill of 2022 SloCPA, Commentary to Art. 94, 118). The provisions on the mandatory guarantee continue to apply to persons who are not considered consumers, i.e., to sales contracts concluded outside the consumer context (2022 SloCPA, Art. 98).

It is worth underlining that the mandatory guarantee does not cover all the goods. The 2022 SloCPA envisages that the minister competent for consumer protection shall issue a regulation specifying the goods for which the producer is obliged to grant a guarantee for flawless operation (*brezhibno delovanje*) for at least one year (2022 SloCPA, Art. 94). Such a regulation¹⁰ was issued in November 2022 (hereinafter referred to as “the Regulation of 2022”), and it entered into force on 26 January 2023 (Regulation of 2022, Art. 5), repealing the previously applicable regulation from

¹⁰ Pravilnik o blagu, za katero se izda garancija za brezhibno delovanje [Regulation on Goods for which a Guarantee for Faultless Operation is Issued], Uradni list RS [Official Gazette of the Republic of Slovenia], No. 142/22.

2012.¹¹ The obligation to grant a guarantee for at least one year for so-called “technical goods” (The Explanatory Memoranda for the Bill of 2022 SloCPA, Commentary to Art. 94, 118) is imposed exclusively on the producer. Due to the maximum harmonisation character of Directive (EU) 2019/771, the mandatory guarantee concerning second-hand goods imposed on the seller contained in Art. 19 of the 1998/2002 SloCPA was abolished (The Explanatory Memoranda for the Bill of 2022 SloCPA, Commentary to Art. 94, 118). The Regulation of 2022 in Art. 1, Sec. 2 explicitly states that it does not apply to second-hand goods.

For the goods covered by the mandatory guarantee, the producer is, as established by Art. 95 of the 2022 SloCPA, obliged to:

- 1) provide the consumer, in addition to the guarantee statement, with instructions for assembly and use and a list of authorized service centers;
- 2) provide a service that is authorized by him/her to carry out service work on the goods and has a contract concluded with him/her for the supply of spare parts if he/she does not perform such activity;
- 3) ensure the elimination of the lack of conformity of the goods free of charge during the warranty period;
- 4) provide, in exchange for the payment, for the repair, maintenance of the goods, spare parts, and attachments for at least three years following the expiration of the warranty period by performing the mentioned services himself/herself or having a service contract concluded with another person.

The Slovenian legal doctrine particularly criticized the producer’s obligation to provide for the repair, maintenance of the goods, spare parts, and attachments for three years after the expiry of the warranty period, enshrined also in the 1998/2002 SloCPA, stating that it is a relic of the socialist economy, characterized by the limitations of the market operations and shortage of certain goods (Možina 2011, 47-48.). Nevertheless, this provision remained intact in the 2022 SloCPA.

Furthermore, the fact that the guarantee statement was not issued or handed over to the consumer does not influence the producer’s obligations stemming from the mandatory guarantee (2022 SloCPA, Art. 96, Sec. 1). The Slovenian legislator retained the presumption that the guarantee statement is not issued if the documents containing all the necessary information

¹¹ Pravilnik o blagu, za katero se izda garancija za brezhibno delovanje [Regulation on Goods for which a Guarantee for Faultless Operation is Issued], Uradni list RS [Official Gazette of the Republic of Slovenia], No. 14/12.

prescribed by the above-mentioned Art. 91, Sec. 2 of the 2022 SloCPA were not handed over to the consumer (2022 SloCPA, Art. 96, Sec. 2). However, if these information are contained in different documents, the producer is obligated to warn the consumer about it specifically (2022 SloCPA, Art. 96, Sec. 2).

If the goods covered by the mandatory guarantee do not meet the specifications or do not have the properties laid down in the guarantee statement or associated advertising, the consumer is primarily entitled to request the remedy of repair. The replacement with identical, new, and faultless goods becomes available to the consumer when repair is not realized within 30 days from the day the producer or the authorized service received the consumer's request (2022 SloCPA, Art. 97, Sec. 1). It is admissible to extend the mentioned 30-day deadline for the shortest time necessary to complete the repair or replacement, which cannot be longer than 15 days (2022 SloCPA, Art. 97, Sec. 1). In order to determine the extended deadline, the nature and complexity of the goods, the nature and severity of the lack of conformity, and the effort needed to complete the repair or replacement are to be taken into account. The 2022 SloCPA mandates the producer to inform the consumer about the exact number of days extending the deadline and the reasons for such an extension before the expiry of the 30-day deadline (2022 SloCPA, Art. 97, Sec. 1). Interestingly, the possibility of the extension was not envisaged in the Explanatory Memoranda. Therefore, the maximum period for the individual realization of repair and replacement is 45 days (30 days + the possibility of extending it for not more than 15 days). The 1998/2002 SloCPA in Art. 21b (1) prescribed a 45-day deadline for completing the repair and replacement, not conceding the possibility of its extension. It was interpreted as a deadline separately applicable to these remedies, meaning that if the repair was not completed within 45 days, the same period applied to the replacement (Možina 2009, 158). It seems that the same interpretation is also valid for the legal solution contained in the 2022 SloCPA. However, it is worth underlining that the consumer would not be allowed to exercise the mentioned remedies against the producer if the seller had previously eliminated the lack of conformity according to his/her legal liability for conformity. Permitting the consumer to request it from the producer, notwithstanding the seller's successful performance, would cause his/her unjust enrichment (The Explanatory Memoranda for the Bill of 2022 SloCPA, Commentary to Art. 94, 118).

The consumer's position is further reinforced by the provision obliging the producer or the authorized service to provide him/her with the

free-of-charge use of similar goods while eliminating the lack of conformity (2022 SloCPA, Art. 97, Sec. 7). If the producer does not fulfil this obligation, the consumer is entitled to compensation for damage suffered by being unable to use the goods from the moment he/she requested repair or replacement until their completion (2022 SloCPA, Art. 97, Sec. 8). It is worth underlining that the producer bears the costs for material, spare parts, work, transfer, and transport of products incurred while repairing and replacing the goods (2022 SloCPA, Art. 97, Sec. 9). The enlisted expenses seem to represent a *numerus clausus*, signifying that the producer's obligation does not include bearing other types of costs. In addition, the 2022 SloCPA in Art. 97, Sec. 6 mandates the producer to issue a new guarantee statement for replaced goods or replaced essential parts of the goods.

The failure to complete repair or replacement within the prescribed time limits places at the consumer's disposal the right to request and obtain a reimbursement of the entire purchase price from the producer or an appropriate price reduction (2022 SloCPA, Art. 97, Sec. 3). The Slovenian legislator specifies that a price reduction is appropriate when it is proportional to the decrease in the value of the goods received by the consumer compared to the value the goods would have had if they were compliant (2022 SloCPA, Art. 97, Sec. 4). It is worth noticing that the legal solution contained in the 2022 SloCPA differs from that enshrined in the Explanatory Memoranda. Namely, while the 2022 SloCPA entitles the consumer to a reimbursement of the entire purchase price to be exerted against the producer, the Explanatory Memoranda explicitly mentioned the termination of the contract (Explanatory Memoranda for the Bill of 2022 SloCPA, Commentary to Art. 97, 119). The 1998/2002 SloCPA also stipulated in Art. 21b, Sec. 2 that the consumer could terminate the contract or request a price reduction when the producer failed to repair or replace goods within the prescribed deadline.

The reimbursement of the entire purchase price (*vračilo celotne kupnine*), as a separate remedy to be exercised against the producer, raises many questions. One may consider it "only the extreme form of a price reduction" since the entire purchase price is refunded to the consumer, and the contract terms are not modified (Wiewiórowska-Domagalska 2012, 77). On the contrary, its consequence is the total return of what the consumer as a contractual party performed (Wiewiórowska-Domagalska 2012, 77). When the consumer terminates the consumer sales contract because of the lack of conformity, the seller must reimburse him/her the price paid for the goods (*vračilo plačanega zneska*) (2022 SloCPA, Art. 86, Sec. 1). It should

be accentuated that such an obligation is imposed on the seller as a party to the consumer sales contract to whom the price was paid. That is why the Slovenian legal theory stressed that the consumer could terminate the contract and obtain the price reduction solely from the seller (Možina 2009, 157). On the other hand, in the case of the mandatory guarantee, the producer, who is not a party to the sales contract, shall reimburse the consumer the entire purchase price, complementing the seller's legal liability for conformity. Such a legal solution seems to deviate from the principle of relativity of the effects of the contract (Strojan 2023, 83). In addition, it should be noted that the producer, because of his/her extraneity to the consumer sales contract, did not receive the purchase price. The Slovenian legislator did not determine whether such reimbursement generates or precedes the consumer's obligation to return the goods nor against whom the appropriate price reduction is to be exerted.

It is noticeable that the remedies available to the consumer based on the mandatory guarantee have a three-level hierarchy (Ocepek 2022, 151; Možina 2009, 158). Namely, the repair can be considered a primary, while the replacement, dependent upon the producer's failure to complete the repair within the stipulated time, is a secondary remedy. The reimbursement of the entire purchase price and the appropriate price reduction can be deemed a tertiary set of claims. The 2022 SloCPA introduced a rule circumventing such a hierarchy applicable to the eventuality when the deficiency of the goods emerges within less than 30 days of their delivery. In that case, the consumer is entitled to immediately request the reimbursement of the purchase price from the producer (2022 SloCPA, Art. 97, Sec. 5). However, it should be noted that in this situation, the consumer is not impeded from opting for repair as a primary remedy in the general hierarchy. This legal solution was not contained in the Explanatory Memoranda.

Finally, since the producer guarantees the flawless operation of the goods for at least one year, his/her liability is activated if these goods show deficiencies within the warranty period that commences from the day the goods are delivered to the consumer (Regulation of 2022, Art. 3). Therefore, the consumer's eventual notification of the faulty operation of the goods is not a precondition for the producer's liability (Možina 2009, 155).

5. CONCLUSION

The regulation of the commercial guarantee in Serbia is still based on Directive 1999/44/EC. On the other hand, the Croatian and Slovenian law in this respect is under the influence of Directive (EU) 2019/771, transposed in these countries, respectively, in 2021 and 2022. The relevant rules in Serbia and Slovenia are contained in a specific act devoted to consumer protection, while in Croatia, they are enshrined in the Obligations Act as *sedes materiae* for contract law. Although existing in all the examined countries, the institute of voluntary commercial guarantee demonstrates certain divergences. First, its gratuitous character is not explicitly accentuated in Serbian and Croatian law. Contrarily, Slovenian law requires that repair and replacement be performed free of charge. While the SrCPA does not give a direct and explicit response to the issue of an eventual difference between the terms of the guarantee statements and related advertising, the CroOA and the SloCPA give priority to the latter when its terms are more advantageous to the consumer than those enshrined in the former unless it was corrected in the same or comparable way to that in which it was issued. However, the same conclusion should be drawn in Serbian law in line with the *favor consumatoris* principle.

Concerning the specific remedies at the consumer's disposal in the event of a commercial guarantee, the Croatian legislator is the only one who established an obligatory three-level hierarchy consisting of repair as primary, replacement as secondary, and termination of the contract and price reduction as tertiary claims. It is worth underlining that the tertiary claims can be exerted solely against the seller. In addition, the consumer is entitled to compensation for damage. On the other hand, the SrCPA does not explicitly determine the consumer remedies concerning the commercial guarantee. At the same time, the SloCPA envisages repair, replacement, and reimbursement of a part of or the entire purchase price without establishing their hierarchy. Croatian and Slovenian law introduced the institute of the producer's commercial guarantee of durability for certain goods for a certain period.

Moreover, regarding the form of the guarantee card/statement, Serbian law envisages the written form as a general rule. However, with the consumer's consent, it can also be issued electronically or on other durable medium available to the consumer. In Croatian and Slovenian law, precedence is given to the durable medium to be delivered to the consumer at the latest upon delivery of the goods. Slovenia is the only examined country that

specified in which language the guarantee statement is to be made. Namely, when the goods are intended for sale on the territory of the Republic of Slovenia, the guarantee statement shall be drafted entirely in Slovenian.

The peculiarity of the Slovenian regulation is the existence of the mandatory guarantee covering the so-called “technical goods”, enlisted in a regulation issued by the minister competent for consumer protection. The producer is the only subject upon which the obligation to give a guarantee for flawless operation of the goods for at least one year is imposed. The application of the provisions governing the mandatory guarantee contained in the SloCPA is extended to sales contracts concluded outside the consumer context. The hierarchy of the remedies available to the consumer is three-level: repair is deemed primary, replacement secondary, and reimbursement of the entire purchase price from the producer and appropriate price reduction are tertiary remedies. However, the emergence of the deficiency of the goods within less than 30 days of their delivery made possible the immediate use of the reimbursement of the purchase price from the producer.

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