



Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU

Country fiche: Germany

EUROPEAN COMMISSION

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1. Germany

1.1 Regulatory background

This section describes the transposition of Directive 1999/44/EC on Consumer Sales into the German legislative system¹ and which led to a major reform of German contract law². The Directive affects mainly one piece of legislation, as the Directive was transposed into the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB) with the so-called 'Act on the Modernisation of the law of obligations' (*Gesetz zur Modernisierung des Schuldrechts vom 26. November 2001: BGBl. I Seite 3138, geregelten Änderungen des Schuldrechts im BGB*) with effect from 1 January 2002³.

Since then, the German legislation has been again modified on 13th June 2014, to accommodate the new Directive 2011/83/EC on Consumer Rights⁴.

1.1.1 Transposition of Directive 1999/44/EC

As stated above, the Directive was originally transposed via a single act into the German Civil Code. Table 1 in the next pages shows how each article has been incorporated, including definitions, conformity with the contract, regulation for the rights of the consumer as well as the remedies and the claiming periods that German law establishes⁵.

Definitions

The definitions contained in Article 1 of Directive 1999/44/EC are all transposed into the German Civil Code except for the concept of "producer", which is regulated in §4 I, II of the German *Produkthaftungsgesetz* (ProdHaftG, hereafter and translated as "Product Liability Act"). In accordance with this paragraph the notion of this term has been slightly extended, as the producer is not only the person responsible for the production of the final product, but also of the raw material or the single components⁶.

Concerning the definition of "consumer", it should be noted that the term has been directly transposed into the German legislation (§13 BGB), but has been adapted to the new Directive 2011/83/EC with effect on 13th June 2014. According to the German Civil Code, a consumer is now "*every natural person who enters into a legal transaction for purposes that predominantly are outside his trade, business or profession.*"⁷ This wording appears to leave room for interpretation regarding purchases on behalf of small

¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

² See Stefan Grundmann, 'European Sales Law — Reform and Adoption of International Models in German Sales Law' (2001) 9 *European Review of Private Law*, Issue 2/3, pp. 239–258, available at

<https://www.kluwerlawonline.com/abstract.php?area=Journals&id=359019> and Rott, P. (2004). 'German sales law two years after the implementation of Directive 1999/44/EC'. *German Law Journal*, 5, p. 237.

Available at

http://www.researchgate.net/publication/43308578_German_Sales_Law_Two_Years_After_the_Implementation_of_Directive_199944EC

³ Schulte-Nölke, H. (2004). 'The new German law of obligations: An introduction'. Available at:

<http://germanlawarchive.iuscomp.org/?p=357>

⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

⁵ All the articles mentioned below pertain to the German Civil Code. If alternative legislation is commented, this will be cited accordingly.

⁶ §4 I, II ProdHaftG

⁷ §13 of the German Civil Code

enterprises and sole traders (particularly dual use items, such as computers and phones etc.).

The concept of “goods” has been respected, and the German legislator has decided not to include second-hand goods obtained through administrative auctions within the scope of this law⁸.

Concerning the notion of guarantees, German law mentions the offering of remedies (i.e. and not the concept of ‘guarantee’ per se) when referring to the scope of the law⁹. The same definition has been adopted in the transposition of Directive 2011/83/EC on Consumer Rights in June 2014. This involves new pre-contractual information obligations for the guarantor.¹⁰

Conformity with the contract

Regarding the concept of conformity with the contract, Germany has departed in some points from Directive 1999/44/EC, for example regarding conformity requirements. According to §433 BGB, the seller is obliged to deliver the good to the buyer “free from material and legal defects”¹¹.

Regarding material defects, the German legislation in its article §434, volunteers some benchmark concepts, e.g. “if, upon the passing of the risk¹², the thing has the agreed quality¹³”. This concept is expanded upon via two points, being “1. if it is suitable for the use intended under the contract”, and “2. if it is suitable for the customary use and its quality is usual in things of the same kind so that the buyer may expect this quality.”¹⁴

On the other side, by legal defect, it is understood in article §435, that “the thing is free of legal defects if third parties, in relation to the thing, can assert either no rights, or only the rights taken over in the purchase agreement, against the buyer”.

Remedies

⁸ See §474(2) of the German Civil Code. The option to include such goods was left at the discretion of Member States according to the Directive 1999/44/EC.

⁹ Article §443 on ‘Guarantee’ of the German Civil Code specifically mentions that “(1) Where the seller, the producer or some other third party enters into obligation, in addition to his statutory liability for defects, by way of making a declaration or in relevant advertising that was available prior to the purchase agreement being concluded or at the time of its conclusion, such obligation being in particular to reimburse the purchase price, to exchange the thing, to repair it or to provide services in this context should the thing not exhibit the quality or not fulfil other requirements than those concerning its freedom from defects, *in each case as described in the declaration or in the relevant advertisement (guarantee)*, the buyer shall be entitled, in the case of a guarantee having been given, and notwithstanding his statutory claims, to the rights under the guarantee in relation to the person who has given the guarantee (guarantor).”. English translation available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1543

¹⁰ Article §443. See italics in the previous citation.

¹¹ Article §433. Available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1543

¹² By passing of the risk it is understood in article §433.2 the procurement of the ownership from seller to the buyer through the pay of the “agreed purchase price”.

¹³ Article §434.1.(2). Second paragraph: “Quality under sentence 2 no. 2 above includes characteristics which the buyer can expect from the public statements on specific characteristics of the thing that are made by the seller, the producer (section 4 (1) and (2) of the Product Liability Act [Produkthaftungsgesetz]) or his assistant, including without limitation in advertising or in identification, unless the seller was not aware of the statement and also had no duty to be aware of it, or at the time when the contract was entered into it had been corrected in a manner of equal value, or it did not influence the decision to purchase the thing.”

¹⁴ Articles §434(2-3) continue with two further considerations: “(2) It is also a material defect if the agreed assembly by the seller or persons whom he used to perform his obligation has been carried out improperly. In addition, there is a material defect in a thing intended for assembly if the assembly instructions are defective, unless the thing has been assembled without any error. (3) Supply by the seller of a different thing or of a lesser amount of the thing is equivalent to a material defect.”

The German legislation directly transposes Article 3.3 of Directive 1999/44/EC. According to it, if the good is not in conformity with the contract, the consumer has first the right to repair or replacement within a reasonable time frame (§439 BGB), except if this is impossible for the seller (§275 BGB) or if this remedy is possible only at a disproportionate expense (§439(3) BGB). The article is also sensible to the seller's rights when providing a remedy and states the following:

"The seller may refuse to provide the kind of remedy chosen by the buyer, if this remedy is possible only at disproportionate expense. In this connection, account must be taken in particular, without limitation, of the value of the thing when free of defects, the importance of the defect and the question as to whether recourse could be had to the alternative kind of remedy *without substantial detriment to the buyer*. The claim of the buyer is restricted in this case to the alternative kind of remedy; the right of the seller to refuse the alternative kind of remedy too".¹⁵

In any case, under the presence of a defect, the seller has to bear all expenses required for the execution of a remedy, in particular transport, workmen's travel, work and materials costs (§439(2) BGB).

Finally, and related to remedies, Article 6.5 Directive 1999/44/EC is directly transposed into German legislation. According to this article, even if the requirements for the declaration of the guarantee as detailed in §477(1) are not satisfied, the consumer maintains their statutory rights to a non-defective good for two years.¹⁶

Although the law does not define this practice explicitly, the law states that after a replacement, the consumer can claim legal guarantee rights for 2 years¹⁷. In the case of a repair, the legal guarantee is only extended with regard to the repaired or exchanged parts¹⁸.

Claiming periods

In §475(2) BGB it is mentioned that the statutory rights last for 2 years from the date of delivery. In the case of second-hand goods, the seller and the consumer can agree a period which will be of no less than 1 year, with the burden of proof under both type of goods maintained for 6 months for the seller. These terms respect the provisions of the Directive.

However, Germany has not chosen to make use of the possibility to include a period of two months (counting from the date the defect is discovered) for the consumer to inform the seller without need of proof that the defect already existed in the product¹⁹.

Liability

On the regulation of business relations, after the consumer has claimed to the seller, the seller in turn has the possibility to claim from the supplier responsible for the lack of

¹⁵ §439(3) BGB

¹⁶ §477(3) of the German Civil Code

¹⁷ §438(1)3 –The article mentions 5 years for immovable property (§438(1)2), but states that "the rest of goods" are covered for a maximum of 2 years. Retrieved from: <http://dejure.org/gesetze/BGB/438.html>

¹⁸ ECC net confirm that the law does rely on a two month limitation. See: http://www.europe-consommateurs.eu/fileadmin/user_upload/eu-consommateurs/PDFs/PDF_EN/REPORT-_GUARANTEE/country_fact_sheets/Country_fiche_DE.pdf

¹⁹ ECC net confirm that the law does rely on a two month limitation. See: http://www.europe-consommateurs.eu/fileadmin/user_upload/eu-consommateurs/PDFs/PDF_EN/REPORT-_GUARANTEE/country_fact_sheets/Country_fiche_DE.pdf

conformity (§478 BGB) without having to respect a fixed period of time. This paragraph only applies with newly manufactured sold goods.

1.1.2 Table of the transposition

The next page displays the articles from Directive 1999/44/EC on Consumer Sales and its transposition into the German legislative system. All the articles but two have been transposed.

Table 1: Transposition of Directive 1999/44/EC in the German legislation

Areas	Art.	Content	Legislation	Comment*
Scope and definitions	1.1	Purpose	Official note 11 BGB	<i>Direct transposition</i> - The purpose being to ensure a uniform minimum level of consumer protection
	1.2.a	Def. Consumer goods	§474 (1) BGB	Concept of "product": any movable item
	1.2.b	Def. Consumer	§13 BGB	(direct), but change of the article in June 2014 with regard to the new Directive 2011/83/EC: "every natural person who enters into a legal transaction for purposes that predominantly are outside his trade, business or profession"
	1.2.c	Def. Seller	§14 BGB	<i>Direct transposition</i> - Seller being any natural or legal person who sells consumer goods
	1.2.d	Def. Producer	§4 I, II ProdHaftG (Product liability Act)	(Expanded): Any persons responsible for the production of the final product, the raw material or of single components, any persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature as well as the importer of consumer goods into the territory of the Community (according to §4 ProdHaftG)
	1.2.e	Def. Guarantee	§443 BGB	Extension of the definition to other guarantees offered to consumers, change in June 2014 according to the Directive 2011/83/EC: approach to the commercial guarantee as it is used in the Directive, new pre-contractual information obligations for the guarantor who can be the seller, the producer or another involved third party (merged with 6.1)
	1.2.f	Def. Repair		Not transposed
	1.3	Exclusion second hand	§474 (2) BGB	Exclusion of second hand goods acquired in administrative auctions in which consumers can be present
	1.4	Contracts of sale types	§474 BGB (1)	Contracts by which a consumer buys a movable thing from an entrepreneur or by which the entrepreneur provides a service to the consumer
Conformity with the contract	2.1	Conformity requirement	§433 BGB	Extended transposition into German legislation: the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership for the buyer. The seller must procure the thing for the buyer free from material and legal defects.
	2.2	Good conformity	§434 (1) 1,2 BGB	Presumption that the use is intended under the contract, if not the customary use and the quality of usual things of the same kind are essential
	2.3	Lack of conformity	§442 BGB	If the buyer has no knowledge of a defect due to gross negligence, the buyer may assert rights in relation to this defect only if the seller fraudulently concealed the defect or gave a guarantee of the quality of the thing; Not transposed: origin in materials supplied by the consumer
	2.4	Seller statements	§434(2)	<i>Direct transposition</i> - The seller shall not be bound by public statements in case she/he was not aware of the statement; the statement had been corrected; or the statement did not influence the decision of the consumer to purchase the good

	2.5	Installation	§434 (2) BGB	<i>Direct transposition</i> - Incorrect installation considered equivalent to lack of conformity if installation formed part of the sale or if the installation instructions created the shortcomings
Rights of the consumer	3.1	Liability	§437 BGB	<i>Direct transposition</i> - Establishes that the seller is liable for any lack of conformity which exists at the time the good is delivered
	3.2	Remedies	§437 BGB	<i>Direct transposition</i> - Stating that the consumer has the right to have non-conforming goods brought into conformity free of charge, or to receive an appropriate discount in price, or to contract rescission
	3.3	Conditions	§439 I,III, 275 I,II BGB	Except for the last paragraph which is not transposed into German law, direct transposition.
	3.4	Free of charge	§439 II BGB	<i>Direct transposition</i> - "Free of charge" referring to the necessary costs incurred to bring the goods into conformity, including postage
	3.5	Reduction of the price	§441 BGB	<i>Direct transposition</i> - Right to price reduction or contract rescission if the consumer is not entitled to the other remedies, or if the seller has not completed them within a reasonable time or without significant inconvenience to the consumer
	3.6	Contract rescission	§323 BGB	More precision when a specification of a period of time can be dispensable, but otherwise direct transposition
Right of redress	4	Final seller liability	§478 BGB	Period of time for the entrepreneur is dispensable, <i>but restriction</i> : only applicable with newly manufactured sold things
Time limits	5.1	Time period	§475 II BGB.	Two years
	5.2	Defect confirmation		Not transposed
	5.3	Reversed burden	§476 BGB.	Six months
Guarantees	6.1	Legally binding	§443 (1) BGB	Merged with 1.2e, in which it is respected the meaning of the directive under which the guarantee will be legally binding on the offerer of the guarantee under guarantee statement and conditions
	6.2	State rights and contents	§477 (1) BGB	<i>Direct transposition</i> - Stating that the guarantee will be legally binding on the offerer of the guarantee under guarantee statement and conditions
	6.3	Written contract	§477 (2) BGB	<i>Direct transposition</i> - The guarantee shall state that the consumer has legal rights under applicable national legislation, make clear that those rights are not affected by the guarantee; give the guarantee details and process for claiming, plus name, address of guarantor plus scope and duration.
	6.4	Language of guarantees	§477 (2), §126b BGB	<i>Direct transposition</i> - On request by the consumer, the guarantee shall be made available in writing or another accessible durable medium
	6.5	Respect 6.2-4		Not transposed
Binding nature	7.1	Restricted rights	§477 (3) BGB	<i>Direct transposition</i> - Specifying the validity of the guarantee contract for consumer even if it infringes on the above three paragraphs
	7.1	Reduced period (2nd hand)	§475 (2)	One year for second-hand products

	7.2	Measures of protection	Official note 11 BGB	<i>Direct transposition</i> - The purpose being to ensure a uniform minimum level of consumer protection
National law and minimum protection	8.1	Supplementary rights		
	8.2	National rules retain		
Information	9	Inform of the rights		
Modification	10	Directive 98/27/EC		
Transposition	11.1	Date		
	11.2	Provisions		
Review	12	Jul-06		
Entry into force	13	Day of publication		
Address	14	To Member States		
Recitals	15	Period-of-use deduction		
	18	Suspension 2-year period		

* The mention of "direct" means a direct transposition, disregarding the fact that the sentences can be placed differently or paraphrased relative to the Directive formulation

Legend

	Articles at the discretion of the Member State (not mandatory)
	Rules on procedures to transpose
	Recitals –at the discretion of the Member State

1.1.3 Additional rights

Below are additional rights available to German consumers.

Right of information

The additional rights of information available to the German Consumer and User are principally contained in the BGB and its “*Einführungsgesetz*” (BGBEG) (*Introductory Act to the German Civil Code*). These rights have lately been modified according to Directive 2011/83/EC to improve consumer protection.

§312d BGB obliges the entrepreneur in the case of off-premises contracts and distance contracts to inform the consumer according to the stipulations of Article 246a of the Introductory Act to the Civil Code.

The following table displays some of the articles found in the aforementioned laws, which require the information provided to consumers and users to be clear and comprehensive:

Table 2: Right of information in the national law		
Consumer rights of information	National Law	Comments
Right to obtain clear and comprehensible information	Art.246a §4(1) BGBEG	Receive the “correct” information on goods
	Art.246a §4(1) BGBEG	“in a clear and comprehensible way”
	Art.246a §4(1) BGBEG	“prior to the contract”
	§312d BGB, Art.246a §1 BGBEG	Necessary information

Related to the information prior to the contract, the entrepreneur is obligated to offer information on the “legal guarantee (...), the post-purchase services and the commercial guarantee” to the consumer for off premises contracts.

Right of withdrawal

The right of withdrawal is extensively legislated in the German Civil Code and has been modified in 2014 within the framework of adapting the national legislation to Directive 2011/83/EC. According to Art.246a §1(2) BGBEG the consumer has to be informed about this right or more precisely, about its conditions, time limits and procedures concerning the exercise of the withdrawal right including a sample form to withdraw from the contract. These details must be part of the contract, unless otherwise agreed by the contracting parties (§355 BGB). In accordance with §355 of the German Civil Code, the withdrawal is valid by declaration towards the entrepreneur (not necessarily in written form) within a minimum period of 14 days from the time of the conclusion of the contract. The withdrawal does not have to provide any reasons (§355 BGB).

For distance and off-premises contracts, the right of withdrawal is established in similar terms, but in such cases, if necessary, the consumer has to be informed that they must bear the costs of returning the goods²⁰.

1.2 Enforcement and redress

In case of a problem with a consumer good, consumers should first address their claim to the seller (i.e. seller liability, §437 BGB). In accordance with §439 BGB the entrepreneur

²⁰ Art.246a §1(2) BGBEG

is obliged to replace or to repair the good at the consumer's discretion if none is related to undue cost or considerable expenditure. If the seller doesn't respond within a reasonable period of time, the consumer should set him a deadline in written form informing him that he would like to withdraw from the contract or reduce the purchase price if the deficiency is not remedied on time.²¹

If no solution between the two parties can be found, there exist mainly three possibilities to achieve an extrajudicial arrangement: conciliation or mediation, arbitration and court procedure as described below.²²

Conciliation

One option at hand for the consumer to obtain an out-of-court settlement is conciliation. This means that the contractual parties are supposed to achieve a consensual arrangement through investigation of an impartial third party acting in accordance with the Rules of Conciliation ('*Schlichtungsordnung*') of the given entity²³. As a general rule, the conciliators are experts in the domain where the agreement has to be reached. Throughout their neutral and independent estimation of the facts and the legal situation, the contributing parties should come to an arrangement within a short period of time. Conciliators can propose a remedy, but it doesn't have to be accepted²⁴.

Mediation

Mediation, which is a relatively new procedure in Germany, represents another possibility for the consumer to reach an out-of-court agreement with the entrepreneur and that on a self-determined and constructive basis. Unlike the option listed above, the contractual parties are self-responsible for finding a solution and the mediator doesn't have any power of decision or the right to provide a proposed settlement. His role consists rather of assisting the contributing parties and creating an environment which enables the participants to resolve the dispute²⁵.

Arbitration

Arbitration is also possible in Germany and a precondition of this is, however, that both parties have agreed to abide by the decision of the arbitrators, often in terms of an arbitration clause when entering into the contract. This option is regulated in §§1025 to 1066 of the German Code of Civil Procedure, which can be modified on a mutually agreed basis²⁶.

²¹ Zentrum für Europäischen Verbraucherschutz e.V. (2014), 'FAQ Gewährleistung Garantie'. Available at: http://www.eu-verbraucher.de/fileadmin/user_upload/eu-verbraucher/PDF/Joint_Project_Garantien/FAQ_Gewaehrleistung_Garantie_DE.pdf

²² Website accessed in April 2015. Information of the Chamber of Industry and Commerce (Industrie- und Handelskammer Schwerin) about extrajudicial arrangements. Available at: http://www.ihkzuschwerin.de/produktmarken/recht/Aussergerichtliche_Streitbeilegung/

²³ For instance the Trade Chambers other organizations of the industry/consumers representatives. See for instance the rules of conciliation for the German Association of SME, available at: <http://www.bvmw.de/der-bvmw/satzung-und-ordnungen/schieds-und-schlichtungsordnung.html>

²⁴ Website accessed in April 2015. Information of the Chamber of Industry and Commerce (Industrie- und Handelskammer Schwerin) about extrajudicial arrangements. Available at: http://www.ihkzuschwerin.de/produktmarken/recht/Aussergerichtliche_Streitbeilegung/

²⁵ According to German law, anybody can be the mediator, as long as the contingent parts agree on that figure. Gesetz zur Förderung der Mediation und anderer Verfahren der aussergerichtlichen Konfliktbeilegung vom 21. Juli 2012. Available at:

http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/17_wp/mediation_sg/bgbl.pdf?__blob=publicationFile

²⁶ Website accessed in April 2015. Information of the Chamber of Industry and Commerce (Industrie- und Handelskammer Schwerin) about extrajudicial arrangements. Available at: http://www.ihkzuschwerin.de/produktmarken/recht/Aussergerichtliche_Streitbeilegung/

Court settlements

The consumers and users also have the right to claim through a court. Depending on the amount in dispute, the claim should be addressed in first instance to the Local Court for an amount of less than €5,000 (*Amtsgericht*) or to the District Court for a value of over €5,000 (*Landgericht*).²⁷ In general, the claim should be addressed to the court of the area where the defendant has his place of residence in the case of the Local Court proceedings.

Cases

Box 1: Court case on the termination of the contract, 2014²⁸

In the appeal of 28 May (file reference VIII ZR 94/13), the court decided that, as a general rule, a defect is not classified as insignificant (minor) when the expense to remedy the defect exceeds 5% of the purchase price of the good. A value of 10% of the purchase price had originally been set, which represents a strengthening of the consumer rights. This refers to the possibility to terminate the contract, which is not possible in the case of an insignificant defect, so that the consumer may only demand the other remedy possibilities at his option”.

Box 2: Court case on the replacement of a consumer good, 2008²⁹

According to the judgement of 16 July (file reference C-404/06), retailers and mail-order companies are no longer allowed to claim compensation when replacing a consumer good during the two-year warranty period as this constitutes an infringement against Directive 1999/44/EC. This has been decided by the European Court of Justice. In accordance with §439(4) of the German Civil Code, the seller may demand the return of the defective product after its replacement with a non-defective good, which had caused some sellers to claim remuneration for the time the buyer had used the defective product. Notwithstanding, Directive 1999/44/EC prescribes that the repair – as well as the replacement – of the defective product should be free of charge for the consumer. Deviations from this shall only be valid if the fulfilment of the consumer’s claim is impossible or the demand disproportionate.

²⁷http://amt24.sachsen.de/ZFinder/verfahren.do%3Bjsessionid=F814E068DD2ABD253849F3CDED0ED7D5.zufi2_2?action=showdetail&modul=VB&id=310084!0

²⁸ Website accessed in April 2015. Available at: <https://openjur.de/u/701340.html>

²⁹ See for instance the article about the court case on the replacement of the defective consumer good. Website accessed in April 2015. Available at: <http://www.faz.net/aktuell/wirtschaft/recht-steuern/eugh-urteil-zum-verbraucherschutz-keine-nutzungsgebuehr-in-der-garantiezeit-1548824.html>

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Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council – Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>

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