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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	14951/18 + COR 1
Subject:	Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council - Statements by Germany, Italy, Malta, Portugal and Poland

Delegations will find below statements by Germany, Italy, Malta, Portugal and Poland to be included in the minutes of the Justice and Home Affairs Council of 7 December 2018.

Meeting of the Justice and Home Affairs Council

Brussels, 7 December 2018

Agenda item: Contract Law - Directive on Contracts for the sales of goods (DSG)

= General approach

STATEMENT BY GERMANY

Deutschland stimmt dem vorliegenden Kompromisstext 14951/18 vom 3. Dezember 2018 in der Annahme zu, dass die Lösung in Art. 8b Abs. 1a des Kompromisstextes 14951/18 vor dem Hintergrund gefunden wurde, den Mitgliedstaaten, die eine längere Frist als ein Jahr in ihrem nationalen Recht haben, deren Beibehaltung zu ermöglichen. Wir gehen davon aus, dass damit weitere Mitgliedstaaten in ihrem nationalen Recht eine Frist für die Beweislastumkehr von einem Jahr vorsehen werden.

Courtesy Translation

Germany accepts the present compromise text 14951/18 of 3 December 2018 on the assumption that the solution in Article 8b(1a) of the compromise text 14951/18 was reached with the aim of enabling Member States whose national law contains a longer period than one year to retain that period. We assume that further Member States will introduce into their national law a period of one year for reversal of the burden of proof.

STATEMENT BY ITALY

L'Italia accetta il testo dell'Orientamento generale solo alla luce di una soluzione di compromesso, richiamando nel contempo le principali questioni che conducono ancora ad un rilevante livello di critica. L'Italia è fermamente convinta che debbano essere tutte affrontate nel futuro negoziato interistituzionale.

Innanzitutto, l'Italia ritiene che la stesura attuale presenti un elevato livello di complessità e che molte soluzioni, così come adottate nella SGD, non siano in linea con la Direttiva sui contratti per la fornitura di contenuti digitali (DCD). I risultati legislativi complessivi, derivanti dalla futura adozione della DCD ed SGC, potrebbero non essere chiari e comprensibili per i consumatori e i professionisti, in particolare le PMI (piccole e medie imprese) che incontreranno difficoltà durante la vendita all'estero per quanto concerne questioni importanti quali la responsabilità del venditore, l'onere della prova e la prescrizione, causando così un elevato livello di confusione, specialmente in relazione a beni che non sono facilmente identificabili come regolamentati dalla DCD o SGD. L'Italia ritiene, inoltre, che la soluzione dei “casi dubbi” (articolo 2A, paragrafo 2) debba essere modificata, poiché rischia di creare oneri ingiusti per i venditori e di impedire ai giudici di indagare sulla reale volontà delle parti in ciascun caso specifico.

Pertanto, è molto importante che durante i futuri triloghi i colegislatori lavorino sulla semplificazione e sull'allineamento delle due direttive, con l'obiettivo di semplificare il testo e senza cercare un compromesso ad ogni costo.

A tal riguardo, anziché creare norme inefficaci preferiremmo piuttosto limitare l'ambito di applicazione della Direttiva unicamente a quelle disposizioni il cui valore aggiunto è ampiamente riconosciuto.

L'Italia desidera inoltre ricordare che la massima armonizzazione sui rimedi contrattuali è, da un punto di vista nazionale, ma anche ai fini della coerenza del diritto dell'Unione, una questione estremamente importante connessa all'obiettivo più importante della presente Direttiva e auspica che i Triologhi prendano in considerazione la cancellazione dell'art. 2 par. 6.

L'Italia continua a nutrire serie preoccupazioni in relazione alle nuove norme sugli aggiornamenti e sui beni con elementi digitali quando il contratto di vendita prevede la fornitura continuativa di contenuti digitali o di servizi digitali per un periodo di tempo. In effetti, da un punto di vista economico, gli effetti delle norme sugli aggiornamenti rimangono incerti (vi è una totale mancanza di dati sull'impatto delle nuove norme) e sembrano imporre al venditore (e non al produttore, che è di solito colui che sa come farlo) l'onere di aggiornare la parte digitale dei beni, e rispondere per omissione di aggiornamento, senza lasciare la scelta al consumatore per poter infine rifiutarlo. In relazione ai beni con elementi digitali quando il contratto di vendita prevede la fornitura continuativa di contenuti digitali o di servizi digitali per un periodo di tempo, vi sono elementi oggettivi (correlati alla stretta connessione tra durata della responsabilità, onere della prova e termine di prescrizione) che dimostrano che il testo attuale porterà a situazioni inique, con il rischio di impatti su tutti i mercati di questo tipo di beni.

Courtesy Translation

Italy accepts the General Approach text only in the light of a compromise solution, while recalling the main issues which still lead to an important degree of criticism. Italy strongly believes they all should be tackled in the future interinstitutional negotiation.

First of all, Italy believes that the actual drafting has a high level of complexity and many solutions, as adopted in SGD, are not in line with the Directive on contracts for the supply of digital contents (DCD). The overall legislative results, deriving from the future adoption of DCD and SGC, might not be clear and understandable for consumers and professionals, in particular SME (small and medium enterprises) who will face difficulties while selling abroad as far as important issues as liability of the seller, burden of proof and limitation period are concerned, thus leading to a great level of confusion, especially in relation to goods that are not easily identifiable as regulated by DCD or SGD. Furthermore Italy believes that the “doubt cases” solution (art. 2A par. 2) should be amended, as it risks to create unjust duties on the sellers and impede judges to investigate the real will of the parties in each specific case.

Therefore, it is very important that during the future Trilogues the co-legislators should work on simplification and alignments of the two directives, with an aim at streamlining their text and without searching a compromise at any cost.

In that respect, instead of creating ineffective rules we would rather prefer to limit the scope of the Directive only to those provisions whose added value is broadly recognized.

Italy wishes also to recall that maximum harmonization on contractual remedies is, from a national point of view but also for the sake of consistency of EU law, a very relevant issue related to the most important aim of this Directive and hope that Triologues will consider the deletion of art. 2 par. 6.

Italy still maintains serious worries in relation to the new rules on updates and on goods with digital elements where the sales contract provides for continuous supply of the digital content or digital service over a period of time. Indeed, from an economic point of view, the effects of the rules on updates still remain uncertain (there is a total lack of data concerning the impact of the new rules) and seem to impose on the seller (and not on the producer, who is usually the one who knows how to do it) the burden of updating the digital part of the goods, and to respond for omission of updating, without leaving the choice to the consumer in order to eventually refuse it. In relation to goods with digital elements where the sales contract provides for continuous supply of the digital content or digital service over a period of time there are objective elements (related to the strict connection between the duration of liability, burden of proof and limitation period) which show that the actual text will lead to unfair situations, with a risk of impacts on the entire markets of this type of goods.

STATEMENT BY MALTA

Malta recalls that the main objective of the proposal for a Directive on contracts for the supply of digital content (DCD) and the proposal for a Directive on contracts for the sales of goods (SGD) was to eliminate the key contract law-related barriers hindering cross-border trade in order to remove the problems faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in national contract law. While the general approach on the DCD secures such an objective, Malta considers that the general approach on the SGD does not. Malta regrets that the principle of maximum harmonisation in the SGD has been substantially eroded, thus failing to eliminate disparities in national laws. A better attempt could also have been made to better align the DCD with the SGD. Malta augurs that further discussions on these files will attempt to better align the two proposals and that decisions to be taken on the SGD during the inter-institutional negotiations will not result in a dilution of the added value achieved in the general approach of the DCD.

STATEMENTS BY PORTUGAL AND POLAND

Courtesy translation

The current version of the compromise text, by extending the period of time on the reversal of the burden of proof, reflects in part the concerns expressed by Portugal and Poland in the negotiation towards a text that effectively protects consumers' rights and the level of protection in force in these Member States.

However, the signatories of this statement maintain their serious concerns on the solution for the hierarchy of rights.

On the basis of Directive 1999/44/CE Member States were allowed to go beyond the Union standards and introduce rules that ensure higher levels of consumer protection than those enshrined in that Directive. Some Member States, such as Portugal and Poland, decided to use this prerogative and strengthen consumer protection by not introducing a hierarchy of rights into their legal systems.

Bearing in mind that consumer protection is crucial to strengthening confidence of the internal market, during the negotiation we had the ambition that the high level of consumer protection could be maintained.

Contrary to our expectations, the Directive as proposed has not taken into account the absence of a hierarchy of rights, presenting a solution which, we believe, can weaken consumer protection and confidence.

In this context, with a constructive spirit and in light of the positive developments regarding the reversal of the burden of proof, the signatories of this statement wish to reserve the right to seek improvements of the current compromise text in the future interinstitutional negotiation, stressing that it is necessary to achieve a more ambitious directive on consumer protection in the European Union, in particular regarding the remedies.

Portuguese version

A atual versão do texto de compromisso, ao alargar o prazo para a inversão do ónus da prova, reflete, em parte, as preocupações manifestadas por Portugal e a Polónia no decurso da negociação com vista a um texto que proteja eficazmente os direitos dos consumidores e o nível de proteção em vigor nos ordenamentos jurídicos destes Estados-Membros. Contudo, os signatários desta declaração não podem deixar de manifestar preocupações com a solução encontrada para a hierarquia de direitos.

Ao abrigo da Diretiva 1999/44/CE, os Estados-Membros podiam ir além do padrão mínimo então fixado e introduzir regras mais protetoras do que as consagradas nessa Diretiva. Alguns Estados-membros, como Portugal e a Polónia decidiram usar essa prerrogativa e reforçar a proteção dos consumidores não introduzindo nos seus sistemas jurídicos uma hierarquia de direitos.

Tendo presente que a proteção dos consumidores é determinante para reforçar a confiança no mercado interno, os signatários desta declaração ambicionavam, no âmbito da negociação, que o seu elevado nível de proteção dos consumidores pudesse ser mantido.

Contrariamente às nossas expectativas, a Diretiva tal como proposta não teve em conta a ausência da hierarquia de direitos, apresentando uma solução que, entendemos, pode fragilizar a proteção e a confiança dos consumidores.

Neste contexto, num espírito construtivo e face à evolução positiva verificada quanto ao prazo para a inversão do ónus da prova, os signatários desta declaração reservam-se o direito de empreender melhorias no texto de compromisso durante a negociação interinstitucional, salientado que, em sede de trólogos, é necessário alcançar uma diretiva mais ambiciosa em matéria de proteção dos consumidores na União Europeia, nomeadamente no que diz respeito aos meios de compensação.

Polish version

Obecna wersja tekstu kompromisowego, uwzględniająca przedłużenie okresu obowiązywania odwróconego ciężaru dowodu, odzwierciedla w części obawy wyrażone przez Portugalię i Polskę w trakcie negocjacji nad tekstem w kierunku, który skutecznie chroniłby prawa konsumentów i zachował poziom ich ochrony obowiązujący w tych Państwach Członkowskich.

Jednak dla sygnatariuszy tego oświadczenia nadal budzi poważne zastrzeżenia rozwiązanie dotyczące hierarchii środków ochrony.

Na podstawie dyrektywy 1999/44/WE Państwom Członkowskim pozwolono wyjść poza unijny standard i wprowadzić przepisy zapewniające wyższy poziom ochrony konsumentów niż przepisy zawarte w tej dyrektywie. Niektóre państwa członkowskie, takie jak Portugalia oraz Polska, postanowiły wykorzystać tę prerogatywę i wzmocnić ochronę konsumentów, nie wprowadzając hierarchii środków ochrony do swoich systemów prawnych. Biorąc pod uwagę, że ochrona konsumentów ma kluczowe znaczenie dla wzmocnienia zaufania w ramach rynku wewnętrznego, w trakcie negocjacji podtrzymywaliśmy ambitne podejście, aby utrzymać obecny wysoki poziom ochrony konsumentów. W przeciwieństwie do naszych oczekiwań, proponowana dyrektywa nie uwzględnia sytuacji braku hierarchii środków ochrony w krajowym porządku prawnym, przedstawiając rozwiązanie, które, jak sądzimy, może osłabić ochronę konsumentów i zaufanie w tym zakresie.

Biorąc powyższe pod uwagę, przedstawiając konstruktywne podejście w świetle pozytywnych zmian w tekście dotyczących odwróconego ciężaru dowodu, sygnatariusze tego oświadczenia pragną zastrzec sobie prawo do szukania poprawy obecnego tekstu kompromisowego w czasie przyszłych negocjacji międzyinstytucjonalnych, podkreślając, że konieczne jest osiągnięcie bardziej ambitnego podejścia w sprawie ochrony konsumentów w Unii Europejskiej, w szczególności w zakresie środków ochrony.
