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CONSUMER PROTECTION FOR LONG-TERM CONTRACTS

Summary

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SUMMARY

Contract law and consumer contract law are in a state of flux. The provisions of the German Civil Code (BGB) and the relevant EU directives have so far been very much tailored to the one-off exchange of goods for money – they are orientated towards sales law. The changes in contract law and consumer contract law that can be observed on both the German and the European level, particularly as a result of digitalisation and the sustainability transformation, are calling this focus on sales law into question and are necessitating significant adjustments to contract law and consumer contract law.

The change is characterised by a decline of the classic purchase in favour of purchase contracts with accompanying or subsequent performances and obligations (such as updates, take-back obligations, accompanying services, etc.), by the expansion of usage contracts (*service by design*) and by an increase in mixed contracts. As a result, long-term contracts and contracts with some long-term effects are becoming the norm. In view of this development, significant parts of sales law-orientated contract law and consumer contract law require a forward-looking review and, if necessary, revision.

On the one hand, this report is dedicated to reviewing the classic protection instruments of withdrawal and information obligations regarding their suitability for the increasingly important long-term situations. On the other hand, the focus is on necessary additions to general contract law and the law on contracts of use; the main aim here is to bring about legislative value decisions by means of dispositive standards on which consumer protection regulations can then be based – if necessary – and from which no deviation is permitted for reasons of consumer protection.

I. Limited suitability of consumer rights of withdrawal and of information obligations

The retroactive consumer-protecting right of cancellation, the right to withdrawal, is not very suitable for long-term contracts and in particular for services and usage contracts. The current legal situation is therefore determined by a large number of selective exceptions to the several rights of withdrawal; the resulting complexity of the regulatory regime must be reduced. The right of withdrawal for long-term contracts should be largely limited to non-retroactive ending-type effects; this corresponds to the legal situation of the vast majority of special rules on withdrawal.

Information obligations as a consumer protection instrument usually relate to the time at which the contract is concluded. In contrast to one-off exchange contracts, however, long-term contracts usually do not have a fixed programme of obligations over the entire term of the contract, which devalues the information provided. No provision has yet been made for this, although a reduction in the information – which may need to be amended at a later date – should also be taken into account. Above all, however, it is necessary to create a legal basis for the modification of long-term contracts and related information obligations in the event of contract amendments (and extensions of the contract period).

II. Conclusion of contracts and in particular customer mailboxes

There is also a need for updating in general contract conclusion law – also because the relevant rules apply to contract amendment agreements. In the various button solutions relevant here (contract conclusion button, cancellation button and, in future, revocation

button), greater attention should be paid to linguistic and structural consistency of the rules. The legal consequences side of the contract conclusion button under German law is in urgent need of revision because the ineffectiveness consequence is far too far-reaching, especially for long-term contracts, and in some cases harmful to consumers. Instead, reference should be made to the legal consequences of cancellation in distance selling. For long-term contracts, the retroactive effect should be limited by a cure after one year of complaint-free performance of the contract on the European level. At the very least, German law should be adapted in line with the directive, and it should be left to the consumer to decide whether they wish to remain bound by the contract.

For customer interfaces, a dispositive regulation is required in the context of § 130 BGB. For the use of customer mailboxes and other technical facilities providing receipt of legally relevant communication by the customer, this should be based on the individual customary use by the person concerned for the receipt of legal communication if these – unlike in the case of a home or workplace – have no physical connection to the customer. This customary use must be supplemented by corresponding presumptions (e.g. letterhead, regular use if the facility is neutral). The one-sided nature of the organisation of the communication environment when using customer interfaces also makes it necessary to apply the quality standards of digital contract law of §§ 327 et seq. BGB to the relevant arrangements.

III. General law of obligations

The general law of obligations needs to be supplemented by dispositive provisions for long-term contracts, in particular for the start-up phase and the post-contractual settlement phase, for ordinary termination, for a general contractual right to injunctive relief modelled on §§ 541 and 1004 BGB and for the suspension of the continuing contract as a result of defences. The amendment of contracts also requires a general statutory regulation for long-term contracts to clarify the fundamental values. This regulation should contain a unilateral contract amendment for important reason, which is controlled by reasonableness standards for both parties, establishes a special right of cancellation for the other party and is linked to a price adjustment.

IV. Purchase with permanent and service elements ("Purchase+")

When purchasing, the unresolved issues of risk transfer for risks arising from long-term and service elements should first be clarified by means of test cases run by the vzbv and other consumer organisations. The actions of third parties – carriers, app providers, providers of digital services, etc. – for the purpose of contract fulfilment regarding the additional elements must also be attributed to the seller in terms of fault standards. The consumer's right of self-help-performance with regard to the service and long-term elements must not be superseded in mixed situations by the currently favoured absorptions to sales law. It would be better to have a right of self-help-performance corresponding to the contract for work and labour (Werkvertrag) also in the case of purchase, which should also apply to B2B contracts.

V. Consumer protection for contracts for use

General law on contracts for use is experiencing a considerable increase in importance for consumers. The newly emerging contractual arrangements often function as use without custody. The general law on contracts for use of §§ 535-548a BGB is not sufficiently adapted to this; the provisions therefore need to be supplemented or modified for such cases. To date, there has been a lack of effective mechanisms for fully determining the scope of the authorisation of use granted by the trader to the consumer. In order to guarantee the suitability of the right of use granted for use by the consumer, the concept of material defects in the general law on contracts for use should be extended to include the inadequate creation of rights in the sense of a legal fitness for purpose requirement. Ultimately, it must be possible to effectively sanction consumers who exceed their rights of use. General law on contracts for use should provide additional rules for this – also as a legal model balancing the interests of the parties involved.