# Report on the Conference on "Implementation of the Sale of Goods Directive and the Digital Content Directive in Austria and Germany" on 26.11.2021

On Friday, 26 November 2021, the second conference on the implementation of the Sale of Goods Directive and the Digital Content Directive in Austria and Germany, which dealt with the concrete implementation laws in both legal systems, took place. The online event was hosted by **Univ.-Prof. Dr. Susanne Augenhofer, LL.M. (Yale)** and Dean of Studies **Univ.-Prof. Dr. Bernhard Koch, LL.M. (Michigan)**. During the conference, which took place from 9.45 a.m. to 5.15. p.m., numerous scholars and practitioners gave exciting and informative presentations on the new regulatory requirements of the European legislator. After a welcome to the almost 90 participants by Univ.-Prof. Augenhofer and Univ.-Prof. Koch, the conference was opened by a greeting from **Univ.-Prof. Dr. Dr. h.c. mult. Tilman Märk, Rector, LFU Innsbruck**.

The meeting started with an introduction to the transposition laws in Austria and Germany by representatives of the ministries responsible for the national legislative transposition of the two EU Directives.

First, **Hon.-Prof. Dr. Johannes Stabentheiner (BMJ)** introduced the participants to the concept of transposition in Austria. As in the past, the Austrian legislator again decided to implement the Directives by means of a special law, the Warranty Directive Implementation Act ("Gewährleistungsrichtlinienumsetzungsgesetz"; GRUG). The changes required by the two Directives in the B2C segment were thereby enshrined in positive law in the new Consumer Guarantees Act ("Vebrauchergewährleistungsgesetz"; VGG). In addition, supplementary provisions have been inserted into the general warranty law of the General Civil Code (ABGB) and into the Consumer Protection Act (KSchG). Thus, for example, the new possibility was created to assert warranty remedies in a very general and form-free (out-of-court) way. Finally, Hon-Prof. Stabentheiner stated that the most important change associated with the implementation of the European requirements was the splitting of Austrian warranty law into different regulatory regimes. Therefore, in the future, when solving a warranty issue, legal practitioners will have to check whether the general warranty provisions under the ABGB or those under the new VGG are to be applied.

**Dr. Benjamin Görs (BMJV)** and **Ministerialrat Dr. Gerhard Schomburg (BMJV)** then introduced the German transposition laws. In Germany, in contrast to Austria, it was decided to implement the Directives in the general codification of civil law, the German Civil Code (BGB).

Specifically, both Directives were transposed into the general part of the BGB. In part, the provisions of the BGB were adapted to the requirements of the two Directives, but in other places it was necessary to create entirely new provisions, e.g., §§ 372b and 327c BGB for the provision of digital content. In this context, it was also interesting that Germany, going beyond the Digital Content Directive, was the only Member State of the EU to introduce a provision regulating the consequences under contract law of declarations made by the consumer under data protection law (§ 327q BGB).

After these introductions to the transposition laws from the Austrian and German perspectives, Austrian and German scholars took a closer look at the concrete transposition of the Sale of Goods Directive in the two countries.

**Univ.-Prof. Dr. Bernhard Koch, LL.M. (Michigan), LFU Innsbruck** dedicated his presentation to selected details of the implementation in Austria. First, he assessed the Austrian legislator's streamlining of the, in his opinion, partly "*bloated*" Directive texts in the implementation as extremely positive. Furthermore, he pointed out that the Weber/Putz jurisprudence of the ECJ had now also been enshrined in positive law in accordance with the requirements of the Sale of Goods Directive. In addition, according to *Koch*, by doubling the six-month reversal of the burden of proof to one year for the B2C sector, the demarcation between sales contracts and contracts for work and services has gained new importance. However, he also pointed out that opportunities had been missed in the implementation, especially regarding the creation of a more sustainable and uniform warranty law. However, in his opinion these opportunities were missed for political reasons and not due to the administrators at the Federal Ministry of Justice (BMJ).

**Prof. Dr. Stephan Lorenz, LMU Munich**, then analysed the implementation of the Sale of Goods Directive in Germany in more detail. He first praised the work of the BMJV, which was, in his opinion, very "*lean*" and true to the Directive. He particularly welcomed the inclusion of the provisions in the general part of the BGB. He then spoke about the legal changes concerning the concept of material defects, the reversal of the burden of proof and the statute of limitations, as well as material defects of goods with digital elements. He was rather sceptical about the trend towards increased formalisation of information obligations, a trend that in his view is (partly) driven by the European legislator. He stated that consumers are now "*literally overwhelmed*" with information. In contrast to *Koch*, he also raised the question of whether the law on sales contracts in general is the right place to take sustainability issues into account.

Following these two presentations on the implementation of the Sale of Goods Directive in Austria and Germany, there was a lively discussion between the participants and the speakers. There was a particularly intense discussion over the point at which consumers can demand a price reduction

or declare termination of the contract, as it is not explicitly stated in the Sale of Goods Directive how many attempts at rectification must be granted to the trader.

After the lunch break, presentations followed on the concrete implementation of the Digital Content Directive in Austria and Germany. **Univ.-Prof. Dr. Christiane Wendehorst, LL.M. (Cantab.), University of Vienna** spoke about the implementation in Austria. She first stated that most of the provisions of the Directive had been implemented in the VGG, but not all. For example, Art 13 of the Directive (concerning default) had been regulated in the KSchG. In this context, she addressed the growing fragmentation of the law caused by this. Furthermore, Univ.-Prof. Wendehorst stated that the obligation to update defective digital services also applies in B2B relationships, which was unusually regulated in a consumer protection law, specifically in § 1 para 3 VGG, by reference to § 7 VGG. As a practical consequence, § 7 VGG had to be "*read into*" a warranty regime for B2B relationships, which was otherwise completely shaped by the general warranty law according to the ABGB. In conclusion, she stated that the advantages of a separate individual law probably outweigh the disadvantages. However, the legal fragmentation that now arises for B2C contracts was, in her opinion, avoidable despite all the legal-political controversies.

**Prof. Dr. Alexander Metzger, LL.M. (Harvard), HU Berlin** then looked at individual details of the German implementation of the Digital Content Directive. He began by praising the work of the BMJV in implementing the Directive, as this had required solving some complex technical issues. At the beginning of his presentation, he also stated that in the course of the implementation – contrary to the actual implementation in the general part of the BGB – he had pleaded for the introduction of a new type of contract for digital content in the special part of the BGB. As, in his view, digital content did not only create a new type of goods, but also new rights and obligations to perform.

He also spoke about the consequences of the introduction of the objective concept of defect for deviating agreements on product characteristics (§ 327h BGB) by the Directive. This would prevent the trader from agreeing on something different by means of a negative quality agreement ("negative Beschaffenheitsvereinbarung"). He also saw a practical problem in the determination of the "*reference group*" to assess the existence or non-existence of the objective requirements for an item. In this context, he pleaded for a narrow interpretation of the objective concept of defect. In his opinion, only those characteristics of an item for which there was no competition in performance were to be regarded as objective requirements. Furthermore, with regard to the updating obligation(s) of the trader (§ 327f BGB), he stated that the assumption of such obligations must probably be based on the practices in the respective markets concerned. In his opinion, it was doubtful whether consumers would actually assert their new individual rights granted by the Directive against traders in practice. For him the side of collective enforcement of

rights seemed most important. In this respect, the consumer associations would have the responsibility to prevent it from becoming "*dead law*".

Following the two presentations on the respective national implementation of the Digital Content Directive, there were also exciting discussions with the participants. As many (practically) relevant questions of interpretation arose once again, the representatives from the ministries in Austria and Germany responsible for the implementation of the Directives were able to provide valuable insights and clarifications.

Finally, the last item on the agenda of the conference was a comparative law analysis and the implementation of the Directives from a stakeholder perspective.

**Univ.-Prof. Dr. Susanne Augenhofer, LL.M. (Yale), LFU Innsbruck** talked in her comparative law lecture on the transpositions in Austria and Germany with a focus on the question whether the transposition has actually led to more harmonisation. With regard to the Austrian transposition, she first stated that due to the time pressure for transposition and because of the complexity of the Directives, it had simply not been possible to implement all the necessary changes directly in the general civil law codification, the ABGB. For the same reasons, on the other hand, she was impressed by the fact that Germany had succeeded in implementing all the transposition standards into the BGB. Furthermore, she noted that both Austria and Germany had made use of the "*opt-out possibilities*" provided for in the Directives, which is why, for example, the provisions of the Directives had not been implemented for the sale of living animals and also why the doubling of the reversal of burden of proof from six to twelve months only applies in the B2C sector in both legal systems. The options granted by the Directives to shorten the warranty period had also been used. In Austria, however, a shortening of the warranty period for the purchase of a second-hand car according to § 10 para 4 VGG is only possible if more than one year had passed since the date of first registration of that car. In Germany, on the other hand, the possibility of shortening the warranty period is not based on the date of registration. In addition, there were also some differences between the legislative transpositions in Austria and Germany concerning the regulations on liability and limitation periods. In this respect, Univ.-Prof. Augenhofer final answer to the question of whether the Directives had led to more harmonisation turned out to be "*Yes and no*", an almost "*classical*" answer in the legal profession.

Subsequently, representatives of consumer and business interest groups looked at the implementation of the two Directives from the stakeholder perspective. **Dr. Petra Leupold, LL.M. (UCLA), VKI/University of Linz** and **Jutta Gurkmann, vzbv** both took a closer look at the implementation from the consumer perspective. In particular, the consumer rights in the area of warranty, which have been strengthened by the implementations, were assessed positively.

However, they were also critical concerning the existence of numerous questions still open to interpretation, which were related directly to the Directives and whose clarification was therefore deemed the responsibility of the ECJ. In the area of Austrian implementation, the increasing fragmentation of the law was again assessed as rather "*unfortunate*". **Mag. Huberta Maitz-Strassnig, WKO** assessed the implementation of the two Directives in Austria as overall positive. Nevertheless, she pointed out that especially the concept of subjective and objective requirements for an item with regard to the assessment of conformity with the contract as well as the practical application of the obligation to update digital content would probably confront traders with great difficulties in the near future.

In the panel discussion that concluded the conference, there were again lively discussions, dealing with such matters as the practical legal difficulties associated with the natural characteristics of digital forms of trade. In addition, there was discussion on pending EU projects, such as the "*right to repair*", which has so far only been announced in general terms by the European Commission.

Ending in the conclusion that, after the reform is before the reform. To which can be added: After the conference is before the conference.

(Julian Nigg)