



Position Paper

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Reaction to the European Commission's proposal on the distance sales of tangible goods (COM(2015)635 final)

Preliminary considerations

EUROCHAMBRES considers a new legislative proposal for online sales of tangible goods as neither necessary nor timely at this stage. Proposing a new legal instrument in relation to tangible goods is premature and – in line with the principles of better regulation that the Commission adheres to - a thorough review of existing applicable measures should be carried out as a first step.

EUROCHAMBRES believes that obliging traders (for B2C contracts) to comply with the national provisions of the consumer's Member State hampers the full development of cross-border e-commerce and creates barriers to businesses selling online tangible goods across Europe.

The risk of being involved in legal disputes before the courts of the consumer's home country on the basis of Article 17 of the Brussels I Regulation (Regulation 2012/1215) is another element that may discourage companies, and especially SMEs, from selling online and across-borders.

Most of the more important provisions regarding e-commerce are now fully harmonised by the Consumer Rights Directive, whilst in several other areas (e.g. legal guarantees, unfair contract terms etc.) a uniform European minimum standard is guaranteed by minimum harmonisation imposed by existing Directives. At this moment, there would rather be a need to evaluate whether the existing Directives have achieved their stated objectives.

Focusing on a legislative initiative on digital content contracts as a first legislative step and conducting a detailed evaluation with regard to tangible goods before any further initiative is adopted with regard to the latter category, seems to the Chamber network to be more coherent with the principles of better regulation that the current European Commission has pledged to follow.

Whereas more harmonisation can indeed lead to more savings for businesses, because of the reduced number of laws to comply with, the extra costs associated with the current proposal will probably outweigh the advantages that are usually associated with full harmonisation. This is due to the fact the balance has overly shifted to the consumer.

Revision of other laws?

While EUROCHAMBRES is convinced that businesses need to be supported in their plans to boost cross-border sales of their products, the proposed legislative proposal is not offering a solution to what

business currently need. Businesses are in need of a review of other legislative acts such as the e-commerce directive and the ROME I regulation. Regarding the latter, it would be beneficial for the Single Market to review the exception included in this Directive dictating that consumers may not be deprived of the level of protection of their home country. The application of the country-of-origin principle would stimulate businesses to offer their services cross-borders. In other words, the choice-of-law-option foreseen by the Rome I Regulation should be extended to consumer contracts to allow the “law of the trader” to be chosen.

For their part, consumers are already well protected through the provisions in their national consumer protection frameworks and EU legislation such as the Consumer Sales Directive and the Unfair Contract Terms Directive. Stating that online sales would be boosted through this Directive while proposing a more stringent legal guarantee provisions seems to be very contradicting, especially in the absence of any concrete evidence supporting this claim. Also, the harmonization of legal guarantees would not put an end to the flurry of differences regarding consumer protection and contract law the sellers need to respect in each Member State.

Avoiding the creation of separate regimes

EUROCHAMBRES considers unfortunate the consequences which will be created through the introduction of a separation of two distinct legislative regimes for the sale of tangible goods: a regime setting rules for the offline sales of goods and a new regime for the distance sales of goods online. Not only will this separation lead to an unnecessary distinction, it will create separate rules for exactly the same products.

Another unintended or at least undesirable consequence, would be that consumers, in the case the envisaged new rules would come into force as currently drafted, would enjoy much higher protection when purchasing online. In effect, this would lead to legislation implicitly favouring one business model over another one. Consumers will indeed prefer to shop online instead of buying from a brick-and-mortars shop who will feel pressured to apply the same rules as in the online world. Rather than expecting that the rules will sooner or later converge, a better approach would be to carry out a profound evaluation of the Consumer Sales Directive and – only if necessary – to amend this Directive - so that coherent rules would apply in all B2C commercial environments.

EUROCHAMBRES suggestions

- **Before the any law is made on contract sales law for tangible goods, the REFIT process should be concluded.**
- **The creation of separate rules for the sale of tangible goods in the online and offline environments will lead to undesirable effects.**
- **Full harmonization is not going to lead to higher cross-borders sales.**
- **An extension of the reversal of burden of proof to two years will prove counterproductive.**
- **Different rules should be applicable for second hand goods**
- **The right to termination in case of minor defects should be scrapped or at least significantly watered down.**

Specific Considerations

Article 1 - Scope

There remains considerable uncertainty about the qualification of certain products such as for instance modern cell phones, which have a lot of technology in them. Guidance from the European Commission should be offered in this respect.

Similarly to the initiative regarding the sale of digital content, EUROCHAMBRES is pleased to see that the scope does not include business-to-business (B2B) contracts. These should be governed by the principle of freedom of contract.

Article 2 - Definitions

The text in its current form proposes to also include second hand and used goods in the scope of the directive and apply the same rules for these goods. The lawmakers had decided to apply a separate set of rules in DIR 1999/44/EC for the reasons given in its recital 16, namely that (...) *“the specific nature of second-hand goods makes it generally impossible to replace; (...) consumer’s right of replacement is generally not available for these goods; (...) Member States may enable the parties to agree a shortened period of liability”*. Article 7 in the same Directive stipulates that seller and buyer may agree on a shorter liability period for the seller as long as it would not be shorter than a year. For evident reasons the lawmakers excluded the possibility of having the good replaced if they were second hand.

The approach for second-hand goods described above has proved its soundness for more than a decade and is thus standing the test of time. EUROCHAMBRES therefore pleads to have a transposition of this approach in any new legal act for tangible goods.

Article 2 § e contains a definition for a *“distance sales contract”*, which, though perhaps unconsciously, differs from the definition on *“distance contracts”* in DIR 2011/86/EU.

Articles 4 – 6 - Conformity with the contract

EUROCHAMBRES considers that under no circumstances there is a valid justification to modify the criteria set out in article 2 § 1 and § 2 of DIR 1999/44/EC which are clear and easy to understand.

Article 2 § 3 of the Sale of Consumer Goods Directive poses that claims for defects in cases where the consumer knew about the defect when the contract was made are excluded. Art 4 § 3 in the Commission’s proposal can be understood as if that, if the consumer knew about the defect before the actual purchase of the good, his warranty rights remain unaffected. This must be corrected or clarified that this can’t be the case.

The wording in art 4 § 1 that *“the seller shall insure that, in order to conform with the contract, the goods shall...”* should be modified as contract law is not the appropriate area of law where to define what the quality criteria should be.

Article 4 § 2 stating that articles 4, 5 and 6 should cumulatively be taken into account when assessing the conformity of a contract can lead to unforeseen problems. For example the combination of articles 4 §1 b and 5 § 1 can create contradictions in certain cases. When the goods are contractually foreseen to serve a well-defined objective, it is not unearthly to conceive that the goods might not be fit for more general purposes.

According to article 4 § 3 there can only be a derogation from the articles 5 and 6, if the consumer *“expressly”* accepts this specific condition when accepting the contract. The introduction of this term would have as a

consequence that consumer and businesses could be interpreted in a way that both would have to actively take action to be able to derogate from the articles 5 and 6.

Article 7 – Third party rights

A buyer e.g. of a book does not acquire the right to copy this book and resell copies, because it is not free of third party rights. Therefore this provision would mean that the sale of a variety of goods would not be possible in conformity with law. Moreover also brands on products are intellectual property and therefore the goods are not "free of intellectual property rights".

The provision also raises questions with regard to third-party-financed transactions where the seller retains title of the goods and transfers the retained title to the financier to secure the ceded purchase price claim. As you can't speak here from goods free from any right of a third person, such financing options would not be possible under this provision. This would also not be in the interests of consumers.

Article 8 - Relevant time for establishing conformity with the contract

Article 8 § 3 of the Commission proposal stipulates that any lack of conformity with the contract which becomes apparent within two years from the time the consumer took possession of the goods, is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

Although EUROCHAMBRES agrees the seller should be liable for a lack of conformity that exists at the time the goods were delivered, the envisaged time limit of two years goes beyond what can be considered as reasonable. A more realistic approach was taken in the Consumer Goods Directive in its article 5 § 3 which provides that - unless proved otherwise – a lack of conformity that becomes apparent within **six months** of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

The proposed extension to two years goes well beyond the schemes that currently are in place in different Member States and is also a considerable change to the provisions in Sales of Consumer Goods Directive which have proven their worth in practice.

Any extension of the presumption period would definitely have negative impacts especially on SME, because costs and the financial risks are the higher the less they can be neutralised by the "law of large numbers". This is clearly shown by surveys.¹

In its current form article 8 § 3 introduced nothing less than a reversal of the burden of proof for the entire warranty period. Whereas a 6 month period of the reversal of the burden of proof is legitimate, policy-makers ought not to lose out of sight that the longer a good has been in the possession of the consumer, the higher the chances that a defect is probably not the result from a lack of conformity with the contract. EUROCHAMBRES agrees with the consideration of the drafters of the Sales of Consumer Goods Directive about the likelihood that the merchandise had been delivered free of defects and that the certainty about it increases the longer the merchandise is with the consumer. User-malpractice and even accelerated wear out because of intense use of a good may occur within two years even though the seller lived up to all the promises made in the contract.

¹ See Flash Eurobarometer 413, 48: The smaller the company, the more likely that the high cost for guarantees and returns are considered problems, e.g. 55% of companies with 1-9 employees say guarantees and returns would be a problem compared to 41% with 50-249 employees, in case of companies with more than 500 employees the figure drops to 35%. A similar effect is also shown with respect of the company type: Companies that are part of an international group are the least likely to see the cost of guarantees and returns as a problem (34%), Flash Eurobarometer 413, 35.

Lawmakers cannot expect that sellers would set aside large legal provisions merely to prove that the products they delivered do not show any lack of conformity with the contract during two full years. Especially SMEs are not in the capacity of bearing such legal costs, which might push them to replace a good within this two year period even if the company is reasonably certain that the defect stems from another cause than a lack of conformity. This might certainly be the case when the goods sold are not of great monetary value and where it would be cheaper to simply giving in to a consumer's request.

Any extension of the presumption period will lead to an increased risk of abuse of consumer rights. In this context, a survey executed on the request of the Commission finds that 100% (!) of ADR bodies, take the stance that existing rights of legal and commercial guarantees are being abused by consumers.² The study also included the results of interviews with consumers who had bought a product in the last 2 years prior to the survey and faced a problem (which in their view would give them a reason to complain), and who were also asked which type of defect the products had. In no less than 9% of the cases the respondents indicated that they themselves caused the damage!³ Even though they were (at least partially) at the origin of this damage, this percentage of consumers thought they were still in their right to ask for remedies. Any extension of the presumption period would certainly support such behaviour to the detriment especially of SMEs and in the end to the detriment of all those consumers who behave correctly.

Article 8 § 2 foresees that in case that the installation was done by the consumer himself, he is granted a "reasonable" period of 30 days do take care of this after the time the consumer takes possession of the good as stipulated in paragraph 1 of the same article. In reality, this article can only result in a further extension of the reversal of the burden of proof of 24 months to 25 months, as the time of installation for which the consumer will have 30 days is foreseen to be considered as the time at which the consumer took possession of the goods. It is undoubtedly upon the consumer himself to decide when he actually installs his purchased good, however the rationale for further extending the burden of proof lacks any logic. Whereas the delivery and taking into possession of a good can easily be proved, the actual installation date is near to impossible to trace. Whereas in a digital environment the acquisition and installation of content are ipso facto the same, this cannot be said of tangible goods.

Article 9 - Consumer's remedies for the lack of conformity with the contract

EUROCHAMBERS is pleased to see that the established principle of a hierarchy of remedies has been maintained. Consumers understand themselves that a seller cannot immediately resolve an issue with a certain product and that therefore the seller should have the possibility to either repair or replace the tangible good.

Article 9 § 4 foresees that consumers should be "*entitled to withhold payments of any outstanding part of the payment, until the seller has brought the goods in conformity with the contract*". This disposition may conceivably lead to consumers holding back a large part of their due payments, even in situations where there is only a minor defect to be deplored which not even necessarily impairs the good functioning of the product.

A situation in which a consumer decides to stall the payment of the outstanding due amount in effect results in an interest-free consumer credit imposed on the seller. Therefore, consumers' rights to withhold payments until the seller has brought the goods in conformity should be strictly limited to situations where the main functionalities of the good are impaired.

² Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU – Final report, Dec. 2015, 211. The following question was asked: "*Are you aware of consumers abusing their rights under legal and commercial guarantees?*"

³ Consumer market study, 162, 165. The following questions were asked: *Q16. Thinking about products you purchased during the last 2 years, have you personally experienced any problems with it? The sort of problems we are referring to are those where you felt you had a genuine cause for complaint because the product was faulty or damaged, or didn't work at all. Q17: You indicated that you experienced a problem with <product>? What kind of problem did you experience?*

Article 10 – Replacement of goods

Remedies in the case of a lack of conformity should not go beyond what was subject of the sales contract. The remedy of replacement should not include an obligation to remove the goods from where they were installed and to install the replacement goods in cases where the seller was not obliged under the contract to install the consumer goods originally purchased.

Article 11 - Choice between repair and replacement

In the interest of all parties involved in the contract, it would be best to leave the choice of the remedy, be it either replacement or repair, to the seller who will be in a better position to judge the situation in function of the extent to which there is a lack of conformity.

Article 13 - The consumer's right to terminate the contract

EUROCHAMBRES is surprised that the legislative proposal does not exclude the possibility to terminate a contract in the occurrence of minor defects. This omission is the more surprising because the Commission's proposal for contract law for digital content does limit the consumer's right to termination only in case of impairment of "*main performance features*" (Article 12 § 5 in digital content proposal). A similar wording should be introduced in this proposal.

Article 13 § 3 (a) provides that the seller upon receiving the consumer's notice of termination of the contract should reimburse him within 14 days after receiving this notice. The issue with this provision is that when the consumer sends his notice for termination to the seller, the seller might be obliged to reimburse the consumer before even the legitimacy of the consumer's request has been established. At least the seller should have the time to look into the consumer's claim and to have the goods back. In this respect, the right of withdrawal (cf Consumer Rights Directive) conferring the consumer similar rights are not to be confused with the right to terminate a contract. The latter right can only be exercised when non-conformity has effectively been established. There should not be any confusion between a right to withdraw and a right to terminate a contract which can only be called upon when certain conditions have been met.

Next to the fact that there is no objective reason why the seller should automatically bear the cost of a return of goods, he should at least be able to choose himself how he collects the goods for return. Article 13 § 3 (b) should therefore be modified to offer more choice to the seller regarding the *modus operandi* of return in order to avoid excessive costs due to the choice of a costly carrier by the consumer.

Article 15 - Commercial guarantees

Article 15 § 2 (a) asks businesses to provide a clear statement of the legal rights of the consumer provided for by the proposed Directive. While consumers have a right to be correctly informed and not to be deceived in the pre-contractual phase, the legislator should be careful not to create supplementary and especially unnecessary obligations for companies which already have clear information obligations included in the Consumer Rights Directive.

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