

Position Paper

UEAPME¹'s Position on the Commission's proposed Directive on certain aspects concerning contracts for the online and other distance sales of goods

General Remarks: better evaluation of existing legislation is needed

As a general remark on the proposal on online and distance sales of **tangible goods**, UEAPME regrets that this proposal comes without a prior assessment and proper evaluation of the Consumer law already in place concerning online and distance sale of goods. In fact, there is already a comprehensive and heavy legislation in place related to consumer protection: the Consumer rights directive (CDR) (in place for less than 2 years), the e-commerce directive, the directive on the sales of consumers goods and the directive on unfair contract terms to name a few. Recently, the new rules on alternative dispute resolutions (ADR) have also entered into force.

Therefore, from our perspective there is no need for a new proposal right now. Instead there is the need to evaluate, in line with the better regulation principle, whether the measures already taken have achieved their goals or have made a positive contribution. In addition, it is necessary to evaluate the impact of new administrative burdens on the sellers, eventual regulatory overlaps as well as inconsistencies, using the Think Small First principle. Furthermore, we believe it is necessary to wait for the results of the current Fitness check on Consumer Law before proposing new legislation on consumer protection.

This proposal as it is now, will not, according to us, fulfil the ambition to ease cross-border sales for businesses and boost the digital single market and e-commerce. Adaptation to different contract laws concerning pre-contractual and information requirements or security requirements in every Member States would still be necessary for SMEs, even with this new legislation. Contrary to frequent statements, i.e. also in the Explanatory memorandum of the proposal, the CDR has not fully harmonised pre-contractual information requirements. According to Article 6/8 of the CDR, Member States are not prevented from imposing additional information requirements in accordance with it. Therefore, Member States can make use of this loophole to add provisions at national level. In addition to this, there is also Art 6/2 of the ROME I Regulation which does not allow depriving a consumer from the protection offered by his home country by a choice-of-law agreement. This exception is one of the real obstacles for cross border e-commerce as far as consumer protection law is concerned.

The Explanatory Memorandum of the proposal justifies the full harmonisation of legal guarantees especially with the following arguments: *"39% of businesses selling online but not cross-border quote different national contract laws as one of the main obstacles to cross-border sales². This applies particularly to remedies in case of a faulty product as mentioned by 49% of EU retailers selling online and 67% of those who are currently trying to sell or considering selling online cross-border."*

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

² Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015).

However, the survey mentioned as source for these arguments of the Commission doesn't give any basis for the assumption that businesses would consider "especially the differences with regard to legal guarantees" between the Member States as a main obstacle for cross-border selling. **High costs of guarantees, delivery costs and returns are some of the main major problems in distance selling** and not only differences in the national laws. This can be confirmed by the answers of traders who do not sell online: 60% of those retailers mentioned the high costs of guarantees and returns as a problem³. From our point of view, such "a free interpretation" of surveys contained in the Explanatory Memorandum of the proposal as a major argument in favour of the proposal is in clear contradiction with the commitments for better regulation.

Therefore, a harmonised regime that tightens up the provisions on legal guarantees to the detriment of traders and would make legal guarantees even more cost-intensive, will not boost cross-border e-commerce. In general, we support the principle that full harmonisation is the preferred regulatory option as it would ease the life of both consumers and businesses but **having a well-balanced solution remains the priority**.

Moreover, this proposal would lead to fragmentation of contract and consumer legislation as rules would change depending on the channels used (online/offline) and types of good provided. We also fear confusion on the applicable law for products that can be considered both as a tangible good and as digital content. Indeed Art 1/3 states that: "*the Directive shall not apply to any durable medium incorporating digital content where the durable medium has been used exclusively as a carrier for the supply of the digital content to the consumer*". UEAPME fears it will be difficult to clearly define when a tangible good is merely a carrier. The same goes for the combination of "sales of goods" and "provisions of services" in a single contract. If the sale of goods is more important in the contract, this proposal will be applicable, if instead the provision of services is more important, the CDR will apply. Since both the CDR and this proposal contain several rules, it is very important for the seller, as well as for consumers, to know which of the two will be applicable. In many cases, this might be unclear.

Apart from these general remarks, we have also detailed comments on the articles. UEAPME's biggest concerns are the extension of the Burden of proof (Article 8) and the remedies for the lack of conformity (Articles 9, 10, 11).

The Commission states in the Explanatory Memorandum of the proposal that: "*differently from Directive 1999/44/EC, the consumer would also have the right to terminate in case of minor defects. Also, unlike Directive 1999/44/EC, under the proposal consumers would not have the duty that they currently have under a number of national laws to notify a defect of the goods to the seller within a certain period of time from its discovery. A major change compared to Directive 1999/44/EC is certainly that the period for the shift of the burden of proof is extended to two years*".

We are very concerned about the cumulative impacts of these provisions. The impact assessment is not adequate. Due to this proposal, the consumer is lifted from the burden of proof for 2 years, does not have an obligation to notify defects and can terminate the contract in case of minor defects. This combination is neither sustainable nor reasonable from a seller's point of view and it is not a balanced position between the parties. Certainly for SME's this will create an extra barrier to selling online.

We therefore ask the European Parliament to carefully assess SME's position and to promote a balanced solution. In our view, this can only be done after the REFIT exercise.

³ Flash Eurobarometer 413, "Companies engaged in online activities" (2015), p. 48

Specific Comments

- Article 8/3 Extension of the existing presumption period

The biggest concern we have is the extension of the burden of proof. Article 8/3 of the discussed proposal extend the existing presumption period from 6 months to 2 years, this means that the reversal of burden of proof applies to the entire warranty period.

The Sales of Consumer Goods Directive (article 5/3) provides that - unless proved otherwise – a lack of conformity which 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 current solution has worked in practice. This solution is based on the period for which one could convincingly accept the reversal of the burden of proof. The likelihood that the merchandise had been delivered free of defects increases the longer the merchandise has been with the consumer. The longer an item is being used, the more likely it is that the defect will result from a handling error, malpractice or wear out.

UEAPME strongly believes that half a year is the longest plausible time period for the legal presumption that the defect had already existed in the moment of the delivery of the good. Rules in the field of consumer law should be balanced, protecting the legitimate interests of both consumers and business alike. A longer presumption period would not meet these demands. This will be a heavy burden on SMEs and we see a high risk of abuse of this right by consumers.

We demand to introduce an obligation to notify the traders of the defect within a reasonable and acceptable timeframe. In case of non-notification, the consumer shall lose its right to remedies for the lack of conformity, unless there is a justified reason for the non-notification.

The Commission justifies this change as a particularly important innovation in the interests of consumers, without significant changes for entrepreneurs, as there would be no differences in practice between the time before and after the (existing) 6-month presumption period. It is not taken in consideration that currently it is the voluntary decision of the seller to be more consumer-friendly than what is required by law. The proposed extension takes away the freedom of action of the company and further restricts commercial freedom.

Consumers will expect to have always someone liable for any problem. It should be noted that according to a survey on behalf of the Commission, 100% of ADR bodies have the view that even the currently existing rights of legal and commercial guarantees are abused by consumers.⁴ In the same study, interviewed consumers which had bought a product in the last 2 years prior to the survey and faced a problem in which they personally took the view that there was a real reason for a complaint, were also asked which type of defect the products had. For 9% of cases the respondents indicated that they themselves caused the damage⁵. This means that the respondents even admitted in a considerable extent, to have caused the defect themselves, but anyway thought there was a real reason for complaint. Any extension of the presumption period would certainly support such a questionable behaviour to the detriment especially of SME and in the end to the detriment of all those consumers who behave correctly.

⁴ 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?”

⁵ 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?*

Commission Proposal	Proposal of UEAPME
<p>Art 8/3 - Any lack of conformity with the contract which becomes apparent within two years from the time indicated in paragraphs 1 and 2 is presumed to have existed at the time indicated in paragraphs 1 and 2 unless this is incompatible with the nature of the goods or with the nature of the lack of conformity.</p>	<p>Art 8/3 - Any lack of conformity with the contract which becomes apparent within two years 6 months from the time indicated in paragraphs 1 and 2 is presumed to have existed at the time indicated in paragraphs 1 and 2 unless this is incompatible with the nature of the goods or with the nature of the lack of conformity.</p>

- **Article 9 Termination of the contract in case of minor defects and possibility to withhold payment**

Also Article 9 will lead to an unbalanced and unjustified situation as it gives in practice the right to terminate the contract in case of minor defects. This should not be allowed.

According to Art 3/6 of the current Sales-of-Consumer-Goods-Directive, the consumer is not entitled to terminate the contract if the lack of conformity is minor. Such an exclusion of the right to terminate is missing in the proposal which means an unbalanced, unjustified solution to the detriment of traders. We would like to point out that the proposal on digital content restricts the right to terminate the contract to cases of essential non-conformity (Art 12/5).

In addition, we would like to point out an unfair situation that could originate by article 9/4. According to the proposal, a consumer shall be entitled to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract. According to our view, article 9 should be amended in a way that would preserve a fair balance between the seller and the consumer. We are concerned about the impacts of this proposal if a consumer has the right to withhold the payment also in a case of very minor defects.

Moreover, we deem it necessary to insert a paragraph such as the one currently present in Article 2/3 of the Sale-of-Consumer-Goods Directive. There is no lack of conformity in cases where the consumer knew about the defect at the time of the conclusion of the contract or could not reasonably be unaware of the defect.

Commission Proposal	Proposal of UEAPME
<p>Art 9 – Consumer’s remedies for the lack of conformity with the contract</p> <p>9/4. The consumer shall be entitled to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract.</p>	<p>Art 9 – Consumer’s remedies for the lack of conformity with the contract</p> <p>9/4. The consumer shall be entitled to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract.<u>The consumer shall, however, not have the right to withhold an amount that evidently exceeds the claims that he/she is entitled to, on the basis of the defect.</u></p> <p><u>To add paragraph 6:</u> In derogation from the provisions of paragraph 3, the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.</p> <p><u>To add paragraph 7:</u> There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.</p>

- **Article 10 Replacement of the goods**

Article 10 not only imposes to the seller to take back the non-conformity good at his/hers expenses but also to bear the cost of removal of the good installed by the consumer himself and of the installation of the replaced good. While the first part is acceptable, the second obligation will be too burdensome.

Indeed, the obligation to remove the non-conforming good and to install the replacement in cases where the installation was not previewed in the contract, goes beyond consumer protection. Remedies in case of non-conformity have to be shaped in accordance with the rights and obligations as laid down in the original contract.

The trader that only sells the products and therefore only gets the price for the mere sale form the consumer could be burdened with tremendous costs, in some cases also higher than the price of the goods originally sold. Moreover, when a consumer installs the goods, it becomes practically impossible to determine if the defect was inherent in the good, or if it was caused by a mistake from the consumer during the installation.

It has to be clarified that the remedy of replacement does not include an obligation to remove goods from where they were installed and to install the replacement, especially in cases where it was not agreed to do so in the original contract.

Commission Proposal	Proposal of UEAPME
<p>Art 10/2 – Where the consumer had installed the goods in a manner consistent with their nature and purpose, before the lack of conformity with the contract became apparent, the obligation to take back the replaced goods shall include the removal of the non-conforming goods and the installation of replacement goods, or bearing the costs thereof.</p>	<p>Art 10/2 – Where the consumer has installed the goods, the seller will not be obliged to remove the non- conforming goods and/or install the replacement goods, nor to bear the costs thereof, unless the consumer can prove that the installation was conducted according to the installation instructions and consistent with the nature and purpose of the goods and the lack of conformity became apparent only after the installation.</p>

- **Art 11 Consumer's choice between repair and replacement**

Article 11 gives free choice to the consumer to repair or replace the goods in case of non-conformity. The article limits the choice only in case one of the options would be impossible, unlawful or would impose disproportionate costs on the seller. We fear the interpretation of these conditions will in the majority of cases favour consumers and make it hardly possible for traders to refuse the choice even if it will create excessive costs for them. In our opinion, this choice should be a trader's right as he/she best knows the product.

Furthermore, the proposal considers the aspect of disproportionate costs of a remedy for the seller only with respect to the relation of repair and replacement, but not with regard to the remedies, particularly between remedies of the first and second level . Therefore, according to the same principle, it has to be clarified whether, in case one of the remedies of the first degree is impossible to fulfil, the seller may refuse the second possible remedy, should this be again disproportionate or impossible. In such cases, the remedies of the second level (price reduction or cancellation of the contract) should be applicable.

Commission Proposal	Proposal of UEAPME
<p>Art 11 – The consumer may choose between repair and replacement unless the option chosen would be impossible, unlawful or, compared to the other option, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:</p> <p>(a) the value the goods would have if there were no lack of conformity with the contract;</p> <p>(b) the significance of the lack of conformity with the contract;</p> <p>(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.</p>	<p>Art 11 – The consumer may choose between repair and replacement unless the option chosen would be impossible, unlawful or, compared to the other option, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:</p> <p>(a) the value the goods would have if there were no lack of conformity with the contract;</p> <p>(b) the significance of the lack of conformity with the contract;</p> <p>(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.</p> <p><u>2. If only one option is possible, the trader may refuse it if this is impossible, unlawful or would impose disproportionate costs, taking into account all circumstances. In such circumstances, price reduction or cancellation of the contract shall apply.</u></p>

- **Art. 12 Price reduction and use of goods**

This article provides that the reduction of the price should be proportionate to the decrease in the value of the goods which were received by the consumer, compared to the value the goods would have if in conformity with the contract.

We believe however that the reduction in price should also be calculated in accordance with the use of the goods by the consumer. Heavily used products should lead to a lesser price reduction than slightly used products.

Commission Proposal	Proposal of UEAPME
<p>Art 12 – The reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if in conformity with the contract.</p>	<p>Art 12 – The reduction of price shall be proportionate to</p> <p>(a) the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if in conformity with the contract;</p> <p>(b) <u>the use the consumer has had of the goods since they were delivered to him.</u></p>

- **Art 13 Termination and use of goods**

Again, the use that the consumer has had of the goods, is not taken into account in this article.

This situation might be acceptable if the legal guarantee period were six months, but not if it is extended to 2 years.

Furthermore, Article 13/c should be deleted as it is unclear how non conformity of a destroyed or lost product could be verified. If the consumer cannot return the product, he/she shall not receive any reimbursement.

Commission Proposal	Proposal of UEAPME
<p>Art 13</p> <p>3. Where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract in accordance with paragraph 2:</p> <p>a) the seller shall reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice and shall bear the cost of the reimbursement;</p> <p>b) the consumer shall return, at the seller's expense, to the seller the goods without undue delay and in any event not later than 14 days from sending the notice of termination;</p> <p>c) where the goods cannot be returned because of destruction or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without destruction or loss until that date, unless the destruction or loss has been caused by a lack of conformity of the goods with the contract; and</p> <p>d) the consumer shall pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The payment for decrease in value shall not exceed the price paid for the goods.</p>	<p>Art 13</p> <p>3. Where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract in accordance with paragraph 2:</p> <p>(a) the seller shall reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice and shall bear the cost of the reimbursement;</p> <p>(b) the consumer shall return, at the seller's expense, to the seller the goods without undue delay and in any event not later than 14 days from sending the notice of termination;</p> <p>(c) where the goods cannot be returned because of destruction or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without destruction or loss until that date, unless the destruction or loss has been caused by a lack of conformity of the goods with the contract; and</p> <p>(d) the consumer shall pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The payment for decrease in value shall not exceed the price paid for the goods.</p> <p>4. <u>Any reimbursement to the consumer provided for in this article may be reduced to take account of the use the consumer has had of the goods since they were delivered to him.</u></p>

- **Art 14 Time limits**

The provision of a legal guarantee only works if the consumer has a duty to report a lack of conformity immediately after he/she has detected the defect. If the consumer does not notify the seller immediately, not only does this indicate that the defect is not that important to the consumer, but moreover it becomes more difficult to establish if the defect was caused by an inherent lack of conformity or other such cause (such as a wrongful use of the product). It is therefore crucial that the consumer notifies the seller as soon as possible.

Commission Proposal	Proposal of UEAPME
<p>Art 14 – The consumer shall be entitled to a remedy for the lack of conformity with the contract of the goods where the lack of conformity becomes apparent within two years as from the relevant time for establishing conformity. If, under national legislation, the rights laid down in Article 9 are subject to a limitation period, that period shall not be shorter than two years from the relevant time for establishing conformity with the contract.</p>	<p>Art 14 – The consumer shall be entitled to a remedy for the lack of conformity with the contract of the goods where the lack of conformity becomes apparent within two years as from the relevant time for establishing conformity. If, under national legislation, the rights laid down in Article 9 are subject to a limitation period, that period shall not be shorter than two years from the relevant time for establishing conformity with the contract. <u>In order to benefit from his rights as laid down in this Directive, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected the lack of conformity.</u></p>

- **Art 15 Commercial guarantees**

We believe it is incompatible with the full harmonisation approach to give Member States the opportunity to impose additional provisions for commercial guarantees, as set out in Article 15/4. This provision would lead to legal uncertainty which should be the opposite goal of this proposal.

Furthermore, paragraph 2 of the Article imposes a burdensome information requirement on traders: a clear statement of the legal rights of the consumer under the Directive. We believe information requirements should be more proportionate. It is not the task of retailers to inform consumers in such an exaggerated way about the legal situation.

Commission Proposal	Proposal of UEAPME
<p>Art 15/2 - The guarantee statement shall be made available on a durable medium and drafted in plain, intelligible language. It shall include the following:</p> <p>(a) a clear statement of the legal rights of the consumer as provided for in this Directive and a clear statement that those rights are not affected by the commercial guarantee; and</p> <p>(b) the terms of the commercial guarantee that go beyond the legal rights of the consumer, information about the duration, transferability, territorial scope and existence of any charges which the consumer might incur in order to benefit from the commercial guarantee, the name and address of the guarantor and, if different from the guarantor, the person against whom any claim is to be made and the procedure by which the claim is to be made.</p> <p>Art 15/4 – The Member States may lay down additional rules on commercial guarantees insofar as those rules do not reduce the protection set out in this Article.</p>	<p>Art 15/2 - The guarantee statement shall be made available on a durable medium and drafted in plain, intelligible language. It shall include the following:</p> <p>(a) a clear statement of the legal rights of the consumer as provided for in this Directive and a clear statement that those rights are not affected by the commercial guarantee; and</p> <p>(b) the terms of the commercial guarantee that go beyond the legal rights of the consumer, information about the duration, transferability, territorial scope and existence of any charges which the consumer might incur in order to benefit from the commercial guarantee, the name and address of the guarantor and, if different from the guarantor, the person against whom any claim is to be made and the procedure by which the claim is to be made.</p> <p>Art 15/4 – The Member States may not lay down additional rules on commercial guarantees insofar as those rules do not reduce the protection set out in this Article.</p>

Additional Comments

- The statement that goods should be free from any right of a third right (**Art. 7**), is unclear and hardly possible in practise. In a practical example, any book sold is not free of any right of a third party and cannot be resold for this reason. This provision would mean that the sale of a variety of goods would not be possible in conformity with the law. Moreover, also brands on products are intellectual property and therefore the goods are not free of intellectual rights. Clarification on the meaning and reasoning of this article is necessary.
- In cases of second hand goods, it should be possible to shorten the guarantee period by agreement as it was previewed in Article 7 of Directive 1999/44. We therefore propose to add in Art. 4/3 of the present proposal the following statement: *“This especially applies when the seller and the consumer on second hand goods agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 8(3).”*
- The extension of the legal guarantee period is not accompanied by an increased right of redress of the seller to the producer. According to UEAPME, the extension of the presumption of defect is only tolerable if the redress of the seller to the producer is guaranteed. It should therefore be clearly provided in the proposed article 16 that in case of redress, the producer cannot refuse the redress and has to pay for all the expenses the seller had to make in order to be able to provide for the remedy.⁶

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⁶ With the exception of WKO, The Austrian Federal Economic Chamber.