

# Position Paper

## UEAPME<sup>1</sup>'s Assessment of Amendments to the proposed Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015) 0635)

### Introduction

On December 2015, the European Commission launched two proposals with the aim to harmonise consumers' protection legislation when buying online digital content and tangible goods. Both proposals have created great discussions in the European Parliament and beyond on the scope, the instrument used, and the content. Indeed the Parliament has proposed to enlarge the scope to offline sales as well, in order to reach full harmonisation of the legal guarantees provisions.

After the reports of the Rapporteurs, several hundred amendments have been tabled, leaving the discussion even wider open than before. For this reason, UEAPME wishes to state very clearly its main concerns and the expected impact on SMEs of the current proposals.

#### Key messages that will be developed in the text below:

1. **UEAPME supports a full harmonisation approach provided that the provisions remain acceptable for SMEs. A minimum harmonisation approach would make the proposals completely meaningless and the legislative framework would be even more burdensome than it is today.**
2. **It is essential to clarify the scope of the proposals. We believe the "sales of good proposal" should cover any good (embedding or not software), unless the good is merely a carrier of the digital content.**
3. **Any extension of the existing 6-months presumption period (reversal of the burden of proof) is not justified. Half a year is the longest plausible time period for the legal presumption that the defect had already existed at the moment of the delivery of the good.**
4. **The hierarchy of remedies needs to be kept.**
5. **The 2-year legal guarantee period has to be maintained. The "lifespan concept" has to be rejected in the interest of legal certainty and avoidance of bureaucracy. A shorter period of 1 year would be needed for second-hand goods.**
6. **Termination of the contract in cases of minor defects would mean an unjustified solution to the detriment of traders, especially the smallest one.**

<sup>1</sup> 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](#).

## 1. Level of harmonisation

One of the most important discussions introduced by the tabled amendments is whether the Directives should aim to minimum or maximum harmonisation.

According to UEAPME, the only meaningful solution is a full harmonisation approach, **provided that the proposals are bearable for SMEs**. This would increase legal certainty and transparency for consumers as well as a level playing field throughout the Internal Market for SMEs.

UEAPME has always supported the idea that full harmonisation should be the final objective and that any legal fragmentation should be avoided. The level of consumer protection with regard to the consequences of a defect should be the same irrespective of the distribution channel. This said, it is of utmost importance to ensure that all the provisions are adapted to SMEs' needs and resources. A reconciliation of interests and a **balanced** design of consumer law are of great importance for the competitiveness of SMEs.

Amendments suggesting a minimum harmonisation (e.g. amendments 235-239 and 408) would result in a higher flexibility for Member States but different national consumer protection standards bear the risk that the overall objective of the proposal, i.e. simplification of consumer legislation for both sides, is missed.

## 2. Scope

The level of consumer protection with regard to the consequences of a defect should be the same irrespective of the distribution channel. Therefore UEAPME generally supports the extension of the scope of the proposal to offline sales (amendments 1-3 and 67-70). Different rules depending on the method through which the goods or services have been bought should be avoided. However, we reaffirm that a proper impact assessment should be conducted to evaluate the impact of such extension to SMEs.

Nevertheless, we have major concerns on the scope of application according to the nature of the good. **The distinction between tangible goods and digital content should remain clear.** UEAPME cannot agree with the proposals put forwards in some amendments (i.e. amendments 124-126) according to which every tangible good embedding digital content (i.e. a washing machine) should be considered as a "digital content".

The distinction should be clear and comprehensible for everyone. Digital content should be limited to softwares, pictures, music or videos, in other words to every product for which the purchase could technically be concluded through a download. We agree that a tangible good could be considered as a "digital content" when it is merely a carrier of the digital content (i.e. a CD or DVD). Here a practical example: a software can be bought on a CD. But it is also technically possible to download it directly. On the other hand, a washing machine may contain embedded software but it is not technically possible to download a washing machine.

## 3. Reversal of the Burden of Proof

The rule on the reversal of proof is a central element of the proposal. 25 Member States opted for the six months period for the reversal of proof. It is therefore not acceptable that a longer period for the reversal of proof, which only exists in 3 Member States, should be imposed as the new standard across the EU.

In addition, a long period for the reversal of proof would lead to significant risks and uncertainties for SMEs who do not have the resources to prove that the defect is not the result of the non-conformity with the contract but due to an improper use by the consumer. This additional risk will be factored into a higher price and therefore in the end go to the detriment of consumers.

**UEAPME therefore strongly supports amendments which foresee a reversal of proof of six months (i.e. amendments 42 and 282-283). As a consequence, amendments which suggest a very long period for the reversal of proof of up to six years or even for the expected lifespan of the product should not be supported (see amendments 278-281).**

According to Art 5/3 of the Sales-of-Consumer-Goods-Directive (1999/44/EC) a lack of conformity which becomes apparent within six months after delivery of the goods shall be presumed to have existed at the time of delivery. This solution has worked in practice. Provisions in the field of consumer law should be balanced, considering the legitimate interests of both consumers and business alike. Such an extension of the presumption period does not meet these demands and it is definitely unacceptable from the perspective of SMEs.

#### 4. Hierarchy of remedies

In line with the current legal framework (in particular the Consumer Sales and Guarantees Directive 1999/44/EC), the consumer should first be obliged to ask the seller to repair or to replace the nonconforming good. Only when such a request is not appropriate, or where the repair or replacement is not possible or not completed within a reasonable time, the consumer should have the secondary right to ask for a reduction of the price or to terminate the contract. This is necessary in the interest of a fair balance between sellers and consumers. In case of non conformity, a trader should always have a second chance. **Accordingly, UEAPME strongly recommends not supporting any amendments which go in the direction of a free choice between remedies, i.e. amendments 285, 287, 288, 289.**

#### 5. Legal Guarantees and expected lifespan guarantee

Some of the tabled amendments propose to extend the current legal guarantee period to six years, other to keep it to two, while some suggest to link the guarantee period to the expected lifespan of the product.

**The durability of a product is neither an appropriate criterium for assessing the non-conformity with the contract (amendments 244 and 245) nor should the expected lifespan of a product be the reference for the length of the guarantee period (amendments 360-362) as it would create a lot of uncertainty as to what can be considered as the expected lifespan of a good.** Currently there exist no binding EU-wide provisions for evaluating the expected lifespan of goods which would make it impossible for sellers to assess the lifespan of their products in a reliable way. **For the same reasons, the expected lifespan should not be used as a basis for introducing a new type of commercial guarantee (amendments 384-388).**

The only way to set guarantees according to lifespan of products would be to establish an independent authority with the ability to determine the 'expected lifespan'. This seems first of all impossible for every product (even for

categories of products), and would create an immense burden on merchants, who would have to keep up to date on the expected lifespan of every product they sell, but would also lead to enormous confusion for consumers.

Member States that have already linked the legal guarantee period to the expected lifespan (such as the Netherlands), conclude that it does not work.

The concept of more durable products is certainly a good one, but it should be achieved through boosting circular economy principles and not by lengthening the legal guarantee period.

The 2 year legal guarantee period has proven to be appropriate and feasible and provides a fair balance between the interests of consumers and businesses.

Therefore, UEAPME does not support amendments proposing a very long guarantee period of six years (amendments 361 and 366), as such a long guarantee period would be excessive and thus not contribute to a balanced approach regarding consumer protection. In particular, the additional risks related to a very long guarantee period of six years would go to the detriment of SMEs and likely lead to higher prices for consumers.

Regarding second-hand goods, UEAPME welcomes amendments suggesting a minimum guarantee period of one year as a shorter guarantee period for second-hand goods is appropriate and well established practice (amendments 57 and 370-371).

Closely linked to the problem of the guarantee period is the right of redress, which should be strengthened. Whatever the outcome of the debate on the length of the legal guarantee, it is of crucial importance for the seller to have a watertight right of redress. It should therefore be clearly provided that 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. Remedies in case of minor defects

The limitation of consumer rights in case of minor defects is a central element as it would not be proportionate to grant consumers remedies for all defects without any minimum requirements. The right of the consumer to a price reduction, to terminate the contract and to withhold a proportionate part of the price should therefore all be limited to cases in which the non-conformity with the contract is not minor. UEAPME thus strongly supports amendments that limit consumer remedies in case of minor defects (amendments 43, 307-309, 335 and 344).

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