

Position Paper

UEAPME¹'s reply to the questionnaire on the online sale of Tangible Goods:

General remarks

As a general remark, UEAPME would like to underline that the current European legislation regarding consumer protection is extremely complicated and not easy to understand, both for consumers and traders. The information obligations specifically are complex and burdensome and not always relevant.

In addition, the proposed approaches need to consider that private law of obligations is a body which is not similar in all Member States. It does not seem appropriate that Member States would have to amend their private law system partly because of new sector-specific rules.

On sale of tangible goods, we believe that small modifications of already existing EU Legislation acts would be sufficient to guarantee consumers protection and stimulate businesses to sell online. In particular, UEAPME supports the application of the country-of-origin principle, originally intended by the e-commerce Directive, without the derogation from article 3 for contractual obligations concerning consumer contracts.

Another option could be to enhance the choice-of-law-option foreseen by the ROME I-Regulation in a way it can also be used for consumer contracts, meaning that the "law of the trader" could be chosen. The current regulation does not allow for depriving a consumer from the protection offered by his home country by a choice-of-law agreement. This exception is a major obstacle for cross-border e-commerce as far as civil consumer protection law is concerned.

As accompanying measures for these approaches, it could also be foreseen that the trader has to clearly notify that "his law" applies to a contract. Another or additional option would be to oblige every Member State, and not the traders, to create a summary of their essential norms in this regard (such as legal guarantee, unfair terms). Those summaries would subsequently be published on a website in all official languages by the EC and the traders could set a link to this information on their websites. In this way, consumers could get an overview when purchasing as mature consumers on the basis of the "trader's law".

The proposed approaches have to be considered against the background of the following aspects:

- essential provisions regarding e-commerce are now fully harmonised by the Consumer Rights Directive
- in numerous other areas (e.g. legal guarantees, unfair contract terms) a uniform European minimum standard is guaranteed by minimum harmonisation directives

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](#).

- the creation of a new legal instrument of whatever kind would create tremendous legal uncertainty in any case for a long time while following the approach of the country of origin (either by amending the e-commerce-Directive or the ROME-I-regulation) would avoid legal uncertainty as the national laws are already in use and relevant decisions of the courts do exist.

In case the proposed approaches are not followed and a new instrument will be proposed, we would like to comment the questions as follows.

1. Scope

- Should a possible initiative cover only cross-border or also domestic sales?

Traders should be allowed to use a single set of rules both for cross-border and domestic sales. Otherwise they would be forced to run/establish two different websites – one for cross-border and one for domestic sales. Therefore a possible initiative should cover both situations.

- Should a possible initiative include only B2C or also B2B? If B2B contracts are included, should the scope on the seller and buyer side be limited to SMEs? If the scope on the seller side includes also companies which are not SMEs, should SMEs as buyers be protected in a comparable way to consumers?

In relation to sale of tangible goods, a new initiative should cover B2C only. A limitation to SME is not justified and would always cause questions which regime applies.

However, UEAPME² reaffirms that in the specific case of digital content, the problems for B2B and B2C contracts are similar. Therefore, a possible initiative on digital content should cover both because SMEs are often the weak part in such contracts and risk having sensitive data for their business withheld by big multinationals.

- What is the best way of treating digital content supplied on a tangible medium, i.e. should it be subject to the rules on the online sale of tangible goods or the rules applying specifically to digital content? Do users/consumers see such content as goods or as digital content?

Digital content supplied on a tangible medium should be subject to the rules on the online sale of tangible goods. The rules applicable to digital content should be reserved to the situations where the product is solely digital and no physical copy is provided. This distinction would also help the consumers and there would be less confusion on which legislative framework applies.

2. Content

a. Conformity

- Which should be the criteria for establishing conformity? Should there be any additional/different criteria in addition to those already provided by the EU law?

No, there should not be additional/different criteria to those already provided in Art 2 (2) of the consumer goods Directive (1999/44). Creating something new and different would cause legal uncertainty.

- What should be the relevant time for establishing the conformity of goods?

² With the exception of WKO, The Austrian Federal Economic Chamber.

The current time for the establishment of the conformity as outlined in Article 5 of Directive 1999/44/EC should be maintained.

- How long should the period for the reversal of burden of proof be?

The consumer goods Directive 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. Furthermore the solution reached in the Directive on the sale of consumer goods is based on the period for which one could convincingly accept the reversal of the burden of proof.

Our view is 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 merchandise. Rules in the field of consumer law should be balanced, protecting the legitimate interests of both consumers and business alike.

b. Remedies

- What contractual right should the buyer have in case of non-conformity? Should the consumer have a free choice of remedies or should there be a hierarchy of remedies? If there is a hierarchy of remedies, how should it be designed? Should the trader have a right to cure?

In the interest of fair and balanced solutions we strongly oppose ideas of a free choice of remedies on the side of consumers but strongly favour a hierarchy of remedies in principle as provided in Art 5 (3) (5) of the consumer sales Directive. In order to make the instrument attractive to traders we would propose a slight adaption of this regime for the trader's choice between repair and replacement.

It is very important that the trader first has a right to remedy. Any trader should be given a possibility to satisfy his/her consumer by fixing the problem in a way he/she consider the most appropriate. In first instance, the trader should be given the possibility to repair the defect, if possible, and in second place to replace the defect product. Only if none of these two options are possible, an appropriate reduction in the price should be rewarded.

- Should the consumer also have a right to damages? If yes, what should it cover? Should in this case strict liability apply?

UEAPME believes that the right to damages should be left out of the scope and should be governed by the law applicable to the contract, which means to the country of origin of the trader.

Strict liability for traders would result in a kind of “contractual product liability” and is absolutely inadequate. It should be noted that a defect within the meaning of the product liability Directive would always be considered a lack of conformity with the contract as well. If the trader (seller) was strictly liable for consequential damages caused by lack of conformity he would bear the product liability risk. Such an approach would cause a diametric contradiction to the legal system established by the – fully harmonised - Directive on product liability which “channels/allocates” strict liability for damages caused by defective goods basically to the producer and only in certain specifically defined cases to importers and suppliers.

- Should the buyer be obliged to notify the defect within a certain period of time? If yes, within which timeframe? In case the buyer does not notify, should the buyer lose all his remedies? Or only the right to terminate the contract?

A notification-obligation would be adequate. This period has to be as short as possible. The longer this period is, the harder it will be to identify the link between non-conformity and the defect. In other words, if the period to notify the trader is too long, the defect could also have been caused by misuse or general wear and tear. Therefore, the consumer should notify the trader within immediately after detecting the defect. If he does not notify the trader within this timeframe, he should lose his right to ask for remedies.

- How should recurring defects be dealt with? E. g. a defect appears after one year and is repaired. But after two years the same defect reappears. (Some Member States have introduced special rules.)

If a product is replaced, a new period of two years should start. If a product is repaired in some of its part, a new period should only start with regard to the repaired part, respectively the part that was defected.

- Do we need special rules for spare parts? Or for perishable goods?

Not for spare parts, but there should be an exception for perishable goods. These goods cannot be compared to regular goods and therefore strict and short deadlines are needed.

c. Guarantee period/ Prescription period

- Should there be both a guarantee period and a prescription period or only a prescription period? How long should they be?

As a general remark, we believe that due to the differences concerning the rules of the private law of obligations among the member states, the exact length of a prescription period should not be regulated. In any case, the prescription period should be maximum two years from the time of delivery. A "guarantee period" should definitely not be regulated.

- How should second hand goods be dealt with? Should there be a shorter prescription or guarantee period?

Yes, a shorter prescription period for second hand goods is necessary. Both the prescription period and the guarantee period should be limited to one year maximum.

d. Commercial guarantees

- Do we need rules on commercial guarantees? If so, what should be their content and should they be mandatory?

No.

e. Unfair terms

-Should individually negotiated terms be subject to unfairness control?

No.

- Should the price/main subject matter of the contract be subject to unfairness control?

No.

- Should there be a list with terms which are always to be regarded as unfair, a so-called black list? If yes, which terms should always be regarded as unfair?

No, the Directive on unfair contract terms sets sufficient standards.

-Should there be a list with terms which are presumed to be unfair, a so-called grey list? If so which clauses should be on one or the other list? In particular, how to treat advanced payment which is very frequent in the online world?

No, the Directive on unfair contract terms sets sufficient standards.

f. Other rules

Do you think that further rules might be needed? In particular, are you aware of any mandatory national rules, which do not have their origin in the implementation of the EU *acquis* and which have as their main objective consumer protection? If so, in which area?

No need for further rules.

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