

Position Paper

UEAPME¹'s proposal for Amendments to the proposed Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015)0635)

Dear Members of the European Parliament,

By reason of the Deadline for Amendments set by the IMCO Committee on the the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, UEAPME would like to share its position on the developments of the Proposal, together with some proposal for changes.

UEAPME welcomed the publication in November of the IMCO Report on the above-mentioned proposal by the Rapporteur Pascal Arimont. The Report has many merits and corrects the European Commission's proposals in some important points.

First and foremost, there is a clear will to find a balanced solution that could be acceptable for all parties. This is what UEAPME always asked for. A solution that can boost consumers' trust and at the same time provide a clear and workable legal framework to encourage SMEs to become active online. Therefore, we highly appreciate the Report's objective to reach such a solution and to take into account all stakeholder's positions. Indeed, SMEs are the most affected by a proposal that aims at harmonising contract rules for online, and possibly offline, sales.

The three key elements we mostly support of the Arimont's Report, and that we hope will be included in the final text, are the proposals to: reduce the reversal of the burden of proof to 6 months (as currently set in the Sales of Consumer Goods Directive), abolish the right to terminate the contract in case of minor defect and maintain guarantee's length to 2 years.

We particularly welcome the proposal to reduce the burden of proof on the trader as we strongly believe that 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. The current solution has indeed worked in practice. The likelihood that the merchandise had been delivered free of defects increases the longer the merchandise has been with the consumer and used by him/her.

Moreover, we think it would be necessary to establish an obligation to notify the traders of the defect within a reasonable and acceptable timeframe.

In addition, the draft report supplements the proposal with regard to the possibility of shortening the warranty period for second-hand goods. We welcome the suggestion of a minimum period of one year, as it is appropriate and well established in practice.

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.

We also welcome and appreciate the proposal to notify the trader by an unequivocal mean in case of termination of a contract (Art 13/1) and to limit the consumer's remedy in case he/she could not reasonably have been unaware of the lack of conformity at the time of conclusion of the contract (Article 9/5).

The Report introduces also a major change to the original proposal, which is the enlargement of the scope to offline sale. **UEAPME can support this option provided that the conditions of the proposals are bearable for SMEs.** Indeed, we have 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. **This is why we strongly advocate to include in the final text the amendments proposed by the Arimont's Report.** Regardless of this, UEAPME can fully support the option to enlarge the scope of application to offline sale, only after a proper impact assessment. Extension of the scope of the proposal should be thoroughly assessed.

Nevertheless, there are still some articles that we believe could be improved. **The most important being the definition of the scope.** Please find below our proposal for additional amendments than the one already supported.

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- Recital 13

Commission Proposal	IMCO's Report	Proposal of UEAPME
<p>This Directive should not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content. However, this Directive should apply to digital content integrated in goods such as household appliances or toys where the digital content is embedded in such a way that its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods.</p>	<p>This Directive should not apply to digital content <i>integrated in goods such as household appliances, toys, DVDs and CDs where that digital content is embedded in such a way that it operates as an integral part of the goods and cannot easily be de-installed by the consumer, unless the seller proves that the lack of conformity lies in the hardware of the good.</i></p>	<p>This Directive should not apply to goods incorporating digital content in such a way that the goods function <i>exclusively</i> as a carrier of the digital content, i.e. DVDs and CDs. <u>However, this Directive should apply to digital content integrated in goods such as household appliances or toys where the digital content is embedded in such a way that its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods.</u></p>

Justification

The original text proposed by the European Commission provided a clearer definition. A large majority of consumer goods contain some form of digital content (washing machines, TV's, kitchen robots, DVD-players, laptops, ...) and this will only increase in the future. If these goods would not be considered as material goods, but as digital content, the scope of this Directive would become practically useless.

This Directive should be considered as *lex generalis*. The distinction should therefore be made clear: material goods should only be excluded from the scope of this Directive if the purpose of the good is exclusively to transport the digital content. If the good has other functions than transportation, it should no longer be considered as digital content, and therefore it should fall under the scope of this Directive. This would mean that only CD's, DVD's, video games, storage media such as USB-sticks, hard drives, etc. would not fall under the scope of this Directive. Other goods that incorporate digital content, but that have other functions besides being a carrier (such as an iPod, household appliances, TV's, DVD-players, ...), should fall under this Directive.

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

Commission Proposal	IMCO's Report	Proposal of UEAPME
Art 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.	-	Art 9/4 - The consumer shall be entitled to withhold the payment of any outstanding part of the price, for the lack of conformity with the contract which is not minor , until the seller has brought the goods into conformity with the contract.

Justification

It is not proportionate to grant the consumer a right to withhold the payment of the price for all defects without restriction, including in case of minor defects. We suggest including the same addition used for proportionate reduction or termination of contract regarding minor defects.

- **Art 10 Replacement of the good**

Commission Proposal	IMCO's Report	Proposal of UEAPME
Art 10/1 - Where the seller remedies the lack of conformity with the contract by replacement, the seller shall take back the replaced goods at the seller's expense unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer.	Art 10/1 - Where the seller remedies the lack of conformity with the contract by replacement at the place where the goods are situated , the seller shall take back the replaced goods at the seller's expense unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer.	Art 10/1 - Where the seller remedies the lack of conformity with the contract by replacement at the place where the goods are situated , the seller shall take back the replaced goods at the seller's expense unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer.

The Report foresees that the good needs to be replaced where it is situated. However, such a general determination of the place of fulfillment does not meet the specific requirements for all movable goods, for example need to repair a car at the garage. We therefore suggest deleting the addition "where the good is situated" and keep the original text proposed by the Commission.

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

Commission Proposal	IMCO's Report	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>Article 13b</p> <p>Obligations of the consumer in the event of termination</p> <p>Where the consumer terminates the contract in its entirety or in relation to some of the goods delivered under the contract in accordance with Article 13(2), the consumer shall:</p> <p>(a) return the non-conforming goods to the seller, at the seller's expense, without undue delay and in any event not later than 14 days after giving the unequivocal statement terminating the contract;</p> <p>(b) pay to the seller, where the goods cannot be returned because of destruction or loss, 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>(c) pay for any decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The</p>	<p>Article 13b</p> <p>Obligations of the consumer in the event of termination</p> <p>Where the consumer terminates the contract in its entirety or in relation to some of the goods delivered under the contract in accordance with Article 13(2), the consumer shall:</p> <p>(b) return the non-conforming goods to the seller, at the seller's expense, without undue delay and in any event not later than 14 days after giving the unequivocal statement terminating the contract;</p> <p>(b) pay to the seller, where the goods cannot be returned because of destruction or loss, 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>(c) pay for any decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The</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>payment to be made for any such decrease in value shall not exceed the price paid for the goods.</p>	<p>payment to be made for any such decrease in value shall not exceed the price paid for the goods.</p>
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Justification

If the product has been destroyed or has been lost by the consumer, it can no longer be verified if there indeed was a defect in the product. The Directive foresees a presumption of a lack of conformity, but it is nevertheless a presumption, and therefore the seller should have a possibility to prove that there was no lack of conformity. In case of destruction or loss of the product, the seller no longer has this possibility, which would place an unfair burden on him. In case of destruction or loss, the burden of proof should be reversed: the consumer should prove that the destruction or loss was caused by a lack of conformity.

- **Art 14 Time limits**

Commission Proposal	IMCO's Report	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.</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</u></p>

	<p>1a. In the case of second-hand goods, the seller and consumer may agree on a shorter period than that provided for in paragraph 1. That shorter period may not be less than one year.</p>	<p><u>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> <p>1a. In the case of second-hand goods, the seller and consumer may agree on a shorter period than that provided for in paragraph 1. That shorter period may not be less than one year.</p>
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Justification

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.

- **Art 15 Commercial guarantees**

Commission Proposal	IMCO's Report	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</p>	<p>Art 15/2 - The guarantee statement shall be <i>drafted in plain, intelligible language and shall be made available to the consumer upon request.</i> 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</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</p>

<p>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>go beyond the legal rights of the consumer as provided for in this Directive, 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- To the extent not covered by this Article, 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>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- To the extent not covered by this Article, 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>
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Justification

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.

Brussels, 22 December 2016

For further information on this position paper, please contact:

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