

Position Paper

UEAPME¹'s proposal for Amendments to the proposed Directive on certain aspects concerning contracts for sales of goods (COM (2017) 637)

Following the publication of an amended text for the Directive on certain aspects concerning contracts for the sales of goods by the European Commission and the possibility to send new amendments before the vote in IMCO, UEAPME would like to share its position on the developments of the Proposal, together with some proposal for changes.

UEAPME welcomed the extension of the scope to include offline sales, as suggested by many members of the EP IMCO Committee and supported by SMEs since the beginning. However, concerns remain on some important elements of the proposal.

We recognise the efforts of the Rapporteur Pascal Arimont to improved the text proposed by the European Commission and find a balance solution that could work for both businesses and consumers. 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.

However, since the publication of the report, many amendments have been introduced and the proposal risks to miss completely the need for a balance between all the parties involved and become too burdensome for SMEs. The proposal, which is meant to boost consumer confidence and incentivate sales cross-border, risk to obtain the exact opposite, overburdening SMEs which will be less keen to start activities cross-border and online. Therefore, we would like to re-affirm five key messages that we believe are absolutely essential for the success of the proposal:

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. **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.
3. **The hierarchy of remedies needs to be kept.**
4. **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. Rules on durability and lifespan are related to product design and not to contract rules. They should therefore not be covered in this proposal but should continue to be addressed in pieces of legislation specifically focussing on product design. A shorter period of 1 year would be needed for second-hand goods.
5. **Termination of the contract in cases of minor defects would mean an unjustified solution to the detriment of traders, especially the smallest one.**

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](#).

- Please find below detailed explanation on why these five elements are an absolute priority for SMEs and our proposal for additional amendments than the one already supported.

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. 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.

3. 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.**

4. 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.

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.

Moreover, commercial guarantees should remain optional and should not be harmonised. Existing EU legislation defines a commercial guarantee as a voluntary tool and companies use it to distinguish themselves from their competitors. The recent CEPS/ECRI study analysing an "obligatory lifespan indication" unnecessarily re-defines the term "commercial guarantee", thereby introducing a new legal concept which is inconsistent with existing legislation.

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 and it is currently used by the vast majority of Member States.

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.

5. 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).

➤ In the next section, you will find concrete amendments which we hope will be tabled and discussed within the Committee.

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- **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.

Justification

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.

UNION EUROPEENNE DE L'ARTISANAT ET DES PETITES ET MOYENNES ENTREPRISES
 EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
 EUROPEAN ASSOCIATION OF CRAFT, SMALL AND MEDIUM-SIZED ENTERPRISES
 UNIONE EUROPEA DELL'ARTIGIANATO E DELLE PICCOLE E MEDIE IMPRESE

- **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>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>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> <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>

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 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 <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 go beyond the legal rights of the consumer <i>as provided for in this Directive</i>, 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>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- 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>

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.