WIRTSCHAFTSKAMMER ÖSTERREICH

Position Paper

of the

Austrian Federal Economic Chamber

Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods

COM (2015) 635 final

(May 2016)

The Austrian Federal Economic Chamber is the legal representative of the entire Austrian business community and represents all Austrian companies – some 480,000 businesses drawn from the areas of Crafts and Trade, Industry, Commerce, Banking and Insurance, Information and Consultancy, Tourism and Leisure, Transportation and Communication. 92.3 % of our members are SME with less than ten employees.

The Austrian Federal Economic Chamber is entered in the register of interest representatives. Registration Number: 10405322962-08.

The Austrian Federal Economic Chamber **urges** the European Parliament **to reject the proposal** for a Directive on certain aspects concerning contracts for the online and other distance sales of goods **because of the following fundamental reasons.**

An evaluation of some specific aspects of the proposal can be found in the Annex of this paper.

- **Instead of new regulatory measures a profound evaluation of existing rules is needed**

From the business perspective currently there is absolutely no need for new and burdensome provisions on the remedies in case of lack of conformity of goods contained in the proposal. What is **really needed is a phase of evaluation.** E-Commerce-traders are faced with a dense set of provisions based on EU-law. In this context the E-Commerce-Directive has to be mentioned but also many other EU-provisions that are relevant for all distribution channels, e.g. the Directive on unfair contract terms, the Directive on unfair commercial practices, the Service Directive. It is less than 2 years ago that traders had to adjust to the new and **very complex legal regime of the Consumer Rights Directive (CRD)** which is a big challenge for enterprises because of its excessive and unclear provisions. Recently the new rules on alternative dispute resolution (ADR) have entered into force as well. In particular with respect to the legal guarantee for goods minimum harmonized provisions are provided by the Sale-of-Consumer-Goods-Directive covering both online and offline contracts.

It is the declared aim of many of these EU-laws and especially of the CRD and the ADR-regime to fulfil the potentials for and the opportunities of cross-border and online trade and to strengthen the internal market. Instead of adding further new provisions to the existing ones there is need for action insofar as **to evaluate whether the regulatory measures already taken have achieved their goals or - at least - have made a positive contribution to target achievement.** Especially with regard to distance sales contracts and contracts negotiated away from business premises regulated in the **CRD there is need to eliminate their shortcomings** and **burdensome requirements** that are not compatible with practical life of businesses. A **screening and reduction of the many excessive information** requirements spread over in different Directives would also be necessary.

The view that it is not useful to start a legislative procedure for a new legal act with regard to the online sale of goods is also shared by EUROCHAMBRES (represents over 20 million businesses) and UEAPME (represents over 12 million enterprises). Both organisations stated in their replies to the consultation of the Commission that especially an evaluation of the CRD should be carried out before any new regulatory measures were taken.[1]

It has to be particularly criticised that under the guise of boosting online sales of goods a tightening of the legal guarantee provisions is planned in general by extending the proposal to other areas obviously without an impact assessment. Such an approach is not compatible with the concept of better regulation. Therefore we would like to point out that we are in general against any tightening in this area of law to the detriment of businesses.

[1] http://www.ueapme.com/IMG/pdf/UEAPME_position_on_Contract_Rules_for_online_purchases_of_digital_content_and_tangible_goods.pdf (27. 4. 2016); Position Paper - EUROCHAMBRES, 3. 9. 2015, 7, http://www.eurochambres.eu/custom/ECH_PP_on_contract_rules_for_digital_content_and_tangible_goods_9.2015-2015-00327-01.pdf (27. 4. 2016); WKO- reply to the consultation, 3. 9. 2015, 14f, https://www.wko.at/Content.Node/Interessenvertretung/Wirtschaftsrecht/-Publikationen-/STN-WKOe-Vertragsbestimmungen-Online-Erwerb-digitale-Inhalte.pdf (27. 4. 2016).

- **Adaption to different contract laws and consumer protection rules including information requirements in every Member State would still be necessary for businesses even if the legal guarantee provisions were fully harmonised**

The Factsheets accompanying the proposal argue in favour of the proposal with the following: *„Businesses will be able to supply digital content and **sell goods** online to consumers throughout the EU **based on the same set of contract law rules**. This will increase legal certainty and create a business friendly environment…..When selling goods, **businesses will save the cost of adapting to the contract law rules of every Member State** they wish to sell in.*[2] The Explanatory Memorandum also reasons in a similar way: The proposal *"will create a **single set of rules** …**allowing traders to sell** to consumers **in all Member States based on the same contractual terms"**.*[3]

These arguments do not correspond to real circumstances. While **it is true** that **traders have to adapt their contracts** or terms and conditions to **the law of the consumers' home country which really means effort and costs for them**, the **conclusion** that the **proposal would change this situation cannot be followed**. Even if the (limited) aspects of legal guarantees were fully harmonised, **traders nevertheless** would have to **seek legal advice to adapt to contract and consumer protection laws** of each Member State they wish to sell because of the many other differences in contract/consumer protection laws (e.g. laws on unfair contract terms). Furthermore the need to get professional advice is not even limited to aspects of contractual law, but **exists also with respect to pre-contractual information requirements. Contrary to frequent statements** – e.g. also in the Explanatory Memorandum of the proposal – that the CRD had fully harmonised **pre-contractual information requirements**, **full harmonisation was not reached** in this respect. According to Art 6/8 CRD the information requirements of CRD are **in addition** to information requirements of the E-Commerce Directive and the Service Directive. But not enough with that in addition **Member States are not prevented from imposing additional information requirements** in accordance with those Directives. Member States make obviously use of this loophole, e.g. by introducing additional information requirements on the legal guarantee that go beyond the requirements of Art 6/1 lit l CRD.

Furthermore fully harmonising the provisions on legal guarantees will not save costs for traders in the reviewing process of their contracts/terms and conditions before starting to sell cross-border because trying to deviate from the already existing compulsory provisions on legal guarantees by contracts/terms and conditions is not possible in a legally valid manner.[4]

Last but not least it has to be pointed out that - in fact - not the differences in the contract and consumer protection provisions are the real reason for the need to adapt contracts/terms and conditions. The necessity for such adaptions follows from the provision of Art 6/2 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 the real obstacle for cross border e-commerce as far as civil consumer protection law is concerned and a small modification of this provision to allow a real choice of law agreement for the law of the trader would be a much easier and more effective way to stimulate cross border sales.

[2] http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm (27.4.2016).

[3] Com (2015) 635 final, 7.

[4] May be it is possible in some Member States to reduce the length of the guarantee period for second hand goods.

- **Commitments for Better Regulation should pay more than just lip service – surveys carried out by the Commission show that the "costs" of guarantees and returns are already too high and deter businesses from online sales**

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 sales.*[5] *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."* This reasoning gives the impression that 49% respectively 67% of businesses consider the national "*differences with regard to remedies in case of faulty products*" as one of the main obstacles. When consulting the source given as reference for these findings one gets a rather different perspective:

64% of retailers that already sell cross-border say that delivery costs are too high, 46% say that the resolving cross-border complaints is too expensive, 38% say that in general not knowing the rules that need to be followed is a problem. For 34% the lack of language skills is an obstacle when selling cross-border.[6] Retailers that do not sell cross-border but consider to do so, raised the following aspects: 68% mention delivery costs as too high, for 64% it is a problem not knowing in general the rules that need to be followed.[7]

Guarantees and returns[8] are for 55% of those retailers that already sell cross-border a problem. 61% of retailers that consider selling cross-border also mentioned guarantees and returns as a problem. **However the "problem of guarantees" is different than the explanatory memorandum makes us believe:** These 55% respectively 61% of retailers said that **guarantees and returns are "too expensive"!**

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. The fact that the high costs of guarantees and returns are the problem for distance selling in general and not especially the differences in the national laws can also be seen from the answers of traders that don't sell online at all, but were also asked what they would consider to be a problem if they were to sell online: 60% (!) of those retailers also mentioned the high costs of guarantees and returns as a problem.[9]

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.**[10]

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

[6] Flash Eurobarometer 413 „Companies engaged in online activities", Fieldwork January-February 2015, Publication May 2015, 34. Unfortunately the Explanatory Memorandum does not indicate the page of the survey which made it rather difficult to verify the sources.

[7] Flash Eurobarometer 413, 40.

[8] „Guarantees and returns" are the only factors of the Eurobarometer 413 survey relating to lack of conformity that might be the basis for the arguments in the Explanatory Memorandum.

[9] Flash Eurobarometer 413, 48.

[10] See Communication "Better regulation for better results – an EU Agenda Com (2015) 215 final, 19. 5. 2015, 3, 4, : *Applying the principles of* ***better regulation will ensure that measures are evidence-based****, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole….Opening*

In view of the fact that **for a great majority of businesses costs! of guarantees are a problem with regard to distance selling** it is positively **absurd trying to boost** cross-border e-commerce **with a fully harmonised regime that tightens up the provisions on legal guarantees to the detriment of traders** and would make **legal guarantees even more cost-intensive for them** (e.g. by the extension of presumption period from 6 months to 2 years, the obligation to remove non-conforming goods and install the replacement goods, see the Annex for details).

In general full harmonisation is the preferred regulatory option from the point of view of businesses. Unfortunately this concept bears the risk of completely losing sight of the aim for well-balanced solutions. Recalling the discussion at EU level concerning the CRD, we have to remember that the chapters on legal guarantees and unfair terms were dropped. Given the pressure of full harmonisation, the institutions involved in the decisions making process were eager to maintain the highest level of consumer protection of each Member State. The proposals submitted during the discussions on the CRD (e.g. tremendous extension of the legal guarantee period and of the presumption period, immediate right to reject) have caused great concerns among businesses and were vehemently rejected by them all over Europe. A Europe-wide consensus couldn't be achieved on this basis either.

We are deeply concerned that the same discussion will arise in the course of the proposal and the competition among the different national levels of consumer protection to higher and higher levels - leaving the interests of businesses and especially SME unconsidered - starts again.

For all these reasons we urge the EU-legislator to reject the present proposal.

Irrespective of our general, well justified refusal we would like to address some aspects of the proposal in the Annex.

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up policy-making can make the EU more transparent and accountable, but it also ensures that policies are based on the best available evidence…..” See also „Better Regulation Guidelines“, SWD (2015) 111 final, 19. 5. 2015, 5: Better Regulation „*is a way of working to ensure that political decisions are prepared in an open, transparent manner, **informed by the best available evidence**…..*“.

ANNEX

Some specifically burdensome aspects of the proposal from the business perspective:

- **Extension of the existing presumption period of 6 months is not justified at all**

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. Art 8/3 of the proposal quadruples (!) the existing presumption period to two years. This means that the reversal of the burden of proof applies to the entire warranty period. 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 in the slightest and is definitely unacceptable from the business perspective.

The solution reached in the Sale-of-Consumer-Goods-Directive is based on a period for which one could convincingly accept the reversal of the burden of proof. The decisive consideration for the drafters of that Directive was that the likelihood that the merchandise had been delivered free of defects increases the longer the merchandise is with the consumer. The longer an item is used, the more likely it is that a defect will result from a handling error, malpractice or wear out. Upon these reasonable grounds the overwhelming majority of 25 Member States apply this six month period.

Our view, both then and now, is 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 Commission justifies this change as 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, as the law requires. The proposed extension takes away the freedom of action of the company and further restricts commercial freedom.

Any extension of the presumption period would definitely have negative impacts especially on SME, because costs and the financial risks are the higher the less they can be neutralised by the "law of large numbers". This is clearly shown by surveys.[11]

Consumer expectations, that there must **always be someone liable for any problem**, **increase** significantly. Therefore any **extension of the presumption period** would undoubtedly lead to an **increased use of** this disproportionate preferential treatment **also in completely unfounded cases**. This is a real concern! It should be noted that according to a survey on behalf of the Commission

[11] See Flash Eurobarometer 413, 48: The smaller the company, the more likely that the high cost for guarantees and returns are considered problems, e.g. 55% of companies with 1-9 employees say guarantees and returns would be a problem compared to 41% with 50-249 employees, in case of companies with more than 500 employees the figure drops to 35%. A similar effect is also shown with respect of the company type: Companies that are part of an international group are the least likely to see the cost of guarantees and returns as a problem (34%), Flash Eurobarometer 413, 35.

100% (!) of ADR bodies, have the view that even the currently **existing rights of legal and commercial guarantees are abused by consumers**.[12]

When speaking about the **risk of "abuse"** of rights the following should also be noted: In the aforementioned 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 damage!**[13] 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.

- **Duty to remove non-conforming goods and to install replacement goods or to bear the costs of it and the restriction of the proportionality-criterion to the relation between repair and replacement completely neglect the interests of traders (Art 10, 11).**

Art 10/2 provides that the replacement of goods installed by the consumer himself should also includ the removal of the non-conforming goods and the installation of replacement goods by the trader. We are aware of the fact that the proposed provisions are – principally - based on the – highly criticised - judgement in Joint Cases C-65/09 and C-87/09 (Weber&Putz) but it is nevertheless a solution that neglects the interests of traders completely.

Remedies in case of non-conformity have to be **shaped in accordance with the rights and obligations as laid down in the original contract.** To oblige the seller to remove the non-conforming goods and to install the replacement goods in cases where the installation of the goods originally purchased was not an obligation of the trader under the contract **goes far beyond what was originally owed to the consumer.** It also means that the trader's liability would be extended to facts and circumstances which occurred after the time of delivery. The **trader that only sells** the products and therefore **only gets the price for the mere sale** from the consumer could be **burdened with tremendous costs many times higher than the price of the goods originally sold.** This is neither a fair nor well-balanced solution.

It has to be mentioned that even the **Court of Justice became aware** of the fact that such a wide-ranging replacement-remedy encompassing the removal of the non-conforming goods and the instalment of the replacement goods was **too burdensome for the seller**. Therefore the Court of Justice restricted this far reaching remedy insofar, as the consumer's right to reimbursement of the cost of removing the defective goods and of installing the replacement goods may be limited to the payment by the seller of a **proportionate amount** bearing in mind the value of the goods and the significance of the lack of conformity. The proposal doesn't provide any limitation in favour of the trader. In addition a limitation in a manner ruled by the Court of Justice would be too complex for practical use.

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[12] 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?"*

[13] 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?*

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 relation to the remedies of the first level to those of the second level. This means that in cases **where only one remedy of the first level is possible** (either repair or replacement) the **trader cannot refuse** this only remedy possible **even if it imposes disproportionate costs** on him.

The unlimited remedy of replacement (encompassing the removal non-conforming and the instalment of conforming goods) and not giving the trader the possibility to refuse an only possible remedy on grounds of disproportionate costs are absolutely not fair and can in the worst case result in insolvency, especially if this "sanction" strikes an SME. **Such obligations** are in general burdensome for businesses, with respect to e-commerce they are **obstacles to cross-border-sales** especially for SME as the costs to comply with such excessive duties are in cross-border cases even higher (necessity to send own employees to the countries of the consumers or to build up a service partner-network in all the Member States they sell to).

Even decisions of the Court of Justice can be wrong and such decisions should not uncritically become laws. The Court "creatively" interpreted the Sale of Consumer Good Directive in a law making manner. Only **enshrining this interpretation in law without thoroughly examining the effects** of its results by those **institutions that are the real legislators** has to be **questioned** from the perspective of democratic legitimacy and **the proper institutional balance** as well. Furthermore such an approach is not compatible with the commitments of better regulation because the effects of law-making rulings of the Court are not and would never be subject of an impact assessment.

Therefore it has to be clearly stated that the remedies in case of lack of conformity do not go beyond what was subject of the contract of sale. Especially it has to be clarified that the remedy of replacement does not include an obligation to remove the goods from where they were installed and to install the replacement goods in cases where the seller was not obliged under the contract to install the consumer goods originally purchased.

Furthermore it has to be clarified that in a case where one of the remedies of the first level is impossible the seller may refuse the only remedy possible if this remedy is disproportionate. In such a case the remedies of the second level (price reduction or cancellation of the contract) should be applicable.

In the interest of all parties involved in the contract, in general it would be the best solution to leave the choice of the remedy, be it either replacement or repair, to the seller.

- **If the consumer is aware of the defect at the time of the conclusion of the contract, this must not lead to the liability of the company.**

A rule like the one in Art 2/3 of the Sale-of-Consumer-Goods-Directive is essential to make clear that there is no lack of conformity in cases were the consumer knew about the defect at the time of the conclusion of the contract or could reasonably not have been unaware of the defect.

Equally, the fact that the non-conformity is due to a material, supplied by the consumer needs to be considered, as it is in Art 2/3 of the Sale-of-Consumer-Goods-Directive.

- **Termination of the contract in cases of minor defects – an unjustified solution to the detriment of traders (Art 9)**

According to Art 3/5 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 contracts restricts the right to terminate the contract to cases of essential non-conformity (Art 12/5 digital content proposal).

- **Punishment of the seller and enrichment of the consumer in the event of termination of the contract is totally unacceptable (Art 13/3 lit d)**

It is totally inappropriate to "punish" the seller who has delivered defect goods and usually bears no fault for the non-conformity and has not even caused it. If it is necessary to terminate a contract, **provisions on restitution have to ensure that there is no enrichment of neither of the parties.**[14] Art 13/3 lit d) **does not meet this need at all.**

For example, a consumer purchases a new car and after twenty months of use the gearstick starts vibrating at a higher speed. The consumer, who would benefit from the 2-year presumption period as well, could terminate the contract and would get back the entire purchase price, if he used the car under normal circumstances (around 10 000 kilometres per year). He would only need to bear the decrease in value, if he used the car intensively (perhaps 50 000 kilometers per year). Even then he would need to bear the decrease in value only to the extent that the decrease in value exceeds depreciation through regular use. Besides the fact that this approach would be extremely complex in practice, **it leads mainly to the result that free use of good constitutes the rule**.

This is not only completely inappropriate in cases of minor defects - such as in the present example –, but even if it is not a minor defect, but occurs only after a long period of time and until then a normal use of the product was possible. Such an approach as proposed in Art 13/3 lit d must also be questioned with regard to its compatibility with the Charter of Fundamental Rights.

- **That goods should be free from any right of a third party, including intellectual property rights would not be possible in practice (Art 7)**

A buyer e.g. of a book does not acquire the right to copy this book and resell this copies, simply because it is not free of any right of a third party. Therefore this provision would mean that the sale of a variety of goods would not be possible in conformity with law. Moreover also brands on products are intellectual property and therefore the goods are not "free of intellectual property rights".

The provision also raises questions with regard to third-party-financed transactions where the seller retains title of the goods and transfers the retained title to the financer to secure the ceded purchase price claim. As you can´t speak here from goods free from any right of a third person, such financing options would not be possible under this provision. This would also not be in the interests of consumers.

- **Comprehensive information about rights in the event of non-conformity in guarantee statements are inappropriate (Art 15)**

According to Art 15/2 lit a) the guarantee statement should include a clear statement of the legal rights of the consumer under the Directive. This would mean that in future a notice about the existence of the legal guarantee and that it is not limited by the commercial guarantee would not be sufficient, but more than that all legal rights need to be stated.

[14] The existing Sale-of-Consumer-Goods-Directive does not regulate the question of compensation for use in cases of termination of the contract. Rather, according to recital 15 the Member States are allowed to regulate that a reimbursement to the consumer may be reduced to take the use of the goods since the delivery into account. Under current Austrian law in cases of termination it is in principle possible to charge a usage fee - up to the date of termination. Article 13 No. 3 lit d) would exclude such a compensation for use.

Such an information requirement is difficult to fulfil and would mean additional burden for companies engaged. **It is in any case certainly not the job of companies to inform consumers** in such an exaggerated way **about the legal situation**. To inform consumers on the legal situation is the task of education policy and consumer associations. A sense of proportion when it comes to information requirements is urgently needed from the business perspective.

- **Administrative penalties and collective actions in "individual" interest in addition to the legal remedies for individual consumers in case of non-conformity are inappropriate (Art 17/2)**

It is for well-considered reasons that the Sales-of-Consumer-Goods-Directive (1999/44/EG) does not include such a provision. In addition to the liability towards the consumer, Art 17/2 would lead to administrative penalties and class actions against suppliers in cases where they deliver digital content not in conformity with the contract.

In any case Art 19/3 contains a supplement to the Injunction Directive (2009/22). This Directive regulates the possibility for injunctions for the protection of "collective" consumer interests. An additional possibility for collective actions in "individual" interests has to be rejected.

- **Further issues, which require changes from the business perspective**

  - There is absolutely **no need and no valid justification to modify Art 2/1 and 2 of the Sales-of-Consumer-Goods-Directive** (1999/44/EC) which are clear and easy to understand. Creating a new and rather complex regime for the criterions of conformity only causes legal uncertainty.

  - The extension of the guarantee period of 30 days to 25 months in cases of self-assembly is not appropriate (Art 8/2).

  - In case of minor defects the right to withhold the payment to the full extent of the price is not justified (Art 9/4).

  - Also in cases of replacement the seller should be able to get an appropriate compensation for use (Art 13/3).

  - In cases of second hand goods it should be possible to shorten the guarantee period by agreement (Art 14).

  - It is totally incompatible with the full harmonization approach to give member states the opportunity to impose additional provisions for commercial guarantees (15/4).