WIRTSCHAFTSKAMMER ÖSTERREICH

Position Paper

of the

Austrian Federal Economic Chamber

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content

COM (2015) 634 final

and the related amendments tabled in the JURI/IMCO-Committees

(September 2017)

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 proposal of the European Commission and the amendments tabled[1] were subject to a thorough and in-depth scrutiny by the Austrian Federal Economic Chamber.

First, we would like to point out – again – that full harmonisation is generally the preferred regulatory option from the point of view of businesses.[2] However, such a concept can only work well if it also provides a fair balance between the interest of consumers and businesses. Unfortunately, we still do not see such a well-balanced solution in the now tabled amendments. The proposal and some of the amendments seem to presume that the digital single market can only properly function when maximising the consumer protection provisions at dizzying heights. Furthermore, some of the proposed amendments even refuse the concept of full harmonisation and stick to a minimum harmonisation.

This approach, however, overlooks the fact that the digital single market rather needs to incentivize businesses to become active in cross border transactions.

Key messages:

1. **The scope should – by no means – be extended to the sale of e.g. electrical goods like household appliances. However, this would be the inevitable consequence of widening the scope to "goods with embedded digital content".**
2. **A 6-month time limit for the reversal of burden of proof is an absolute necessity.**
3. **Time limits up to a maximum of 2 years for exercising legal remedies are an urgent need. The "lifespan concept" has to be rejected in the interest of legal certainty and avoidance of bureaucracy.**
4. **The hierarchy of remedies needs to be kept.**
5. **The concept of a sort of "mandatory" - "commercial guarantee" for the lifespan has to be refused.**
6. **The extension of scope of application to other counter-performances than money should be urgently reconsidered.**
7. **No provision on compensation but a clarification is needed that claims for damages shall be regulated by the laws of the Member States.**
8. **The customer shall only be entitled to terminate the contract in case of delayed delivery after having granted a reasonable extension of time.**
9. **The possibility of the consumer to terminate a contract by notice to the supplier given by any means is inadequate.**
10. **Obligation to return digital content supplied on a durable medium in the event of termination of the contract shall not depend on a corresponding request of the supplier.**

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[1] The amendments tabled can be found under the following links: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-599.501%2b02%2bDOC%2bPDF%2bV0%2f%2fEN http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-599.502%2b02%2bDOC%2bPDF%2bV0%2f%2fEN http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-599.503%2b02%2bDOC%2bPDF%2bV0%2f%2fEN

[2] Position Paper of the Austrian Federal Economic Chamber on the Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM (2015) 635 final) and the related amendments tabled in the IMCO-Committee (March 2017)

11. **Proportionate payment is necessary for the use made of the digital content prior to the termination, if there was a benefit for the consumer.**
12. **A mandatory right to terminate contracts after 12 months would make contracts with a longer duration but better pricing conditions impossible.**
13. **Administrative penalties and collective actions in "individual" interests in addition to the legal remedies for individual consumers in case of non-conformity are inappropriate. Any attempts to introduce means of collective redress through the back door have to be vehemently rejected.**

1. **The scope should – by no means – be extended to the sale of e.g. electrical goods like household appliances. However, this would be the inevitable consequence of widening the scope to "goods with embedded digital content".**

We strongly warn against the approach proposed by way of several amendments according to which the Directive would apply to goods in which digital content is embedded, unless the seller proves that the lack of conformity lies in the hardware of the good. Both traders and consumers will be lost in confusion which rules apply in a specific case.

We would like to emphasize very clearly that all the preparatory work for the proposal as e.g. the stakeholder consultation only focused on contracts with regard to "real" digital content, thus contracts that are not covered by the existing Consumer Sales Directive (1999/44).

Extending the scope – so to say with the stroke of the pen - to goods with embedded digital content means that many tens of thousands SME all over Europe (selling e.g. electrical appliances of all sorts) that didn't even have a chance to "have their say" would suddenly be confronted with a new legal framework specifically tailored to "providers of digital content". We urge the European Parliament not to follow such an approach that would be in sharp contradiction to the principles of better regulation and the "think small-first-principle".

2. **A 6-month time limit for the reversal of burden of proof is an absolute necessity (Art 9).**

We therefore fully support amendment 644 that addresses this need in the right way.

At the same time, we reject amendments 631, 637 and 638.

Article 9 imposes the burden of proof of conformity of the digital content at the time (and period) of supply on the seller for an unlimited period of time. The rules of evidence for goods (Article 5/3 Sale of Consumer Goods Directive, but also Article 8/3 of the proposal of the directive for online sales of goods), for the benefit of the consumer, state that in the event of occurrence of a lack of conformity within a specified period of time (currently 6 months), there is a presumption that this defect existed at the time of delivery. The supplier - not to be responsible – needs to prove that the lack of conformity at the time of delivery was not present. Apart from the fact that a time limit of 6 months is missing in the proposal, the burden of proof in the case of digital content is also tightened in terms of content. It refers to the conformity as such. As a result, the proposed burden of proof provision equals an assumption that digital content is always delivered in a deficient manner. This does not reflect the reality.

The Commission justified the lack of a time limit for the burden of proof inter alia with the argument that digital content is not a "wear" subject. However, this approach ignores that whether or not the

digital content "works" depends essentially on the digital environment of the consumer. This is definitely not static, but might change shortly after the delivery of the digital content because of installations of other programs, automatic or conscious (could also be daily) updates of other programs, contamination with viruses etc. These changes of the consumer´s digital environment might lead to the consequence of incompatibility with the digital content. Besides some digital contents e.g. CDs can also be worn.

If one-person-businesses or SME had to prove for an indefinite time (e.g. after 23 months), that the program was handed over in conformity with the contract at the time of supply, they would have to make use of tremendous resources in order to examine the user's environment that has for certain changed comprehensively from the time of supply. One-person-businesses or SME often do not have or simply cannot have such resources. If the basic presumption under this unlimited burden of proof is that the digital content is provided in a deficient manner, this will mean a potential unlimited commercial risk to the supplier for basically every distributed digital content.

For interests of legal certainty and a balanced solution, a **time limit for the burden of proof** is essential. Therefore, a **period of maximum 6 months** would be a –just- plausible solution for digital content as well as online sale of goods (see e.g. amendments 639, 640, 641, 642 that also have our support).[3] Furthermore, - **as amendment 644** provides - coherence with the content of the rules of evidence and the presumption applicable for goods is necessary to make clear, that in case of occurrence of lack of conformity within this period of time, the presumption is in favour of the consumer, that it already existed at the time of supply.

The aspect that the supplier does not know the digital environment of the consumer should at least be compensated with the idea that the consumer must cooperate with the seller. This approach seems generally reasonable, but does not change the fact that it creates considerable expenses and effort for the supplier and that the extent of the required cooperation of consumers is unclear. The interpretation of the criteria "necessity and possibility", and the fact that the least intrusive means which are at the disposal of the parties in the circumstances have to be used, will for sure cause difficulties in practice.

Furthermore, if the result of the examination is that the "non-functioning" is caused by the digital environment of the consumer, the supplier will also be obligated to describe the "defects" or inadequacies of the consumer´s digital environment in a rather precise way. Such an examination is certainly a considerable effort and cost burden for suppliers. As a result, the supplier would provide a free service for the customer in such cases, which goes beyond what was owed by the contract. In the end the customer would receive a huge advantage without having to pay anything for it. Therefore, it would be only fair that the consumer has to bear the costs of that extra service in cases were the digital environment was the cause for the non-functioning.

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 **100%**

[3] It is also to reject, that the proposal of the directive for online sales of goods contains a presumption period four times longer (2 years instead of 6 months) than in the Sale of Consumer Goods Directive. The period of 6 months should not be extended.

(!) of ADR bodies, have the view that even the currently **existing rights of legal and commercial guarantees are abused by consumers**.[4]

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![5] 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.

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.[6]

3. Time limits up to a maximum of 2 years for exercising legal remedies are an urgent need. The "life span concept" has to be rejected in the interest of legal certainty and avoidance of bureaucracy.

A 2-year legal guarantee period, as provided in Art 5 of the Sale of Consumer Goods Directive should also apply for digital content.

We therefore support amendment 670, amendment 849 that at least allows Member States to provide such a limitation period.

Any reference to the life span of goods is unreasonable. Such a concept would cause tremendous **bureaucracy, unacceptable legal uncertainty** and rising costs for businesses and consumers.

In fact, the concept of a lifespan period would require defining the lifespan of each and every good and model available on the market. As companies will have to be aware and well informed about the different lifespans of the products, this approach will massively increase the administrative burden for them. Besides, it should be noted that defining the lifespan period of goods will also require consulting (costly) experts. Especially with regard to the consumer-friendly jurisdiction of the European Court of Justice, such an undefined concept could in the end lead to a legal "lifespan-guarantee".

Consequently, we refuse amendments 847 and 848.

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[4] 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?"*

[5] 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?*

[6] 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.

4. The hierarchy of remedies needs to be kept.

In the interest of a fair balance between sellers and consumers the hierarchy of remedies has to be kept. This system has been proven to be appropriate and feasible.

In case of non-conformity, a trader should always have a second chance. A free choice of remedies cannot be a solution from an environmental perspective either as it would encourage a "throw away"-culture.

We reject any amendments that favour a free choice of remedies (e.g. 699, 703, 710, 725, 734, 757, 756, 769 and 772) and an additional remedy in the form of a "right to reject" as proposed by amendment 782.

Furthermore, it is not appropriate to provide the right to terminate the contract in **case of a minor lack of conformity** with the contract. We therefore **support the proposal of the Commission** in this respect and **amendment 822.**

We support amendments aiming for **more balanced solutions with regard to the retention of the price in case of minor defects (e.g. amendment 724).**

5. The concept of a sort of "mandatory" - "commercial guarantee" for the lifespan has to be refused.

There are absolutely no reasons for introducing such a new concept, in addition to the legal guarantee regime. The instruments of the legal guarantee ensure that consumers have rights in case of non-conformity with the contract. A guarantee can and should therefore only be an additional asset to these mandatory obligations, **given on a voluntary basis**. A legal obligation to "guarantee" the durability of goods is absolutely inappropriate.

Such concepts would turn a voluntary tool and thus an essential factor of competition between companies to the contrary. Making "commercial" guarantees "mandatory" is a contradiction in itself. The lifetime of a product is highly dependent of consumers' use and choices. The lifetime of an appliance varies depending on many factors that are beyond the manufacturer's control: use frequency, maintenance, installation, location (the room being damp, too cold, too hot, badly ventilated).

Furthermore, a study of the German Umweltbundesamt revealed that one third of products are discarded by consumers while still working. Instead of intrusive measures via contract law non-regulatory means like for example the promotion of consumer awareness campaigns is needed.

Giving an "expected or predicted" lifetime declaration on the whole product would potentially mislead the consumer and this should be avoided as there is no possibility for manufacturers to control consumer use patterns.

We therefore reject amendment 635.

6. The scope of application covering also other counter-performances than money (i.e. by giving access to personal data or other data) should be urgently reconsidered (Art 3/1)

Such an approach would stifle innovation and as a result business models would probably not be offered any more (e.g. freeware). This would neither be in the interests of users nor be compatible with the EU-aim of boosting innovation.

An example: A company that offered the use of its informational websites/games websites free of charge in exchange for statistical data (e.g. game ratings, access statistics etc.) will in the future abstain from such an offer and request additional fees. The same applies to situations when personal data is given away during a registration process on a website with the help of an e-mail address.

The directive should refrain from the concept of "data as counter performance". The application of this approach causes unpredictable and immeasurable complications when providing services especially against the background that specific provisions in the area of data protection are applicable anyhow. The numerous amendments tabled on this issue illustrate the complexity of the potential complications linked with this concept quite well (e.g. amendments 419, 548 etc.). However, taking into considerations that the General Data Protection Regulation already provides information requirements, withdrawal options, as well as the rights to the transferability and deletion, these amendments would not even be necessary. Still, there is no practical solution when consent was withdrawn because of data protection. The supplier should at least have the possibility to terminate the contract after the consumer withdrew his or her consent. Otherwise consumers would receive the ordered digital content while obtaining at the same time their data. Hence, actually consumers would receive these digital contents for free.

Generally, the concept of "other data as a counter performance" gives the impression as if existing and acknowledged business models embodied the image of an enemy for the European Union. Whereas actually some companies just identified new business opportunities and decided to use them. In fact, statistical data and their return to the costumer do not have any value for consumers. Therefore, it is neither comprehensible nor understandable why these business models are generally classified as problematic and why they need to be regulated.

The same applies to the attempt to regulate some aspects of the copyright regime with this directive (see e.g. amendment 630). This would lead to an absurd situation, as according to the applicable copyright law, consumers could also be obliged to refrain or remove certain actions.

Having said that **amendments 445 and 444 have our full support.**

7. No provision on compensation but clarification is necessary that claims for damages shall be regulated by the laws of the Member States (Art 14)

Article 14 provides a strict liability of the supplier in the event of economic damages to the digital environment of the consumer by non-conformity of the digital content. Member States shall lay down detailed rules for the "exercise" of the right to damages.

Beside the fact that we consider strict liability as absolutely inadequate, the current proposal will lead to high legal uncertainty as it is not clear what is regulated at Union level and what is left to the Member States' competence. This is not compatible with the notion of better regulation.

The consumers' right to damages in the case of a lack of conformity should be an area completely left to the Member States' competence and this should be clearly stated in Art 14. The approach that Art 14 could be an additional instrument to the already existing national remedies needs to be rejected. Furthermore, **amendment 857 and 410** aim at offering customers the possibility to **claim** for non-material harm, comprising apparently the **loss of enjoyment** (as the justification with reference to the Package Travel Directive suggests), which needs to be fully and **vehemently rejected.**

We therefore fully support amendments 855 and 856.

We strictly reject amendments 868, 870 and especially amendment 857 and 410 aiming at extending the liability of the supplier to non-material harm, obviously in the form of "loss of enjoyment".

8. The customer shall only be entitled to terminate the contract in case of delayed delivery after having granted a reasonable extension of time (Art 11)

According to the proposed Art 5/2 the provider - unless otherwise agreed - is obliged to deliver immediately after the conclusion of the contract. Art 18/2 of the Consumer Rights Directive already contains provisions for delayed delivery. It stipulates that the consumer is obliged to call upon the trader to make the delivery within an additional period of time appropriate to the circumstances. It is inadequate that in the case of providing digital content, the supplier is not granted an adequate extension for the delivery (e.g. think of the case of a server failure as a reason for delayed delivery). This differentiation is not justified and furthermore not in accordance with the principle of objectivity under art 20 of the European Charter of Fundamental Rights.

We therefore fully support amendment 689 and 690.

9. The possibility of the consumer to terminate a contract by notice to the supplier given by any means is inadequate (Art 13/1)

We support amendments 774, 775, 776 and 780 as going into the right direction.

10. Obligation to return digital content supplied on a durable medium in the event of termination of the contract shall not depend on a corresponding "request" of the supplier (Art 13/2)

It is not appropriate that the consumer should only be obliged to return digital content supplied on a durable medium "upon the request" of the supplier. The consumer should return the durable medium by operation of law.

11. Proportionate payment necessary for use made of the digital content prior to the termination, if there was a benefit for the consumer (Art 13/4)

If the consumer was able to use a program for a longer period of time due to the fact that the lack of conformity has only affected a single function of the programme, which the consumer had not used so far or did not need, he should be liable to pay for the use prior to the termination. The situation is as such comparable to continuous obligations, for which following Art 13/ 6 an obligation to pay for the use is foreseen.

12. A mandatory right to terminate contracts after 12 months would make contracts with a longer duration and thus better pricing conditions impossible (Art 16)

Art 16 of the proposal provides a right for consumers to terminate contracts with indeterminate duration or with a duration exceeding 12 months any time after the expiration of 12 months. This would make contracts with a longer duration, but at a more favourable price, impossible and would therefore lead to reduced consumer choice.

We therefore fully support amendment 911. While amendments 917, 918 that even aim at reducing this duration to 6 months have to be rejected.

13. 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 18)

It is for well-considered reasons that the Consumer Sales Directive (1999/44/EG) does not include such a comparable provision on enforcement as proposed in Art 18/2. In addition to the liability towards the consumer, this provision would lead to administrative penalties and class actions against suppliers in cases where they deliver digital content not in conformity with the contract to an individual consumer. Amendment 969 even explicitly aims at collective redress enforcement measures.

Any attempts to introduce means of collective redress through the back door have to be vehemently rejected. We therefore explicitly refuse amendment 969.

Art 20/3 contains a supplement to the Injunction Directive (2009/22) anyhow. This Directive regulates the possibility for injunctions for the protection of "collective" consumer interests. An additional possibility for collective actions in "individual" interest has to be rejected.

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