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)

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 has already **urged** the European Parliament **to reject the proposal** for a Directive on certain aspects concerning contracts for the online and other distance sales of goods in its first Position Paper on this proposal in May 2016 because of many fundamental reasons. After having thoroughly analysed the huge amount of proposed amendments we are even more convinced that there is no alternative to a total rejection of this proposal.

We have always clearly pointed out that – 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. Given the pressure of full harmonisation, the actors involved in the decision making process are eager to maintain the highest level of consumer protection of each Member State. While the draft report by MEP Arimont fortunately aims at finding balanced solutions for important aspects, rather many of the proposed amendments now tabled illustrate the competition among different national levels of consumer protection to higher and higher levels – leaving the interests of businesses and especially SMEs unconsidered.

Furthermore, many of the proposed amendments even refuse the concept of full harmonisation and stick to a minimum harmonisation. There is legitimate **cause of concern that in the end businesses from all sectors (online and offline) will face new and more burdensome provisions than today.** Moreover, the main but false[1] justification given by the Commission for proposing this Directive that **full harmonisation of legal guarantee provisions** would allow traders to sell to consumers in all Member States based on the same contractual terms all over Europe and therefore boost E-Commerce **vanishes into thin air.**

We would like to recall very clearly that **the existing Sale-of-Consumer-Goods-Directive** (1999/44, based on minimum harmonisation) **does not differentiate between online and offline sales**. By hastily presenting a proposal for online-sales instead of evaluating the Sale-of-Consumer-Goods-Directive and other legislative acts the **Commission has artificially created a problem** that would not have existed without this proposal: The impending increase of legal fragmentation and therefore the obvious question whether the proposed online-sales Directive should be extended to the offline channel in order to avoid two different regimes. With such a - so to say - rather tricky approach the Commission circumvented her own commitments to better regulation, her clear statements to better listen to those effected by new initiatives. 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 was 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 existing legislation(e.g. the CRD) should be carried out before any new regulatory measures were taken.[2]

We, and especially our members, are deeply concerned about these developments. We recall our position that from the business perspective there is absolutely **no need for new and particularly burdensome provisions** of the proposed directive. Irrespective of our general, well justified,

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[1] See our Position Paper (May 2016) for further details, especially relating to the fact that according to surveys 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.
https://www.wko.at/Content.Node/Interessenvertretung/Wirtschaftsrecht/OnlineSalesGoods-en-635.pdf

[2] http://www.ueapme.com/IMG/pdf/UEAPME_position_on_Contract_Rules_for_online_purchases_of_digital_content_and_tangible_goods.pdf (15.3. 2017); 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 (15. 3. 2017); 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).

refusal we would like to address some highly important aspects of the proposal and the proposed amendments:

Key messages:

1. **Any extension of the existing 6-months presumption is not justified at all and would encourage abusive consumer behaviour.**
2. **The hierarchy of remedies needs to be kept. An additional remedy in terms of a "right to reject" has to be refused.**
3. **The 2-year legal guarantee period has to be maintained. The "life span concept" has to be rejected in the interest of legal certainty and avoidance of bureaucracy. A shorter period of 1 year is urgently needed for second-hand goods.**
4. **Termination of the contract in cases of minor defects would mean an unjustified solution to the detriment of traders.**
5. **Duty to remove non-conforming goods and to install replacement goods or to bear the costs of it completely neglects the interests of traders.**
6. **The same legal regime should apply for goods irrespective whether they comprise software or not.**
7. **Quasi-expropriation of the seller and enrichment of the consumer in the event of termination of the contract is totally unacceptable also from the point of view of fundamental rights.**
8. **The disproportionality-criterion should also apply between bringing goods into conformity and level-2-remedies.**
9. **The concept of a sort of "mandatory" - "commercial guarantee" for the life span has to be refused.**
10. **Awareness of the defect by the consumer at the time of the conclusion of the contract must not lead to the liability of the trader.**
11. **Comprehensive information about rights in the event of non-conformity in guarantee statements would lead to further information overload** (Art 15)
12. **Administrative penalties and collective actions in "individual" interest in addition to the legal remedies for individual consumers in case of non-conformity are inappropriate.**

1. Extension of the existing 6-months presumption is not justified at all and would encourage abusive consumer behaviour

We therefore fully support the amendments that propose to keep the current 6-months presumption period (e.g. amendments 42, 41, 282, 283)

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 months 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 into 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.[3]

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% (!) 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.

[3] 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] 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?*

2. **The hierarchy of remedies needs to be kept. An additional remedy in terms of a "right to reject" has to be refused.**

In the interest of a fair balance between sellers and consumers the hierarchy of remedies should be kept. 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 therefore totally reject amendments supporting the free choice of remedies (e.g. amendments 285, 287, 288).

In this context we would also like to point out clearly that an additional remedy in terms of a **"right to reject" (amendment 358) has to be refused as well.**

This right to reject was already subject to discussions on the Consumer Right Directive, during which it was correctly and wisely decided to drop the approach. It is not apparent neither comprehensible why this approach that is absolutely incompatible with the hierarchy of remedies should now be taken up again.

3. **The 2-year legal guarantee period has to be maintained. The "life span concept" has to be rejected in the interest of legal certainty and avoidance of bureaucracy. A shorter period of 1 year is urgently needed for second-hand goods.**

The 2-year legal guarantee period has been proven to be appropriate and feasible and provides a fair balance between the interest of consumers and businesses.

We therefore totally reject amendments that propose a prolongation of this period (e.g amendments 364, 366, 367)

Especially amendments proposing a **completely new approach** and replacing this 2-year period by the **lifespan of goods** completely ignore the practical reality of companies and **have to be rejected**. 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 to define 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 to consult (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".

It should further be emphasised that it would be absolutely incompatible with the commitments to better regulation to introduce such a completely new and extremely vague concept without a profound impact assessment.

In cases of **second hand goods a shorter period of 1 year is** urgently needed. **We therefore support amendments providing such solutions (e.g. amendment 57, 370, 371).**

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

4. **Termination of the contract in cases of minor defects would mean an unjustified solution to the detriment of traders.**

The exclusion of the right to terminate is missing in the proposal which means an unbalanced, unjustified solution to the detriment of traders.

We therefore fully support amendments that exclude the right of termination for minor defects (e.g. amendments 43, 297).

5. **Duty to remove non-conforming goods and to install replacement goods or to bear the costs of it completely neglect the interests of traders (Art 10)**

Art 10/2 provides that the replacement of goods installed by the consumer himself should also include 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.

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.

6. **The same legal regime should apply for goods irrespective whether they comprise software or not**

We warn against the approach proposed by several amendments (e.g. amendment 212, 213) according to which the Directive would not 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 therefore fully support amendment 211.

7. **Quasi-expropriation of the seller and enrichment of the consumer in the event of termination of the contract is totally unacceptable also from the point of view of fundamental rights (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.**[6] 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 a defect becomes apparent. The consumer in case of termination 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 kilometres 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 completely inappropriate in cases of defects that occur after a 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.

In addition the seller should also be able to get an appropriate compensation for use in cases of replacement.

8. **The disproportionality-criterion should not only apply between repair and replacement but also between bringing goods into conformity and level-2-remedies.**

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.

We therefore support amendments 324 and 325 addressing this aspect in the right way.

[6] 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.

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.

9. **The concept of a sort of "mandatory" - "commercial guarantee" for the life span has to be refused.**

There are absolutely no reasons for introducing such a new concept, additionally to the already existing and efficient legal guarantee regime. The instruments of the legal guarantee ensure that consumers have rights in case of non-conformity with the contracts. 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.
Furthermore it would be totally incompatible with the commitments to better regulation to introduce such a new concept without any impact assessment.

We therefore strictly reject the amendments 384, 385, 386, 387 and 388.

10. **Awareness of the defect by the consumer at the time of the conclusion of the contract must not lead to the liability of the trader**

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.

Therefore, amendments 46, 372 have our full support.

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.

11. **Comprehensive information about rights in the event of non-conformity in guarantee statements would lead to further information overload (Art 15/2 lit a)**

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.

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**. A sense of proportion when it comes to information requirements is urgently needed from the business perspective.

12. **It is incompatible with the full harmonization approach to allow member states imposing additional provisions for commercial guarantees**

Therefore, we fully support amendments 382, 383.

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 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 goods 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.

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