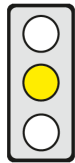


KEY ISSUES

Objective of the Directive: Comprehensive harmonisation of the law on legal guarantees for online sales of goods will remove uncertainties for businesses and consumers in cross-border online trade and thus encourage such trade. At the same time, the level of consumer protection will be raised.

Affected parties: Consumers, businesses, intermediaries.



Pro: The Directive is an initial step towards full harmonisation of consumer protection law – required in order to complete the internal market.

Contra: (1) Since the Directive does not create full-harmonisation of the sale of goods law, it is doubtful whether it will in fact promote online trade.

(2) Due to the fact that it is restricted to online trade, the Directive unjustifiably fragments national law and distorts competition.

CONTENT

Title

Proposal COM(2015) 635 of 9 December 2015 for a **Directive on certain aspects concerning contracts for the online and other distance sales of goods**

Brief Summary

► Context and objectives

- As part of the Digital Single Market Strategy [COM(2015) 192; see [cepPolicyBrief](#)] the Commission wants to remove barriers to the digital single market. By fully harmonising important consumer contract law rules and raising the level of protection, it wants to remove trade barriers and strengthen confidence in cross-border online trade thereby encouraging such trade (Recitals 9 - 11).
- The Commission proposes two new Directives:
 - on aspects of contract law concerning distance sales of goods (this [cepPolicyBrief](#)) and
 - on aspects of contract law concerning the supply of digital content [COM(2015) 634; [cepPolicyBrief](#) to follow].
- As a consequence of both Directives, the Commission expects trade within the EU to increase by € 1 billion and real EU gross domestic product (GDP) to "permanently" gain about €4 billion per year (p. 12).

► Scope and Definitions

- The Directive applies to sales contracts concluded between a business (seller) and a consumer (buyer) in relation to goods sold at a distance (Art. 1 and 2).
- "Goods" means movable, "tangible" items with the exception of (Art. 2 (d))
 - items sold by way of judicial measures – e.g. execution – and
 - water, gas and electricity unless sold in limited quantities.
- "Distance sales contracts" are sales contracts concluded without the simultaneous physical presence of the seller and the buyer, exclusively by means of distance communication, e.g. internet, telephone or post (Art. 2 (e), Recital 4).
- The Directive does not apply to durable data carriers with digital content which only serve as a carrier for the supply of such content, namely DVDs and CDs. These are covered by the aforementioned parallel draft Directive [COM(2015) 634] (Art. 1 (2), (3) and (4), Recital 12, 13 and 14).

► Full harmonisation

- In most of the areas which it covers, the Directive provides for full harmonisation. Thus divergent – including more stringent – national provisions are in so far prohibited (Art. 3).
- The Directive does not affect national general contract laws in so far as not regulated therein [Art. 1 (4)].
- Member States are permitted to adopt more detailed conditions in relation to "aspects" which are regulated in this Directive but which are not fully harmonised, such as e.g. limitation periods (Recital 14).

► Conformity of goods with the contract

- The seller is responsible for ensuring that goods (Art. 4 (1))
 - correspond to the agreed quantity, quality and description,
 - are fit for the consumer's desired purpose which the seller has accepted,

- possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.
- At the same time, the goods must (Art. 4 (2), Art. 5),
 - be fit for the purposes for which goods of the same description are ordinarily used;
 - be delivered along with accessories – e.g. instructions or packaging – as the consumer may ("reasonably" - see Recital 18) "expect" to receive, and
 - possess qualities and performance capabilities which are normal in goods of the same type, whereby public statements made by the seller or producer prior to conclusion of the contract are relevant.
- Goods do not conform to the contract if they (Art. 4 (2), Art. 6 and 7, Recitals 20 and 21)
 - are incorrectly installed by the seller or incorrectly installed due to inadequate installation instructions,
 - are encumbered by third-party rights – e.g. intellectual property rights – i.e. there is a defect in title.
- ▶ **Liability, relevant time for conformity with the contract and reversal of the burden of proof**
 - The seller is liable for any "lack of conformity with the contract" (defect) existing at the "relevant time".
 - The relevant time is basically the time at which the buyer obtains physical possession of the goods, or at which the goods are handed over to a carrier designated solely by the buyer (Art. 8 (1), Recital 24, Explanatory Memorandum p. 15: passing of risk).
 - Where the goods have to be installed, the relevant time is (Art. 8 (2), Explanatory Memorandum p. 15 et seq.)
 - in the case of installation by the seller: the time when the installation is complete;
 - in the case of goods "intended" for installation by the buyer: the time when the buyer has had a reasonable time for installation but in any case not later than 30 days after handover.
 - In the case of a "lack of conformity with the contract" (defect) which "becomes apparent" within two years of the relevant time, the seller must prove that the goods were originally in conformity with the contract (reversal of the burden of proof, Art. 8 (3)).
- ▶ **Buyer's rights under legal guarantee ("remedies") for "lack of conformity"**
 - In the case of a "lack of conformity", the buyer can firstly require repair or replacement of the goods ("Stage 1") or – if these remedies fail or are excluded – price reduction or "termination of the contract" ("Stage 2") (Art. 9 – 13).
 - There is no obligation to give notification of defects within a specific deadline after the defect occurs. Member States are not permitted to impose such a notification obligation (Recital 25).
- "Stage 1": Repair or replacement delivery**
 - Repair or replacement delivery must be carried out "free of charge" within a "reasonable" time and without any "significant inconvenience" to the buyer (Art. 9 (1) and (2), Recital 28).
 - The buyer's right to choose between repair and replacement does not apply if an option is impossible, unlawful or imposes "disproportionate" costs on the seller (Art. 11, Recital 27).
 - Where the buyer installs the goods before the defect "becomes apparent", the seller must remove them and install the replacement goods or bear the costs thereof (Art. 10 (2)).
 - The buyer does not have to pay for any use made of the replaced goods prior to replacement (Art. 10 (3)).
- "Stage 2": Price reduction or "termination" (rescission)**
 - The buyer is entitled to a proportionate reduction of the price or to terminate the contract by notice, given by any means, if repair or replacement by the seller is impossible or unlawful, has not been or will not be carried out within a "reasonable" time or causes "significant inconvenience" to the buyer (Art. 9 (3), Art. 12 and 13).
 - The buyer may terminate the contract even for a "minor" lack of conformity (Recital 29).
 - The purchase price must be reimbursed and the goods returned without undue delay, but in any case no later than 14 days after termination of the contract by the buyer (Art. 13 (3) (a) and (b)).
 - The buyer must pay the seller (Art. 13 (3) (c) and (d))
 - any decrease in value of the returned goods only to the extent that it exceeds depreciation through regular use, and not exceeding the purchase price,
 - in the case of destruction or loss of the goods, the monetary value the non-conforming goods would have had without the destruction or loss, unless the latter was due to the defect.
- ▶ **Time limits for claims under legal guarantee**
 - The buyer can assert claims due to defects where these "become apparent" within two years of the relevant time (Art.8) (Art. 14).
 - National limitation periods cannot be shorter than this (Art. 14).
- ▶ **Right of redress and commercial guarantees**

The Directive also provides for rights of redress against intermediaries (Art. 16) and for requirements as to the commercial guarantees which go beyond the legal guarantee (Art. 15).

Main Changes to the Status Quo

- ▶ Online sales are now governed by this Directive instead of the Sale of Consumer Goods Directive (1999/44/EC).

- ▶ The reversal of the burden of proof in the case of defects is extended from six months to two years.
- ▶ In future, the purchaser can also rescind the sale contract for a "minor" defect. Until now, this has been expressly prohibited (see Art. 3 (6) Sale of Consumer Goods Directive).
- ▶ Until now, buyers lost their rights in some Member States if they failed to notify the seller of the defects within a specific deadline. In future, such notification requirements will be unlawful.
- ▶ The guarantee period now amounts to a mandatory two years even for second-hand goods. Member States can no longer allow companies to reduce this to 1 year by way of contractual terms or agreements.

Statement on Subsidiarity by the Commission

Only EU action aimed at full harmonisation can remove the current legal fragmentation and create a uniform level of consumer protection and legal certainty for businesses (p. 7).

Policy Context

Following the failure of the Regulation on a Common European Sales Law [COM(2011) 635], the EU Commission announced, in its Communication on the Digital Single Market Strategy [COM(2015) 192; see [cepPolicyBrief](#)] inter alia uniform EU legislation on "main" contractual rights for online sales of goods.

Legislative Procedure

9 December 2015 Adoption by the Commission

Options for Influencing the Political Process

Directorates General:	DG Internal Market (leading)
Committees of the European Parliament:	Internal Market (leading), Rapporteur Pascal Arimont (PPE); Culture and Education; Legal Affairs
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Legal Affairs and Consumer Protection (leading); Economy and Energy; Transport; Digital Agenda; EU Affairs
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The Directive is an initial step towards full harmonisation of consumer protection law - required in order to complete the internal market. It is, however, restricted to areas - albeit broad - of the law on legal guarantees. Other important areas - such as the conclusion of contracts, impossibility, default of acceptance, damages and limitation periods - are not harmonised. Some areas only receive rudimentary or vague provision in the Directive - e.g. defects in title, return procedures, passing of risk - so that national law will have to be applied or there will be a risk of differences of interpretation. All of this undermines the desired harmonising effect of the Directive. Furthermore, significant obstacles remain such as language barriers, geographical distance and risk of litigation. **It is therefore doubtful whether the Directive will really be able to encourage cross-border online trade.**

In practice, online and offline sales are hard to separate: Many online traders operate flagship stores, and many shops also offer their products on the internet. The Directive only applies to online sales however. Thus, depending on the sales channel, different standards of consumer protection apply to the sale of one and the same product. There is, however, no good reason why guarantee law applicable to goods sold online should be any different to that applicable to the same goods sold in a shop. De facto, traders will be forced to offer customers the same level of consumer protection as under the Directive for offline sales as well. **For the completion of the internal market, however, full harmonisation of guarantee law both for online and offline trade is advisable in order to prevent distortions of competition between the two sales channels.** The rule which shifts the relevant time for determining conformity in the case of products that have to be installed, should be withdrawn. The Directive already provides that non-conformity may exist even though installation only took place after handover. Apart from that, there is a need for clarification as to whether the risk of accidental destruction or deterioration prior to conclusion of installation shifts to the seller, which would seem unjustified if the goods are already within the buyer's sphere of influence.

The significant extension of the reversal of the burden of proof from 6 months to 2 years **results in a de facto two-year period of liability on the part of the seller, even for defects arising after the risk has passed**, because he will often be unable to provide proof to the contrary. This encourages buyers to treat the goods carelessly. It also fails to take account of the fact that over time there will be an increasing likelihood that a defect did not already exist prior to the passing of risk but is due to wear and tear or incorrect use. **This** – particularly since the buyer can terminate the contract without notification of defects, also for “minor” defects and, in the case of normal use, without paying for use – **will give rise to higher prices**. It is therefore doubtful whether online trade will gain from this.

The two-year guarantee period does not create legal certainty because the limitation periods in the Member States can still be applied. Therefore, defects which become apparent within two years can still be asserted subsequently if national law provides for a longer limitation period. **Full harmonisation also of limitation periods would be more effective**.

Legal Assessment

Legislative Competency

The Directive is correctly based on the power to approximate laws in the internal market (Art. 114 TFEU). Although it covers both cross-border and purely national online sales, the two types of distance sales are, in practice, almost impossible to separate. It is therefore appropriate to regulate them uniformly at EU level.

Subsidiarity

Unproblematic. Convergence of consumer contract law can only take place at EU level.

Proportionality with respect to Member States

The Directive intervenes in national laws on the sale of goods and, as a result of full harmonisation, restricts the legislative freedom of the Member States. Its positive impact on cross-border online trade is unlikely to be huge, however, because full harmonisation is limited to guarantee law; **important areas of contract law which have an influence on guarantee law**, such as impossibility, damages and limitation periods, are left out. It is precisely these areas, however, that **should also be fully harmonised in order to create the desired legal clarity for consumers and cost savings for businesses**. In addition, a large number of the provisions in the Directive are not sufficiently comprehensive or clear. In particular, it is necessary to clarify the extent of the Directive's exclusionary effect and to what extent the Member States are permitted to adopt supplementary rules – e.g. rights to damages in the case of non-conformity.

Restricting the scope to distance sales leads to an additional unjustified fragmentation of the law within national legal systems. There is no logical reason to apply different guarantee rules to sales of identical goods depending on the sales channel. The fragmentation is further increased by the proposed parallel Directive [COM(2015) 634] which creates a third set of rules for the sale of digital content. The very significant raising of the level of consumer protection for online sales, does not seem necessary either due to the specific nature of distance sales transactions or due to the desired harmonisation of the law.

Impact on German Law

The German Civil Code (BGB) must be amended. In particular, the reversal of the burden of proof in Section 476 BGB must be extended from six months to two years and the minimum level of severity for revocation, under Section 323 (5), sentence 2 BGB, must be struck out. Changes are also necessary to the law on defects in title. The requirement for the defect to “become apparent” within the guarantee period must be regulated as an additional prerequisite while longer national limitation periods as under Section 438 (3) BGB are still possible.

Possible future follow-up measures by the EU

As the distinction between online sales and conventional retail sales becomes increasingly blurred, significant pressure will build up to extend the fully harmonised rules for online trade to include online transactions. The Commission recognises this and suggests an initiative for the avoidance of divergences (Explanatory Memorandum p. 3).

Conclusion

The Directive is an initial step towards full harmonisation of consumer protection law - required in order to complete the internal market. It is, however, restricted to broad areas of the law on legal guarantees. Important areas of contract law which have an influence on guarantee law have been left out. In order to create the desired legal clarity for consumers, and cost savings for businesses, full harmonisation is also necessary in these areas. It is therefore doubtful whether the Directive will really be able to encourage cross-border online trade. Restricting the scope of the Directive to distance sales leads to an unjustified fragmentation of national law. For the completion of the internal market, however, full harmonisation of guarantee law for online and offline trade is advisable in order to prevent distortions of competition between the two sales channels. The significant extension of the reversal of the burden of proof gives rise to a two-year period of liability on the part of the seller even for subsequent defects, which will lead to higher prices. The two-year guarantee period does not create legal certainty because the limitation periods in the Member States can still be applied. Full harmonisation also of limitation periods would be more effective.