

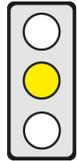
FULL HARMONISATION OF THE GUARANTEE LAW FOR SALES OF GOODS

cepPolicyBrief No. 03/2018

KEY ISSUES

Objective of the Directive: Extensive full-harmonisation of guarantee law for sales of goods will remove barriers in cross-border trade. The level of consumer protection will be raised.

Affected parties: Consumers, traders, intermediaries.



Pro: (1) The Directive provides for extensive full-harmonisation of consumer guarantee law for sales of goods and thus reduces barriers in cross-border trade.

(2) Retaining uniform rules for both distance selling of goods and conventional retail trade, avoids distortions of competition between the two sales channels.

Contra:

(1) The Directive contains numerous ambiguities which lead to legal uncertainty, and opens up opportunities for abuse by consumers.

(2) The Directive must be brought into line with the Directive on the supply of digital content.

The most important passages in the text are indicated by a line at the side.

CONTENT

Title

Amended proposal COM(2017) 637 of 31 October 2017 for a **Directive on certain aspects concerning contracts for the sales of goods**, amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC and repealing Directive 1999/44/EG.

Brief Summary

► Context and objectives

- By fully harmonising important consumer contract requirements and raising the level of consumer protection, the Commission wants to remove trade barriers in the internal market and promote cross-border trade by increasing consumer confidence (Recitals 9–11, p. 3 et seq.).

► Scope and definitions

- The Directive applies to all “sales contracts” which a natural or legal person (“seller”) concludes, in the course of its “trade, business, craft or profession”, with a “consumer” (purchaser), in relation to goods, whether by way of distance selling or in an actual retail outlet, online or offline (Art. 1 (1) and Art. 2 (a)–(c), Recital 7, p. 3).
- “Goods” means “tangible movable items” with the exception of (Art. 2 (e))
 - those sold by authority of law - e.g. execution - and
 - water, gas and electricity unless they are sold in limited quotas.
- The Directive does not apply
 - to contracts concluded earlier than two years after its entry into force (Art. 20 (1)), or
 - to “tangible” data media used exclusively as a carrier for the supply of digital content, e.g. DVDs and CDs; these are subject to the parallel proposal for a Directive on the supply of digital content [COM(2015) 634; [cepPolicyBrief](#)] (Art. 1 (3)), Recital 13).
- It also applies to “digital content” (e.g. software) that is embedded into goods such as kitchen appliances and toys where the function is “subordinate to the main functionalities of the goods” (Recital 13).

► Full harmonisation

- The Directive provides for full harmonisation in the areas which it regulates. In this regard, divergent national legislation – including that which is more stringent – is not permitted (Art. 3).
- The Directive does not, however, affect general national contract law, “insofar as” it does not regulate those “aspects” (Art. 1 (5)). Member States may therefore adopt more far-reaching provisions on limitation periods, commercial guarantees and rights of redress (Recital 14).

► Conformity and “lack of conformity” of the goods with the contract

- Goods conform with the contract where they (Art. 4 (1) and (2) and Art. 5)
 - correspond to the agreed quantity, quality and description;
 - are fit for the purpose which was indicated by the consumer and accepted by the seller;
 - possess the qualities and performance capabilities indicated in a pre-contractual statement which forms an integral part of the contract;
 - are fit for the purposes for which goods of the same description would ordinarily be used;
 - are delivered along with accessories - such as instructions or packaging - in such a way as the consumer may “reasonably” (Recital 18) “expect”, and
 - possess qualities and performance capabilities which are normal and to be expected in goods of the same type, also taking into account any public statements made by the seller or manufacturer prior to conclusion

of the contract.

- Otherwise the goods lack conformity with the contract. This is also the case where the goods (Art. 6, 7 and Recitals 20 and 21)
 - were installed incorrectly by the seller, or - by the consumer 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 establishing conformity with the contract and reversal of the burden of proof**

- The seller is liable for “lack of conformity” (defects) which exists at the relevant “time” (Art. 8).
- The relevant time is the time at which the consumer, or a third party or carrier indicated by the consumer, has acquired physical possession of the goods (Art. 8 (1), Recital 24).
- Where the goods have to be installed, the relevant time (Art. 8 (2))
 - in the case of installation by the seller: the time at which the latter completes this installation;
 - in the case of goods “intended” for installation by the consumer: on expiry of a “reasonable” time for the installation, but not later than 30 days from handover.
- In the case of a “lack of conformity” which “becomes apparent” within two years after 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)).

▶ **Consumer’s rights under warranty (“remedies”) in the case of a “lack of conformity with the contract”**

- In the case of a “lack of conformity” of the goods with the contract, the consumer can demand, firstly, repair or replacement (“Stage 1”) or - where these remedies fail or are excluded - a price reduction or “termination of the contract” (“Stage 2”) (Art. 9-13).
- The consumer has no obligation to effect notification within a certain time after the defect becomes apparent. Member States are no longer allowed to introduce such a notification requirement (Recital 25).

“Stage 1”: Repair or Replacement

- Repair or replacement must be “free of charge”, completed within a “reasonable” time and without any “significant inconvenience” to the consumer (Art. 9 (1) and (2), Recital 28).
- The consumer’s right to choose does not apply where an option is impossible, unlawful or involves “unreasonably” high costs for the consumer (Art. 11, Recital 27).
- Where the consumer installed the goods before the lack of conformity with the contract “became apparent”, the seller must – in the case of replacement delivery – remove the goods and install the replacement goods, or bear the costs thereof (Art. 10 (2)).
- The consumer does not have to pay for any use made of the defective goods prior to replacement (Art. 10 (3)).

“Stage 2”: Price reduction or “termination of the contract” (rescission)

- The consumer can demand a proportionate reduction of the price or terminate the contract by any form of notice, if repair or replacement by the seller is impossible or unlawful, was or will not be carried out within a “reasonable” period or would involve “significant inconvenience” to the consumer (Art. 9 (3), Art. 12 and Art. 13 (1)).
- The consumer may terminate the contract even where the lack of conformity is “minor” (Recital 29).
- The purchase price must be reimbursed by the seller and the goods returned by the consumer without undue delay and not later than 14 days after termination of the contract (Art. 13 (3) (a) and (b)).
- The consumer must provide the seller (Art. 13 (3) (c) and (d))
 - with reimbursement for any decrease in the value of the returned goods only insofar as it exceeds the usual depreciation through normal use, and no more than the purchase price,
 - with the replacement value in the event of the destruction or loss of the goods, unless the destruction or loss is due to a lack of conformity with the contract.

▶ **Time limits for claims under warranty**

- The consumer may assert claims due to a lack of conformity with the contract where this lack “becomes apparent” within two years after the relevant time (cf. Art. 8) (Art. 14).
- National limitation periods cannot end earlier (Art. 14).

▶ **Rights of redress and commercial guarantees**

The Directive regulates requirements applicable to commercial guarantees and rights of redress against intermediaries (Art. 15 and 16).

Main Changes to the Status Quo

- ▶ This fully-harmonising Directive will now apply with regard to all sales of goods between a seller and a consumer, instead of the minimum harmonisation approach of the Consumer Goods Directive 1999/44/EC, which will be repealed.
- ▶ The reversal of the burden of proof in the case of a lack of conformity with the contract will be extended from six months to two years.
- ▶ In future, the obligations for consumers to notify defects, which apply in some countries, will be unlawful.
- ▶ In future, the consumer will also be able to terminate the contract for a minor lack of conformity.
- ▶ The two-year period of liability is now also obligatory for second-hand goods and can no longer be shortened by way of the contract.

Statement on subsidiarity by the Commission

Only full harmonisation can remove the current legal fragmentation (p. 7).

Policy Context

Following the failure of the Regulation on a Common European Sales Law [COM(2011) 635], the EU Commission, in the Strategy for the Digital Single Market [COM(2015) 192; see [cepPolicyBrief](#)], announced uniform provisions regarding “key mandatory EU contractual rights” in relation to online sales of goods. At the end of 2015, it published its original proposal for a Directive [COM(2015) 635; see [cepPolicyBrief](#)], which was strongly criticised for being restricted to distance selling. Both the EU Parliament and the Council called for the scope to be extended to include the conventional retail trade. In its amended proposal, the Commission has complied with this request.

Legislative Procedure

31 October 2017 Adoption by the Commission

Options for Influencing the Political Process

Directorates General:	DG Justice and Consumers (leading)
Committees of the European Parliament:	Internal Market (leading), Rapporteur Pascal Arimont (PPE); Culture and Education; Law
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Justice and Consumer Protection (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

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

ASSESSMENT

Economic Impact Assessment

The Directive is the first step towards full harmonisation of consumer protection law – necessary for completion of the internal market: It **fully harmonises**, i.e. converges substantial parts of **consumer guarantee law for sales of goods EU wide and thus reduces barriers in cross-border trade**. In addition, it strengthens consumer protection on an EU-wide basis. The fact that – by contrast with the original draft – the amended proposal is not restricted to distance selling of goods but also applies to conventional trade, is appropriate. **Retaining uniform rules for both distance selling and conventional retail trade avoids distortions of competition between the two sales channels** which, in practice, are often difficult to separate: Many online traders operate flagship stores, and retail businesses often also offer their goods on the internet. Traders – and purchasers – would otherwise have to take account of varying provisions in the Member States, for the two sales channels, as well as for offline sales which are not fully-harmonised, and this would inhibit trade. The basic disadvantage of full-harmonisation, however, is that it eliminates competition between the regulatory systems of the Member States, which would otherwise promote innovation and efficiency, and does not take account of differences in the traditions and preferences of the Member States. This conflict of objectives is not resolvable however.

The significant extension of the reversal of the burden of proof from 6 months, in most Member States, to two years, results in a de facto two-year period of liability for the seller even for defects in goods arising after the transfer of risk because, in many cases, the seller will be unable to prove that the goods were originally in conformity with the contract. It does not take account of the fact that, over time, there is increased likelihood that a defect did not already exist on transfer of risk but is due to wear and tear or improper use. It also creates false incentives for the consumer to handle the goods in a careless manner. On the other hand, it does make the seller pay closer attention to the quality of its goods. **The consumer’s legal position is also significantly improved** by the fact that, in future, it will be able to terminate the contract even for minor defects and will not have to give prompt notification of defects or pay any compensation for making normal use of the goods. The consumer could be tempted, despite early discovery of the defect, to delay asserting claims under warranty until shortly before expiry of the two-year period and to keep using the goods until then at the seller’s expense. All **this will make itself felt in higher prices**.

Legal Assessment

Legislative Competency

The Directive is correctly based on the power to approximate laws in the internal market (Art. 114 TFEU). It will remove differences in national guarantee law which are a barrier to cross-border trade.

Subsidiarity

Unproblematic. The convergence of consumer contract law can only take place effectively at EU level.

Proportionality with respect to Member States

The Directive constitutes radical intervention in national laws on the sale of goods. It significantly raises the level of consumer protection as compared with the existing Consumer Goods Directive (1999/44/EC) and also brings about a full-harmonisation which considerably restricts the legislative freedom of the Member States. They are not permitted to adopt any rules which diverge from the Directive even where they provide greater protection for the consumer. Their primary authority, to adapt national sales law flexibly where necessary and to continue to develop it independently, is also further restricted, and not only with regard to cross-border but also for purely domestic sales

of goods. The Directive could therefore be in breach of the principle of minimum intervention. A continuation of minimum harmonisation as a “less severe measure” is, however, ruled out. The elimination of legal divergences arising from such harmonisation is only possible by way of full-harmonisation.

Restricting full-harmonisation to online law, as proposed in the Commission’s initial draft, is to be rejected because it would lead to unjustified legal fragmentation.

The question to be considered is whether, on the whole, the expected positive consequences of the proposal justify encroachment upon the sovereignty of the Member States. Firstly, it must be taken into account, on the one hand, that not the whole of national sales law is being fully harmonised because the Directive is limited to consumer guarantee law and excludes contracts between companies and essential parts of general contract law such as the conclusion of contracts, impossibility, default on acceptance, damages and limitation periods. On the other hand, however, the latter do interact with guarantee law and would also – although this is not part of the proposal – have to be harmonised in order to create real legal clarity. This, however, would further increase the Member States’ loss of sovereignty.

Secondly, insofar as the Directive lowers the level of consumer protection in certain Member States, this is justified as contributing to the overall coherence of the law on consumer contracts if – as here – the Directive results in a noticeable improvement in the EU-wide level of protection (CJEU, Case No. C-233/94, para. 48).

Disproportionate, however, is the fact that there are no special rules for cases where application of the general rules appears to be inappropriate. If, for example, the defect typically only appears later – as in the case of construction materials – or the seller fraudulently conceals the defect, the consumer should also be allowed to assert his rights where the defects only become “apparent” after expiry of the two-year deadline. The Directive should provide for specific exceptions or an opt-out clause in this regard.

Thirdly, **the Directive contains numerous ambiguities that have to be eliminated.** Some points are only partially regulated – e.g. defects in title, return modalities, transfer of risk – or are unclear so that supplementary national law will have to be applied or there is a risk of differences in interpretation. All this undermines the envisaged harmonising effect of the Directive and creates legal uncertainty. In particular, there is a need for clarification on the extent to which it precludes national regulations, i.e. where and under what conditions Member States may provide supplementary provisions, e.g. rights to damages for a lack of compliance. Fourthly, major obstacles remain, such as language barriers, distances and litigation risks.

Before the Directive can genuinely promote cross-border trade to a sufficient degree, it is essential to eliminate as far as possible its aforementioned weaknesses.

Compatibility with EU Law in other respects

Impairing the legal position of sellers constitutes an intervention in their freedom to conduct a business which is protected as a fundamental right (Art. 16 EU Charter of Fundamental Rights). A legal justification for this may arise from the fact that the Commission is aiming to achieve a high level of consumer protection (Art. 114 (3) TFEU) and in so doing has to make up for individual reductions in this level in some Member States. **The Directive**, however, also **opens up opportunities for abuse by consumers.** In order to comply with proportionality, it is therefore necessary to ensure that a consumer, by combining his improved rights under warranty, cannot purposely obtain unjustified advantage to the detriment of the seller, to an extent which goes beyond the aim of the Directive. Thus, where defects become apparent at an early stage, the consumer could delay asserting claims until the end of the two-year period in order to gain free use of the goods in the meantime. In order to avoid unreasonable detriment to sellers, it may be possible to oblige consumers to notify apparent defects within a reasonable period or pay a usage charge after expiry of this deadline, without however losing their rights under warranty for failure to report defects. In addition, the obligatory two-year seller’s liability period is too long for second-hand goods.

For the sake of uniformity of the law on consumer contracts, the content of **the Directive must be brought into line with the Digital Content Directive**, [COM (2015) 634], which is being proposed in parallel. Guarantee law for the sale of goods and for the provision of digital content should only differ insofar as this is justified due to the specific subject matter of contractual performance. The scope of both Directives must be clearly defined as digital content is increasingly being integrated into goods (e.g. smart phones or “smart” fridges). The fact that the Directive will also apply to the sale of goods with embedded digital content which has a “subordinate” function to that of the goods, is too vague and gives rise to legal uncertainty. One possibility would be to apply the one or the other Directive dependent e.g. on the fact whether the defect lies in the integrated software or the “hardware” of the good.

Impact on German law

The German Civil Code (BGB) must be amended. In particular, the reversal of the burden of proof in Section 476 must be extended from six months to two years and the exclusion of the rescission in case of a minor defect in Section 323 (5), sentence 2, must be abolished. Changes are also necessary to the law on defects in title. The requirement for the defect to “become apparent” within the warranty period must be regulated as an additional prerequisite. Longer national limitation periods, such as that in Section 438 (1), No. 1 and 2 and Section 438 (3) BGB, remain possible but are useless if the defect only becomes “apparent” after expiry of the two-year warranty period.

Conclusion

The Directive extensively fully harmonises consumer guarantee law for sales of goods and thus reduces barriers in cross-border trade. Retaining uniform rules for both distance selling and conventional retail trade, avoids distortions of competition between the two sales channels. The consumer’s legal position is significantly improved which will be reflected in higher prices. The Directive contains numerous ambiguities which must be eliminated and opens up opportunities for abuse by consumers. The Directive must be brought into line with the Directive on the supply of digital content. Before the Directive can genuinely promote cross-border trade to a sufficient degree, it is essential to eliminate as far as possible its weaknesses.