

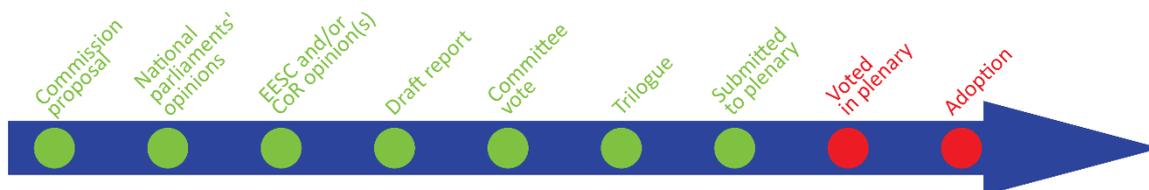
## Consumer sale of goods

### SUMMARY

On 29 January 2019, the European Parliament and the Council reached a provisional agreement on the Commission proposal for a new directive on the consumer sale of goods. The Commission's original proposal, from 2015, which was intended to lay down rules on online and other distance sales of goods only, was replaced on 31 October 2017 by an amended version. This sought to replace entirely the existing Consumer Sales Directive dating from 1999, and regulate contracts concluded both online and offline. The provisional agreement on the proposal reached between the Parliament and Council would allow Member States to decide on a legal guarantee of longer than two years and extend the period during which it is presumed that the goods were faulty from the start. Parliament is due to vote on the agreement during the March II 2019 plenary.

**Amended proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the sales of goods and amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council**

<i>Committee responsible:</i>	Internal Market and Consumer Protection (IMCO)	COM(2015) 635 9.12.2015,
<i>Rapporteur:</i>	Pascal Arimont (EPP, Belgium)	COM(2017) 637, 31.10.2017.
<i>Shadow rapporteurs:</i>	Lucy Anderson (S&D, United Kingdom) Anneleen van Bossuyt (ECR, Belgium) Morten Løkkegaard (ALDE, Denmark) Dennis De Jong (GUE/NGL, the Netherlands) Pascal Durand (Greens/EFA, France) Marco Zullo (EFDD, Italy) Mylène Troszczynski (ENF, France)	2015/0288(COD) Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	First-reading vote in plenary.	



## Introduction

In December 2015, the Commission proposed a directive on contracts for online and other distance sales of goods, which was to partially replace the existing Consumer Sales Directive with regard to both online and offline distance sales. Unlike the Consumer Sales Directive, the proposed online sale of goods directive would provide for maximum harmonisation, thereby prohibiting Member States from introducing a higher level of consumer protection than envisaged in the directive. On 31 October 2017, the Commission amended the above proposal to include offline sales within its scope also.

## Context

The proposed directive is part of the [digital single market \(DSM\) strategy for Europe](#) and is accompanied by several other proposed legal instruments, notably the [digital content directive](#) (2015/0287(COD)) and the [portability of digital content directive](#) (2015/0284 (COD)). Unveiled in November 2017, the amended proposal was made following the outcome of the [regulatory fitness check](#) (REFIT) of consumer and marketing law, completed in May 2017.

## Existing situation

The subject matter of the proposal is currently regulated by the Consumer Sales Directive ([CSD](#)) from 1999, a minimum-harmonisation directive leaving Member States the right to maintain or adopt more consumer-friendly implementing provisions. The directive applies to all consumer sales transactions. It addresses the issue of seller's liability for defects in goods sold and introduces the concept of conformity with the contract, while also providing for remedies in the event of non-conformity (defectiveness). The deadline for pursuing remedies is set at a minimum of two years, running from the moment of the delivery of the goods, and can be prolonged by national legislation. Furthermore, at least during the first six months, there is a reversed burden of proof in favour of the consumer; Member States are free to extend this period. Certain Member States have provided for longer periods of legal guarantee or, as in the case of the Netherlands, have refrained from imposing a maximum period of seller's liability for defects altogether, leaving the issue to be determined on a case-by-case basis. Under the CSD, consumer remedies for defects are divided into two groups – primary remedies (repair or replacement) and secondary remedies (price reduction or termination of contract). Member States must ensure that consumers have at least the right to exercise a primary remedy of their choice if a defect appears; they may limit consumers' recourse to secondary remedies (price reduction or termination of contract) to situations in which the primary remedy is either impossible to provide or has not been provided by the seller. However, Member States are equally free to give consumers a full choice between all remedies from the start, and some national laws provide for that.

## Parliament's starting position

Prior to the submission of the proposal under review, the Legal Affairs Committee (JURI) had adopted a [report](#) in 2013 backing the related proposed CESL (proposal dating from 2011 and subsequently withdrawn), in particular, the optional nature of the instrument and the legal form of a regulation. In its [opinion](#), the Internal Market and Consumer Protection Committee (IMCO) had suggested changing the legal form of the CESL from an optional code to a directive. In February 2014, the Parliament adopted its [first reading position](#) on the CESL, supporting the legal form of an optional instrument, but proposing to limit its scope to cross-border business-to-consumer transactions only.

## The changes the amended proposal would bring

### General issues

The proposed directive (both the original proposal from 2015 and the amended proposal from 2017) is a de facto recast of the CSD, initially limited to online and other distance contracts, but extended to all consumer sales contracts in 2017. In contrast to the current CSD, the proposal provides for maximum instead of minimum harmonisation, effectively barring Member States from introducing or maintaining more consumer-friendly rules. This means that when implementing the directive in domestic law, Member States' national legislatures will be obliged to offer exactly the same level of protection as that envisaged by the directive. In its substance, the proposed directive draws on the existing CSD or codifies the Court of Justice of the European Union's (CJEU) case law interpreting CSD rules.

### Conformity of goods

#### *Notion of conformity of goods*

Under the CSD, goods have to be in conformity, inter alia, with the description given by the seller. The proposed directive introduces a direct reference to the **content** of the contract. The proposal introduces a new rule, whereby conformity of the goods with the contract should cover material defects, but also legal ones, meaning that goods must be free from any third-party rights, including intellectual property rights. The preamble specifies that goods should be free from any third-party right 'which precludes the consumer from enjoying the goods in accordance with the contract'. Presumably, other third-party rights (such as intellectual property rights) would not be considered a legal defect of the goods, provided that consumers can use them for personal consumption.

#### *Relevant time for analysing non-conformity*

The CSD stipulates that the relevant time for ascertaining non-conformity is the delivery of the goods (Article 5(1)). The proposal provides for a more elaborate set of rules, depending on whether the goods were installed (for instance, in the consumer's house) by the seller or under their responsibility, and whether the carrier delivering the goods was chosen by the seller or by the consumer.

#### *Presumption of non-conformity*

The proposal raises the level of consumer protection significantly by extending the period during which the presumption of non-conformity operates, to two years. Under the CSD, only if non-conformity becomes apparent within six months of delivery, is it presumed that it existed at the time of delivery.

### Buyer's remedies against seller

#### *Cascade system (hierarchy of remedies)*

First, unlike the withdrawn proposal for a common European sales law ([CESL](#)), the proposed directive upholds the 'hierarchy of remedies', whereby the consumer does not have a free choice between repair, replacement and refund, but must first accept repair or replacement (as chosen by the buyer). The consumer, if entitled to termination or reduction of price, would be allowed to terminate even if the defect were minor (in contrast, the CSD does not allow this).

Second, while under the CSD the consumer may terminate or demand a partial refund only if a repair/replacement is not available or if the seller did not complete it within a reasonable time and without 'significant inconvenience' to the consumer, under the proposal the consumer would also have a right to demand a refund in two additional

circumstances: if the seller declares that they will not complete a first-degree remedy in a reasonable time, or if it is clear from the circumstances that the seller will not complete such a remedy within a reasonable timespan. Third, a new rule provides that consumers will not be entitled to a remedy to the extent that they themselves have caused the non-conformity or its effects.

#### **Withholding of payments, termination and refunds**

The proposal introduces a new rule, whereby in cases of non-conformity, a consumer may withhold payment of any outstanding part of the price for as long as the seller does not remedy the non-conformity.

The CSD lacks any detailed provisions on termination of a contract. The proposal fills that gap with a number of detailed rules. First, the seller must reimburse the price 'without undue delay' and no later than 14 days from receiving the notice of termination. The seller must also bear the costs of reimbursement (for instance, banking fees). Second, the proposal makes it clear that the consumer should send back the goods under the same timing conditions and at the seller's expense.

If some goods are defective and the consumer has a right to terminate the contract, they may do so only in relation to defective goods and in relation to 'other goods, which the consumer acquired as an accessory' to the defective ones. Furthermore, two rules oblige the consumer to make payments to the seller in case of termination. Under the first one, if the goods were destroyed or lost (even with no fault on the part of the consumer), the consumer must – upon termination – pay to the seller the monetary value that the goods would have had on the date of return. Under the second one, the consumer must also pay the seller for the decrease in the value of the goods, if such a decrease exceeds 'regular use', but not more than the price originally paid.

#### **Time limits and deadlines**

Under the proposal, the seller would be liable to the consumer if the non-conformity appears within two years of delivery. National law may not impose a shorter prescription period than two years from delivery. While the CSD features the same rules, the novelty is that the Member States will no longer be allowed to provide for an exception (that is, a shorter period of liability) for second-hand goods. Furthermore, the period of liability of the seller will be identical to the timeframe of the presumption of non-conformity.

#### **Commercial guarantee**

The regime concerning the commercial guarantee is the only part of the proposal that is subject to minimum harmonisation. Therefore, the Member States may enact rules providing for a higher level of consumer protection with respect to guarantees. Furthermore, under recital 14, Member States are explicitly allowed to fill legal gaps with regard to guarantees.

## **Preparation of the proposal**

#### **Results of the REFIT exercise**

In May 2017, the Commission concluded its regulatory fitness check ([REFIT](#)) of consumer and marketing law. The [main report](#), accompanied by reports on the [public consultation](#), [country reports](#) and [additional evidence](#), was devoted to other directives (on unfair terms, [unfair commercial practices](#), [price indication](#), [misleading and comparative advertising](#) and [injunctions](#)). The CSD was addressed in two separate studies outside the scope of the main report: one on the [method of harmonisation](#) (minimum versus maximum) and another on the [extension of certain rights](#) under the directive.

**Study on the method of harmonisation**

The study on the method of harmonisation, prepared by a consortium of external contractors, generally favoured the policy option of switching from minimum harmonisation (whereby Member States may enact more consumer-friendly rules than those in the directive) towards maximum harmonisation (whereby Member States' national law may not offer consumers a higher level of protection than that provided for in the directive). While the study acknowledged that in some Member States the guarantee period is longer than two years, it nevertheless argued that most defects become apparent within the first two years, and that eliminating the possibility for Member States to extend the period of legal guarantee will 'enhance transparency and boost consumer confidence across the Single Market'.

Concerning the extension of the period for reversing the burden of proof from six months to two years, the study pointed out that many traders already de facto accept claims from consumers without requiring proof throughout the two-year period of legal guarantee, and therefore making this a legal rule would not bring about a significant change. As regards the hierarchy of remedies, the study pointed to a consumer poll from 2015, in which some 77 % of European consumers found it 'reasonable' that they cannot claim a refund for a defective good when it breaks down for the first time. Therefore, in the view of the study, granting consumers a truly free choice of remedies (between repair or replacement, and refund or reduction of price) is not necessary.

**Study on the extension of rights**

The study on the extension of certain rights under the CSD, also prepared by a consortium of external contractors, aimed at addressing three main issues:

- determining the costs and benefits of extending the legal guarantee period to more than two years for all products, or of applying varying guarantee periods for a selection of products depending on product type, value or life span as declared by the manufacturer;
- determining the costs and benefits of giving consumers the right to terminate the contract if the seller fails to repair or replace a defective good within a specified deadline;
- determining the costs and benefits of introducing an obligation on sellers to inform consumers about the availability of spare parts and introducing an obligation on sellers to keep or facilitate access to spare parts for all or some products.

The study found that introducing a uniform legal guarantee period extending beyond two years would increase the level of consumer protection in 23 Member States. The study noted that, according to some stakeholders, such a provision would also be environmentally friendly, leading to a reduction of waste and to tackling the problem of [planned obsolescence](#) (whereby producers lower the quality of goods on purpose, so that they break down faster and force consumers to buy new ones). On the other hand, the study noted that businesses claim they would face higher compliance costs, which some of them would try to transfer onto consumers. Nonetheless, around a third of business respondents would see the extension of the legal guarantee to three or five years as not generating additional costs.

Concerning a differentiated legal guarantee period, the study noted that 31 % of businesses interviewed expected such a system to generate 'major costs', whilst 30 % expected 'no costs'. The study considered the Dutch and Finnish differentiated legal guarantee systems to be 'rather complex'. Concerning the possibility of devising such a

system at EU level, the study considered that there is 'limited evidence to suggest' that it would be possible, given its complexity and the need for continual updates in order to follow the changes in the types and quality of goods offered on the consumer market.

Concerning the introduction of a fixed deadline within which sellers would have to repair or replace faulty goods, the study noted that it was 'generally favoured by consumers' associations as a way of protecting consumers against delays in remedies'. However, the authors of the study pointed out that most sellers solve complaints within two weeks anyway, and argued that imposing a specific deadline could be problematic for sellers who need to wait longer for producers or service centres to carry out a repair or replacement. Concerning the introduction of an obligation to inform consumers about the availability of spare parts for consumer products, the study highlighted existing evidence which suggests that such a rule would influence consumers to purchase more repairable products.

## Stakeholders' views

### Consumers

In 2016, reacting to the original proposal, the European Consumer Organisation (BEUC) [considered](#) that the proposed rules 'do not represent a high standard of protection for consumers' and that they will result in 'a considerable and highly undesirable diminution of consumer protection in a number of key areas due to its full harmonisation approach'. BEUC was particularly concerned, inter alia, about the maximum two-year legal guarantee period for consumer goods, beyond which consumers would have no remedy against the seller, and about the introduction of a 'strict hierarchy of remedies regime, which strips consumers in a number of Member States of a higher level of protection'.

### Businesses

In December 2017, the EU-wide SME federation, UEAPME, issued a [position paper](#) on the outcome of REFIT, in which it highlighted the need to reinforce the right of redress of the seller towards the producer. UEAPME noted that it is 'of crucial importance for the seller to have a watertight right of redress. It should therefore be clearly provided that the producer cannot refuse the redress and has to pay for all the expenses the seller had to make in order to be able to provide for the remedy.'

The EU-wide federation of national business interest representations, BusinessEurope, reacted to the Commission's original (2015) proposal in an April 2016 [position paper](#), where it argued that many of the rules favour consumers at the expense of businesses, thereby creating an imbalance. In order to tilt the balance more in favour of businesses, the federation advocated, inter alia:

- deleting the rule that consumer goods must be free of third-party rights;
- introducing a requirement that consumers must notify any defect by a specific deadline (or will lose their remedy);
- deleting the rule giving consumers a reasonable time to install the goods (if they are installing the goods themselves) before the period of the legal guarantee starts to run;
- limiting the period of reversed burden of proof in favour of consumers from two years to six months only;
- not allowing consumers to terminate if the defect is minor;
- allowing sellers to decide about the method of collecting faulty goods from consumers;
- making the rule on commercial guarantees subject to maximum harmonisation.

### Legal practitioners

In March 2016, the Council of Bars and Law Societies of Europe (CCBE) published a [position paper](#) reacting to the original proposal from December 2015. In it, the CCBE voiced its regret that the proposal does not extend to commercial sales contracts (business-to-business), arguing that just like consumers, SMEs in particular deserve to be protected from stronger business partners. Furthermore, putting the burden of consumer protection only on the final seller (who deals directly with the consumer) is, in their view, unfair. The CCBE further argued in favour of harmonising the rules on tangible and digital sales (the proposed [digital content and services directive](#)), arguing that incoherence between the two instruments would undermine the overall goal of consumer protection. The CCBE supported the choice of maximum, instead of minimum harmonisation. Concerning some more detailed aspects of the proposal, it suggested to reduce the period of reversed burden of proof from two years to six months only, and to prevent consumers from terminating if the defect is minor.

### Advisory committees

In April 2016, the European Economic and Social Committee (EESC) adopted an [opinion](#) on the proposal (rapporteur: Jorge Pegado Liz, Portugal). The EESC criticised the choice of legal basis (proposing Article 169 TFEU instead of Article 114 TFEU) and the maximum-harmonisation approach. On the substance of the proposal, the EESC would prefer to see the requirement of durability built into the definition of conformity, which would influence the duration of the seller's liability for defects. The EESC points out that in various Member States, consumers have the right to reject defective goods and claim immediate reimbursement, which would be curtailed by the directive. The EESC considers that the rule requiring consumers to pay (upon termination of the contract) for the use, deterioration or loss of a defective good is 'highly questionable' and even contradicts CJEU case law ([Case C-404/06 Quelle](#)). The EESC recommends laying down time limits that would take into account the existing guarantee periods in some Member States, such as Finland, the Netherlands, Sweden and the UK.

### National parliaments

A number of [national parliaments](#) examined the proposal. Only the French Senate adopted a [reasoned opinion](#) on subsidiarity, indicating that 'harmonising protection for consumers who make online purchases at European level must not prevent a Member State from offering its nationals a higher level of protection'. Therefore, the French senators concluded that Article 3 of the proposal – which introduces total harmonisation 'do[es] not allow the Member States to maintain and develop a higher level of consumer protection', thereby violating – in their view – the principle of subsidiarity.

### Parliamentary analysis

In September 2015, the Members' Research Service of EPRS published an in-depth analysis on [Contract law and the Digital Single Market](#), in which it explored the regulatory options available to the EU legislature with regard to the contract law-related aspects of the digital single market strategy. Subsequently, the Members' Research Service hosted a [policy hub](#) on the subject. In February 2016, the Parliament's Policy Department for Citizens' Rights and Constitutional Affairs organised a [workshop](#) on new rules for contracts in the digital environment, also encompassing the online sales directive proposal. In April 2016, EPRS published an [implementation appraisal](#) on consumer sales. Finally, in July 2017, EPRS published an [impact assessment](#) on proposed EP amendments extending the scope of the proposal to offline sales contracts, according to which the

harmonisation of sales rules across Member States and sales channels would reduce the fragmentation of the legal framework and enhance its clarity and transparency.

## Legislative process

### Committee referral in Parliament and the draft report

The proposal was referred to the Parliament's Committee on the Internal Market and Consumer Protection (IMCO), (rapporteur: Pascal Arimont, EPP, Belgium), with the Committee on Legal Affairs (JURI) as associated committee under Rule 54 of Parliament's Rules of Procedure (rapporteur: Heidi Hautala, Greens/EFFA, Finland). However, in the end, the JURI committee did not adopt an opinion on the proposal. The IMCO rapporteur presented his [draft report](#) on 18 November 2016. The most important modification he proposed at that stage involved expanding the scope of the directive to both online *and offline* sales.

### Initial work in the Council

In the Council, the proposal was referred to the Working Party on Civil Law (Contract Law). On 11 March 2016, the Council discussed the proposal in an [open session](#).

### Report of the IMCO committee

Following the publication of the amended Commission proposal, the IMCO committee adopted its [report](#) on 22 February 2018. The committee also voted in favour of opening trilogue negotiations and the mandate was confirmed at the February II plenary session. The committee suggested excluding from the directive's scope any embedded digital content or digital services embedded in tangible goods. Furthermore, the directive would not apply to the sale of live animals.

The directive would theoretically become a minimum-harmonisation instrument (Article 3(1)); however, **most rules in the directive would actually be, as a matter of 'exception', maximum-harmonisation rules** (article 3(2)). Therefore, Member States would be allowed to:

- give the consumer the right to **choose between repair or replacement**, even if one of the options would be disproportionate for the seller (Article 11 in conjunction with Article 3(2));
- extend the **time limit for pursuing consumer remedies** beyond two years (Article 14 in conjunction with Article 3(2));
- maintain or introduce provisions on remedies for **hidden (latent) defects** (Article 3(3));
- maintain or introduce provisions on the consumer's **short-term right to reject** the goods in case of non-conformity (Article 3(3));
- maintain but not introduce new rules concerning the period during which a defect becomes apparent in goods which were transported by a carrier chosen by the consumer, i.e. a possibility to extend that deadline beyond two years (Article 8(1) in conjunction with Article 8(2a) and 3(3)).

A newly inserted Article 3a would provide that the goods must meet the **requirements of conformity** set out in article 4 (subjective requirements for conformity), article 5 (objective requirements of conformity), article 6 (conformity requirements in case of goods requiring installation) and article 7 (lack of third-party rights). The new terminology – 'subjective' and 'objective' requirements for conformity – follows the terminology used in the proposal for a digital content and services directive, which the co-legislators examined in parallel. What is important is that both subjective and objective criteria would be mandatory, and would have to be fulfilled jointly.

In the case of fitness for purpose, the goods would have to be fit not only for any purpose made known by the consumer and accepted by the trader explicitly, but also for any purpose 'that is a reasonable purpose in the circumstances'. Member States may maintain a shorter period, but not shorter than one year, for the pursuit of consumer remedies in the case of **second-hand goods**, but only if the consumer actually had an opportunity to examine them in person before concluding the contract (article 8(2b)).

Instead of the two-year period of **reversed burden of proof** in the consumer's favour, the report would provide for a one-year period (article 8a(1)). For second-hand goods that the consumer had examined personally, that period may be reduced to six months. The two-year **legal guarantee period** would be suspended until the consumer receives the goods replaced or repaired (Article 9(1b)). In case of replacement with a new product or installation of new parts, this period would start to run once again (Article 9(1c)).

Concerning the consumer's right to pursue a **secondary remedy** (termination or price reduction), this would be possible also if a 'lack of conformity appears despite the trader's attempt to bring the goods into conformity' (article 9(3)(b a)), as well as in cases where 'the lack of conformity is of such a serious nature as to justify the immediate price reduction or termination of the contract' (article 9(3)(c a)). However, the open-ended notion of a 'serious nature' of the non-conformity is not defined in any way, and no interpretive guidelines are provided in the preamble, leaving it to the parties to agree upon or, ultimately, to an alternative dispute resolution body or court to interpret.

A new article 9a would lay down detailed rules on the **repair of goods**. Specifically, the trader would be bound by a one-month deadline to complete the repair and would have to perform it 'without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required' them. Just like repair, **replacement** would also have to be completed within a deadline of one month (article 10(3a)). The deadline would be calculated from the moment when the trader has acquired physical possession of the goods. In both cases, the consumer would have a right to withhold payment of any outstanding part of the price until the repair or replacement takes place.

A new rule on the trader's **liability in damages** towards the consumer is inserted (article 13a). Damages would be awarded 'for any financial loss arising from the lack of conformity... or a failure to supply' and would 'as far as possible, place the consumer in the position in which he would have been had the goods been in conformity with the contract'.

A new rule on **commercial guarantee** (article 15(5a)) is inserted, whereby a producer giving a guarantee of durability of goods of two years or more would be liable directly to the consumer with regard to repair or replacement of the goods, and would have to repair or replace them no later than within one month from obtaining them.

A newly inserted article 20a provided that five years after the directive's entry into force, the Commission must **review** its application and report back to the Parliament and Council.

### **Council's general approach**

At its meeting of 6-7 December 2018 the Justice and Home Affairs Council adopted a [general approach](#), thus enabling the start of trilogue negotiations with the Parliament. The general approach focused on coordinating the proposal for the consumer sales directive with the proposal on digital content, on the specific way of regulating tangible

goods with digital content, the issue of updates for digital elements in tangible goods, as well as ensuring a balance between consumers and businesses. The Council noted that the general approach was agreed with full knowledge of Parliament's position.

The Council argued that goods with the embedded digital content or embedded digital services should be regulated only under this directive and not also under the digital content and services directive. It referred to such goods as '**goods with digital elements**' and defined them as all goods that 'incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions'.<sup>1</sup>

The Council agreed with the Commission's proposal to keep the two-year **legal guarantee period**, however, it would allow Member States to go beyond this in their national legislation (article 8a(1a)). For goods with digital elements where the contract provides for continuous supply of digital goods or services, the liability would also be two years from the time of delivery, or more in case of a long-term contract. Seller would be required to **provide updates** necessary to keep the goods with digital elements in conformity, including security updates. In case of goods with digital elements delivered in a single act of supply the updates would be required for two years.<sup>2</sup>

Like the Parliament, the Council also proposed a one-year period of the **reversed burden of proof** in the consumers' favour, however, it suggested that Member States should be allowed to extend this to two years. For goods with digital elements where the contract provides for continuous supply of digital content or services, the burden of proof would be on the seller for two years or more, depending on the duration of the contract.<sup>3</sup> Member States would also be allowed to introduce provisions that consumers must inform the seller of lack of conformity within two months from the date on which they detected the lack of conformity.

The Council agreed with Parliament's amendments on the **hierarchy of remedies**, including the possibility of requiring an immediate price reduction or termination if this is justified by the serious nature of the lack of conformity. However, it suggested that consumers should not be entitled to terminate a contract if the seller can prove that the lack of conformity is only minor (article 9(3a)). The general approach did also not foresee that the legal guarantee should stop during the time used to repair or replace the product or that the new two-year legal guarantee should start in case of replacement with a new product or a new part.

The Council also proposed that the deadline for the application of the directive be prolonged by six months.

### **Provisional agreement**

Joint trilogue meetings, on both this proposal and the digital content proposal, started on 12 December 2018 and ended on 29 January 2019 with provisional agreements on both files. The two institutions agreed that **goods with digital elements** would be regulated only through the sales of goods directive and not through the directive on contracts for digital content and services (article 2a).

According to the [provisional agreement](#), the **legal guarantee** would remain two years, with Member States allowed to maintain or introduce longer time limits (article 8(3)). The **reversed burden of proof** would be one year, while allowing Member States to introduce or maintain a two-year period (article 8b(1a)). For goods with digital content that provide for continuous supply of the digital content or digital services, the reversed burden of

proof would be at least two years (article 8b(2)). Consumers would have a right to necessary **updates** during the period of time they may 'reasonably expect given the type and purpose of the goods and the digital elements' and throughout the period of the contract where the sales contract provides for a continuous supply of the digital content or service (article 5(2a)). The time necessary for repair of a product would not suspend the time-limit of the legal guarantee and replacement of the product or its part would not re-start it. Member States would also be allowed to require consumers to inform the seller of lack of conformity within two months from the date on which they detected the lack of conformity (article 8c). The seller would be required to complete the repair within 'reasonable time' (article 10).

Article 9a preserves the **hierarchy of remedies** from the proposal: the consumer would be entitled to choose between repair and replacement (with certain restrictions), but would be able to request a reduction of the price or terminate the contract only after an initial repair or replacement did not prove to be successful. However, in cases of a serious lack of conformity the consumer would be able to demand a reduction of price or terminate the contract without first going through repair/replacement. The consumer would never be entitled to terminate a contract if the seller can prove that the lack of conformity is only minor (article 9), even if earlier repair/replacement proved unsuccessful.

Producers that decide to offer consumers a **commercial guarantee of durability** for a certain period of time will be liable directly to the consumer for the entire period of the commercial guarantee with regard to repair or replacement of the goods within a reasonable period of time (article 15).

The agreement incorporates the Parliament's demand to require Member States to ensure that consumers have information on their rights and how to enforce them (article 17a). It also requires the Commission to conduct a review of the application of the directive five years after its entry into force (article 22a).

The directive would enter into force 20 days after its publication in the Official Journal and would need to be implemented by the Member States two and a half years after that (article 22).

#### **Formal adoption of the compromise text**

The Council's Committee of Permanent Representatives (Coreper) confirmed the agreement on 6 February 2019. The IMCO committee approved it on 20 February 2019. Parliament is due to vote on it during the March II plenary session.

## **References**

[Contracts for online and other distance sale of goods](#), European Parliament, Legislative Observatory.

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Dalla Pozza V. et al., [Online and other distance sales of goods: Impact assessment of substantial amendments](#), EPRS study, PE 603.258 (2017).

Remáč M., [Implementation appraisal: Contract rules for online purchase of digital content and tangible goods – Part of Digital Single Market](#), EPRS, European Parliament, PE 573.293 (2016).

Milà Rafel R., (2016). '[Intercambios digitales en Europa: las propuestas de directiva sobre compraventa en línea y suministro de contenidos digitales](#)', *Revista CESCO de Derecho de Consumo* 17 (2016): 11-44.

## Endnotes

- <sup>1</sup> The Council's definition did not make a distinction between main and subordinate functions. On the other hand, in the recitals of this proposal the Commission suggested that the directive should apply to the digital content embedded in goods in such a way that 'its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods'. A similar description of the embedded content was mentioned in the recitals of the proposal for the [digital content directive](#). The IMCO committee's [report](#) on the proposal for the digital content directive defined embedded digital content or digital service as 'digital content or a digital service pre-installed in a good'.
- <sup>2</sup> The IMCO committee's [report](#) on the proposal for the digital content directive also suggested a liability period of two years from the time of delivery for embedded digital content. It suggested that the trader should provide the consumer with updates 'during a reasonable period of time'.
- <sup>3</sup> Parliament's negotiators argued also for the reversed burden of proof of one year of the date of delivery for embedded content delivered by a single act of supply, and within the duration of the contract for delivery over a period of time.

*Fourth edition, based on a briefing originally drafted by Rafał Mańko. The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. To view previous versions of this briefing, please see: [PE 614.744](#) (March 2018).*

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