

The Consumer Voice in Europe

# PROPOSAL FOR A DIRECTIVE ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR DISTANCE SALES OF GOODS

BEUC Position Paper



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## Why it matters to consumers

Building upon the high level of protection under the EU consumer law acquis, the proposal concerning distance sales of goods offers opportunities for reform and innovation in the area of sales law and legal guarantees. The Commission's Proposal will have an impact on consumer rights and it is important that these rights are strengthened, not weakened. There is a need for clear rules on conformity of goods and it is crucial that consumers have remedies available in case the goods are faulty. Modern and effective rules in this field comprising on-line and offline transactions are essential for consumers when engaging in purchases across the EU Single Market.

## Summary

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**Whilst BEUC welcomes certain elements of the tangible goods proposal**, such as:

- the two year reversal of the burden of proof,
- the removal of notification requirements, or
- the equal treatment of new and second-hand goods,

**we stress that the proposed provisions do not represent a high standard of protection for consumers**; rather they will effect a considerable and highly undesirable diminution of consumer protection in a number of key areas due to its full harmonisation approach. These areas include, inter alia:

- the creation of separate legal regimes for online and offline sales,
- a blanket two year legal guarantee period beyond which consumers will have no recourse if their product develops a fault, or
- the introduction of a strict hierarchy of remedies regime, which strips consumers in a number of Member States of a higher level of protection.

Each of our concerns is further outlined in detail below. We are hopeful that the European legislator will work to ensure that consumer rights across the EU are not weakened but improved and modernised.

## 1. General Remarks: objectives of the proposed Directive

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### 1.1. Potential of the Digital Single Market and high level of protection for consumers

Building upon the high level of protection under the EU consumer law acquis, BEUC recognises that there are opportunities for reform and innovation in the area of sales law. In principle therefore, we welcome the desire to exploit the potential of the Digital Single Market, tackle obstacles to cross-border trade and increase consumer confidence.

There is an obvious need for uniform EU-wide rules on the supply of **digital content products**, due to the absence of a clear legal framework in many Member States and the lack of an EU-wide standard on consumer remedies where the digital content is not provided to the consumer or does not conform with the contract. However, when it comes to sales contracts of tangible goods, it is important to note that the 1999/44 Sales Directive already established a uniform standard in the sale of consumer goods and associated guarantees which applies regardless of whether products are sold in the shop or at a distance. In addition, the 2011/83 Consumer Rights Directive modernised and simplified contract law rules on information duties, the right of withdrawal from distance and off-premises contracts and other aspects of business-to-consumer contracts. It also sets out specific rules about the information that needs to be displayed relating to the existence of the legal guarantee. For the area of tangible goods, the need for better rules and more protection for consumers, rather than the absence of uniform rules, should be the approach in updating EU sales law.

**BEUC supports the Directive's general objective to contribute to create more opportunities in a real Digital Single Market, which benefits both consumers and businesses. However, any initiative on the legal guarantees of tangible goods must be a legislative response to a *breach of contract* by the seller and *grant tangible rights* to consumers. What is needed is a clear commitment to comprehensively protect consumer's interests.**

The benchmark for any new sales law rules on tangible goods must therefore be a **truly high level of protection for consumers**, which ensures that EU rules on non-conformity of goods with the contract are effective and the enforceability of consumers' rights are ensured.

### 1.2. The impact of the differences between national contract laws - a key barrier to trade?

In light of the challenges which go along with the digitalisation of the economy, there must be a **good balance between the need for a more competitive market and the need for a high level of consumer protection** – taking into account the fact that consumers are not on equal footing with traders and need rules protecting them from exploitive and unfair market behaviour.

**We are sceptical about whether the Proposal will achieve this balance.**

**The preamble of the Proposal shifts the focus away from the consumer's interest to what is supposedly necessary to tackle fragmentation within the Digital Single Market:** trade barriers and competition problems are identified as barriers to market integration, while the need for a high level of consumer protection is marginalised.

**Whilst BEUC agrees that there is a need for modernisation of the rules around the Digital Single Market, we consider that the European Commission overestimates the 'uncertainty faced by businesses' and the 'complexity of the legal framework' which would hinder businesses from taking part in the internal market.<sup>1</sup>**

Within the European Union, parties can freely designate the law applicable to a contract. This also holds true for business-to-consumer relationships: the Rome I Regulation, which takes into account the implications of cross-border e-commerce, allows professionals to set up contracts under their own law. Therefore standardised contract terms regularly contain choice of law clauses. Traders can usually rely on the application of whatever law was agreed upon in the contract; this includes also the interpretation, performance, nullity of the contract or breach of contractual obligations. **Accordingly, traders themselves are convinced that harmonised contract law in the EU would make 'little or no difference to their cross-border trade' activities.<sup>2</sup>**

For cross-border cases, according to the Rome I Regulation, **consumers are protected only by a weak safety** net where the chosen law provides for less protection than the mandatory consumer law of the country where the consumer resides and if the professional targets his activities to that country. Only in this case and where there is a dispute or – as in the case of non-conformity – a breach of contract by the trader, a *problem* of compliance costs might arise. Consumers from smaller Member States – often no targeted by foreign traders – regularly do not benefit from this weak safety net when shopping abroad on their own initiative. They need to be reassured by a high level of EU harmonisation to overcome uncertainties about their rights and obligations.

**Traders themselves do not see the 'need to adapt and comply with different consumer protection rules' as something that has a large impact on their decision to sell across borders to consumers,<sup>3</sup> which is even more** the case since the Directive 2011/83/EU of consumer rights became operational. The Directive has fully harmonised certain core rules for distance and off-premises contracts with the aim of reducing compliance costs for businesses. The Commission's credo that a fully harmonised consumer sales law would generate more choices and lower prices<sup>4</sup> therefore appears to be unsubstantiated.

**Consumers cannot benefit from a reform of consumer law that lowers important consumer protection in their country. EU policy should aim, as a guiding principle, at achieving consumer welfare first by way of a solid legal framework with a high level of protection and better enforcement of consumer rights.**

### **1.3. Full harmonisation: practical and legal consequences**

**Full harmonisation does not necessarily boost consumer confidence in the internal market. It may help tackling fragmentation but it does not necessarily favour consumers if it does not bring a high level of consumer protection.**

It may have a positive impact on national laws that offer a rather low level of protection. But it prevents other Member States from maintaining or, in future granting, consumers a higher level of protection under national law, which would be possible under EU rules of minimum harmonisation. The preference of full harmonisation ends national autonomy

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<sup>1</sup> Explanatory Memorandum, p 2.

<sup>2</sup> The flash Eurobarometer Report 300 shows that 80 % of the traders believe that harmonised contract law in the EU would make "little or no difference to their cross-border trade".

<sup>3</sup> According to the Eurobarometer Report on European contract law in consumer transactions of 2011, only 7 % of businesses consider the "need to adapt and comply with different consumer protection rules" as having a large impact on their decision to sell cross-border to consumers.

and effects a petrification of what is perceived to be an adequate standard of legal rights at the time of adoption of the legislation. Notably, the adequate standard may change rapidly against the backdrop of the changing dynamics of the digital market. A low, maximum level of protection may therefore negatively affect competition among traders.

**BEUC stresses that the relationship of the proposed Directive with national contract law is another issue of fundamental importance:**

- **Which additional rights provided under national rules on non-conformity may be invoked by consumers?**
- **Can consumers claim compensation for losses?**



**BEUC's view:**

**In the field of consumer remedies, a full harmonisation approach is particularly problematic due to the deep interconnection with national civil law. A targeted full harmonisation approach may unexpectedly remove national rights and lead to a lack of harmony, or cause interference, with national traditional contract law to the detriment of consumers.**

**Against this background BEUC is in favour of minimum harmonisation. Full harmonisation could only be supported for this Directive if:**

- **The proposed provisions are well-drafted and the scope of application clear,**
- **important consumer protection rules in national laws are not omitted or watered-down,**
- **an overall truly high level of consumer protection is achieved, and**
- **consumer confidence is improved.**

## **2. Subject matter and scope, Article 1**

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### **2.1. Restriction of scope to distance sales contracts, Article 1(1):**

***Two sets of rules depending on whether consumers shop online or in high street shops***

The proposed Directive would apply to distance sales contracts concluded between the seller and the consumer, including rules on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of these remedies (Article 1(1)). Since the 1999/44 Sales Directive would continue to apply to non-distance sales, the narrow scope of the Proposal would lead to **different sets of rights for consumers buying directly in the shop and those buying by way of the internet or other distance channels.**

**If the Proposal were to be implemented in its current form, it would lead to the undesirable scenario whereby consumers would be well advised *not to shop online in some Member States if their national law offers a higher level of protection.*** Thus, the proposed Directive may inadvertently curb online sales in some countries.

**The current proposal would therefore lead to more, not less fragmentation of the market.** The problem of two sales law regimes is recognised in the Explanatory Memorandum attached to the Proposal. In it, the Commission says it will take steps to ensure that consumers and traders are able to rely on a coherent legal framework. The Commission has launched an in-depth analysis of EU consumer legislation within the frame of its Regulatory Fitness and Performance Programme (REFIT), the data of which will 'feed into the progress made by the co-legislators on the proposal for online and other distance sales of goods'.

Although the inclusion of such data corresponds to a demand made by BEUC, **we criticise this tactic, which represents a turnaround from what is the normal order for the preparation of a legislative initiative: assessment – discussion – proposal.**

**In view of the expected expansion of the scope to non-distance sales, BEUC will look at the current Proposal as if both distance and non-distance sales were covered by it.**

## **2.2. Sale contracts for the sale of goods and provision of services, Article 1(2)**

We welcome that the proposed Directive would, in line with the 2011 Consumer Rights Directive, apply to the part relating to the sale of goods where a contract includes elements of both the sales of goods and provision the of services (Article 1(2)).

## **2.3. Goods which incorporate digital content: clarification needed, Article 1(3)**

In view of the fact that contracts over digital content are covered by the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, we consider it as appropriate to exclude goods such as CDs or DVDs incorporating digital content in such a way that the goods function only as a carrier of the digital content (Article 1(3)). However, the characterisation of such goods as "durable media" seems to be inadequate because this concept – prominently anchored in the Consumer Rights Directive to protect the interests of consumers against the seller – relates by definition to storage and transmission rather than *carriage*. In order to avoid problems of transposition and interpretation, there should be a clarification in the operative part of the text. An explanation by way of Recitals is not sufficient.



### **BEUC's view:**

- **Any proposal which leads to two classes of consumer protection must be rejected.**
- **The principle of appropriate preparation of legislative initiatives must be respected.**
- **Problems of transposition and interpretation should be avoided.**
- **The demarcation line between digital content products and tangible goods must be clear.**

### 3. Definitions, Article 2

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#### 3.1. Support of definitions for the sake of clarity but risk of confusion

**BEUC supports the introduction of definitions and the orientation towards the 2011 Consumer Rights Directive for the sake of clarity and uniformity.** For example, we approve the definition of a “contract” (Article 2(h)) as an agreement intended to give rise to obligations or other legal effects.

Nevertheless, as a general point, we wish to make clear that, since the 1999/44 Sales Directive continues to apply to non-distance sales, **rephrasing and new definitions may result in an inconsistent application of the Directive and lead to confusion of consumers and traders.**

#### 3.2. Commercial guarantee, Articles 2(g), 15

In practice, there is an **overlap between statutory legal guarantees and commercial guarantees** (warranties), which often lead to consumer confusion or to situations, in which consumers are prevented from exercising their legal guarantee rights because sellers accept claims only where a *commercial* guarantee is available. Even if sellers recognise their liability to fix the faulty products, there is a growing tendency to impose a solution on the consumer.

**For these reasons, BEUC supports the transparency requirements for commercial guarantees** laid down in Article 15 of the Proposal, in particular the requirement to provide information on a durable medium and to draft the guarantee statement in plain, intelligible language, which must include key rights and information of consumers.

**BEUC also supports the “minimum clause”** in para.4, pursuant to which Member States may lay down additional rules on commercial guarantees insofar as those rules do not reduce the protection.

In light of these safeguards, the **right approach** is to introduce – in correspondence to the 2011 Consumer Rights Directive, a broad definition of a **“commercial guarantee”** (Article 2(g) **governing both integral commercial guarantees (for free) and extended (paid-for) guarantees:**

‘commercial guarantee’ means any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract (Article 2(g)).

**We support the clarification that “any commercial guarantee shall be binding on the guarantor”** under the conditions laid down in: (a) pre-contractual information provided by the seller, including any precontractual statement which forms an integral part of the contract; (b) advertising available at the time of or before the conclusion of the contract; and (c) the guarantee statement (Article 15(1)).

**Clarification is also needed for the concept of “paid-for guarantees”,** for which – in contrast to the concept of “free of charge (Article 2(j)) – the proposed Directive does not provide a definition. There are, however, many different forms of commercial guarantees which may be offered to consumers. All these forms need to be assessed under the aspects of unfairness and information duties, addressed and laid down in other EU legal acts.<sup>5</sup>

**Although BEUC welcomes the provisions on commercial guarantees, the wide scope of definition means a deviation from the concept of commercial guarantees under the 1999/44 Sales Directive, which did not harmonise rules on paid-for guarantees. This will lead to the problems of application and confusion.**



#### **BEUC’s view:**

- **Consumer confusion and inconsistent application of the Directive in the Member States resulting from rephrasing and the introduction of new definitions should be avoided.**
- **Clarification is needed for the concept of paid-for commercial guarantees.**
- **Different forms of commercial guarantees must be assessed under the aspects of unfairness and information duties.**

## **4. Level of harmonisation, Article 3**

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### ***Full harmonisation: risk of omission or reduction of consumer rights in Member States***

The policy shift from minimum towards maximum harmonisation is effected by Article 3 of the proposed Directive, which states that Member States cannot maintain or introduce provisions diverging from those laid down in the Directive including more or less stringent provisions to ensure a different level of consumer protection (Article 3). **To the extent that the proposed Directive mirrors the provisions of the 1999 Sales Directive, the minimum standard of protection is turned into a maximum level of protection.** As a result, a significant number of consumers would be deprived of a higher levels of protection granted under their national laws. The negative impact of full harmonisation of the proposed rules in their current shape will be described in context below.

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<sup>5</sup> For example, Directives on Unfair Contract Terms, Unfair Commercial Practices, or Consumer Rights.



## 5. Conformity of goods with the contract and requirements for conformity, Articles 4-7

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### 5.1. General concept of conformity of goods with the contract

The rights and remedies of consumers depend on the concept of *conformity*. The Proposals reproduces to a good deal the conformity criteria of Article 2 of the 1999/44 Sales Directive with a number of alterations and supplements (Articles 4-7).

**The basic rule for conformity focuses on the contractual agreement between the seller and the consumer:** a consumer has the right to receive goods that are of the quantity, quality and description required by the contract. They need to be fit for any particular purpose for which the consumer requires them and which was agreed upon, and possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract (Article 4(a-c)). The **requirements for conformity**, set out in Article 5, address consumer's expectation and include a fit-for-purpose criterion: Goods shall

- possess qualities and performance capabilities which are normal in goods of the same type and which the consumer may expect and
- be fit for all the purposes for which goods of the same description would ordinarily be used.

**BEUC considers the general concept of conformity and the avoidance of rebuttable presumptions as provided under the 1999/44 Sales Directive as reasonable.** We also support the clarification that goods must be clear of any third-party rights (Article 7). From the consumer point of view, it does not matter whether the good is faulty because of a material defect or a **legal defect**. However, the inclusion of a "where-relevant" criterion and the separation of the basic rule for conformity (Article 4) from the requirements for conformity (Articles 4-7) lead to an **over-emphasis on subjective criteria** – the agreement made by the parties. This can also be seen in the possibility for parties to **derogate from the effects of the requirements for conformity by way of party agreement (Articles 4(3), 18)**.

While we do not see significant problems of consumer protection in general cases – we welcome the inclusion of the requirement of an express consent by the consumer for the latter case – **problems of consumer detriment may arise in situations where traders can easily dictate contractual terms ("take it or leave it"-situations), which will often be the case if goods are sold at a distance.** Traders would be entitled to "contract out" of important consumer rights where the consumer is "expressly" informed of, and "expressly" accepts. Given that consumers will very rarely be in a position to negotiate with traders online, and given that "express" consent could arguably involve merely agreeing to online terms and conditions, the ability of traders to contract out of statutory obligations could severely undermine consumer protections in this area. In some cases, the very existence of a party agreement may be in dispute or it will be difficult for consumers to realise the scale of the defect, one may think of incorrect installation.

The Commission's clear intention here, as communicated to stakeholders, is not for this to be able to happen. Rather, the Commission's intention is that traders will only be able to "contract out" of their obligations once a defect has become apparent. To ensure that this intention is affected by the Directive, we suggest that the text of Article 4(3) is amended, **to introduce stricter requirements, or a rule giving priority to objective standards.**

**In order to avoid confusion and problems of implementation, we also recommend maintaining the wording of the 1999/44 Sales Directive, if changes are not necessary.** Unnecessary changes seem to be made, such as describing the obligation of the seller to deliver goods which are in conformity with the contract using terms like "*shall ensure*" instead of "*must*" (Article 4, first sentence).

## 5.2. Removing of notification requirements

A significant improvement in consumer protection is the removal of notification requirements, which exist in some Member States. Whereas the 1999/44 Sales Directive allows Member States to oblige consumers to notify the defect to the seller within two months from the date on which he detected a lack of conformity (Article 5), the notification requirement has been taken out under the Proposal.

**BEUC strongly supports the exclusion of this possibility because these obligations are burdensome for the consumer and unsubstantiated in Business-to-Consumer contracts.** Consumers are often unaware of such a legal requirement and it would be unjustified and disproportionate to deprive consumers of essential remedies for non-compliance with a mere ancillary duty. This is all the more unjustified as it is the seller who is in breach of contract.

## 5.3. Need for a more ambitious conformity concept: a durability criterion

**The proposed concept of conformity is not ambitious enough and has not taken into account (new) market realities,** such as the circular economy, planned obsolescence, or the need for availability of spare parts. More-far reaching improvements are necessary in many respects.

Recital 23, having no operative effect, contains a weak commitment to more durable products and to sustainable consumption patterns but it is made clear that durability should not be dealt with by the proposed Directive but rather by way of sector-specific instruments. It is a matter of course and not an improvement if the Proposal states that durability information in sales contracts are relevant for the question of conformity with the contract. In order to meet consumer demands, there should be a **clear link between conformity of goods with the contract on the one hand and durability requirements on the other, particularly those included in sector-specific EU legislation.** We refer, for example, to standards for vacuum cleaners, which – according to new measures implementing the eco-design legal framework – will soon require a durability of 500 hours of use or about eight years average durability.

**BEUC advocates for an inclusion of the criterion of 'durability' to those of conformity or requirements thereof or a reference to the expected life-span of a product.** A durability criterion could be applied cumulatively with other conformity criteria or be used to concretise the reasonable expectations of consumers.<sup>6</sup> This would contribute to the function of the conformity test as a regulatory instrument to increase lifetimes and durability of products and be in line with the EU's objective for a green, circular economy as well as for achieving sustainable consumption and production.

**Furthermore, we support the introduction of a rule laying down obligations to provide spare parts. At the very least, there should be an obligation of traders to provide for information on the availability of spare parts.** The French consumer code could serve as a role model, which sets out corresponding obligations.

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<sup>6</sup> Currently, under the Directive 1999/44, there is a legal presumption that the goods are in conformity with the contract if they, inter alia, show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods.

It goes without saying that a **longer legal guarantee period** would effectively tackle deliberate attempts to make products obsolete and lead to more durable products.



**BEUC's view:**

- **The notion and criteria of conformity are crucial elements of the proposed Directive and any differences of text or other updates in comparison to the 1999/44 Sales Directive may lead to frictions and implementations problems.**
- **We agree with the basic design of the conformity provision but there is an over-emphasis of subjective-criteria, which may lead to consumer detriment.**
- **What is needed is a more ambitious legislation that takes into account the need for durable products and the availability of spare parts.**

## **6. Relevant time for establishing conformity, and burden of proof, Article 8**

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### **6.1. Relevant time for establishing conformity Article 8(1-2)**

**BEUC supports the proposed provisions on the relevant time for establishing conformity of goods with the contract.** Article 8(1) specifies that the relevant time for establishing conformity with the contract – hence the relevant time determining the seller's liability for non-performance – is based on the **physical possession** of the goods by the consumer or a third party indicated or carrier chosen by the consumer. This corresponds to the passing of risk-rule in the 2011/83 Consumer Rights Directive.

In case of installation of goods (Article 8(2)), the physical possession will depend on the completion of the installation by the seller. If the goods need to be installed by the consumer, a "*reasonable time*", which may not be longer than 30 days, constitutes the relevant time for establishing conformity. As a general rule, this approach is appropriate. However, **BEUC calls for an exception for situations where the complexity of the installation requires a longer time.**

### **6.2. Burden of proof, Article 8(3)**

**Burden of proof is a key issue for the effective enforcement of consumer rights.** If the burden of proof is in favour of traders, consumers are prevented from seeking the remedies they are entitled to. In many cases, the complexity of products would require a costly expert investigation.

**We strongly support the extension of the reversal of the burden of proof period by Article 8(3):** In order to ensure higher awareness of consumers and easier enforcement of the Union rules on consumer's rights in relation to non-conforming goods (Recital 33), any lack of conformity with the contract which becomes apparent within two years from the relevant time for establishing conformity, is presumed to have existed at **this time** unless this is incompatible with the nature of the goods or with the nature of the lack of conformity. It will be up to the trader to prove that the good was not faulty from the start.



**BEUC's view:**

**We welcome the proposal to extend the period of time during which the burden of proof is reversed in favour of the consumer to two years.**

## **7. Consumer's remedies for the lack of conformity with the contract, Article 9: Hierarchy of remedies – no free choice**

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Article 9(3): The consumer shall be entitled to a proportionate reduction of the price [...] or to terminate the contract [...] where:

- (a) a repair or replacement is impossible or unlawful;
- (b) the seller has not completed repair or replacement within a reasonable time;
- (c) a repair or replacement would cause significant inconvenience to the consumer; or
- (d) the seller has declared, or it is equally clear from the circumstances, that the seller will not bring the goods in conformity with the contract within a reasonable time.

**BEUC opposes to the approach of the Proposal to simply uphold the hierarchy of primary remedies – repair and replacement – and secondary remedies – price reduction and rescission of the contract – as provided in the 1999/44 Sales Directive by way of full harmonisation. It causes a clear reduction in consumer protection in many Member States. What is needed is the best practical solution for consumers when exercising their rights.**

**For example, in Greece, Portugal and Slovenia, consumers enjoy a free choice of remedy.** If a Portuguese consumer buys an electric kettle in a high street shop, which later gets broken because of a defect that existed from the start, it is principally up to the consumer to choose the remedy. This choice is only limited under considerations of good faith. If the same consumer, under the current Proposal, buys the same kettle online, he loses this choice and will be deprived of what is considered as a key right in that country.

**A free choice of remedies has the advantage that:**

- a better solution can be found for the individual case, taking into account the nature of the good and the defect,
- the **lack of conformity, which is a breach of contract** by the seller has a proportionate and adjusted consequence,
- it improves accountability of the seller, and
- traders cannot impose measures upon the consumer.

**The Proposal also fundamentally weakens the protection of consumers in the United Kingdom** where consumers can return a faulty good and get a full refund in first 30 days after buying a product (known as the “**short term right to reject**”). The trader pays the cost of returning the goods and a refund must be given within 14 days. The right to reject a faulty good is well-established, well-understood and ingrained in public. Its abolition would clearly frustrate the expectations<sup>7</sup> of consumers to be able to both ask for a replacement and demand a full refund. It would also mean consumers would be discouraged from making another purchase from a different trader within a short timeframe. **In addition, the Commission’s proposal does not provide for consumers to be able to obtain a price reduction or reject the good after a trader has had one failed attempt at repairing or replacing it.** In countries where this right is provided, for example in the United Kingdom, consumers will lose out very heavily when it comes to remedies. **Consumers could end up trapped in a highly undesirable cycle of finding a fault with their product, getting it repaired, and then finding a fault again.**

Ignoring BEUC’s suggestion, of granting the consumer the possibility to resort to other remedies than repair or replacement if the same or **another defect has (re-)appeared after the good was first repaired or replaced, is a missed opportunity.** Furthermore, we call for a definition of what is the ‘reasonable time’ for repair or replacement. In many Member States, the seller must carry out the measure within 15 or 30 days, which should serve as a general rule across the Union.

**Accordingly, instead of depriving consumers from some Member States of the abovementioned key rights it would be better and more appropriate to offer consumers in all Member States the same high level of protection as currently exists in these countries.**

**As a general rule, it should be up to the consumer to decide which remedy he prefers.** The small improvement under the Proposal to allow a termination of the contract also where the defect of the product is only minor<sup>8</sup> cannot outweigh the overall reduction in consumer rights in the area of remedies.

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<sup>7</sup> The outcome of a Which? survey conducted in December 2015 showed that nearly 90% of Which? members would expect to be able to exercise a short-term right to reject.

<sup>8</sup> Recital 29 rightly explains that this provides a strong incentive to remedy all cases of a lack of conformity at an early stage.



**BEUC's view:**

**It must be up to the consumer to decide which remedy he prefers because it is the trader who is in breach of contract. A free choice of remedy, established and well-received in a number of Member States, is the fair legislative response to misconduct from the trader.**

## **8. The legal guarantee period, Article 14: Race to the bottom**

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**BEUC rejects the intention of the Proposal to turn the minimum duration of the legal guarantee period under the 1999/44 Sales Directive into a maximum standard:** if this Proposal becomes law, consumers are entitled to a remedy for lack of conformity of the goods with the contract **only** where the non-conformity becomes apparent **within two years** as from the relevant time for establishing conformity (Article 14).

**However, a great many products have an average durability longer than two years**, for example kitchenware, washing machines, or furniture. Consumers expect that such products will last a long time and that they can bring a claim for non-conformity after the proposed two years period has passed.

**In several countries, the guarantee period is longer than the minimum of two years, ranging from three to six years. In other cases, it is designed as a non-absolute period based on the expected lifetime of the product. Such countries will be hit hard by the proposed rule and have to substantially weaken their existing level of consumer protection.**

In the **United Kingdom**, where the concept of a guarantee period is a foreign one, **consumers can claim a remedy for a faulty good** if that fault becomes apparent within its expected lifetime, **up to a limit of six years**. The six year cut off is a back-stop provided by the UK's limitation period. The European Commission's proposal for a guarantee period of just two years for all tangible goods, after which consumers would have no rights or remedies if their good demonstrated a lack of conformity, would therefore **reduce UK consumers' rights in relation to faulty products, by four years in some cases**. This would represent a significant diminution in the rights of consumers, many of whom believe that their legal rights in relation to a product **should last as long as they could reasonably expect** the product to last.<sup>9</sup>

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<sup>9</sup> This is the outcome of a recently conducted Which? member survey.

A full harmonisation of the legal guarantee period as suggested in the proposed Directive would also prevent consumers in other Member States from making use of well-established and familiar remedies provided under their national laws. Several Member States have established **flexible models of legal guarantee periods**. In the **Netherlands**, products must be delivered to the consumer in conformity with the agreement but without a defined cut-off or time limit. Instead, the duration of the legal guarantee period is based on the duration of the **expected average life-span of the product**. This legal guarantee system, which meets the expectations of the buyer and takes into account the durability of products, would be abolished under the level of protection proposed by the Directive.

**Another prominent and important specific legal guarantee concept which would no longer apply to faulty goods is the “vice-caché”,** which exists in France, Belgium and Luxembourg. This legal guarantee scheme applies to situations where a defect exists at the time of the sale but it cannot be detected by way of normal observation or examination of the product at the moment of delivery. If the requirements are fulfilled, consumers are not limited to the proposed two years from the moment of physical possession by the consumer but **a specific time limit runs from the moment the defect is revealed**. The consumer has the option to return the product and be fully reimbursed, or retain the product and get a price reduction. It would be unjustified and unfair to take away this right. Hidden defect rules are in place in several other Member States. The full harmonisation approach has therefore severe consequences for different countries throughout the Union.

**BEUC stresses that there will inevitably be cases where the defect cannot be detected before a certain amount of time. Sometimes this will not happen before the now-proposed two years legal guarantee period has expired.<sup>10</sup> In other cases, the complexity of the product will not allow consumers to detect the non-conformity of the good before the two years have passed.**

**The impact of the Commission’s proposal can be demonstrated on the example of the Volkswagen emission scandal,** where millions of consumers have bought a car which has an illegal device installed and which does not match the specifications of the sales contract. Since the legal guarantee period is only two years in many Member States, **consumers now face the risk of being sent away empty-handed because they discovered the defect of the car more than two years after purchase**. It would be cynical of the Commission to claim the proposal would create ‘a win-win situation for businesses and consumers’ and that ‘overall a high level of consumer protection will be ensured’.<sup>11</sup>

In this respect, if the Commission insists on a blanket legal guarantee period across the EU, **BEUC strongly recommends the introduction of harmonised rules on the suspension of the legal guarantee**. A suspension period should start the moment the buyer communicates to the seller that the product is faulty. If harmonisation is not possible, we suggest to at least clarify by way of Recitals that Member States are free to provide for suspension or interruption of the legal guarantee period in certain cases. While this has been made clear by the Preamble of the 1999/44 Sales Directive (Recital 8), the current Proposal contains no corresponding reference, for unknown reasons.

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<sup>10</sup> One may think of roof-tiles which do not support the ice and break years after their installation.

<sup>11</sup> Explanatory Memorandum, p. 11.



**BEUC's view:**

- **A blanket two year maximum legal guarantee period is not sufficient.**
- **Any legal guarantee period must live up to the longer lifespan of many products and not frustrate legitimate consumer expectations.**
- **A reduction in consumer protection in the Member States should be avoided.**

**We propose a hybrid approach where there is:**

- **A general guarantee period for all products.**
- **A longer legal guarantee period for durable products according to their expected life-span; this in consistency with the objectives of the circular economy agenda.**

## **9. Specification of the exercise of remedies, Articles 10-13**

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We principally welcome the clarification that the **seller must take back the replaced goods at his expense**. However, this applies only where no party agreements have been made after the lack of conformity has been brought to the seller's attention by the consumer (Article 10(1)). Due to the uneven playing field between the trader and a consumer, **BEUC suggests abolishing the exception for party autonomy**.

Another clarification has been made by Article 10(3), which implements the rationale of the *Quelle*-judgment of the Court of Justice<sup>12</sup> that the buyer shall not be liable to pay for any use made of the replaced goods in the period prior to the replacement (para 3).

**We welcome that explicit provisions are made to calculate the price reduction (Article 12)**, which shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if in conformity with the contract. However, except for delivery of a quantity of a product, situations of non-conformity cannot always be calculated with the *proportionate* method and there are difficulties in investigating the value of the goods which may deprive consumers of a price reduction granted under the 1999/44 Sales Directive. The Directive speaks of an '*appropriate* reduction of the price' and gives more leeway to take into account fairness and significance. Taking also into account that, in practice, a narrow terminology will lead to more terminations of contracts, **we suggest to use a less compelling phrasing (e.g. 'shall take into account [...]')**, instead of introducing a strict calculation method.

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<sup>12</sup> Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] I-2685.



**As to the termination of the contract (Article 13), we support the general solution for partial lack of conformity** (para 2) – a termination should principally be only partial, where the lack of conformity relates only to part of the goods delivered under the contract. However, we believe that the **concept of accessory goods is too narrow** and the focus on what is the ‘main item’ inappropriate in many cases. Relevant should be the natural connection of the goods or, what is indicated by Recital 29, that the consumer would have not acquired one good without the other.

**We are concerned that the 14 days period for restitution after termination of the contract will constitute an obstacle for consumers** when dealing with specific kinds of goods which do not allow for a quick return (para 3). In addition, the **consequences for non-compliance are unclear**. We wish to point out that the orientation towards the 2011 Consumer Rights Directive is not appropriate since it is the seller who is in breach of contract. We are concerned that the **rule that consumers pay for a decrease in value of the goods** if the decrease in value exceeds depreciation through regular use (para 3, lit d) gives professionals the option to **unjustifiably impose costs upon consumers** in case of a justified termination of the contract.

It is also unclear and in **need of clarification** how the **new provisions on the consequences of non-return due to destruction or loss** (para 3(c-d)) relate to specific national rules.



**BEUC's view:**

**The specifying rules for the exercise of remedies are principally supported by BEUC. However, improvements and clarification is needed so as to avoid unjustified costs and burden for consumers.**

## **10. Mandatory nature, Article 18: safeguards necessary**

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Article 18 affirms the mandatory nature of the consumer contract law rules under the 1999/44 Sales Directive: **parties may not restrict or waive the rights granted to consumers under the Directive** and deviations from the requirements contained in the Directive to the detriment of the consumer are not binding on the consumer before the lack of conformity is brought to the seller's attention. It is a **welcome upgrade** of the standard of legal protection under the 1999/44 Sales Directive that Member States should no longer be able to provide that, in case of **second-hand goods**, the seller and consumer may agree on a shorter time period for the liability of the seller.

However, as pointed out<sup>13</sup>, we are concerned that the **Proposal allows for a derogation** of the effects of the requirements of Articles 5 (requirement for conformity) and 6 (incorrect installation) as long as the consumer knew of the specific condition of the goods and has expressly consented to it. Here, consumer protection is reduced for the sake of freedom of contract and **traders may be entitled to “contract out”** of important consumer rights, potentially even by way of terms and conditions. **Additional safeguards or objective criteria are therefore necessary.**



**BEUC’s view:**

**Problems of consumer detriment arising from “take-it-or-leave-it situations” should be avoided by adding safeguards or stricter requirements.**

## **11. Need for more ambitious legislation: Producer Liability**

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(23) Whereas legislation and case-law in this area in the various Member States show that there is growing concern to ensure a high level of consumer protection; whereas, in the light of this trend and the experience acquired in implementing this Directive, **it may be necessary to envisage more far-reaching harmonisation, notably by providing for the producer’s direct liability for defects for which he is responsible.**

The Preamble of the 1999 Sales Directive recognises that future attempts to further harmonise EU sales law should relate to *more* protection for consumers, for example by providing for **the producer’s direct liability**. It is unfortunate that the Proposal does not establish a consumer right against anyone other than the seller although it is the producer that causes a deficiency in the production process. Not even a definition of a ‘producer’ is provided therein.

Currently, consumers are discouraged from buying products from foreign sellers because if a problem of non-conformity arises, it will often be difficult for consumers to get in touch with the seller (particularly SMEs) and have their goods repaired. A future-proof Proposal should enable consumer to seek remedies directly against the big producing companies, which may also have a branch, agency or other establishment in the country where the consumer is domiciled. Since the burden to produce better products will be on producers rather than the sellers, which cannot always be held accountable for the non-conformity of the good, a system of **joint liability would promote competition, longer-lasting products, and reduce the burden on SMEs. More attention would be paid to other important aspects of purchases, such as security or sustainability.**

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<sup>13</sup> Under 5.1.

**BEUC advocates for a joint liability of sellers and producers which should be based on the concepts which already exist in many Member States. Consumers should be able to choose whether to direct the claim to the seller or the producer; such a choice must be free and should not be limited by unlawful attempts of the seller to reject his personal responsibility for the defective good.**

This would create an additional safety net for consumers and – which is in line with the rationale of the Proposal – encourage consumers to shop cross border. It would avoid many problems related to the co-existence of legal and commercial guarantees and the drawbacks of the latter, such as ambiguous terms of conditions, problems of enforceability, or high costs. There should be a wide notion of ‘producer’ and provisions should be made for the liability of importers or the case of unknown producers.<sup>14</sup>



**BEUC’s view:**

**A joint liability system would be a milestone in EU consumer protection policy and the VW emission scandal has proved its necessity.**

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<sup>14</sup> For example, under Greek law, anyone who imports a product for sale, leasing, or operational leasing or any other form of distribution in the context of his professional commercial activity has the same liability as the producer and if the identity of the producer is unknown, all suppliers of the product are considered producers for the purposes of this law, unless within a reasonable period, they inform the consumer about the identity of the producer or the person who supplied the product to them.

**Annex Table – Negative impact of the proposed Directive on the duration of the legal guarantee period and the system of remedies**

Rights	Current level of protection	Impact of proposed Directive
<p><b>Duration legal guarantee</b></p>	<ul style="list-style-type: none"> <li>• <b>Belgium, France, Luxembourg</b> (and others): specific legal guarantee schemes for hidden defects, e.g. <i>vice-caché</i></li> <li>• <b>Finland</b>: Expected lifetime</li> <li>• <b>Iceland</b>: 5 years for goods with a longer expected lifespan</li> <li>• <b>Ireland</b>: 6 years</li> <li>• <b>Netherlands</b>: Expected lifetime</li> <li>• <b>Norway</b>: 5 years for goods with a longer expected lifespan</li> <li>• <b>Sweden</b>: 3 years</li> <li>• <b>United Kingdom</b>: 6 years (5 years in Scotland) limitation period</li> </ul>	<p align="center"><b>Reduction to two years maximum</b></p> <p align="center"><b>Abolishment of national rules for hidden defects</b></p>
<p><b>Choice of Remedies</b></p>	<ul style="list-style-type: none"> <li>• <b>Denmark</b>: In the first instance, the consumer may choose between repair, substitution and – if the defect is significant – price reduction or termination of contract. If the seller offers to repair or replace, the consumer can no longer opt for a price reduction or termination of contract.</li> <li>• <b>Greece</b>: <b>Free choice of remedy.</b></li> <li>• <b>Ireland</b>: As a first option, consumers may refuse an item which turns out to be faulty when used for the first time (<b>Right to reject</b>). In these situations, consumers will be entitled to a full refund. In a second phase, following the “acceptancy” of the product, consumers may choose between repair, replacement or – when repair or replacement are not possible within a reasonable period or without significant inconvenience to the consumer – price reduction or termination of the contract.</li> <li>• <b>Latvia</b>: <b>Free choice of remedy</b> during the first 6 months.</li> <li>• <b>Portugal</b>: <b>Free choice of remedy.</b></li> <li>• <b>Slovenia</b>: <b>Free choice of remedy.</b></li> <li>• <b>Sweden</b>: At a first stage, consumers may choose between repair or replacement. In addition to repair or replacement, <b>consumers may also claim a refund if the defect is of material significance.</b> In a second stage, consumers may choose between refund or reduction of the purchase price if repair or replacement is impossible, does not take place within a reasonable period of time, or cannot be done without significant inconvenience to the consumer.</li> <li>• <b>United Kingdom</b>: As first tier remedies, consumers may not only choose between repair or replacement but also have the <b>right to reject a faulty product within 30 days after purchase.</b> As second tier remedies, consumers may choose between reduction of price or refund.</li> </ul>	<p align="center"><b>Abolishment of free choice of remedy and short time right to reject</b></p> <p align="center"><b>Establishment of a hierarchy of remedies</b></p>



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