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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain aspects concerning contracts for the online and other distance sales of goods

(Text with EEA relevance)

{SWD(2015) 274 final}
{SWD(2015) 275 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The Digital Single Market Strategy[1] adopted by the Commission on 6 May 2015 announced a legislative initiative on harmonised rules for the supply of digital content and the online sales of goods. This initiative is composed of (i) a proposal on certain aspects concerning contracts for the supply of digital content, and (ii) a proposal on certain aspects concerning contracts for the online[2] and other distance sales of goods.

As announced by the Commission in its 2015 Work Programme, these two proposals draw on the experience acquired during the negotiations for a Regulation on a Common European Sales Law. In particular, they no longer follow the approach of an optional regime and a comprehensive set of rules. Instead, the proposals contain a targeted, fully harmonised set of rules. The proposals also build on a number of amendments made by the European Parliament in first reading concerning the proposal for a Regulation on a Common European Sales Law, in particular the restriction of the scope to online and other distance sales of goods and the extension of the scope to certain digital content which is provided against another counter-performance than money.

While this explanatory memorandum covers specifically the proposal on certain aspects concerning contracts for the online and other distance sales of goods, the part of this explanatory memorandum explaining the reasons for the proposal concerns both proposals as these two proposals are envisaged as a package with common objectives.

• Reasons for and objectives of the proposal

The general objective of the proposals is to contribute to faster growth of opportunities offered by creating a true Digital Single Market, to the benefit of both consumers and businesses. By eliminating the key contract law-related barriers hindering cross-border trade, the rules put forward in the proposals will reduce the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law.

39% of businesses selling online but not cross-border quote different national contract laws as one of the main obstacles to cross-border sales.[3] This applies particularly to remedies in case of a faulty product as mentioned by 49% of EU retailers selling online and 67% of those who are currently trying to sell or considering selling online cross-border.[4] Different national contract law rules have created one-off costs for retailers selling to consumers of approximately €4 billion; these costs mostly affect micro and small- and medium-sized enterprises (SMEs). The purpose of these proposals is to create a business-friendly environment and make it easier for businesses, especially SMEs, to sell cross-border. Businesses should be given legal certainty and avoid unnecessary costs caused by differing national laws when selling goods and digital content outside their domestic market.

Only 18% of consumers who used the Internet for private purposes in 2014 purchased online from another EU country while 55% did so domestically.[5] Consumers are not confident when

1 COM(2015) 192 final http://ec.europa.eu/priorities/digital-single-market/

2 For the purpose of this Explanatory memorandum, any reference to "online sales" shall be understood as "online and other distance sales"

3 Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015).

4 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), breakdown by sector (B2C only).

5 Eurostat survey on ICT usage in households and by individuals (2014)

buying online across borders and believe that they are better protected when buying online in their own country, under their familiar domestic law. One of the major reasons is their uncertainty about their key contractual rights. Differing national regimes also constitute an obstacle to efficient enforcement of consumer rights. As a result, consumers miss opportunities and face a narrower range of goods at less competitive prices. Moreover, since consumers are not confident to shop online cross-border, they are unable to take advantage of existing price divergences between Member States and thus miss important potential opportunities.

It is necessary to act fast in relation to the online sales of goods. At the same time, harmonising the rules on distance sales may bear the risk to have rules on the distance sales which are different from the rules on the face-to-face sales. Given the increasing importance of the omni-channel distribution model (i.e. selling at the same time via multiple channels such as directly in a shop, online or otherwise at a distance), the Commission will take steps to avoid such a result and ensure that consumers and traders will indeed be able to rely on a coherent legal framework which is simple to apply everywhere in the EU.

Therefore, together with the current proposal, the Commission has, in the context of its Regulatory Fitness and Performance Programme, launched an in-depth analysis of the existing EU consumer legislation. Data from the Fitness Check Analysis on the application of the Consumer Sales and Guarantees Directive to face-to-face purchases of goods are likely to be available in the 2nd half of 2016. While these data and therefore the outcome of the Fitness Check exercise on this point are not yet available, its possible conclusions if pointing to the need for a Commission initiative on the face-to-face sales of goods, could feed into the progress made by the co-legislators on the proposal for online and other distance sales of goods.

- **Consistency with existing policy provisions in the policy area**

The key substantive provisions of this proposal cover the main differences of national consumer mandatory rules following the Member States implementation of the minimum harmonisation rules of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees[6]. It is those main differences on national rules which affect traders' decision whether or to which extent to sell goods cross-border.

While the proposal takes the rules of Directive 1999/44/EC as a basis, it provides for a full harmonisation of the conformity criteria for the goods, of the hierarchy of the remedies, available to consumers and of the periods for the reversal of burden of proof and the legal guarantees. Furthermore, certain features of the current Directive 1999/44/EC are clarified, such as the fact the consumer would be entitled to termination or price reduction if the seller does not repair or replace the goods within a reasonable time. Differently from Directive 1999/44/EC, the consumer would also have the right to terminate in case of minor defects. Also, unlike Directive 1999/44/EC, under the proposal consumers would not have the duty that they currently have under a number of national laws to notify a defect of the goods to the seller within a certain period of time from its discovery. A major change compared to Directive 1999/44/EC is certainly that the period for the shift of the burden of proof is extended to two years. Like Directive 1999/44/EC, the proposal leaves provisions on the consumer's right to receive compensation for the losses caused by such lack of conformity to national laws.

6 OJ L 171, 7.7.1999, p.12.

Furthermore, the proposal also supplements Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council[7], which has already fully harmonised certain rules for the online and other distance sales of goods (mainly pre-contractual information requirements and the right of withdrawal). The proposal also supplements Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)[8], which, among others, partially establishes harmonised rules on electronic contracts.

The proposal will not fully harmonise any rules on unfair terms and therefore will not have any impact on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[9].

The proposal is compatible with the existing EU rules on applicable law and jurisdiction in the Digital Single Market[10]. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[11] and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[12], which provide rules to determine the competent jurisdiction and applicable law, apply also in the digital environment. These instruments have been adopted quite recently and the implications of the internet were considered closely in the legislative process. Some rules take specific account of internet transactions, in particular those on consumer contracts. These rules aim at protecting consumers inter alia in the Digital Single Market by giving them the benefit of the non-derogable rules of the Member State in which they are habitually resident. Since the current proposal on the online and other distance sales of goods aims at harmonising the key mandatory provisions for the consumer protection, traders will no longer face such wide disparities across the 28 different legal regimes. Together with the proposed new contract rules for online and other distance sales of goods as set out in this proposal, the existing rules on private international law establish a clear legal framework for buying and selling in a European digital market, which takes into account both consumers' and businesses' interests. Therefore, this legislative proposal does not require any changes to the current framework of EU private international law, including to Regulation (EC) No 593/2008 (Rome I).

The proposal complements and allows sector specific Union legislation, such as the Ecodesign[13] or Energy Labelling[14] legislation, its implementing and delegated acts, to

7 OJ L 304, 22.11.2011, p.64.

8 OJ L 178, 17.7.2000, p. 1–16.

9 OJ L 095, 21.04.1993 p. 29 – 34.

10 A detailed explanation of the EU rule on applicable law and jurisdiction in the Digital Single Market can be found in Annex 7 to the Commission Staff Working Document containing the Impact Assessment accompanying the Proposals for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, SWD(2015) 275

11 OJ L 351, 20.12.2012, p. 1–32.

12 OJ L 177, 4.07.2008, p. 6

13 Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L285, 31.10.2009, p.10 – 35.

14 Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ L 153, 18.06.2010, p. 1 – 12.

introduce product specific durability requirements for example durability information requirements.

- **Consistency with other Union policies**

The Digital Single Market Strategy intends to deal with all major obstacles to the development of cross-border e-commerce in the Digital Single Market in a holistic manner. The proposal should be seen in the context of this holistic approach. This covers among others the initiatives related to the role of platforms, the European Cloud initiative, VAT related burden and parcel delivery. It also covers initiatives related to enforcement/redress, i.e. the entry into operation of the Online Dispute Resolution platform[15] and the review of the Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws[16]. In particular, fully harmonised contract law rules in the EU will also facilitate coordinated enforcement actions undertaken by the Consumer Protection Co-operation authorities[17].

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis of this proposal is Article 114 of the Treaty on the Functioning of the European Union and its main objective is the improvement of the establishment and the functioning of the internal market.

The existing differences in consumer contract law rules hinder traders from selling online cross-border because they have to adapt their contracts to different mandatory consumer contract law rules in different Member States they export to and consequently incur contract law related costs. Consumers are uncertain about their key contractual rights when shopping abroad and therefore prefer to stick to their own domestic markets. Those problems have a direct effect on the establishment and functioning of the internal market and limit competition.

The differences between national mandatory rules that apply to consumer sales contracts in the Member States mainly result from national mandatory rules going beyond EU minimum harmonisation Directives[18] [19]. There are several key areas where such differences exist and bring additional costs for businesses and lack of legal certainty for consumers.

Directive 1999/44/EC provides for a hierarchy of the remedies available to consumers. If goods are not in conformity with the contract, a consumer is entitled to have the goods

15 Regulation (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.06.2013, p.1.

16 OJ L 364, 9.12.2004, p. 1.

17 This Directive will amend the Regulation on consumer protection cooperation to add a reference of this Directive in the Annex of that Regulation.

18 That information is mainly drawn from the notifications by Member States to the Commission according to Articles 32 and 33 of Directive 2011/83/EU regarding the transposition of Council Directive 93/13/EEC and Directive 1999/44/EC; for full notifications see: http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/notifications/index_en.htm.

19 While most of the differences in the national consumer rules come from the different ways the Member States have implemented the EU minimum harmonisation directives, there are also some other national mandatory consumer contract law rules which do not have their origin in the implementation of EU consumer acquis. For specific examples see: the Impact Assessment accompanying the Proposals for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, SWD (2015) 275, section 1.2."Main differences between consumer mandatory contract law rules affecting cross-border trade of goods".

brought into conformity by first requesting repair or replacement. Only as a second step can the consumer ask for termination of the contract or price reduction. 20 Member States[20] have followed this approach, while other Member States have either offered the consumers a free choice of remedies, or have taken over the hierarchy of remedies but have also provided for another remedy, for instance a right to reject non-conforming goods within a short deadline.

According to Directive 1999/44/EC Member States are authorised to oblige the consumers to inform the seller of the defect within two months from its discovery in order to benefit from their rights. In case of non-notification consumers lose their right to remedies. While in 11 Member States[21] consumers do not have such an obligation, in 12 Member States[22] the consumer has to notify the defect within 2 months, and in 5 Member States[23] the consumer has to do so within a different period of time.

Pursuant to Directive 1999/44/EC a consumer can only ask for a remedy if the goods were non-conforming when delivered. The burden of proof is reversed during the first 6 months, obliging the trader to prove during this period that no such defect existed at the time of delivery. While 25 Member States have followed that approach, 3 Member States[24] have recently extended the period for shifting the burden of proof.

Directive 1999/44/EC provides that the trader can be held liable for a period of no less than 2 years for defects which were present at the time of delivery. While 23 Member States have implemented this 2 year period, in 1 Member State[25] that period is longer and in 2 Member States[26] it is unlimited. In 2 other Member States[27] there is no specific legal guarantee period, but the consumer rights are limited by the prescription period (time limits in national legislations within which rights can be invoked in court).

Overall, the proposal will remove obstacles to the exercise of fundamental freedoms which result from these differences between national mandatory consumer contract law rules, in particular from the additional transaction costs when concluding cross-border transactions and the lack of confidence in their rights experienced by consumers when purchasing from another EU country all of which have a direct effect on the establishment and functioning of the internal market and limit competition.

The proposal will guarantee a high level of consumer protection by providing a set of fully harmonised mandatory rules which maintain and in a number of cases improve the level of protection that consumers enjoy under the existing Directive 1999/44/EC.

- **Subsidiarity**

The proposal complies with the subsidiarity principle as set out in Article 5 of the Treaty on European Union.

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20 Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Luxemburg, Malta, the Netherlands, Poland, Romania, Slovakia, Spain, Sweden.

21 Austria, Bulgaria, Czech Republic, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Poland and the United Kingdom.

22 Belgium, Croatia, Cyprus, Estonia, Finland, Italy, Latvia, Malta, Portugal, Romania, Slovenia and Spain.

23 Within reasonable time in Denmark and Sweden; promptly in the Netherlands and immediately in Hungary (in these countries a notification within 2 months is always considered to be within the time limit); within 6 months in Slovakia.

24 France, Portugal and Poland.

25 Sweden.

26 Finland and the Netherlands.

27 Ireland and the United Kingdom.

The objective of the initiative is to remove consumer contract law barriers in the online trade and help to establish a genuine Digital Single Market for the benefit of businesses and consumers. This objective cannot be adequately achieved by the Member States. Rules on the sales of goods in Directive 1999/44/EC are of minimum harmonisation and therefore allow for different implementation by the Member States. This has led to legal fragmentation. Only a coordinated intervention at the Union level aiming at removing existing diverging national approaches in the European Union consumer laws by way of full harmonisation can contribute to the completion of the internal market by solving this problem.

The proposal is based on full harmonisation of certain key consumer contractual rights. Thus it will create a single set of rules ensuring the same high level of consumer protection across the European Union and allowing traders to sell to consumers in all Member States based on the same contractual terms. The proposal would significantly reduce traders' compliance costs while granting consumers a high level of protection. Therefore, action at EU level would be more effective than action at national level.

The full harmonisation approach has already proven successful in the area of EU consumer protection legislation, for instance through the rules of Directive 2011/83/EU, by ensuring a set of uniform consumer rights for all consumers within the European Union which are interpreted and enforced in a uniform way in all Member States. An initiative at EU level will secure the development of consumer rights in a coherent manner while ensuring that all consumers in the EU benefit from the same high level of consumer protection. It will create legal certainty for businesses which want to sell their goods in other Member States. Such a result can only be achieved by an action at the EU level.

Furthermore, an initiative at EU level will secure the application of consumer rights in a coherent manner while ensuring that all consumers in the EU benefit from the same high level of consumer protection. It will create legal certainty for businesses which want to sell their goods in other Member States. Such an initiative will provide a consistent legal basis for coordinated enforcement actions as the proposed Directive will be included in the Annex of Regulation (EC) No 2006/2004 on cooperation of national authorities responsible for the enforcement of consumer protection laws. Moreover, enforcement actions would be largely facilitated by the proposed uniform fully harmonised rules. Thus the enforcement of EU legislation will be strengthened for the benefit of EU consumers. Such a result can only be achieved by an action at the EU level.

- **Proportionality**

The proposal complies with the principle of proportionality as set out in Article 5 of the Treaty on European Union because the proposal will not go beyond what is necessary for the achievement of the objectives.

The proposal will not harmonise all aspects concerning contracts for the online and other distance sales of goods. Instead, it will focus on further harmonising only those targeted, key mandatory consumer EU contractual rights which are essential in cross-border online transactions, and which have been identified as barriers to trade by stakeholders and are necessary to build consumer trust when buying at a distance abroad. Moreover, the choice of the legal form of a Directive instead of a Regulation will have as a result considerably less interference into national laws (see below under "Choice of the instrument").

- **Choice of the instrument**

The Commission presents a set of two full harmonisation Directives: one Directive on certain aspects concerning contracts for the online and other distance sales of goods and a Directive on certain aspects concerning contracts for the supply of digital content.

The choice of a Directive leaves Member States freedom to adapt the implementation to their national law. A Regulation would require a much more detailed and comprehensive regime than a Directive in order to allow its effects to be directly applicable. This would have as a consequence considerably more interference into national laws.

The choice of full harmonisation will lead to simple and modern rules that remove contract law barriers and create a level playing field for businesses while at the same time ensuring that consumers benefit from a high level of consumer protection all over the EU.

A non-binding instrument such as a voluntary model contract would not achieve the objective to improve the establishment and functioning of the internal market. Traders would still be obliged to comply with different mandatory national rules of the consumer's country of residence, when the latter provide for a higher level of consumer protection than the model contract, and would thus still face increased contract law-related costs.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

Consultation process

An extensive consultation strategy has been developed to ensure a wide participation throughout the policy cycle of this initiative. This strategy was based on a mix of public and targeted consultations. The Commission has sought a wide and balanced range of views on this issue by giving the opportunity to all relevant parties (businesses, consumers, national authorities, lawyers and academics) to express their opinions.[28]

- Public Consultation: An open 12 weeks web-based public consultation resulted in 189 responses from all categories of stakeholders from across the EU.

- Targeted consultations: A stakeholder consultation group was composed of 22 organisations representing a wide range of interests. The group met 7 times.

In-depth interviews with businesses were also conducted from June to August 2015 in order to gather data on contract law related costs faced by business when selling abroad.

Within the framework of the Digital Single Market Strategy, two surveys, a consumer survey[29] and a business survey[30], were used in 2015 to collect data identifying the main cross-border obstacles to the Digital Single Market.

Consultation of Member States: Three one-day workshops with Member States were organised between June and October 2015. The relevant issues were also discussed with national enforcement authorities at the Consumer Protection Cooperation committee meeting

28 For more details about the consultations, please see: http://ec.europa.eu/justice/newsroom/contract/opinion/index_en.htm

29 GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, 2015.

30 Flash Eurobarometer 413 "Companies engaged in online activities" (2015) http://ec.europa.eu/public_opinion/flash/fl_413_en.pdf

(April 2015) and the national authorities responsible for consumer policy at the Consumer Policy Network meeting (May 2015).

Summary of the results

The majority of respondents from the consumer side recognise that harmonisation may improve cross border e-commerce but they would only support full harmonisation as long as existing consumer protection levels across Member States are not reduced. They also warn about the risk of creating different regimes depending on the sales' channel. Consumer associations strongly oppose any form of the application of the trader's law. Moreover considering the different characteristics of B2B and B2C contracts and taking into account possible frictions with already existing legal instruments consumer organisations do not support the inclusion of B2B contracts in the scope of this proposal. The majority of businesses would favour harmonised EU rules on the B2C sales of goods. Some business associations however are doubtful about the need to take any action, but if there is some action at EU-level they would prefer the application of the trader's law and a modification of Regulation (EC) No 593/2008 (Rome I). Business organisations recommend avoiding as much as possible a sectorial approach which could lead to diverging rules for online and offline sales and for goods and digital content. The large majority of legal professions' associations would favour harmonised EU rules and the same regime for B2C and B2B contracts.

Member States would in general support EU harmonised rules, but are cautious about political feasibility and the differentiation between online and offline sales rules. Some of them would prefer a better implementation, enforcement and evaluation of the existing legislation before producing new legislation. The vast majority of Member State respondents support the inclusion of only B2C contracts. In addition, an important number of Member States explicitly oppose any form of application of the trader's law and, thus, amending the Rome I Regulation.

On the substance of the rules, the majority of consumer associations support a free choice of remedies while the majority of respondents from the business side argue in favour of a hierarchy of consumer remedies across the EU. Member States are divided: while some of them are in favour of a hierarchy of remedies, others would support a free choice of remedies by the consumer. A majority of respondents from the legal professions are in favour of a free choice of consumer remedies, while some others prefer to keep a hierarchy of remedies, possibly negotiable between the parties. On the reversal of the burden of proof consumer organisations advocate for a period longer than 6 months (mainly 2 years) and practically all of them are in favour of a longer legal guarantee period. Businesses would want to maintain the current 6-month reversal of burden of proof period and would support full harmonisation of the current 2-year legal guarantee period. Member States and legal professions would in general support maintaining the existing rules for the reversal of the burden of proof and the legal guarantee.

- **Collection and use of expertise**

The Commission relied on several economic and legal studies, which were either commissioned for the specific purpose of this initiative or as part of the Digital Single Market Strategy. Those include a survey carried out in 2015 in order to identify the main cross-border

obstacles to the Digital Single Market[31], Eurostat statistics 2014, Eurobarometers and an SME panel[32].

A comparative law study provided an overview of the mandatory rules applicable to contractual obligations in contracts for sales of goods sold at a distance and in particular online.

- **Impact assessment**

The Regulatory Scrutiny Board delivered an initial opinion on the draft impact assessment on 16 October 2015 which has been modified taking into account comments from the Board and resubmitted. The second opinion, which approved the draft impact assessment subject to comments, was delivered by the Board on 9 November 2015.[33]

The revised impact assessment report and an executive summary are published with the proposals.[34]

Policy alternatives examined

In addition to examining the consequences of the absence of policy change, the impact assessment examined the following policy alternatives: (i) option 1: targeted fully harmonised rules for goods and digital content; (ii) option 2: application of the trader's law combined with the existing harmonised rules on goods/targeted and fully harmonised rules for digital content; (iii) option 3: no policy change for goods and targeted fully harmonised rules for digital content; (iv) option 4: no policy change for goods and minimum harmonisation rules for digital content; (v) option 5: a voluntary European model contract combined with an EU trust-mark.

On a comparative analysis of the impacts of these options, the Impact Assessment Report arrived at the conclusion that option 1 would best meet the policy objectives. This option will reduce contract law-related costs for traders and facilitate cross-border e-commerce. Businesses will be able to rely largely on their own law when selling cross-border as the main rules, which are relevant for cross-border trade, will be the same in all Member States. While the new rules on online sales of goods will entail certain one-off adaptation costs for businesses selling online, these costs would be counterbalanced by the cost savings resulting from the possibility to sell throughout the EU at no additional contract law-related costs, due to fully harmonised rules. Particularly small businesses will benefit compared to the current situation, as the cost savings from fully harmonised cross-border rules for goods will be the more significant the smaller a business is. Therefore the new rules will provide businesses with a legally certain and business friendly environment. Consumers will have a clear set of

31 See, in particular:
- GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, 2015 http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/docs/21.09_dsm_final_report.pdf
- Eurostat survey on ICT usage in households and by individuals (2014),
- Comparative Study on cloud computing contracts (2014) DLA Piper, p.33 and seq.; Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts; University of Amsterdam: Centre for the Study of European Contract Law (CSECL)Institute for Information Law (IViR): Amsterdam Centre for Law and Economics (ACLE) p.32 and seq
- Flash Eurobarometer 413 "Companies engaged in online activities" (2015) http://ec.europa.eu/public_opinion/flash/fl_413_en.pdf
- Economic study on consumer digital Content products, ICF International, 2015.

32 A SME panel survey conducted in 2011 within the Europe Enterprise network, which gathered responses from 1047 micro, small and medium sized businesses.

33 The opinion of the Regulatory Scrutiny Board is available at: http://ec.europa.eu/justice/contract/index_en.htm.

34 The impact assessment report and the Executive summary are available at : http://ec.europa.eu/justice/contract/index_en.htm.

rights throughout the EU and will thus be more confident in buying goods or accessing digital content cross-border. While in a few Member States the level of protection may be lowered on a few individual points, this option will significantly increase the overall current level of EU consumer protection under Directive 1999/44/EC, notably by extending the period of reversal of the burden of proof to two years. Although Member States will not be able to adopt or maintain more protective consumer protection rules, overall a high level of consumer protection will be ensured, and cross-border enforcement of the rules will be enhanced. This will create a win-win situation for businesses and consumers. Competition will be increased, leading to an overall increase of trade and consequently an increased choice at more competitive prices for consumers, with significant macroeconomic gains for the EU.

Lack of policy change would not contribute to achieving the objectives of the Digital Single Market, and would risk having negative economic impacts relative to the current situation.
Option 2 would lead to increased incentives for cross-border supply, since traders would be able to sell their products cross-border entirely on the basis of their own law. Consumers may to some extent benefit from increased choice and lower prices. In certain cases they may benefit from a potentially higher level of consumer protection under the trader's law, if that goes on specific points beyond their own national law. However, as a result of the application of the trader's law for the online sales of goods and the respective derogation from Regulation (EC) No 593/2008 (Rome I), European consumers would no longer benefit from a higher level of consumer protection that their own national law, going in its implementation beyond Directive 1999/44/EC, may provide on top of the trader's law. This would have a negative impact on consumers' confidence in cross-border purchasing. In addition, it is very likely that such a change could not be limited to EU traders and, consequently, would entail the removal of protection offered by mandatory consumer contract rules in transactions with traders from third countries.

In options 3 and 4 contract law-related obstacles to cross-border trade would remain for goods.

Option 5 could help businesses sell goods across the EU and provide consumers with a satisfactory level of consumer protection, very much depending on the content of the model contract rules to be agreed upon by the industry and on the degree of usage and acceptance of the trust mark by EU businesses. Consumers may be more confident to buy from foreign traders to whom the EU trust mark has been awarded. However, traders would still be obliged to comply with mandatory national rules of the consumer's country of habitual residence, when they provide for a higher level of consumer protection than the model contract rules, and may thus still face contract law-related costs.

Main impacts of the proposal

The impact assessment considers the impact of both proposals, the Directive on certain aspects concerning contracts for the supply of digital content and the Directive certain aspects concerning contracts for the online and other distance sales of goods.

The two proposals will eliminate contract law related barriers to cross-border online trade, both for consumers and traders. Removing these obstacles is an incentive for cross-border trade: if the barriers related to contract law were lifted, 122,000 more businesses would be selling online across borders. Intra-EU exports would increase by around €1 billion. Increased online retail competition will lead to retail prices going down in all Member States, averaging -0.25% at EU level. As a result of this price decrease and increased consumer trust stemming

from uniform EU rights, there will be additional consumer demand. Household consumption, which mirrors consumers' welfare, would rise in every Member State with an EU average of +0.23%, which corresponds to about €18 billion. Between 7.8 and 13 million additional consumers would start buying online cross-border. The average amount spent annually by each cross-border buyer would also increase by €40. This increase in supply and demand will have direct effects on the main macroeconomic variables in each Member State and in the EU as a whole. Overall real EU GDP is expected to permanently gain about €4 billion per year.

Who would be affected and how

Businesses will face costs to comply with the new Directive but eventually benefit even more from fully harmonised rules to export goods and digital content throughout the EU. Having implemented the new rules, businesses will largely not have to adapt their contract terms to the laws of other Member States, no matter how many Member States they sell to. SMEs will not be exempted from the new legislation: exemptions would decrease consumers' trust when purchasing from them. There is no justification for giving consumers less protection when they buy from SMEs instead of bigger sellers. An exemption would also undermine the benefits for SMEs of having one single set of rules applying throughout the EU. On the contrary, the initiative will be particularly beneficial to SMEs, which are more affected by the costs to adapt their contract to mandatory rules of other Member States and are more often confined to their home market that their bigger competitors. Cross-border trade is an important way for them to benefit from the advantages of economies of scale. SMEs face a problem in finding customers. This would be easier to cope with in the online context, since the internet enables online sales at reduced costs compared to offline trade.

For goods in particular, businesses currently selling only face-to-face will not have to incur any adaptation costs. Businesses already selling or wishing to sell online to consumers in other Member States will directly benefit from the cost savings resulting from fully harmonised EU rules. Businesses currently selling both online and face-to-face will not in practice be faced with additional costs due to different regimes, as a fragmentation between the rules on online and face-to-face sales of goods is not likely to occur or would probably not have a significant impact. If such costs do occur, they would be limited and only for a short transitional period. According to retail business representatives, omni-channel businesses could actually cope with possible transitional differences between the online and face-to-face sales regimes for goods by applying the respective higher standards to all of their sales and thus operating under a single business model.

For businesses the application of the new rules will entail a certain number of obligations in their relations with consumers. However, many of these obligations are already contained in national laws, to different degrees and extent, as a result of EU minimum harmonisation legislation and therefore businesses are familiar with them. Regarding in particular the prolongation of the period for the shift of the burden of proof from 6 months to two years, this is not expected to have a very significant impact on businesses, since recent data show that in practice only a minority of businesses insist on consumers proving the trader's liability within the entire 2 year legal guarantee period and that the reversal of the burden of proof often operates de facto throughout the entire 2-year legal guarantee period, with very limited change in traders' behaviour before or after the 6 months on this point. [35]

35 "Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015, to be published).

Consumer protection level will be increased compared to the existing EU level. This applies in particular to the extension of the reversal of the burden of proof to two years by aligning it with the legal guarantee period. Compared to their national standards, all EU consumers will benefit on this point from a higher level of consumer protection (except in the case of two Member States where the level will remain the same). This higher level of protection will facilitate consumers exercising their rights and is expected to significantly boost consumers' trust, which is particularly relevant for cross-border purchases given the element of distance involved. As regards the level of consumer protection on other points, like the consumer's duty to notify the defect to the seller and the consumer's right to terminate the contract even in case where the non-performance is minor, in comparison with current national standards, in most cases the proposal will result in a higher level of protection, while in a limited number of Member States certain additional rights in some individual points may be lower. Nevertheless, overall a high level of consumer protection will be ensured and enforcement of the rules will be enhanced. In addition, not only consumers will have access to a wider choice of products from traders across the EU at competitive prices, but they will also be able to benefit from higher quality and more durable products, in line with European Commission's Circular Economy Package.

- **Fundamental rights**

The proposal for the online and other distance sales of goods will impact positively a number of rights protected under the EU Charter of Fundamental Rights, in particular Article 38 on consumer protection and Article 16 on the freedom to conduct a business.

A set of fully harmonised rules for online sales of goods will ensure a fully harmonised high level of consumer protection throughout the EU in conformity with Article 38 of the Charter of Fundamental Rights by providing consumers with clear and specific rights when they buy goods online domestically or from other Member States. However, these rules will replace the current national rules that exist for goods which could lower the level of protection consumers enjoy in certain Member States.

A set of fully harmonised rules for online sales of goods will also contribute to achieving the objective of Article 16 because businesses will be facilitated to sell goods in the EU, both domestically and cross-border. Their ability to expand their business will therefore be reinforced.

Finally, clear contract law rights may help to fulfil the objective of Article 47 (Right to an effective remedy) because it may increase the ability to exercise one's right to an effective remedy before the courts. The new rules should clarify the remedies available in case of disputes.

4. BUDGETARY IMPLICATIONS

The proposal will not have any budgetary implications

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Member States will be required to send to the Commission the measures implementing the Directive on certain aspects concerning contracts for the online and other distance sales of goods. These measures will set out the text of the adopted legislation by the Member States. The Commission will monitor these measures to ensure that they comply with the Directive.

- **Explanatory documents**

In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

- **Detailed explanation of the specific provisions of the proposal**

The proposal consists of 21 articles. Many of these provisions have their origin in Directive 1999/44/EC or the proposal for a Regulation on a Common European Sales Law.

Article 1 sets the subject matter and the scope of the Directive by clarifying that the Directive sets certain rules on conformity, remedies and the modalities for the exercise of these remedies. In the course of the impact assessment, which accompanies the proposals, no B2B problems were identified; consequently the Directive does not deal with those matters. This Directive does not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content, neither it applies to distance contracts for provision of services. However, it applies to goods like household appliances or toys where the digital content is embedded 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. Furthermore, where a sale contract provides both for the sale of goods and the provision of services this Directive applies only to the part relating to the sale of goods.

Article 2 contains a list of definitions for terms used in the Directive. Some definitions stem from the current acquis (such as, for example, the definition of 'consumer' and 'goods') and as they refer to the same concepts, they should be applied and interpreted in a manner consistent with the acquis. Others definitions come from Directive 2011/83/EU or from the proposal for a Regulation on a Common European Sales Law.

Article 3 establishes that the present Directive is a full harmonisation Directive. Member States will not be able to adopt or maintain laws that remain below or go beyond the requirements contained therein. The effect of Article 3 combined with Article 1 is also to determine that in areas not included in the scope of the Directive Member States can still legislate.

Article 4 sets the conformity criteria which the goods have to meet in order to conform to the contract. The goods must primarily conform to what was promised in the contract. It also clarifies that, as a default rule, the conformity of the goods would be assessed not only with regard to the contract terms but also a combination of subjective and objective criteria should apply in order to safeguard legitimate interests of both parties to a sales contract. Those additional objective criteria are set in articles 5, 6 and 7.

Article 5 sets objective criteria for conformity of the goods. In the absence of explicit contractual terms, specifying conformity criteria, the goods must conform to these objective criteria.

Article 6 explains that a lack of conformity resulting from an incorrect installation of the goods is to be regarded as a lack of conformity of the goods themselves if the reason for the incorrect installation is in the sphere of the seller.

Article 7 contains an additional conformity requirement relating to the legal defects goods may have. According to that rule the goods must be clear of any third-party rights, including those based on intellectual property.

Article 8 specifies at which time the conditions for the lack of conformity must be completed in order to engage the seller's liability for non-performance. Generally, that is the time of passing of risk, similarly as in Directive 2011/83/EU, where the consumer or a third party, designated by the consumer, including a carrier, commissioned by the consumer, obtains control over the goods. In cases where the goods need to be installed, the relevant time for establishing conformity is when the installation is completed or after the consumer had a reasonable time for installation but in any case not later than 30 days from the moment of passing of risk. Finally, paragraph 3 of article 8 shifts the burden of proof for the absence of lack of conformity to the seller for a period of two years.

Article 9 lists the remedies for lack of conformity the consumer has available by fully harmonising the order in which remedies could be exercised. In a first step the consumer should be entitled to have the goods repaired or replaced within a reasonable time and without any significant inconvenience. In a second step the consumer should be entitled to a price reduction or to terminate the contract where the lack of conformity is not or cannot be remedied through repair or replacement. The article also provides the consumer with the right to withhold performance until the goods are brought in conformity.

Article 10 imposes on the seller the obligation, when remedying a lack of conformity by replacement of goods, to take back the replaced goods at its own expenses. The seller may take back the defective goods and install the new ones itself or commission a third party to do that at the seller's expenses. The article also clarifies that the consumer should not be obliged to pay for the use which was made of the replaced goods prior to the replacement.

Article 11 clarifies that it is up to the consumer to choose between repair and replacement unless the option chosen would be disproportionate compared to the other option available, impossible or unlawful. It also provides criteria for assessing whether the option chosen is disproportionate compared to the other option available.

Article 12 provides guidance as to how to calculate the price reduction.

Article 13 regulates the modalities for and the consequences of exercising the right to terminate the contract. The right to terminate the contract due to the lack of conformity is a last resort remedy applicable where other ways to remedy that lack of non-conformity are not feasible or have failed. The consumer should enjoy this right also in cases where the lack of conformity is minor. The article specifies that the contract can be terminated by any means of notice from the consumer and that termination should be only partial, where the lack of conformity relates only to part of the goods delivered under the contract. However where the lack of conformity can justify the termination of the contract as a whole, that remedy should not be limited to only partial termination. Article 13 furthermore regulates the restitution as a consequence of the termination by providing that no later than 14 days the seller should reimburse the price paid at its own expenses and that the consumer should return the defective goods at the seller's expense. Finally, this article regulates consumers' obligations under certain restricted conditions to pay the monetary value of the goods where the goods cannot be returned and also to pay to a limited extent for the diminution of the value of the goods.

Article 14 maintains the time limits of two years for the availability of the remedies under this Directive. Where in some Member States the rights available to consumers under article 9 may be subject to a prescription period that period cannot expire earlier.

Article 15 provides transparency requirements as to the commercial guarantees issued by the sellers, for instance as to the form for delivery and the content a guarantee statement should have. Moreover, it states that the guarantee is binding for the seller in accordance with the conditions which are contained in advertisements, pre-contractual information and in the guarantee statement. It clarifies that where conditions which are for instance advertised differ from those included in the guarantee statement the more advantageous to the consumers should prevail.

Article 16 provides the seller with a right to redress in case of an act or omission by a person in earlier links of the chain of transactions which triggered the seller's liability for lack of conformity towards the consumer. The modalities for exercising this right are to be regulated by the national laws of Member States.

Article 17 obliges Member States to ensure that adequate and effective means exist to ensure compliance with this Directive.

Article 18 affirms the mandatory nature of the consumer contract law rules of this Directive by the usual clause clarifying that any deviation from the requirements contained in the Directive to the detriment of the consumer is not binding on the consumer.

Article 19 provides for amendments to other EU legislation. It amends Directive 1999/44/EC in order to avoid overlaps between the two instruments. Article 19 also adds a reference to the Directive in the Annex of Regulation (EC) No 2006/2004 so as to facilitate cross-border cooperation on enforcement of this Directive. It also adds a reference to the Directive in Annex 1 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests[36] so as to ensure that the consumers' collective interests laid down in this Directive are protected.

Article 20 establishes the deadline for transposition by Member States.

Article 21 sets the date of entry into force.

Article 22 specifies the addressees of the Directive.

36 OJ L110, 1.05.2009 , p.30.

2015/0288 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain aspects concerning contracts for the online and other distance sales of goods

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[37],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) In order to remain competitive on global markets, the Union needs to successfully answer the multiple challenges raised today by an increasingly technologically-driven economy. The Digital Single Market Strategy[38] lays down a comprehensive framework facilitating the integration of the digital dimension into the Single Market. The first pillar of the Strategy tackles fragmentation in intra-EU trade by approaching all major obstacles to the development of cross-border e-commerce.

(2) For the achievement of a genuine digital single market, the harmonisation of certain aspects concerning contracts for sales of goods, taking as a base a high level of consumer protection, is necessary.

(3) E-commerce is the main driver for growth within the Digital Single Market. However its growth potential is far from being fully exploited. In order to strengthen Union competiveness and to boost growth, the Union needs to act swiftly and encourage economic actors to unleash the full potential offered by the Digital Single Market. The full potential of the Digital Single Market can only be unleashed if all market participants enjoy smooth access to the online sales of goods and are able to confidently engage in e-commerce transactions. The contract law rules on the basis of which market participants conclude transactions are among the key factors shaping business' decisions whether to offer goods online cross-border. Those rules also influence consumers' willingness to embrace and trust this type of purchase.

(4) While online sales of goods constitute the vast majority of distance sales in the Union, this Directive should cover all distance sales channels, including phone and mail

37 OJ C […], […], p. […].

38 COM(2015) 192 final.

orders, in order to avoid any unjustified distortions of competition and to create a level playing field for all businesses selling at a distance.

(5) The Union rules applicable to the online and other distance sales of goods are still fragmented although rules on pre-contractual information requirements, the right of withdrawal and delivery conditions have already been fully harmonised. Other key contractual elements such as the conformity criteria, the remedies and modalities for their exercise for goods which do not conform to the contract are subject to minimum harmonisation in Directive 1999/44/EC of the European Parliament and of the Council[39]. Member States have been allowed to go beyond the Union standards and introduce rules that ensure even higher level of consumer protection. Having done so, they have acted on different elements and to different extents. Thus, national provisions transposing the Union legislation on consumer contract law significantly diverge today on essential elements of a sales contract, such as the absence or existence of a hierarchy of remedies, the period of the legal guarantee, the period of the reversal of the burden of proof, or the notification of the defect to the seller.

(6) Existing disparities may adversely affect businesses and consumers. Pursuant to Regulation (EC) No 593/2008 of the European Parliament and of the Council[40], businesses directing activities to consumers in other Member States need to take account of the mandatory consumer contract law rules of the consumer's country of habitual residence. As these rules differ among Member States, businesses may be faced with additional costs. Consequently many businesses may prefer to continue trading domestically or only export to one or two Member States. That choice of minimising exposure to costs and risks associated with cross-border e-commerce results in lost opportunities of commercial expansion and economies of scale. Small and medium enterprises are in particular affected.

(7) While consumers enjoy a high level of protection when they purchase online or otherwise at a distance from abroad as a result of the application of Regulation (EC) No 593/2008, fragmentation also impacts negatively on consumers' levels of confidence in e-commerce. While several factors contribute to this mistrust, uncertainty about key contractual rights ranks prominently among consumers' concerns. This uncertainty exists independently of whether or not consumers are protected by the mandatory consumer contract law provisions of their own Member State in the case where a seller directs his cross-border activities to them or whether or not consumers conclude cross-border contracts with a seller without the respective seller pursuing commercial activities in the consumer's Member State.

(8) In order to remedy those problems, businesses and consumers should be able to rely on a set of fully harmonised, targeted rules for the online and other distance sales of goods. Uniform rules are necessary in relation to several essential elements of consumer contract law which under the current minimum harmonisation approach led to disparities and trade barriers across the Union.

(9) Fully harmonised consumer contract law rules will make it easier for traders to offer their products in other Member States. Businesses will have reduced costs as they will no longer need to take account of different consumer mandatory rules. They will enjoy

39 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171, 7.7.1999, p.12.

40 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L177, 4.7.2008, p.6.

more legal certainty when selling at a distance to other Member States through a stable contract law environment.

(10) Increased competition among retailers is likely to result in wider choices at more competitive prices being offered to consumers. Consumers will benefit from a high level of consumer protection and welfare gains through targeted fully harmonised rules. This in turn would increase their trust in the cross-border commerce at a distance and in particular online. Consumers will more confidently buy at a distance cross-border knowing they would enjoy the same rights across the Union.

(11) This Directive covers rules applicable to the online and other distance sales of goods only in relation to key contract elements needed to overcome contract-law related barriers in the Digital Single Market. For this purpose, rules on conformity requirements, remedies available to consumers for lack of conformity of the goods with the contract and modalities for their exercise should be fully harmonised and the level of consumer protection as compared to Directive 1999/44/EC, should be increased.

(12) Where a contract includes elements of both sales of goods and provision of services, the Directive should apply only to the part relating to the sale of goods in line with the approach taken by Directive 2011/83/EU.

(13) This Directive should not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content. However, this Directive should apply to digital content integrated in goods such as household appliances or toys where the digital content is embedded 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.

(14) This Directive should not affect contract laws of Member States in areas not regulated by this Directive. Member States should also be free to provide more detailed conditions in relation to aspects regulated in this Directive to the extent those are not fully harmonised by this Directive: this concerns limitation periods for exercising the consumers' rights, commercial guarantees, and the right of redress of the seller.

(15) Where referring to the same concepts, the rules of this Directive should be applied and interpreted in a manner consistent with the rules of Directive 1999/44/EC and Directive 2011/83/EU of the European Parliament and of the Council[41] as interpreted by the case law of the Court of Justice of the European Union.

(16) For the purpose of legal clarity the Directive includes a definition of a sales contract. This definition maintains that contracts where goods are yet to be produced or manufactured, including under consumer's specifications, are also included in the scope of the Directive.

(17) In order to bring clarity and certainty for sellers and consumers the Directive should define the notion of a contract. This definition follows the common traditions of all Member States by requiring an agreement intended to give rise to obligations or other legal effects for a contract to exist.

(18) In order to balance the requirement of legal certainty with an appropriate flexibility of the legal rules, any reference to what can be expected of or by a person in this

41 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council OJ L 304, 22.11.2011, p.64.

Directive should be understood as a reference to what can reasonably be expected. The standard of reasonableness should be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the parties involved. In particular, the reasonable time for completing a repair or replacement should be objectively ascertained, having regard to the nature of the goods and the lack of conformity.

(19) In order to provide clarity as to what a consumer can expect from the goods and what the seller would be liable for in case of failure to deliver what is expected, it is essential to fully harmonise rules for determining the conformity with the contract. Applying a combination of subjective and objective criteria should safeguard legitimate interests of both parties to a sales contract. Conformity with the contract should be assessed by taking into account not only requirements which have actually been set in the contract - including in pre-contractual information which forms an integral part of the contract - but also certain objective requirements which constitute the standards normally expected for goods, in particular in terms of fitness for the purpose, packaging, installation instructions and normal qualities and performance capabilities.

(20) A large number of consumer goods are intended to be installed before they can be usefully used by the consumer. Therefore any lack of conformity resulting from an incorrect installation of the goods should be regarded as a lack of conformity with the contract where the installation was performed by the seller or under the seller's control, as well as where the goods were installed by the consumer but the incorrect installation is due to incorrect installation instructions.

(21) Conformity should cover material defects as well as legal defects. Third party rights and other legal defects might effectively bar the consumer from enjoying the goods in accordance with the contract when the right's holder rightfully compels the consumer to stop infringing those rights. Therefore the seller should ensure that the goods are free from any right of a third party, which precludes the consumer from enjoying the goods in accordance with the contract.

(22) While freedom of contract with regard to the criteria of conformity with the contract should be ensured, in order to avoid circumvention of the liability for lack of conformity and ensure a high level of consumer protection, any derogation from the mandatory rules on criteria of conformity and incorrect installation, which is detrimental to the interests of the consumer, shall be valid only if the consumer has been expressly informed and has expressly consented to it when concluding the contract.

(23) Ensuring longer durability of consumer goods is important for achieving more sustainable consumption patterns and a circular economy. Similarly, keeping non-compliant products out of the Union market by strengthening market surveillance and providing the right incentives to economic operators is essential to increase trust in the single market. For these purposes, product specific Union legislation is the most appropriate approach to introduce durability and other product related requirements in relation to specific types or groups of products, using for this purpose adapted criteria. This Directive should therefore be complementary to the objectives followed in this Union sector specific legislation. In so far as specific durability information is indicated in any pre-contractual statement which forms part of the sales contract, the consumer should be able to rely on them as a part of the criteria for conformity.

(24) Enhancing legal certainty for both consumers and sellers requires a clear indication of the time when the conformity of the goods to the contracts should be assessed. In order to ensure coherence between the present Directive and Directive 2011/83/EU it is appropriate to indicate the time of the passing of risk as the time for assessing the conformity of the goods. However, in cases where the goods need to be installed, that relevant time should be adapted.

(25) The optional possibility for Member States to maintain notification obligations for consumers may lead them to easily lose well-substantiated claims for remedies in case of delayed or lack of notification, especially in a cross-border transaction where a law of another Member State applies and the consumer is not aware of this notification obligation resulting from the law of another Member State. Therefore a notification obligation for consumers should not be established. Accordingly, Member States should be prevented from introducing or maintaining a requirement for the consumer to notify the seller the lack of conformity within a certain deadline.

(26) In order to allow businesses to rely on a single set of rules across the Union, it is necessary to fully harmonise the period of time during which the burden of proof for the lack of conformity is reversed in favour of the consumer. Within the first two years, in order to benefit from the presumption of lack of conformity, the consumer should only establish that the good is not conforming, without needing to demonstrate that the lack of conformity actually existed at the relevant time for establishing conformity. In order to increase legal certainty in relation to available remedies for lack of conformity with the contract and in order to eliminate one of the major obstacles inhibiting the Digital Single Market, a fully harmonised order in which remedies can be exercised should be provided for. In particular, the consumer should enjoy a choice between repair or replacement as a first remedy which should help in maintaining the contractual relation and mutual trust. Moreover, enabling consumers to require repair should encourage a sustainable consumption and could contribute to a greater durability of products.

(27) The consumer's choice between repair and replacement should only be limited where the option chosen would be disproportionate compared to the other option available, impossible or unlawful. For instance, it might be disproportionate to request the replacement of goods because of a minor scratch where this replacement would create significant costs while, at the same time, the scratch could easily be repaired.

(28) Where the seller has not remedied the lack of conformity through repair or replacement without significant inconvenience for the consumer and within a reasonable time, the consumer should be entitled to a price reduction or to terminate the contract. In particular any repair or replacement needs to be successfully accomplished within this reasonable period. What is a reasonable time should be objectively ascertained considering the nature of the goods and the lack of conformity. If upon the laps of the reasonable period, the seller has failed to successfully remedy the lack of conformity, the consumer should not be obliged to accept any further attempts by the seller in relation to the same lack of conformity.

(29) Considering that the right to terminate the contract due to the lack of conformity is an important remedy applicable where repair or replacement are not feasible or have failed, the consumer should also enjoy the right to terminate the contract in cases where the lack of conformity is minor. This would provide a strong incentive to remedy all cases of a lack of conformity at an early stage. In order to make the right to terminate effective for consumers, in situations where the consumer acquires multiple

goods, some being an accessory to the main item which the consumer would not have acquired without the main item, and the lack of conformity impacts that main item, the consumer should have the right to terminate the contract also in relation to the accessory elements, even if the latter are in conformity with the contract.

(30) Where the consumer terminates the contract due to the lack of conformity, this Directive prescribes only the main effects and modalities of the right of termination, in particular the obligation for the parties to return what they have received. Thus, the seller shall be obliged to refund the price received from the consumer and the consumer shall return the goods.

(31) In order to ensure the effectiveness of the right to terminate for consumers while avoiding the consumer's unjustified enrichment, the consumer's obligation to pay for the decrease of the value of the goods should be limited to those situations where the decrease exceeds normal use. In any case the consumer should not be obliged to pay more than the price agreed for the goods. In situations where the return of the goods is impossible due to their destruction or loss, the consumer should pay the monetary value of the goods which were destroyed. However, the consumer should not be obliged to pay the monetary value where the destruction or loss is caused by the lack of conformity of the goods with the contract.

(32) In order to increase legal certainty for sellers and overall consumer confidence in cross-border purchases it is necessary to harmonise the period during which the seller is held liable for any lack of conformity which exists at the time when the consumer acquires the physical possession of goods. Considering that the large majority of Member States have foreseen a two-year period when implementing Directive 1999/44 and in practice this is considered by market participants as a reasonable period, this period should be maintained.

(33) 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, this Directive should align the period of time during which the burden of proof is reversed in favour of the consumer with the period during which the seller is held liable for any lack of conformity.

(34) In order to ensure transparency, certain transparency requirements for commercial guarantees should be provided. Moreover in order to improve legal certainty and to avoid that consumers are misled, this Directive provides that where commercial guarantee conditions contained in advertisements or pre-contractual information are more favourable to the consumer than those included in the guarantee statement the more advantageous conditions should prevail.

(35) Considering that the seller is liable towards the consumer for any lack of conformity of the goods resulting from an act or omission of the seller or a third party it is justified that the seller should be able to pursue remedies against the responsible person earlier in the chain of transactions. However, this Directive should not affect the principle of freedom of contract between the seller and other parties in the chain of transactions. The details for exercising that right, in particular against whom and how such remedies are to be pursued, should be provided by the Member States.

(36) Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual rights should be afforded the right to initiate proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.

(37) Nothing in this Directive should prejudice the application of rules of private international law, in particular Regulation (EC) No 593/2008 Regulation (EC) No 1215/2012 of the European Parliament and of the Council[42].

(38) Directive 1999/44/EC should be amended to exclude distance sales contracts from its scope of application.

(39) Regulation (EC) No 2006/2004 of the European Parliament and of the Council[43] should be amended to include a reference to this Directive in its Annex so as to facilitate cross-border cooperation on enforcement of this Directive.

(40) Directive 2009/22/EC of the European Parliament and of the Council[44] should be amended to include a reference to this Directive in its Annex so as to ensure that the consumers' collective interests laid down in this Directive are protected.

(41) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[45], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(42) Since the objectives of this Directive, namely to contribute to the functioning of the internal market by tackling in a consistent manner contract law-related obstacles for the online and other distance sales of goods cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(43) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Article 16, 38 and 47 thereof.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive lays down certain requirements concerning distance sales contracts concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of these remedies.

42 Regulation (EC) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351, 20.12.2012, p.1.

43 Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws OJ L 165, 18.06.2013, p.1.

44 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests OJ L110, 1.05.2009 , p.30.

45 OJ C 369, 17.12.2011, p. 14.

2. This Directive shall not apply to distance contracts for the provision of services. However, in case of sales contracts providing both for the sale of goods and the provision of services, this Directive shall apply to the part relating to the sale of goods.

3. This Directive shall not apply to any durable medium incorporating digital content where the durable medium has been used exclusively as a carrier for the supply of the digital content to the consumer.

4. In so far as not regulated therein, this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract.

Article 2

Definitions

For the purpose of this Directive, the following definitions shall apply:

(a) 'sales contract' means any contract under which the seller transfers or undertakes to transfer the ownership of goods, including goods which are to be manufactured or produced, to the consumer and the consumer pays or undertakes to pay the price thereof.

(b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

(c) 'seller' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive;

(d) 'goods' means any tangible movable items with the exception of

  (a) items sold by way of execution or otherwise by authority of law;

  (b) water, gas and electricity unless they are put up for sale in a limited volume or a set quantity.

(e) 'distance sales contract' means any sales contract concluded under an organised distance scheme without the simultaneous physical presence of the seller and the consumer, with the exclusive use of one or more means of distance communication, including via internet, up to and including the time at which the contract is concluded;

(f) 'durable medium' means any instrument which enables the consumer or the seller to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(g) '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;

(h) ‘contract’ means an agreement intended to give rise to obligations or other legal effects;

(i) ‘repair’ means, in the event of lack of conformity, bringing goods into conformity with the contract;

(j) ‘free of charge’ means free of the costs necessarily incurred in order to bring the goods into conformity, particularly the cost of postage, labour and materials.

Article 3

Level of harmonisation

Member States shall not maintain or introduce provisions diverging from those laid down in this Directive including more or less stringent provisions to ensure a different level of consumer protection.

Article 4

Conformity with the contract

1. The seller shall ensure that, in order to conform with the contract, the goods shall, where relevant:

   (a) be of the quantity, quality and description required by the contract, which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model;

   (b) be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted; and

   (c) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.

2. In order to conform with the contract, the goods must also meet the requirements of Articles 5, 6 and 7.

3. Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract.

Article 5

Requirements for conformity of the goods

The goods shall, where relevant:

   (a) be fit for all the purposes for which goods of the same description would ordinarily be used;

   (b) be delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive; and

   (c) possess qualities and performance capabilities which are normal in goods of the same type and which the consumer may expect given the nature of the goods and taking into account any public statement made by or on behalf of the

seller or other persons in earlier links of the chain of transactions, including the producer, unless the seller shows that:

(i) the seller was not, and could not reasonably have been, aware of the statement in question;

(ii) by the time of conclusion of the contract the statement had been corrected; or

(iii) the decision to buy the goods could not have been influenced by the statement.

Article 6

Incorrect installation

Where the goods are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity with the contract of the goods if:

(a) the goods were installed by the seller or under the seller's responsibility; or

(b) the goods, intended to be installed by the consumer, were installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

Article 7

Third party rights

At the time relevant for establishing the conformity with the contract as determined by Article 8, the goods must be free from any right of a third party, including based on intellectual property, so that the goods can be used in accordance with the contract.

Article 8

Relevant time for establishing conformity with the contract

1. The seller shall be liable for any lack of conformity with the contract which exists at the time when:

   (a) the consumer or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods; or

   (b) the goods are handed over to the carrier chosen by the consumer, where that carrier was not proposed by the seller or where the seller proposes no means of carriage.

2. In cases where the goods were installed by the seller or under the seller's responsibility, the time when the installation is complete shall be considered as the time when the consumer has acquired the physical possession of the goods. In a case where the goods were intended to be installed by the consumer, the time when the consumer had reasonable time for the installation but in any case not later than 30 days after the time indicated in paragraph 1 shall be considered as the time when the consumer has acquired the physical possession of the goods.

3. Any lack of conformity with the contract which becomes apparent within two years from the time indicated in paragraphs 1 and 2 is presumed to have existed at the time

indicated in paragraphs 1 and 2 unless this is incompatible with the nature of the goods or with the nature of the lack of conformity.

Article 9

Consumer's remedies for the lack of conformity with the contract

1. In the case of a lack of conformity with the contract, the consumer shall be entitled to have the goods brought into conformity by the seller, free of charge, by repair or replacement in accordance with Article 11.

2. A repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

3. The consumer shall be entitled to a proportionate reduction of the price in accordance with Article 12 or to terminate the contract in accordance with Article 13 where:

   (a) a repair or replacement are 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.

4. The consumer shall be entitled to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract.

5. The consumer shall not be entitled to a remedy to the extent that the consumer has contributed to the lack of conformity with the contract or its effects.

Article 10

Replacement of goods

1. Where the seller remedies the lack of conformity with the contract by replacement, the seller shall take back the replaced goods at the seller's expense unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer.

2. Where the consumer had installed the goods in a manner consistent with their nature and purpose, before the lack of conformity with the contract became apparent, the obligation to take back the replaced goods shall include the removal of the non-conforming goods and the installation of replacement goods, or bearing the costs thereof.

3. The consumer shall not be liable to pay for any use made of the replaced goods in the period prior to the replacement.

Article 11

Consumer's choice between repair and replacement

The consumer may choose between repair and replacement unless the option chosen would be impossible, unlawful or, compared to the other option, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:

(a) the value the goods would have if there were no lack of conformity with the contract;

(b) the significance of the lack of conformity with the contract;

(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.

Article 12

Price reduction

The reduction of price 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

Article 13

The consumer's right to terminate the contract

1. The consumer shall exercise the right to terminate the contract by notice to the seller given by any means.

2. Where the lack of conformity with the contract relates to only some of the goods delivered under the contract and there is a ground for termination of a contract pursuant to Article 9, the consumer may terminate the contract only in relation to those goods and any other goods, which the consumer acquired as an accessory to the non-conforming goods.

3. Where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract in accordance with paragraph 2:

(a) the seller shall reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice and shall bear the cost of the reimbursement;

(b) the consumer shall return, at the seller's expense, to the seller the goods without undue delay and in any event not later than 14 days from sending the notice of termination;

(c) where the goods cannot be returned because of destruction or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without destruction or loss until that date, unless the destruction or loss has been caused by a lack of conformity of the goods with the contract; and

(d) the consumer shall pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The payment for decrease in value shall not exceed the price paid for the goods.

Article 14

Time limits

The consumer shall be entitled to a remedy for the lack of conformity with the contract of the goods where the lack of conformity becomes apparent within two years as from the relevant time for establishing conformity. If, under national legislation, the rights laid down in Article 9 are subject to a limitation period, that period shall not be shorter than two years from the relevant time for establishing conformity with the contract.

Article 15

Commercial guarantees

1. 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 pre-contractual 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.

   If the guarantee statement is less advantageous to the consumer than the conditions laid down in pre-contractual information provided by the seller or advertising, the commercial guarantee shall be binding under the conditions laid down in the pre-contractual information or advertising relating to the commercial guarantee.

2. The guarantee statement shall be made available on a durable medium and drafted in plain, intelligible language. It shall include the following:

   (a) a clear statement of the legal rights of the consumer as provided for in this Directive and a clear statement that those rights are not affected by the commercial guarantee; and

   (b) the terms of the commercial guarantee that go beyond the legal rights of the consumer, information about the duration, transferability, territorial scope and existence of any charges which the consumer might incur in order to benefit from the commercial guarantee, the name and address of the guarantor and, if different from the guarantor, the person against whom any claim is to be made and the procedure by which the claim is to be made.

3. Non-compliance with paragraph 2 shall not affect the binding nature of the commercial guarantee for the guarantor.

4. The Member States may lay down additional rules on commercial guarantees insofar as those rules do not reduce the protection set out in this Article.

Article 16

Right of redress

Where the seller is liable to the consumer because of a lack of conformity with the contract resulting from an act or omission by a person in earlier links of the chain of transactions, the seller shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the seller may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

Article 17

Enforcement

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.

2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:

(a) public bodies or their representatives;

(b) consumer organisations having a legitimate interest in protecting consumers;

(c) professional organisations having a legitimate interest in acting.

Article 18

Mandatory nature

Any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them or varies their effect before the lack of conformity with the contract of the goods is brought to the seller's attention by the consumer shall not be binding on the consumer unless parties to the contract exclude, derogate from or vary the effects of the requirements of Articles 5 and 6 in accordance with Article 4 (3).

Article 19

Amendments to Directive 1999/44/EC, Regulation (EC) No 2006/2004 and Directive 2009/22/EC

1. Article 1 of Directive 1999/44/EC is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of ***contracts for*** *the sale of consumer goods and associated guarantees,* ***which are not distance sales contracts,*** *in order to ensure a uniform minimum level of consumer protection in the context of the internal market."*

(b) paragraph 2 is amended as follows:

(i) point (f) is replaced by the following:

"(f) repair: shall mean, in the event of lack of conformity, bringing consumer goods into conformity with the contract of sale;"

(ii) the following point is added:

"g) 'distance sales contract' means any sales contract concluded under an organised distance scheme without the simultaneous physical presence of the seller and the consumer, with the exclusive use of one or more means of distance communication, including via internet, up to and including the time at which the contract is concluded".

2. In the Annex to Regulation (EC) No 2006/2004, the following point is added:

"22. Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on certain aspects concerning contracts for the online and other distance sales of goods (OJ…)"

3. In Annex I to Directive 2009/22/EC the following point is added:

"16. Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on certain aspects concerning contracts for the online and other distance sales of goods (OJ…)"

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*date of two years after the entry into force*] at the latest.

2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 21

Entering into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 22

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*