

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT **C**

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**The new proposal for  
harmonised rules for the  
online sales of tangible  
goods: conformity, lack of  
conformity and remedies**

WORKSHOP FOR THE JURI COMMITTEE





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**The new proposal for harmonised rules  
for the online sales of tangible goods:  
conformity, lack of conformity and  
remedies**

**IN-DEPTH ANALYSIS**

**Abstract**

Upon request by the JURI Committee, this paper evaluates the European Commission proposal of 9 December 2015 harmonizing certain civil law contractual rules for Online Shopping. The directive's approach concerning conformity, lack of conformity and remedies is analyzed. It also examines the question if the proposal is fit to tackle the overall objectives of the digital single market strategy, that of reducing obstacles for cross-border trade.

**This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the JURI Committee**

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## LIST OF ABBREVIATIONS

- B2C** Business to consumer relationship
- CESL** Proposal COM (2011) 635 for a Regulation on a Common European Sales Law (withdrawn)
- DCFR** Draft Common Framework of Reference
- CRD** Directive 2011/83/EU on Consumer rights
- CSD** Directive 1999/44 on the Sale of consumer goods and associated guarantees
- The Proposal** Proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods of 9 December 2015, COM (2015) 635
- PECL** Principles of European Contract Law

## KEY FINDINGS

- The proposal contains many **clarifications of rights** that were already part of the Consumer Sales Directive. These clarifications are highly useful, but should **also become applicable** to face-to-face sales under the current Consumer Sales Directive.
- The proposal adopts **different standards for conformity**. This is unfortunate. In addition, the proposed standards seem too much geared towards the subjective agreement of the parties instead of towards a more objective conformity standard.
- Several of the proposed rules will lead to **a higher level of protection** of consumers in distance contracts. This is evident from the extension of the reversal of the burden of proof of a lack of conformity to two years, the possibility to terminate in case of minor defects and the abolition of the Member States' discretion to oblige the consumer to notify the seller about a lack of conformity within two months after detecting the defect.
- Turning the rights provided by the existing CSD into a regime of maximum harmonisation for distance and online sales will contribute to an **overall higher level of protection** in the EU as a whole, but will naturally oblige some Member States to **reduce** their existing protection. The consumer can no longer have a **free choice of remedies** and a **direct right to terminate** the contract will no longer be allowed. Consumers' claims in case the **defect manifests itself after more than two years** in a case in which the consumer could expect the goods to have a longer durability are also no longer possible. These seem unfortunate consequences of the Proposal.

## 1. INTRODUCTION

This is a briefing note prepared at the request of the Committee on Legal Affairs of the European Parliament for a workshop on 'New rules for contracts in the digital environment', on 17 February 2016 at the European Parliament in Brussels.

This note focuses on the *Proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods* of 9 December 2015, COM (2015) 635 (hereinafter 'The Proposal'). The related *Proposal for a directive on certain aspects concerning contracts for the supply of digital content* of 9 December 2015, COM (2015) 634 is being dealt with in another briefing paper. The Commission envisages both proposals as one package with the common objective of contributing to the creation of a Digital Single Market as set out in its Digital Single Market Strategy adopted on 6 May 2015, COM (2015) 192. Although both proposals are related, their field of application and proposed substantive rules on conformity and remedies differ to such an extent that it was decided to discuss them in two separate briefing notes.

This note will discuss conformity, lack of conformity and remedies of the consumer against the **background of the aims of the Proposal**. The note is structured in the following way. Section 2 provides the background to the current Proposal and asks whether it will contribute to the overall aim of reducing obstacles to cross-border trade. Sections 3 and 4 provide an in-depth analysis of the rules on conformity and lack of conformity and on the remedies of the consumer. Section 5 concludes and makes some recommendations on how to improve the Proposal.

## 2. BACKGROUND: CURRENT FRAGMENTATION OF CONTRACTUAL REMEDIES AND THE AIM OF THE PROPOSAL

The current law on contractual remedies in case of consumer sales can be briefly characterised as follows. It is a **multi-level system** that is made up of rules at both the national and European level. According to national laws, consumers are usually able to claim performance (i.e. delivery and repair and replacement in case delivery is defective) as well as damages and termination in case of non-performance of the contract. In addition, the consumer has the right to withhold payment of the price until the seller has performed himself. The availability of each of these actions is tied to more specific requirements that differ from one Member State to another. This is also true for the requirement of non-conformity that often begets a somewhat different interpretation in each of the Member States.

As a result of Directive 1999/44/EC on the Sale of consumer goods (hereinafter 'CSD'), some of these national consumer rights are subject to **minimum-harmonisation**. This is true in particular for the definition of conformity (including time limits) and for the rights to repair and replacement, termination and price reduction. Arts. 18 and 20 of maximum harmonisation Directive 2011/83/EU on Consumer rights (hereinafter 'CRD') provide for a default rule on the time of delivery and on the passing of risk. The place and further modalities of delivery are not covered.

The result of this is that rules on consumer remedies within the EU are **fragmented in two different ways**. The **first type** of fragmentation consists of remaining differences among Member States, either because the remedy is not covered by EU-law at all (as is the case with the claim for damages for non-performance and elements of the claim for termination and delivery), or because the remedy is covered, but only by means of minimum-harmonisation. In case of the latter, the overall level of consumer protection in the EU has surely gone up, but remaining differences require business parties to still make study of the extent to which a specific Member State has gone beyond the minimum-level of protection. Examples include the availability of remedies (some Member States adopted the CSD's hierarchy of remedies, others leave the consumer a free choice), the existence of a notification duty on the part of the consumer for a lack of conformity, the period of shifting the burden of proof (CSD's minimum of 6 months, or a longer period) and the period in which the trader can be held liable for defects present at the time of delivery (CSD's minimum of two years, or a longer period).

The **second type** of fragmentation is caused by EU-law itself. The main reason for this lies in the **different scope of application** of the various EU-directives in the area of consumer protection. While some directives, such as the CSD, are applicable to both face-to-face sales and sales at a distance (including online sales), other directives (in particular the Consumer Rights Directive) mainly apply to distance and off-premises contracts. Another reason why EU-legislation leads to fragmentation is caused by the need to treat the national implementations of EU-directives differently from rules produced by the national legislator and courts: implemented EU-law requires a **different interpretation** in line with the aims of the EU-instrument and the case law of the Court of Justice of the European Union. All this leads to EU-consumer rights running parallel to national rights.

It is beyond doubt that this fragmentation in consumer's remedies is not conducive to foster cross-border trade and the subsequent further development of the internal market. The Commission (Proposal, p. 2) rightly argues that the resulting complexity of the legal framework leads to uncertainty faced by both businesses and consumers. Within the ambit of the current legislative EU-competences, **fragmentation is less likely to occur** if:

1. the legislative instrument covers **more contractual remedies** (and possibly other topics such as formation and contents of the contract);
2. the **degree of harmonisation is higher**. The relevant scale is that of a directive containing minimum-harmonisation, a directive containing maximum-harmonisation and a regulation;
3. the **scope of application and substantive rules** of the relevant EU-instruments are **more uniform**.

This still leaves open how the relevant rules become applicable to the contract: as contractual default-rules or because of a choice by the parties, as proposed in the now withdrawn Proposal COM (2011) 635 for a Regulation on a Common European Sales Law (hereinafter 'CESL'). The present Proposal confirms that the Commission has abandoned the latter approach in the area of contract law.<sup>1</sup>

If the aim of the current Proposal is indeed, as it claims, to create a more business-friendly environment by reducing fragmentation and complexity, and thus make it easier to sell cross-border, this aim must be evaluated against the three mentioned factors. In this respect the Proposal has **low ambitions**:

1. The Proposal (Arts. 9-13) **adds little** to the consumer's remedies for lack of conformity that were already part of the CSD, namely the right to repair and replacement, price reduction and termination. It adds to these existing rights:

- the right of the consumer to **withhold payment** of the price until the seller has properly performed the contract (Art. 9 s. 4; see section 4.1 sub b below);
- an extension of the period in which the lack of conformity is presumed to have existed at the time of delivery from six months to **two years** (Art. 8 s. 3; see section 3.2 below).

In addition, the Proposal makes explicit:

- the obligation of the seller to **take back the replaced goods** at the seller's expense (Art. 10 s. 1);
- that the consumer is **not liable to pay for any use** made of the replaced goods prior to replacement (Art. 10 s. 3).

Both clarifications are discussed in section 4.1 sub b below.

The present Proposal thus lacks rules on a wide variety of topics relevant to contracting parties that were part of the 2011 CESL-proposal, including rules on delivery (Arts. 93 ff. CESL), payment of price (Arts. 124 ff), damages for non-performance (Arts. 159 ff. CESL), change of circumstances (Art. 89 CESL), anticipatory breach (Art. 116 CESL), and the

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<sup>1</sup> See also Commission Work Programme 2015: A New Start, COM (2014) 910 final (16 December 2014), Annex II 12.

passing of risk (art. 143 CESL). It must be noted that the damages claim is part of the Digital Content Proposal (Art. 14).<sup>2</sup>

2. The Proposal is aimed at **maximum-harmonisation**. Here lies the main difference with the existing Consumer Sales Directive; it also provides the main rationale for the Proposal in that it seeks to ensure one level of consumer protection across the EU, thus allowing traders to sell to consumers based on the same contractual terms. The Proposal will indeed contribute to this goal, be it:

- on the **limited scale of the remedies specifically covered** by the Proposal. The Proposal does not affect the other contractual topics just mentioned. In addition, minimum-harmonisation remains in place for the limitation periods for exercising consumer's rights, commercial guarantees and the right of redress for the seller (Recital no. 14). This casts some **doubts** about the extent to which the Proposal truly contributes to the ability of traders to draft similar contractual terms for both their domestic and cross-border contracts.
- at the well-known price to be paid for an overall higher level of protection: it will **lower the level of protection in some Member States**. Substantive examples are provided below.

An example concerning the scope of application of the rules concerns the **definition of the 'distance sales contract.'** Art. 2 (e) of the Proposal follows the definition adopted in the Consumer Rights Directive (Art. 2 (7)) by requiring 'an organised distance scheme', which requires no simultaneous physical presence of seller and consumer and an exclusive use of means of distance communication until the contract is concluded. It is left to the consumer to prove that such a scheme exists. However, this can be difficult for the consumer who is sometimes unable to ascertain whether the offer he received is part of a broader scheme with many consumers being addressed. This would be an argument to reverse the burden of proof and create a presumption that a distance contract is concluded by means of a distance scheme. This is the solution that was adopted in German law (§ 312c BGB) and that was advocated for by Dutch authors as well.<sup>3</sup> The question must be asked whether the proposed maximum-harmonisation will still allow for this extra protection of the consumer by way of a reversal of the burden of proof.

3. The scope of the Proposal is limited to distance sales contracts for movables in B2C-relationships (Art. 1 s. 1). These contracts are at present also covered by, inter alia, the CSD – but no longer if the Proposal is accepted – as well as by the CRD (providing information requirements and a right of withdrawal). The accompanying Proposal COM (2015) 634 for a Directive on contracts for the supply of digital content provides parallel rules on contracts for the supply of digital content. The result of this is that, if the current Proposals are adopted, this will lead to an **increased fragmentation of the EU-law on contractual remedies**, also in view of small substantive differences among the two proposed directives (see section 3 below about the conformity requirement). The **future regulatory framework** will in essence look like this:

- the Consumer Sales Directive covers remedies for face-to-face-contracts by way of minimum-harmonisation;
- Proposal COM (2015) 635 covers remedies for distance sales, mostly but not entirely by way of maximum-harmonisation;

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<sup>2</sup> See in more detail briefing note PE 536.494 by Prof. Vanessa Mak.

<sup>3</sup> On this J.M. Smits, *WPNR* 6500 (2001), p. 275.

- Proposal COM (2015) 634 covers remedies for contracts for the supply of digital contents, mostly but not entirely by way of maximum-harmonisation;
- The Consumer Rights Directive will continue to provide the consumer who is a party to a distance contract with a right of withdrawal.

It is highly questionable whether adding an extra layer of maximum-harmonisation rules only for distance sales and contracts on digital contents will make the regulatory framework less complicated. This is all the more so in view of the fact that the existing directives (in particular the CSD) on the one hand, and the two new proposals on the other, show **differences in detail**.<sup>4</sup> These differences are not restricted to the substance – on which more in section 3 – but concern for example also the definitions of ‘consumer’<sup>5</sup> and ‘commercial guarantee’.<sup>6</sup> As a result of the Proposal, the EU-rules on distance contracts will become more elaborate and partly different from the rules on face-to-face sales.

In conclusion, the Proposal will, for those limited topics covered by the Proposal, lead to less divergence of the national laws on distance sales – for which maximum-harmonisation will be provided – but also to more divergence within national law among distance sales and face-to-face sales to the detriment of those sellers who sell both online and through shops, thus using multiple sales channels. It seems right to ask:

- a) why a **sectorial approach** was chosen, having for a consequence that face-to-face sales are not already part of this Proposal<sup>7</sup>;
- b) why not a **more elaborate set of provisions**, also covering other aspects of the consumer sales contracts, is proposed;
- c) whether harmonisation by way of a **regulation**, or a new start for the **CESL-Proposal**, would not be the better option if the goal is to reduce complexity and costs. It is clear that this would only make sense if the proposed rules would be more elaborate and cover more topics than the current texts.

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<sup>4</sup> The two proposals also use sometimes slightly different formulations, as in the definition of ‘seller’ and ‘supplier’ in their Art. 2.

<sup>5</sup> The Proposals add ‘craft’ to the definition of ‘consumer’ in Art. 2 (b); this is not part of the current CSD.

<sup>6</sup> Cf. Art. 2 (g) Proposal and Art. 1 (e) CSD.

<sup>7</sup> Notwithstanding the announced ‘Fitness Check Analysis’: Proposal, p. 3.

## 3. CONFORMITY AND LACK OF CONFORMITY (ARTS. 4-8)

### 3.1 General approach and clarification of what is 'conformity'

The key criterion for the seller's liability is the conformity with the contract. This conformity is assessed on basis of both the explicitly agreed upon conditions the goods must meet and/or the extent to which they are fit for normal use or have the qualities the consumer can reasonably expect. This means that the **main standard for conformity** is what the parties have agreed upon (a more subjective criterion); however, this standard can be raised by the legislative default criteria (such as 'fit for normal use') and be lowered if the seller told the consumer about defects or if the consumer should have discovered such defects himself. The consumer's expectations are also influenced by statements made by parties earlier in the chain, such as advertisements by the producer. Arts. 4-8 of the Proposal essentially lie down these rules in a detailed way. In this, they substantively follow both Art. 2 of the CSD and Arts. 99 ff. of the CESL. This main criterion for conformity as applied in the 15 years since the implementation of this directive has not met with major criticism in the Member States.

One **point of criticism** on the proposed conformity standard is whether the focus on the subjective agreement is apt, in particular in case of distance contracts.<sup>8</sup> The consumer who buys a product online usually has very little to negotiate with the trader. This is an argument to prefer the objective standard over the subjective party-agreement: goods must simply meet the requirement of being fit for use and function in line with an average consumer's reasonable expectations. Too much emphasis on the party agreement could lead to difficult discussions about what the parties have 'actually' agreed upon.

The two proposals adopt **partly different standards of conformity**. It seems that Art. 6 of the Digital Content proposal applies a more subjective standard.<sup>9</sup> If this is indeed meant by the Commission, it means that the conformity regime will be spread out over three different directives with partly diverging rules: the CSD for face-to-face sales, the future Online and Distance sales directive for distance contracts and the Digital Content directive for the supply of digital contents. This is highly unsatisfactory. It is emphasised that the CESL had proposed uniform rules for these contracts. The question that remains is why the two proposals were not merged into one, in particular because – upon acceptance – the Member States are likely to implement them together into their national laws.

The Proposal adopts a number of **novelties** compared to the current CSD. These novelties are the following.

- Art. 7 makes explicit that conformity also requires the goods to be **free from rights of a third party**. This is a useful clarification. The CSD's concept of conformity was believed to cover both defects in quality and defects in rights,<sup>10</sup> although this was not made explicit in the text of the directive. However, the provision is drafted in a very general way and does not seem to take into account the possibility that the consumer knew of third party rights and is willing to accept these. Art. 102 s. 4 CESL did make this reservation for intellectual property rights.

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<sup>8</sup> This comment was also made by C. Twigg-Flesner at the ELI-conference on the two proposals held in Vienna on 21 January 2016.

<sup>9</sup> See in particular the first part of Art. 6 s. 2: 'To the extent that the contract does not stipulate (...) the requirements for the digital content (...).'

<sup>10</sup> M.C. Bianca/S. Grundmann (eds.), *EU Sales Directive: Commentary*, Intersentia 2002, p. 128 (Grundmann) and p. 154 (Bianca).

- Art. 8 s. 1-2 specify **at which time the lack of conformity must exist**. This is the time at which the risk passes to the buyer, meaning when the consumer obtains control over the goods. A separate provision is added on installation of the goods. Such detailed provisions are missing in the CSD, that only contains the rule that the lack of conformity must exist at the time of delivery (Art. 3 s. 1). These are useful clarifications that are in line with Art. 105 CESL and with how the CSD was already interpreted. These clarifications should preferably also become applicable to face-to-face sales under the CSD, which is **not envisaged** by the current Proposal.

### 3.2 Reversal of the burden of proof for two years

A fundamental difference with the existing CSD is to be found in Art. 8 s. 3. Art. 5 s. 3 CSD provides that, unless proved otherwise, a lack of conformity which becomes apparent within **six months of delivery** of the goods is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. The nature of the goods will stand in the way of applying the presumption if the goods are for example edible or otherwise perishable; the nature of the lack of conformity will stand in the way if the non-conformity is of a nature that cannot have existed at the time of delivery, e.g. because it is the clear result of non-normal use of the product (the mobile phone was exposed to water or the purchased dog dies of a cold because it was kept outside for weeks during winter time). The Proposal now aims to **extend this period to two years** 'in order to ensue higher awareness of consumers and easier enforcement of the Union rules on consumer's rights' (Recital no. 33). This will oblige a great majority of member states to extend the period for distance contracts. This extension of the reversal of the onus of proof had not been proposed in the CESL-proposal, that suggested to maintain the period of six months (Art. 105 s. 2 CESL). The underlying rationale may be found in the fact that defects in consumer goods are often of a technical nature the consumer knows nothing about.

The **benefit** of this presumption of non-conformity is that the consumer only needs to prove that a lack of conformity exists and that this lack has manifested itself within two years, not how it came about or that it is the seller's fault. It should be noted that this is not a guarantee or a warranty: the only thing that Art. 8 s. 3 provides for is a reversal of the burden of proof about the time at which the defect came into being. If the seller sheds enough doubt that the non-conformity did not exist at the time of delivery, the buyer must still provide the necessary proof that it did. Having said this, the provision does greatly strengthen the position of the consumer. In practice it will be difficult for the seller to prove that the defect did not already exist at the time of delivery.<sup>11</sup>

The main argument against this reversal of the burden of proof is that it may incite a consumer **not to exercise reasonable care** in dealing with the product, and subsequently claim that the defect already existed at the time of delivery and ask for repair or replacement. This speaks in particular in case of technically advanced products such as computers and mobile telephones, for which the seller has insufficient expertise to rebut the presumption. However, it is likely that the Commission's argument (Proposal, p. 12) makes sense that consumer behaviour is not too much influenced by this rule.

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<sup>11</sup> Cf. F. Gomez, in Bianca/Grundmann, o.c., p. 69.

## 4. REMEDIES OF THE CONSUMER (ARTS. 9-14)

### 4.1 Maximum-harmonisation and clarification of existing rights

The Proposal closely follows the system of remedies already laid down in the CSD. According to this **two-step remedy system** of Art. 9, the consumer must first claim repair or replacement, to be completed by the seller within a reasonable time, and is only in second stage allowed to claim price reduction (elaborated in Art. 12) or termination (elaborated in Art. 13). The idea behind this system is to **keep the contract intact** for as long as possible and thus reduce costs. Here lies a clear policy choice that the European legislator already made with the CSD and that is now maintained. This is the choice to balance the far-going rights the directive provides to the consumer with the interest of the seller, who must not be confronted with a claim for termination or price reduction before he had a second chance to properly perform the contract.

The change from minimum- to maximum-harmonisation of this system of remedies **will greatly affect member States' existing laws** on distance contracts, as discussed in sub-section a below. In addition, sub-section b will look at the Proposal's clarifications of already existing rights of the consumer. The main extensions of consumers' rights are discussed in sections 4.2 (termination) and 4.3 (notification duty).

#### a. Maximum-harmonisation and the system of remedies

The hierarchy of remedies of the CSD is adopted in 20 Member States, while the remaining Member States offer the consumer a free (or less limited) choice of remedies. The turn towards maximum-harmonisation means that the latter Member States will have to adapt their laws and **decrease their existing level of consumer protection**.

One particularly important aspect of the system of remedies is the **period in which the trader can be held liable for the non-conformity**. The existing CSD (Art. 5 s. 1) provides that the seller shall be held liable if the lack of conformity becomes apparent within two years from delivery of the goods. Art. 14 of the Proposal provides a substantively similar rule, but formulated from the perspective of the consumer. It states that the consumer shall be entitled to a remedy if the lack of conformity becomes apparent within two years. This **two-year-period** is not a limitation period and is also not a durability guarantee.<sup>12</sup> It is in this respect unfortunate that the Proposal itself (on p. 6, 9 and 13 and in Recital no. 33) speaks of a 'legal guarantee period.' The rule does not imply that all goods must remain in conformity with the contract for two years. It only means that the seller's liability can be engaged if the non-conformity was present at the time of delivery *and* manifests itself within two years after the delivery. This provision thus protects the seller against claims based on defects that arise more than two years after delivery.

Until now this two-year-period has not met with great criticism in the Member States. However, turning the two-year-period into maximum-harmonisation will provide **a major change to the national laws** of those Member States that take the conformity standard seriously. If the criterion is whether the goods are fit for ordinary use and possess the qualities that the consumer may expect (Art. 5), **durable consumption goods** may well have to last for much longer than two years. The buyer of a washing machine, refrigerator or a piece of consumer electronics may well be confronted with a defect that manifests itself after more than two years, while the reasonable consumer expectation is that the

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<sup>12</sup> Cf. E.H. Hondius, in Bianca/Grundmann, o.c., p. 21.

goods must remain in conformity for three or four years. This is one reason why not all Member States have implemented the two-year-period period, and allow the consumer to bring a claim for a longer period. They will have to change their law to the detriment of the consumer.

b. Clarifications of existing rights of the consumer

The Proposal clarifies some of the already existing rights of the consumer.

First, it makes explicit that the consumer has the **right to withhold payment** of the price until the goods are brought in conformity (Art. 9 s. 4). This right was not explicitly laid down in the CSD, but all Member States recognise it in their national laws. One question for discussion is why the Proposal does not adopt the more nuanced rule of Art. 113 CESL, that provides more guidance on when the buyer is exactly allowed to withhold payment of the price.

Second, the seller not only has to repair or replace the defective goods, he also has the **obligation to take back the replaced goods at its own expense**. An exception exists if the parties have agreed otherwise after the lack of conformity was mentioned to the seller (Art. 10 s. 1). This is as such a useful clarification, although the uneven position in bargaining power between seller and buyer may of course cast some doubts about the ability of the buyer to negotiate about this.

Third, the consumer is not obliged to pay for any use made of the replaced goods prior to replacement (Art. 10 s. 3). This was a contested issue under Directive 1999/44, but in its *Quelle*-judgment,<sup>13</sup> the Court of Justice EU decided that **no compensation for the use of the defective goods** needs to be given. The proposed provision confirms this for the case of distance contracts. This is a hard and fast rule, but it could be questioned whether it leads to a just result under all circumstances. It does imply that buyers of durable consumption goods (such as televisions or washing machines) that break down after 23 months will be able to claim repair or replacement without the need to pay a fair compensation for use. This would even be true for cars – even though it is highly unlikely that a car would be bought by way of a distance contract.

Fourth, Art. 11 of the Proposal restates what is already stated in, or inherent to, Art. 3 s. 3 CSD, namely that the consumer can freely choose between repair and replacement unless the chosen remedy would be impossible or impose disproportionate costs on the seller. The explicitly added criterion of **unlawfulness** is accepted in all national laws and was also part of Art. 111 CESL. Thus, the consumer cannot expect the seller to replace goods with a minor scratch if replacement would entail significant costs while the scratch could also be easily repaired (Recital no. 27).

Fifth, a new provision (Art. 12) is proposed on how to **calculate the price reduction**. It must 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. This type of calculation was already assumed under the CSD,<sup>14</sup> but is now made explicit. Art. 120 CESL provided a more elaborate provision, but is not substantively different.

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<sup>13</sup> Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände*.

<sup>14</sup> See e.g. Bianca, in Bianca/Grundmann, o.c., p. 163.

## 4.2 The right to terminate the contract

The Proposal keeps termination firmly embedded within the hierarchy of remedies. The consumer is only allowed to terminate in the well-defined circumstances of Art. 9 s. 3, in short when repair or replacement are impossible, are not completed within a reasonable time (or when it is clear that the seller will not do so), or are too burdensome for the seller. The Proposal **does not contain a provision like Art. 11** (making the choice between repair and replacement subject to how burdensome this would be for the seller) for the choice between termination and price reduction. This could have been considered in view of the wish to keep termination a remedy of last resort.

Turning the current hierarchy of remedies into maximum-harmonisation will have **severe consequences for those Member States** that allow the consumer to terminate immediately without first having gone through the first step of asking for repair and replacement. This is for example the case under English law.<sup>15</sup>

Compared to the current CSD, the Proposal suggests a number of **new rules** on termination of distance contracts for lack of conformity. These new rules (a) partly change the existing regime and (b) partly add to the existing provisions.

### a. Change to the existing regime: termination also in case of minor defects

Art. 3 (6) of the current CSD provides that the consumer is not entitled to terminate<sup>16</sup> the contract if the lack of conformity is minor. The Proposal explicitly breaks with this rule. In terms of policy choice mentioned before, the Proposal thus moves more towards the protection of the consumer at the expense of the seller's interest: **it will be easier for the consumer to make an end to the contract**. The Commission (Recital, no. 29) reasons that this is a strong incentive for the seller to remedy a lack of conformity in an early stage. In this, the Proposal also deviates from Art. 114 s. 2 CESL, that did not allow termination in case of an insignificant lack of conformity, as well as from Art. IV.A.-4:201 DCFR that requires more than a minor lack.

The obvious result of this change is that termination will be easier to realise for the consumer: *any* lack of conformity will allow for termination. A defect of slight importance, such as a small scratch or a cosmetic defect, a minor technical malfunction or a different type of packaging, are at present not regarded as sufficient enough to justify termination.

### b. Additions: new rules on modalities and on consequences of termination

Art. 13 of the Proposal adds a number of provisions on the modalities and consequences of termination. Four new rules are proposed.

First (s. 1), termination must take place by **notice to the seller**. This notice can be given by any means. This is a useful provision that harmonises the exact way in which termination must take place in consumer distance sales. Art. 118 CESL provided the same rule. What is **missing in the Proposal**, however, are detailed rules on when a notice (and therefore the termination) becomes effective. Art. 10 CESL provided detailed rules on this,

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<sup>15</sup> See in more detail the In-Depth Analysis "Scope of application and general approach of the new rules for contracts in the digital environment", PE 536.493, by Prof. Hugh Beale.

<sup>16</sup> The CSD uses the term 'rescind', but the Proposal now rightly uses 'termination', thus following PECL, DCFR and CESL.

essentially adopting the **receipt theory**. The Proposal's lack of detailed rules on notices this may still lead to divergence.

Second (s. 2), the Proposal introduces the right to **partial termination** in case the lack of conformity relates to only some of the goods. This partial termination seems more limited than under most national laws, or under Art. 117 CESL that also allowed for termination if the obligations were 'otherwise divisible.' The Proposal seems limited to cases of quantitative non-conformity only: the text implies that it is not possible to claim partial termination (a reduction in the price) in case of a defective performance, probably because this case is meant to fall entirely under the rule on price reduction (Art. 12).

Third (s. 3 a-b), the Proposal provides for the **consequences of termination**. Termination will naturally release the parties of their obligations under the contract. If performance already occurred, the Proposal provides that termination leads to the seller's obligation to reconstitute the price within 14 days from receipt of the notice and to the consumer's obligation to return, at the seller's expense, the goods within 14 days from sending the notice. At the moment these obligations are dealt with by national law.

Fourth (s. 3 c-d), the Proposal deals with the well-known situations in which the goods are **destroyed or lost or have decreased in value** at the time they have to be returned. These situations are currently dealt with differently in the national laws of the Member States. The Proposal's solutions follow closely those of Art. 173 CESL. If the goods cannot be returned, the consumer must pay their monetary value at the date the return had to be made. If the goods have decreased in value other than through regular use, the consumer shall pay for the decrease.

This is **as such a viable choice** to deal with the situation in which return in kind is impossible, but questions can be raised about its **effect in Member States** that choose different solutions. Does maximum-harmonisation oblige them to opt for the solution of the Proposal or can they stick to their own specific rules that are often part of a well-balanced system of rules? For example, Dutch law (Art. 6:271 BW) obliges the buyer in case of destruction or loss to pay damages, but only in so far as the non-performance of the obligation to return the goods can be attributed to him. The primary criterion for this is whether the consumer has exercised reasonable care with regard to the goods from the moment that he had to take the possibility of termination into account (Art. 6:273 BW). It is likely that rules like this will not be consistent with the maximum-harmonisation character of the Proposal.

The Proposal does not deal with all consequences of termination. The **proprietary effects of the termination** are left to national law. More importantly, the Proposal also lacks a rule on **damages next to termination**. In many cases the consumer who is confronted with such a severe lack of conformity that he wishes to terminate, is also allowed to claim damages. These could be damages that follow from the non-performance itself, but also damages that are caused by the termination. An example of the latter concerns the case in which the consumer decides to terminate the contract, but is only able to purchase the similar product elsewhere at a higher price. The trader will have to consult the specific national laws to establish the extent to which he is obliged to compensate the consumer for such damages. This makes the Commission's argument that there is no urgent need for harmonisation of the damages claim not entirely convincing.

### 4.3 No notification duty

Art. 5 s. 2 CSD allows member states to provide that the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such a lack. The legal consequence of a failure to notify is that the buyer loses his rights against the seller. The ratio of this notification duty is clearly to protect the seller against late, and therefore difficult to counter, complaints from the side of the buyer. A majority of 17 member states chose to introduce such a notification duty for consumer sales, including Denmark, Estonia, Finland, Italy, the Netherlands, Poland, Slovakia, Spain and Sweden.<sup>17</sup> The Proposal now provides for the **abolition of this duty** as it may lead consumers 'to easily lose well-substantiated claims for remedies (...), especially in a cross-border transaction.' The argument is that the consumer may not be aware of the *Obliegenheit* to notify the seller about the defect in case the law of another member-state applies (Recital no. 25<sup>18</sup>). This fits in with previously made arguments in the literature against a notification duty in cross-border sales<sup>19</sup> as well as with the withdrawn CESL-proposal that only aimed at introducing a notification duty in contracts between traders (Art. 122). Again, there is a trade-off here between the far-going rights of the consumer laid down in the Proposal and the need to protect the seller's interest. The abolition of the notification duty is – together with the extension of the reversal of the burden of proof – clear evidence of the Commission's wish to further strengthen consumer rights.

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<sup>17</sup> E.H. Hondius et al (eds.), *Principles of European Law: Sales*, Sellier 2008, p. 314.

<sup>18</sup> The argument against the notification duty was already made at the time of drafting Directive 1999/44, but was not accepted by the Council. See e.g. D. Staudenmayer, *ERPL* 2000, p. 547, at 558, on which Hondius, in Bianca/Grundmann, o.c., p. 214.

<sup>19</sup> C. Twigg-Flesner, Fit for Purpose? The Proposal on Sales, in G. Howells/R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, Sellier 2009, p. 175.

## 5. CONCLUSIONS

The present proposals are clear evidence of the Commission's tempered ambitions with regard to the harmonisation of consumer contract law. This may be understandable in view of previous experiences (in particular with the failed CESL-Proposal), but the current approach is not without problems. This briefing note highlights the following points.

1. The field of contractual remedies belongs to the core of the Member States' private law. Experience with the CSD shows that implementation of EU-rules in this area can be a complicated and time-consuming process. This calls for **a more integrative approach** towards harmonisation, not for separate directives for specific types of consumer sales contracts as the Commission now proposes.

2. The current proposals will **add to existing fragmentation** of consumer remedies in sales contracts. This raises doubts about their ability to make the regulatory framework less complicated and costly. The result will rather be that an extra layer of fully harmonised rules for some topics of distance sales and digital contents contracts will be added to the existing framework. This calls for a **rethinking of the policy** to separate the two proposals. The proposed maximum-harmonisation will increase the overall level of consumer protection, but the argument that a trader is no longer required to look into national laws is not very strong if not the whole range of remedies (or even consumer sales law as a whole) is harmonised. Some doubt is also in place about the argument that it is the law that stands in the way of online shopping. Other factors that determine a consumer's reliance in shopping may be more important.

3. The proposals contain **many clarifications** of rights that were already part of the CSD. These clarifications are highly useful, but should also become applicable to face-to-face sales under the CSD.

4. The two proposals suggest **different standards for conformity**. This is unfortunate. In addition, the proposed standards seem too much geared towards the subjective agreement of the parties instead of towards a more objective conformity standard.

5. Several of the proposed rules will lead to **a higher level of protection of consumers** in distance contracts. This is evident from the extension of the reversal of the burden of proof of a lack of conformity from six months to two years, the possibility of termination in case of minor defects and the abolition of the Member States' discretion to oblige the consumer to notify the seller about the lack of conformity within two months after detecting the defect.

6. Turning the rights provided by the existing CSD into a regime of maximum harmonisation for distance and online sales will contribute to an overall higher level of protection in the EU as a whole, but will naturally **oblige some Member States to reduce their existing level of rights**. This is true for those Member States that allow consumers a free choice of remedies or a specific remedy (such as termination) without first having to claim repair or replacement of the defective goods. It is also true for Member States that take the conformity standard seriously and allow the consumer to claim if the defect manifests itself after more than two years in the case the consumer could expect the goods to have a longer durability. These seem unfortunate consequences of the current Proposal.



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