



Study on the costs and benefits of minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels

Executive Summary

March 2017

Study context and objectives

The study is part of the ongoing Fitness Check of EU consumer and marketing law, and focuses on the Consumer Sales and Guarantees (CSG) Directive 1999/44/EC. This Directive provides consumers across the EU with a minimum level of protection by laying down a minimum set of rules on conformity with the contract and on remedies in case a good turns out not to be in conformity with the contract of sale. The CSG is a minimum harmonisation Directive and Member States are able to go beyond the minimum rules set by it.

In terms of scope, the Directive in its current form applies to the sale of tangible consumer goods, both new and second hand, and regardless of the sales channel (distance or face-to-face sales channels). However, in the context of the Digital Single Market Strategy, the European Commission has recently proposed a Directive on online and distance sales of goods¹. The proposed Directive – if adopted – would fully harmonise the following key mandatory rights and obligations of the parties to a contract for the online and distance sale of goods:

- A two year legal guarantee period (as under the CSG Directive);
- Removal of the notification obligation²;
- Extension of the timeframe for the reversal of burden of proof for the fact that the defect existed at the time of delivery from six months (under the CSG Directive) to two years; and
- Hierarchy of remedies (as under the CSG Directive).

This would create two different regimes for online and other distance sales of goods and for offline, or face-to-face, sales, thus creating differences in the rights enjoyed by consumers depending on whether they bought their goods online or offline.

Against the above background, the study responds to two objectives:

- To determine the impact of going beyond the minimum rules set by the CSG Directive;
- To determine the costs and benefits of full harmonisation and alignment of EU rules for different sales channels (offline and distance).

¹ COM(2015) 635 final - 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.

² The CSG Directive currently allows Member States to introduce a period of two months within which a consumer who detects any defect has to inform the seller (Article 5). That possibility for Member States would be removed if the new Directive were to be adopted as proposed by the Commission.

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The current situation

Several Member States have gone beyond the minimum rules provided for by the CSG Directive. Specifically:

- Five Member States have a longer guarantee period than provided in the Directive³.
- Three Member States have a longer time period for reversal of burden of proof than the six months stipulated in the CSG Directive.⁴
- A free choice of remedies exists in five Member States⁵, while in Ireland and the United Kingdom consumers have a 30-day right to reject legal right to reject goods that are of unsatisfactory quality, unfit for purpose or not as described, considered as an element that goes beyond the hierarchy of remedies.
- The CSG Directive allows Member States to oblige consumers to notify the seller of a defect within two months of detection of lack of conformity, seven Member States do not have a notification obligation in their national legislation.⁶

Impacts of minimum harmonisation on the Single Market and cross-border activity

While fragmentation in national consumer protection legislation across the EU is not the only barrier for a retailer thinking of opening a shop in another EU Member State (issues such as complexity of VAT regimes or employment laws are seen as major barriers), it is nonetheless perceived as an important obstacle by businesses. Eurobarometer data⁷ suggests that for 42 % of retailers using face-to-face sales channels, the additional costs of compliance with different consumer protection rules and contract law (including legal advice) are considered as a “very important” or “fairly important” barrier to the development of their cross-border sales to other EU countries. Differences in national legislation generate additional costs for businesses such as cost of obtaining legal advice and adapting the terms and conditions of sale to a particular national law⁸ and the costs of complying with different national laws.

Potential impacts of no further EU policy action on rules applicable to face-to-face sales, meaning that the CSG Directive would continue to apply to face-to-face sales of goods while new rules would come into force for distance sales channels

All stakeholders across all categories consider that having two separate regimes for face-to-face versus distance channels is not desirable as it would result in confusion among consumers and would create discrepancies in protection available to consumers shopping via different channels. This could potentially lead to a higher number of complaints, disputes and consumer detriment. Moreover, businesses would also be negatively affected. It is estimated that 1.3 million retailers are currently using both face-to-face and distance selling channels that would potentially need to comply with two different regimes (national rules implementing the Sales and Guarantees Directive and the future rules for online and other distance sales). For businesses this could mean that omni-channel retailers would need to develop separate terms and conditions for the two different sales channels (offline versus online) and different sets of remedies for the two channels⁹, incur costs of training staff in the two different sets of rules and in adapting business processes (procedures for handling complaints, remedies etc.) for the different channels. Finally, it could lead to market distortions between face-to-face and distance/omni-channel retailers.

³ Namely: in Ireland and UK there is no legal guarantee period only the prescription periods apply: in Ireland six years and in United Kingdom six years in England, Wales and Northern Ireland, five years in Scotland; in Sweden the legal guarantee period is three years, ; there is no fixed time limit for the legal guarantee in Finland and the Netherlands but the guarantee period is linked to the lifespan of the products. In addition, a three years prescription period applies in FI as from the date of discovery of the defect and two years prescription period applies in the NL as from the notification).

⁴ A longer time period for the reversal of burden of proof exists in France and Portugal (two years), as well as Poland (one year).

⁵ Croatia, Greece, Lithuania, Portugal, and Slovenia

⁶ These Member States are: Austria, France, Germany, Greece, Ireland, Poland and the United Kingdom.

⁷ Eurobarometer survey FI359 was published in June 2013.

⁸ Estimates of costs stemming from differences in consumer contract law showed that these can range from €4,000 to €12,000 per Member State (Impact assessment, Proposals for Directives of the European Parliament and the Council (i) on certain aspects concerning contracts for the supply of digital content, (ii) on certain aspects concerning contracts for the online and other distance sales of goods, Annex 2), whereas the average contract law related costs for firms involved in business to consumer (B2C) transactions were considered to range from nearly €9,000 to €10,000 per Member State.

⁹ Which may result in a higher number of complaints / consumer disputes (due to confusion among consumers) and thus legal costs

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Potential impacts of alignment of rules applicable to distance and to face-to-face sales of goods based on the proposal for online sales of goods and full harmonisation of selected consumer protection rules

Overall, there is strong support among all categories of stakeholders (consumer organisations, businesses and national authorities) and Member States for alignment of rules for face-to-face and distance sales. Alignment of rules would avoid confusion between different sales channels, reduce complexity, facilitate cross-border transactions, increase competition and reduce traders' compliance costs and prices for consumers.

The potential impacts of harmonising specific provisions are discussed below.

A **uniform two-year legal guarantee period** could have an impact on five Member States currently going beyond the minimum rules. Introduction of a uniform two-year legal guarantee period could potentially reduce consumer protection in these countries. Evidence, however, shows that the vast majority of defects become evident within the first two years of purchase – even in the case of products expected to last longer than two years. Indeed 96% of consumers who had encountered the problem of defective products reported that the defect was detected within two years of purchase, while over two thirds discovered the defect within 6 months of purchase.¹⁰ Benefits highlighted in favour of a uniform two-year legal guarantee period include enhancing transparency and boosting consumer confidence across the Single Market.

An **extension of the reversal of the burden of proof** to two years could potentially result in increased compliance and operating costs, a higher number of disputes and have knock-on effects on consumer prices according to businesses.¹¹ Consumer representatives, on the other hand, argued that it offered higher consumer protection by facilitating redress, tackling unfair practices and lead to lower disputes. However, the 2015 consumer market study on the functioning of the legal and commercial guarantees¹² suggests that both traders (sellers, manufacturers) and consumers are largely unaware of the existing burden of proof rules. Only a minority of traders insists on consumers proving the trader's liability within the entire 2 year legal guarantee period; i.e., there is no/very limited change in traders' behaviour before or after the 6 months on this point. This means that in the current guarantee system the reversed 'burden of proof' period does not make a significant difference in practice and it is often operating de facto as long as the entire 2-year legal guarantee period.

The **removal of the notification obligation** was valued by consumer associations as a way to increase consumer protection and reduce consumer detriment caused by some traders who may abuse this time-limit. Business associations, however, argued that it would result in potential abuse by consumers and consumers procrastinating their claims and hence making remedy related actions such as repair more costly.

In regards to the **hierarchy of remedies** and **free choice of remedies**, the 2015 study on legal and commercial guarantees showed that 77% of consumers agreed that it was reasonable for a seller to offer a repair or replacement, but not a refund, when a problem with a product occurs for the first time.¹³ Consumer representatives pointed to the benefits of free choice to consumers by preventing time wastage and allow for more flexibility.

The **impacts of harmonisation** and **alignment** are likely to vary across Member States. Overall, businesses' compliance costs are expected to become lower, notably due to uniform rules on the length of the legal guarantee and on the hierarchy of remedies, and consumer redress is likely to be made easier through a longer period for the reversal of proof and the removal of the notification obligation for consumers. All in all, the alignment of rules for offline and distance channels and full harmonisation would

¹⁰ European Commission, DG Justice and Consumers, (forthcoming) Consumer Market Study to Support the Fitness Check of Consumer Law.

¹¹ However, interviews with businesses in countries (i.e. France and Poland) where a longer period of the reversal of burden of proof is already in place, provided a mixed picture. Nearly half of businesses based in or selling in these 2 Member States showed that benefits prevailed or indicated there to be no costs tied to this rule. Nonetheless, just over one third considered there to be major or moderate costs involved and the remainder of respondents did not know

¹² European Commission, DG Justice and Consumers (2015): Consumer market study on the functioning of the legal and commercial guarantees: the full report is available at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/legalguaranteesfinal_report_en.pdf

¹³ Ibid.

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have an overall positive impact on consumers and businesses in the Single Market, most notably in the form of increased competition through greater cross-border activity, by maintaining a level playing field between retailers using different channels and by offering uniform protection to all consumers.