

European Commission's proposed directive on online contracts lacks harmonisation

AmCham EU position on proposal to improve quality and coherence of EU online contract law

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's initiatives to improve the quality and coherence of European online contract law in the framework of the Better Regulation Agenda. However, the Commission's proposed directive lacks harmonisation with contract law in the EU, which will result in companies still relying on different rules for different distribution channels. AmCham EU therefore urges the European institutions to devote attention to the harmonisation of the proposed directive with the EU *acquis* in the field of consumer protection, and to wait for the conclusions of the REFIT exercise, the European Commission's Regulatory Fitness and Performance programme, which should clearly identify the gaps. These efforts will help to ensure that the proposed rules do facilitate easier online cross-border consumer transactions, benefitting business, consumers and society as a whole.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's efforts to create a more digital-friendly Single Market, and therefore supports the Commission's initiatives to improve the quality and coherence of European online contract law in the framework of the Digital Single Market package.

However, AmCham EU believes that the Commission's proposed directive on contract law needs to be re-assessed and reworked to ensure that the proposed rules will deliver the promised benefits to consumers and traders of all sizes. AmCham EU is foremost concerned with the directive's lack of harmonisation with other relevant consumer protection rules.

AmCham EU has outlined in this position paper specific items that are of concern and looks forward to working with the European Parliament, European Council and Commission to further develop the proposed text into a workable and equitable instrument that will drive online cross-border consumer transactions.

Contractual obligations shall be equal for all distributions channels

AmCham EU believes that with the appropriate adjustments, the proposed directive could provide increased legal certainty for business-to-consumer contracts and could act as the desired stimulus for cross-border trade, becoming an incentive for traders to sell online.

However, AmCham EU members believe that imposing different contractual standards for online and offline transactions would create additional burden on businesses, fragment the market, and go against the overall objective to harmonise contractual rules. The proposal is creating a parallel legal regime for online transactions as far as remedies and guarantees are concerned, imposing new formalities to traders that will have to adapt their policies and materials to be provided to consumers online. This creates added complexities for companies operating cross channel, as it will have to offer different guarantees depending on the distribution channel used and will only confuse consumers.

AmCham EU believes that a balance should be achieved for both traders and consumers. It favours adopting a harmonised approach for all distribution channels in order to provide greater legal certainty for traders and allow them to easily conduct online cross-border sales, as well as establishing a simple set of remedies for consumers regardless of the channel or the trader's country of residence. Furthermore, AmCham EU considers that the requirement to provide the conditions of the guarantee to the consumer on a durable medium is very burdensome. AmCham EU would therefore recommend harmonising remedies and guarantees for all distributions methods (eg, retail, distance selling and direct selling).

AmCham EU also encourages Member States to harmonise national contractual obligations on remedies and guarantees for all distribution channels.

The reversal of the burden of proof adds extra pressure on traders

The proposal introduces a reversal of the burden of proof in the European Union. AmCham EU understands and welcomes the objective to fully harmonise the period of time during which the lack of conformity shall be established. However, the reversal of the burden of proof opens the door to potential abuses and adds extra pressure on traders.

AmCham EU supports the objective of such a provision to provide greater certainty for consumers while allowing them to benefit from a harmonised time period where the lack of conformity is granted. However, AmCham EU does not feel the necessity to extend the period to two years, since if the product is defective, its default will appear sooner than the two-year period provided by the proposal.

The reversal of the burden of proof could also act as a deterrent for traders to operate on cross-border basis and will result in increased cost that consumers will have to support through product price increase. AmCham EU recommends amending the provision on the reversal of the burden of proof, reducing the time limit to six months as it is currently implemented in 25 Member States.

Additionally, the proposal does not foresee the obligation of the consumer notifying the trader of the product defect when it occurs, adding uncertainty for traders when identifying a defect from normal wear and tear. As a consequence, AmCham EU believes that consumer protection should be balanced with potential burden for traders.

Online contractual obligations should be fully in line with the consumer *acquis*

The interaction between the consumer *acquis* and particularly the Consumer Rights Directive and the proposed directive on certain aspects concerning contracts for the online and other distance sales of goods is key. The Consumer Rights Directive is a fundamental element of the business-to-consumer contractual framework in Europe.

With regard to the time for establishing the conformity of the goods, Article 8 (2) provides that the passing of risk can be postponed up to 30 days from the time the consumer takes possession of the goods. However, it is in conflict with the general rule that passing of the risk happens when the consumer gets possession of the goods as provided by the Consumer Rights Directive and shall therefore be amended.

The proposed directive adds a new remedy in Article 9 (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’. This provision adds uncertainty for traders as consumers could withhold the full price and/or never pay. AmCham EU recommends amending the provision, limiting the amount to be withheld to the cost of bringing the good into conformity.

In addition, the consumer should not be allowed to make unlimited use of the products before return or replacement. Consumers should be liable to pay for any use that would cause damage or loss to the product. The Commission should therefore adapt the following wording of Article 10 (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 13 (4) provides that the trader must reimburse the consumer no later than 14 days from the receipt of the termination notice and that the consumer must then return the goods no later than 14 days after sending the notice of termination. This creates a situation where the trader can be forced to reimburse the consumer without any certainty that the goods will actually be returned, thus resulting in increased abuses. Consequently, AmCham EU welcomes the consistency with the Consumer Right Directive with regard to the 14 days period; however AmCham EU believes that the trader should have the possibility to examine the goods prior to reimbursing the consumer.

Finally, AmCham EU welcomes the consistency of this proposal with the provisions related to digital content proposed in the package on online contractual aspects. The package rightly points out that many forms of digital content supply and related service provision are also in the scope of online sale contracts.

Conclusion

Overall, AmCham EU welcomes the Commission's efforts to improve the quality and coherence of European online contract law. The recently-proposed directive, however, lacks harmonisation with contract law in the EU, which will result in companies still relying on different rules for different distribution channels.

AmCham EU urges the European institutions to carefully re-assess the proposal and its potential impact. Particular attention needs to be devoted to its interaction with other EU laws such as the consumer *acquis*. AmCham EU urges the institutions to wait for the conclusions of the REFIT exercise, which should clearly identify the gaps. In line with the broader objective of better regulation, AmCham EU believes that regulation should be evidence-based and feels this proposal is premature. AmCham EU looks forward to fine-tuning the proposal to deliver a directive that will facilitate easier online cross-border consumer transactions, benefitting business, consumers and society as a whole.