

## Our position

# Proposed directive on sales contracts remains unbalanced

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



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 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

## 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 contract law in the framework of the Better Regulation Agenda. Extending the scope to off-line sale contracts is a step in the right direction, however, the proposed directive remains unbalanced.

The European institutions must devote attention to procedural aspects to strike the right balance between consumers and traders. These efforts will ensure that the proposed rules facilitate easier online and off-line cross-border consumer transactions, benefitting business, consumers and society as a whole.

## Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's efforts to improve the quality and coherence of European contract law in the framework of the Digital Single Market package.

The Commission's initiative to amend the scope of the proposed directive on contract law to include off-line consumer transactions is commendable. The extended scope allows multi-channel traders to align their sales conditions for all distribution channels, while reducing the administrative burden and related cost.

However, some provisions still need to be reworked to ensure that the proposed rules will deliver the promised benefits. The lack of pragmatism in relation to procedural aspects in the current text is particularly concerning.

AmCham EU outlines in this position paper specific items of concern, and looks forward to working with the EU institutions to further develop the proposed text into a workable and equitable instrument that will drive cross-border consumer transactions.

## Contractual obligations shall be fully harmonised for all distribution channels

AmCham EU welcomes the extension of the scope of the Directive to off-line sales contracts. Identical contractual standards for online and offline transactions create a level playing field for businesses. Furthermore, they encourage cross channel operations and stimulate business to diversify sales channels, creating additional opportunities for consumers.

Full harmonisation fulfils the objective of the proposal, aligning sales conditions across Member States and distribution channels. The maximum level of harmonisation should be the main objective of any review of EU consumer law.

The harmonisation of the legal guarantee period is a welcome development, but a pragmatic approach should be adopted to implement it. The requirement to provide the conditions of the guarantee to the consumer on a durable medium is very burdensome. Therefore, recital 34 of the Commission's

reviewed proposal allowing Member States to set rules on the content of the guarantee statement and how it should be made available to consumers is welcome.

AmCham EU supports the harmonisation of the legal guarantee period to two years, as per the approach of the European Parliament and the Commission. The two-year period remains the standard in most Member States and must be upheld as it offers legal certainty to both consumers and traders. Any amendment of the guarantee period (e.g. to take into account the expected lifespan of a product) would be counterproductive and could not be applied to all product categories, thus limiting the impact of the provision. The two-year period should be upheld.

## Notification obligations for consumers would ease the use of existing remedies

The proposal does not encourage Member States to maintain notification obligations for consumers in case of lack of conformity of the goods. The obligation for consumers to notify businesses in case of non-conformity remains a legal safeguard for traders against unsubstantiated claims. Such a notification should be mandatory via specific communications channels offered by businesses. Member States are encouraged to maintain notifications obligations for consumers.

## 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. Fully harmonising the period of time during which the lack of conformity shall be established is a positive and useful objective. However, the reversal of the burden of proof opens the door to potential abuses and adds extra pressure on traders.

Such a provision would provide greater certainty for consumers while allowing them to benefit from a harmonised time period where the lack of conformity is granted. However, there is no need to extend the period to two years, since if the product is defective, its defect will appear sooner than the two-year period provided by the proposal.

This reversal could also act as a deterrent for traders to operate on a cross-border basis. This may result in increased costs that consumers will have to support through product price increases. The provision on the reversal of the burden of proof should be amended to reduce 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 to notify the trader about a defect when it occurs. This is likely to add uncertainty for traders, increasing the difficulty of recognising a defect as opposed to normal wear and tear. As a consequence, AmCham EU believes that consumer protection should be balanced with potential burden for traders.

## Choice between repair and replacement

The proposal creates a new right for consumers to choose between repair and replacement of the product. Such a provision goes directly against the European Commission's circular economy objectives of 'closing the loop of product lifecycles through greater recycling and re-use, and bring benefits for both the environment and the economy'. Companies are – by their nature – best-placed to evaluate the most cost-efficient and environment-friendly manner to bring a product back into conformity.

Giving consumers the choice between repair and replacement will impose a disproportionate burden on companies, especially for those producing goods with a high added-value and longer lifespan (such as luxury products for example).

Such an obligation will additionally endanger companies' relationship with their customers, as the burden to explain why a product should be repaired rather than replaced will be put on them.

In this context, the general rule should be that the product should be repaired. If that is not possible, companies shall then replace the product.

## 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. The provision should be amended, 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 (3) a 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. While AmCham EU welcomes the consistency with the Consumer Rights Directive with regard to the 14 day period, the trader should have the possibility to examine the goods prior to reimbursing the consumer.

Finally, AmCham EU is pleased that this proposal is consistent with the package on online contractual aspects. The latter rightly points out that many forms of digital content supply and related service provision are also in the scope of online sale contracts.

## Conclusion

The European Commission's efforts to improve the quality and coherence of European contract law are a positive development. The re-worked proposed directive, however, does not strike the right balance between consumer protection and cross-border trade facilitation.

The European institutions should 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 looks forward to helping to fine-tuning the proposal in order to deliver a directive that will facilitate easier cross-border consumer transactions, benefitting business, consumers and society as a whole.