

**STANDARD FORM OF EXPLANATORY MEMORANDUM FOR EUROPEAN UNION  
LEGISLATION AND DOCUMENTS**

**13927/17- COM(2017) 637 final  
ADD 1: SWD(2017) 354 final**

**Amended proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council**

Submitted by the Department for Business, Energy and Industrial Strategy on 21<sup>st</sup> November 2017

**SUBJECT MATTER**

1. This Explanatory Memorandum relates to the European Commission's amended 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 (previously referred to as the "Tangible Goods Directive"). The proposal was originally published in December 2015, alongside the proposal for a Directive concerning contracts for the supply of digital content (the "DCD Directive").
2. Both of these proposals are designed to support the delivery of the Commission's 2015 Digital Single Market (DSM) strategy. The Commission consider that by reducing contract-law related barriers to trade, and making it easier for consumers to shop online across the single market, both businesses and consumers will benefit.
3. Both proposals were prioritised as part of the DSM strategy to enable the Commission and Member States to respond to commercial and technical developments, as well as changes in consumers' behaviours, as a result of digitalisation.
4. The Online Sales proposal was also specifically designed to address the differences in Member States' legal systems by being framed as a maximum harmonisation Directive. The existing Consumer Sales and Guarantees Directive ('the CSD'<sup>1</sup>) applies (without specifying different sales channels) to both 'offline' (i.e. face-to-face) and online sales, and establishes the key requirement for traders to provide consumers with goods 'in conformity with the contract', failing which a hierarchy of remedies, from repair and replacement to refund is available to the consumer. However, its provisions are expressed as the minimum requirement, and Member States have been free to adopt more stringent provisions to ensure a higher level of consumer protection. Thus, differences in

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<sup>1</sup> Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees; originally transposed into UK law in the Sale and Supply of Goods to Consumers Regulations 2002, which amended remedies provided for in the Sale of Goods Act 1979

implementation among Member States has resulted in some discrepancies in the remedies available to consumers.

5. The Commission considers that that this has hampered efforts to boost e-commerce and cross-border trade as consumers are not encouraged to buy from unfamiliar or EU-based traders and businesses are not encouraged to sell to consumers elsewhere in the single market. The statistics cited in this report - from a survey on retailers' attitudes to cross-border trade - support this. For example, only 27% of EU traders say they are confident in selling goods online domestically or to other EU countries,<sup>2</sup> and differences in national contract law and in national consumer protection rules were listed as two out of the four most serious obstacles to cross-border trade, according to retailers currently selling online.<sup>3</sup>
6. During discussions on the Online Sales proposal in both the Council and the European Parliament, there were calls for the scope of the original proposal to be extended in order to avoid creating different rules for "offline" face-to-face and online sales and ensure coherency. This would also address the trend towards increased omni-channel sales (i.e. businesses offering a mix of sales options, all of which provide the consumer with a seamless shopping experience no matter how they choose to engage with the trader; in-store, online, through a mobile app, etc.)
7. In the Council, a majority of Member States called for the scope to be revised in order to avoid the unnecessary legal fragmentation which would result from the creation of different sales regimes.
8. In the European Parliament, the rapporteurs for the Internal Market and Consumer protection (IMCO) and the Legal Affairs (JURI) Committees for this proposal tabled amendments to extend the scope of the proposal in this way. An impact assessment was commissioned by IMCO to assess these amendments, and its conclusions supported the need to set consistent rules for both online and offline sales. Essentially, this amounted to repealing the CSD (rather, as in the original proposal, than amending the CSD so that it did not apply to 'distance sales' – i.e. online sales), and having a new set of common rules that apply whether goods are purchased on- or off-line.
9. The main provisions in this revised proposal address the differences in Member States' consumer protections as a result of the way they have implemented the minimum harmonisation provisions of the CSD, which is achieved by re-enacting many of the CSD's provisions but making their requirements compulsory across the EU.

## **SCRUTINY HISTORY**

10. 15252/15: 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 was submitted to Parliament on 5<sup>th</sup> January 2016.

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<sup>2</sup> Survey on retailers' attitudes towards cross-border trade and consumer protection 2016, p.120.

<sup>3</sup> Survey on retailers' attitudes towards cross-border trade and consumer protection, p.123-124

## **MINISTERIAL RESPONSIBILITY**

11. The Minister for Small Business, Consumers and Corporate responsibility has primary responsibility.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

12. Consumer protection is devolved to Northern Ireland, but reserved in relation to Scotland and Wales and a draft of this memorandum has been shared with all three administrations.

## **LEGAL AND PROCEDURAL ISSUES**

13. The Legal basis proposed by the Commission is Article 114 of the Treaty of the Functioning of the European Union. Its main objective is the improvement of the establishment and functioning of the internal market.
14. The European Parliament procedure is the ordinary legislative procedure pursuant to Article 294 of the Treaty.
15. The Council will act by qualified majority procedure.
16. The Directive which certain provisions of the proposal repeal and replace is Directive 1999/44/EC (the Sale of Consumer Goods and Associated Guarantees Directive) re-implemented in the UK by certain provisions of the Consumer Rights Act 2015.
17. The proposal is intended as a maximum harmonisation measure. The UK would not be able to maintain more or less stringent requirements in relation to matters falling within the scope of the proposed Directive than those set out in the proposal. It will be necessary to review legislation in the UK which covers matters falling within the scope of the proposed Directive, primarily the Consumer Rights Act 2015, to determine the extent to which they impose more or less stringent requirements.
18. We will consider options for implementation following the outcome of EU exit negotiations.
19. A recital to the Directive respects the freedom to conduct a business (Article 16), consumer protection (Article 38) and the right to an effective remedy and to a fair trial (Article 47), and the current proposal makes no further references to the Charter.
20. A thriving cross-border e-commerce sector can bring benefits to businesses and consumers, supporting the rights in Article 16 and 38.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

21. The proposed Directive is applicable to the European Economic Area.

## **SUBSIDIARITY**

22. The Commission's objective in introducing this revised proposal is to create a single set of consumer rules relating to conformity of goods, time limits relating to burden of proof and guarantee periods, and remedies for non-conformity across the EU in order to fully harmonise all consumer protection aspects which are relevant to online cross-border trade. This will contribute to the completion of the Digital Single Market by removing the fragmentation caused by the differing implementation of the existing minimum harmonisation Directive 1999/44/EC.
23. The Commission states that this fragmentation creates barriers to online cross-border trade. Such fragmentation cannot be addressed through uncoordinated actions by Member States.
24. The Government agrees that the establishment of a harmonised framework for consumer rules within the EU cannot be achieved by Member States on their own. However, we recognise that the introduction of a full harmonisation Directive is likely to have an impact on Member States who have chosen to go beyond the minimum requirements of the existing Directives in certain areas. This is an area of concern for the UK and is discussed in more detail below.

## **POLICY IMPLICATIONS**

25. Since 2015, the Government has been supportive of the EU's efforts to create a Digital Single Market which will deliver for consumers and businesses, including new entrants to market.
26. The Government also welcomes initiatives which will bolster consumers' and traders' confidence in cross-border sales and it is our view that e-commerce will help to bring the reality of the single market closer to consumers and businesses alike.
27. On 23 June 2016, the EU referendum was held and the people of the United Kingdom voted to leave the European Union. The Government respected the result and triggered Article 50 of the Treaty on European Union on 29th March 2017 to begin the process of exit. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to negotiate, implement and apply EU legislation.
28. We continue to support the view that if the Digital Single Market reaches its full potential it will allow UK consumers to access more choice and lower prices for goods bought online across Europe and allow UK business to benefit from its position as a global ecommerce leader. It will therefore continue to be important after our exit from the EU that robust consumer protections are put in place to underpin e-commerce and reassure consumers when buying goods online from unfamiliar traders, or businesses based elsewhere in the EU. These protections will also provide clarity to businesses about their rights and obligations when selling goods and services online and cross-border.
29. The UK has been engaged in Council discussions since they began on the original proposal in 2016. However, as a result of Member States' desire to extend the

scope of the proposal to encompass both online and offline sales, negotiations are yet to begin on the substance of this file.

30. The main policy implications and concerns in relation to the Directive for the UK are therefore the same as they were when the original proposal was adopted and published, and these are set out below. We will continue to develop our views and engage with stakeholders once discussions begin on the revised proposal:

#### **Lack of future flexibility**

31. The UK has introduced or retained provisions that go beyond the existing minimum standards in EU law, and the Government would, in principle, be free to regulate further (provided that new rules did not fall below the European standard). If this proposal is adopted, then that flexibility would be lost and it would be impossible to either introduce more or less generous provisions.

#### **Loss of key UK consumer protections**

32. The Government supports the proposal to introduce a full harmonisation measure where there is evidence that minimum harmonisation and the resulting divergence in laws create barriers to e-commerce. However, the introduction of a full harmonisation Directive will be likely to have an impact on Member States who have chosen to go beyond the minimum requirements of the existing Directives in certain areas. Our initial assessment is that the short term right to reject would be the chief concern for UK consumers and we discuss this in more detail below.

33. We recognise that traders can offer consumers additional protections as part of their offering to customers (without the compulsion of a legal requirement), and have noted, for example, that the British Retail Consortium's (BRC) response to the original proposal indicated that many UK retailers intend to continue offering consumer rights that go beyond the proposed standards. However, we are concerned that the baseline has to be set at an appropriate level in order to support consumer confidence and avoid a bias towards established players who are better able to signal additional protections to an established customer base, at the expense of new entrants, SMEs and more unfamiliar cross-border traders.

34. We expect that several Member States will have concerns that full harmonisation will result in a reduction of consumer protection for their citizens. In the UK the proposals, if finally agreed in their current form, will mean that certain key rights would need to be repealed for online and other distance sales. This will therefore be an area of significant interest for the UK during negotiations on the file. We will continue to work with stakeholders to develop our official position.

#### **Loss of the short term right to reject**

35. The UK has had, in effect, a right to reject faulty goods since 1893. This right was recently clarified in the Consumer Rights Act 2015 where, re-implementing the CSD, the right to reject faulty goods (i.e. goods which do not 'conform to the contract'), and obtain a full refund was set at 30 days. This right sits alongside the hierarchy of remedies contained in the CSD, which (as a minimum) requires the trader first to offer free repair or replacement before the consumer may rescind

the contract and demand a refund. Where all the relevant conditions apply, a UK consumer can go straight to rejection and refund, within the time limit.

36. As this legislative proposal is based on maximum harmonisation and includes the same hierarchy of remedies (though some of the detail around it has been amended), the proposal if it passes un-amended, would be likely to require the UK, when implementing, to repeal the short term right to reject faulty goods. Repealing this right would mean that consumers would not be able to obtain a refund until, assuming other remedies were available, they had first pursued them, unless the retailer decided to provide more generous conditions.
37. Building confidence in new suppliers is particularly important for the Digital Single Market where consumers will need confidence to try new, unfamiliar suppliers rather than sticking to tried and tested favourites.

### **Loss of a one repair or replacement limit**

38. In the UK, a consumer who chooses not to exercise their right to reject immediately, and has a right to repair or replacement, may reject and, if appropriate, obtain a full refund if after one repair or one replacement, the goods still do not conform to the contract. This protection was reviewed and clarified in the Consumer Rights Act 2015 where the limit of one repair or one replacement was introduced. The UK would need to repeal the one repair or one replacement limit under this proposal, to bring it into line with the proposed legislation; although (as has always been the case under the CSD), the right for the consumer to require a repair or replacement is always subject to either recourse being impossible or disproportionate.
39. The Government is concerned that the proposal does not contain a strict limit on the amount of repairs and replacements a supplier can offer before a consumer can access a partial or full refund. The Government sees a limit on the amount of repairs and replacements offered to consumers as key to consumer confidence, whilst balancing the interests of business who welcome the legal certainty that a (a non-time-based) limit provides.
40. The Government argues that the caveat to the requirement to offer repair/replacement is ambiguous and could lead to further disputes as consumers and traders argue about whether or not, in a given set of circumstances, the requirement to replace or repair is impossible or disproportionate, and how these terms are defined. Setting a clear limit on the repair/replacement process provides consumers with legal certainty that they will not be locked into an endless cycle of failed repairs or replacements, with the inconvenience this involves, or find themselves in dispute with a supplier over whether another repair is 'possible' or 'significantly inconvenient' to either party, or if a full refund does apply.
41. In addition, with the existing UK solution, business has clarity on their obligations to the consumer when things go wrong which reduces the likelihood of disputes arising between traders and consumers, and traders are prevented from locking the consumer into a long cycle of failed repairs or replacements when goods are faulty. They are therefore incentivised not to sell poor quality goods in the first place (i.e. because they will lose all monies from the sale).

42. In the report the Commission highlight responses received from businesses and consumer organisations during the 2015 'REFIT (regulatory fitness) review of EU consumer and marketing law. They suggest that the existence of a hierarchy of remedies for when things go wrong is in line with consumers' expectations as well as consumers' behaviour when seeking redress for faulty goods.<sup>4</sup>

### **Liability period and limitation periods**

43. The CSD sets a limit of two years from delivery of the goods during which a seller may be held liable for lack of conformity to the contract (including faults). Though lack of conformity – breach of contract, in effect - gives rise to the hierarchy of remedies (repair/replace/refund), national legislation will make provision for a time limit during which those claims for breach of contract may be brought. Thus the Limitation Act, applicable in England and Wales and Northern Ireland, prevents actions for breach of contract being taken six years after the cause of action arose (five years in Scotland), which could, in principle be longer than two years after delivery of the goods.

44. The UK has taken the minimum standard in the CSD as meaning that in principle a consumer could make a claim against a trader for breach of the lack of conformity condition at any point where the breach became apparent, which (as mentioned above) could occur after two years from the date of delivery. The amended proposal would restrict claims to those where lack of conformity became apparent before two years from the date of delivery, although national limitation periods for taking action in relation to such claims are set at a minimum (as with the current CSD), and so the six/five year minimums would not be affected.

### **Reversal of the burden of proof**

45. The proposal includes an extension to the reversal of the burden of proof so that in the event of goods having a fault, the consumer will have the benefit of a presumption for a period of 2 years that the goods were faulty when delivered. Under current law (the CSD, and as transposed into UK law in the CRA) this period is 6 months (minimum). During this period it is for the supplier, not the consumer, to prove that the goods, contrary to the consumer's claim, were satisfactory at the time of sale. We agree with the Commission that this has the potential to lead to a significant increase in consumer protection.

46. We will want to ensure that this extension to the reversal of the burden of proof does not impose a disproportionate burden on business and is justified by a robust cost/ benefit analysis. We will consider this in more detail as discussions on the revised proposal progress.

### **CONSULTATION**

47. Since the original proposal was published on 9 December 2015, BEIS officials have met with a number of key stakeholders including Which?, the Federation of Small Business, the British Retail Consortium, the Law Society of England and

<sup>4</sup> COMMISSION STAFF WORKING DOCUMENT on the Impacts of fully harmonised rules on contracts for the sales of goods, p.23

Wales and the Competition and Markets Authority. Although discussions were put on hold whilst the Commission considered the best way to achieve the extension of the scope of the proposal, BEIS officials continued to engage with key stakeholders on this file. We will continue to do so throughout the negotiation process.

### **IMPACT ASSESSMENT**

48. The Commission's Impact Assessment (IA) (15252/15 ADD1) and Summary of the IA (15252/15 ADD2) considers this Directive. IA contains an explanation of the rationale for the proposals and the approach adopted.

49. Document SWD(2017) 354, published alongside the Commission's revised proposal, provides an assessment of the need to set uniform rules for all types of sale, and is annexed to this EM.

### **FINANCIAL IMPLICATIONS**

50. There are no clear financial implications.

### **TIMETABLE**

51. We do not yet have a clear timetable for ongoing consideration of this revised proposal, although the Estonian Presidency have preliminarily scheduled a Council Working Group meeting on 19 and 20 December, at which point we expect they may set out the way forward for the file. It is then possible that Bulgaria will table further Working Groups during 2018.

### **MINISTERIAL NAME AND SIGNATURE**

A handwritten signature in black ink, appearing to read 'Margot James', written in a cursive style.

**MARGOT JAMES MP**

Parliamentary Under Secretary of State and Minister for Small Business, Consumers and Corporate Responsibility.