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NOTE

From:	General Secretariat of the Council
To:	Working Party on Civil Law Matters (Contract Law)
No. Cion doc.:	13927/17
Subject:	Amended proposal for a Directive on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC and repealing Directive 1999/44/EC - Compilation of Member States comments on Articles 1 to 15

On 20 February 2018 and 15 and 16 March 2018, the Bulgarian Presidency invited delegations to provide written comments and any potential drafting suggestions on Articles 1 to 15 of the Amended Commission proposal for a Directive on certain aspects concerning contracts for the Sales of Goods as set out in 13927/17 JUSTCIV 260 CONSOM 337.

Delegations will find attached the written comments received so far.

BELGIUM

Articles 1 to 14.

Article 1 - Subject matter and scope

1. This Directive lays down certain requirements concerning sales contracts concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-conformity and the modalities for the exercise of those remedies.

2. This Directive shall not apply to contracts for the provision of services. However, in case of sales contracts providing both for the sale of goods and the provision of services, this Directive shall apply to the part relating to the sale of goods.

3. This Directive shall not apply to any tangible medium incorporating digital content where the tangible medium has been used exclusively as a carrier for the supply of the digital content to the consumer.

4. Member States may exclude from the scope of this Directive contracts for the sale of second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person.

5. In so far as not regulated therein, this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract.

BE COMMENTS:

§ 1: BE would prefer to keep the term seller. It's a sales directive; we are dealing with contract of sales of goods (it gives a clear scope for what the directive is about).

If we consider adding provisions **on information obligation** on the trader to the consumer we should add this aspect in the scope of application of the directive. This is compatible with the CRD article 3 § 2.

BE supports EU Parliament amendment 36 on article 1 § 1 which adds a reference to the **objective of a high level of consumer protection**. This is also mentioned in the DCD. BE would like to add the word "with the contract" after "conformity of goods" (as the EP amendment 36).

§ 2: BE is not in favour of paragraph 2. The first sentence is not necessary and could lead to confusion especially in relation to the definition of sales contract given in 2 a. It could appear as a contradiction with the definition given in 2a where a contract of provision of service (goods to be manufactured or produced) is defined as a sales contract according to the definition.

We should have the same approach as the directive 99/44. This directive applies to contracts of sales. And this notion should be defined by MS and not by the directive. Another paragraph should say that contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive.

As for the second sentence, there is a principle in BE law that in the presence of mixed contracts there is a principle "*accessorium sequitur principale*". So the nature of the contract depends on the main obligation specified in the contract. This aspect should be left to MS. This principle was followed in article 6 (installation-this is a provision of service which is treated as an accessory of the main obligation, the sales of goods). See also comment under art.6.

§ 3: BE supports this §, this directive should not apply to tangible medium.

§ 4: BE does not support this §. It is not in favour of harmonisation. Apparently only one member state applies this exception.

§ 5: BE wants to align § 5 on § 9 of Article 3 of the Digital content proposal. BE suggests mentioning a reference to hidden defects in a recital.

The EP proposes a new article 2 (a) which redefines the scope of the directive:

- BE can support § 1 but NOT § 2, 3 and 4.

The goods regime shall apply to goods with embedded digital content according to the general approach of the Council in the framework of the DC Directive.

Article 2 - Definitions

For the purpose of this Directive, the following definitions shall apply:

(a) 'sales contract' means any contract under which the seller transfers or undertakes to transfer the ownership of goods, including goods which are to be manufactured or produced, to the consumer and the consumer pays or undertakes to pay the price thereof;

(b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

(c) 'seller' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive;

(d) 'producer' means the manufacturer of goods, the importer of goods into the Union or any person purporting to be a producer by placing their name, trade mark or other distinctive sign on the goods;

(e) 'goods' means any tangible movable items with the exception of

(a) items sold by way of execution or otherwise by authority of law;

(b) water, gas and electricity unless they are put up for sale in a limited volume or a set quantity;

(f) 'commercial guarantee' means any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

(g) 'contract' means an agreement intended to give rise to obligations or other legal effects;

(h) 'repair' means, in the event of lack of conformity, bringing goods into conformity with the contract;

(i) 'free of charge' means free of the necessary costs incurred in order to bring the goods into conformity, particularly the cost of postage, labour and materials.

BE COMMENTS:

(a) BE prefers not having a definition on sales contract for the reasons mentioned in article 1.2. That's not necessary and might lead to confusion. A definition should be left to MS.

However, if the majority of MS support the idea of a definition then it should be improved as it is not logical in the same sentence to define sales contract by including "goods which are to be manufactured or produced" (could create the confusion with contracts for the provision of services). The directive should include the goods which are to be manufactured or produced but in a separate article (as the 99/44 directive-article 1-5).

(b) BE would like to support recital 16 (a) of the EU Parliament, that is the equivalent of recital 17 of the CRD

(16 a) The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered to be a consumer. This reflects a common-sense approach to everyday transactions, and would also provide added legal certainty given the wide range of goods and scope of the proposal.

(c) see comment under 1.1.

(d) BE is fine with the Commission proposal.

Contrary to the EP, BE does not support the introduction of the definitions of digital content/digital service or embedded digital content under this article.

BE supports the introduction of the notion of durable medium as proposed by the EP amendment (48).

BE thinks that it is not necessary to define the notion of contract (g)

BE supports the deletion of the definition of repair (f). Current definition has no added value. If we define repair we should also define replacement. This might be complicated.

BE supports the introduction of a definition of "bringing in conformity".

The definition of free of charge is not given in the DCD – It should not be defined under article 2 either, but the notion of free of charge should be clearly described in the relevant articles related to the remedies.

Article 3 - Level of harmonisation

Member States shall not maintain or introduce provisions diverging from those laid down in this Directive including more or less stringent provisions to ensure a different level of consumer protection.

BE COMMENTS:

This comment is still preliminary, subject to scrutiny reservation:

BE considers that a maximum harmonisation clause for all aspects covered by the directive is not a realistic approach if we want to achieve progress in the field. On the other side, BE acknowledges that harmonisation brings simplification and legal certainty in some aspects.

For these reasons, BE finds interesting elements in the EP amendment (54). We could negotiate the proposal under a minimal harmonisation approach with maximum harmonisation for some aspects: conformity criteria's; hierarchy of remedies. BE is not in favour of stand still clause.

Another option is to keep a maximal harmonisation clause but with targeted minimal harmonisation. This is also feasible but brings less legal certainty regarding to the legal impact of the provisions. COM ensures that BE could keep its hidden effect guarantee even with maximum harmonization. But this needs an explicit exception which is not well perceived by other delegations.

Article 4 - Conformity with the contract

1. The seller shall ensure that, in order to conform with the contract, the goods shall, where relevant:

(a) be of the quantity, quality and description required by the contract, which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model;

(b) be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted; and

(c) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.

2. In order to conform with the contract, the goods shall also meet the requirements of Articles 5, 6 and 7.

3. Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer shall be valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract.

BE COMMENTS:

BE is in favour of bringing art. 4 and 5 in line with the DCD proposal for as much as it is possible, without the specificities that are tied to digital content.

As to 3, BE would prefer the wording of article 2 § 3 of the directive 99/44 as regards to the consequence of the fact that the consumer knew of the condition of the goods: **There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded**, (…)"

Article 5 - Requirements for conformity of the goods

The goods shall, where relevant:

(a) be fit for all the purposes for which goods of the same description would ordinarily be used;

(b) be delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive; and

(c) possess qualities and performance capabilities which are normal in goods of the same type and which the consumer may expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions, including the producer, unless the seller shows that:

(i) the seller was not, and could not reasonably have been, aware of the statement in question;

(ii) by the time of conclusion of the contract the statement had been corrected; or

(iii) the decision to buy the goods could not have been influenced by the statement.

BE COMMENTS:

See comment under art. 4.

As to c, BE would like to be in line with the directive 99/44 as far as the structure of this article is concerned.

BE is in favour of having a separate paragraph dealing with the specific question of public statement made by the seller (as article 2 § 4 of directive 99/44), in order to avoid uncertainty (words “unless the seller shows” relate to the public statement and not to the qualities and performance capabilities of the goods).

Article 6 - Incorrect installation

Where the goods are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity with the contract of the goods if:

(a) the goods were installed by the seller or under the seller's responsibility; or

(b) the goods, intended to be installed by the consumer, were installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

BE COMMENTS:

BE is in favour of adding to art. 6 (b) "… instructions, where those instructions were provided by the seller/trader". This is in line with the DCD proposal.

BE is in favour of adding to art. 6 a the fact that installation "forms part of the contract" in order to be in line with the directive 99/44 (article 2.5). COM agreed it was implicitly the case if the goods are installed by the seller. Moreover, the existence of this article demonstrates that, in this case, when a contract provides goods and installation, the principle "*accessorium sequitur principale*" applies and therefore contradicts article 1 para 2 (second sentence). So that's why this article 1 paragraph 2 should be deleted.

Article 7 - Third party rights

At the time relevant for establishing the conformity with the contract as determined by Article 8, the goods shall be free from any right of a third party, including based on intellectual property, so that the goods can be used in accordance with the contract.

BE COMMENTS:

This article needs to reflect the same text as the one which will result from the trilogue discussions on the DCD proposal.

Article 8 - Relevant time for establishing conformity with the contract

1. The seller shall be liable for any lack of conformity with the contract which exists at the time when:

(a) the consumer or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods; or

(b) the goods are handed over to the carrier chosen by the consumer, where that carrier was not proposed by the seller or where the seller proposes no means of carriage.

2. In cases where the goods were installed by the seller or under the seller's responsibility, the time when the installation is complete shall be considered as the time when the consumer has acquired the physical possession of the goods. If ~~n a case where~~ the goods were intended to be installed by the consumer, the physical possession of the goods is considered to take place ~~the time~~ when the consumer has had reasonable time for the installation and ~~but~~ in any case not later than 30 days after the time indicated in paragraph 1. ~~Shall be considered as the time when the consumer has acquired the physical possession of the goods.~~

3. Any lack of conformity with the contract which becomes apparent within two years from the time indicated in paragraphs 1 and 2 is presumed to have existed at the time indicated in paragraphs 1 and 2 unless this is incompatible with the nature of the goods or with the nature of the lack of conformity.

BE COMMENTS:

Art. 8 §2, second sentence is not as clear as the first sentence, wording could be improved (see our proposal). Furthermore, we have a scrutiny reservation on the period of 30 days. BE considers that a 30 days' time limits is arbitrary. It would be more adequate to keep a reference to a "reasonable time for the installation" and to put the burden of proof on the consumer regarding the moment upon which he has effectively installed the good. This option is in line with the current practice.

§ 3: BE wishes the re-introduction of the option for MS to allow the parties to agree upon a shorter guarantee for the sale of second hand goods (max. to 1 year) but BE is not in favour of Amendment 80 of the EP on that topic, that introduces a shorter period for the reversal of the burden of proof (1 year, 6 months for second hand goods). BE is not in favour of different option if the consumer has had or not the possibility to check the good before the sale contract was concluded.

For clarity, BE is in favour of adding the idea that the seller can prove otherwise (to be in line with article 5;3 directive 99/44). Moreover, BE suggests having a separate article on the burden of proof (as in DCD) and distinguishing between the possibility for the seller to prove otherwise, and the situation where the presumption does not apply because of the nature of the goods or of the lack of conformity.

It also would be necessary to precisely state exactly (in a recital?) how to interpret the "nature of the goods or the nature of the lack of conformity".

Article 9 - Consumer's remedies for the lack of conformity with the contract

1. In the case of a lack of conformity with the contract, the consumer shall be entitled to have the goods brought into conformity by the seller, free of charge, by repair or replacement, in accordance with Article 11.

2. A repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

3. The consumer shall be entitled to a proportionate reduction of the price in accordance with Article 12 or to terminate the contract in accordance with Article 13 where:

(a) a repair or replacement are impossible ~~or unlawful~~ ;

(b) the seller has not completed repair or replacement within a reasonable time;

(c) a repair or replacement would cause significant inconvenience to the consumer; or

(d) the seller has declared, or it is equally clear from the circumstances, that the seller will not bring the goods in conformity with the contract within a reasonable time.

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.

5. The consumer shall not be entitled to a remedy to the extent that the consumer has contributed to the lack of conformity with the contract or its effects.

BE COMMENTS:

In general, BE is in favour of restructuring and reformulating articles 9 – 13. The EP has also proposed something along those lines in their amendments 82 and following.

BE is in favour of 'a reasonable time' and would not wish to determine a specific period within which the repair/replacement needs to take place.

BE is in favour of a hierarchy of remedies

The disproportionality principle shall only come into play in the choice between repair or replacement (relative proportionality), not when deciding to go from repair/replacement tot price reduction/termination (absolute proportionality). In the latter case only the conditions under art. 9.3 apply. Here the option differs from the one in DCD.

A suspension of the guarantee period during the time needed for repair/replacement is paramount! BE is in favour of mentioning this in the text or to have a recital like recital 18 in the directive 1999/44.

BE would suggest to move paragraph 4 in a recital.

BE wants § 5 to be deleted and replaced by: *There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer*. (article 2 § 3 of the 1999/44 directive).

Article 10

Replacement of goods

1. Where the seller remedies the lack of conformity with the contract by replacement, the seller shall take back the replaced goods at the seller's expense ~~unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer.~~

2. Where goods were installed ~~in a manner consistent with their nature and purpose,~~ before the lack of conformity with the contract became apparent, the obligation to take back the replaced goods shall include the removal of the non-conforming goods and the installation of replacement goods, or bearing

the costs thereof.

3. The consumer shall not be liable to pay for any use made of the replaced goods in the period prior to the replacement.

BE COMMENTS:

BE is in favour of deleting the last part of art. 10 §1 'unless the parties…'.

Art. 10 §2 needs to apply to ALL installations, not just those done by the consumer. A rewording is needed along the lines of: " Where goods were installed before the lack of conformity with the contract became apparent, …".

Article 11 - Consumer's choice between repair and replacement

The consumer may choose between repair and replacement unless the option chosen would be impossible, ~~unlawful~~ or, compared to the other option, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including:

(a) the value the goods would have if there were no lack of conformity with the contract;

(b) the significance of the lack of conformity with the contract;

(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.

BE COMMENTS:

BE is in favour of deleting “unlawful”.

BE has a scrutiny reserve on the proposed principle (by FR and EP) of giving preference to repair above replacement. In any case, as stated above, we are not in favour of giving consumers a free choice between the first and second level of remedies; this would even contradict the proposed principle.

Article 12 - Price reduction

The reduction of price shall 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.

Article 13 - The consumer's right to terminate the contract

1. The consumer shall exercise the right to terminate the contract by notice to the seller given by any means.

2. Where the lack of conformity with the contract relates to only some of the goods delivered under the contract and there is a ground for termination of a contract pursuant to Article 9, the consumer may terminate the contract only in relation to those goods and any other goods which the consumer acquired as an accessory to the non-conforming goods.

3. Where the consumer terminates a contract as a whole or in relation to some of the goods delivered under the contract in accordance with paragraph 2:

(a) the seller shall reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice and shall bear the cost of the reimbursement;

(b) the consumer shall return, at the seller's expense, to the seller the goods without undue delay and in any event not later than 14 days from sending the notice of termination;

(c) where the goods cannot be returned because of destruction or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without destruction or loss until that date, unless the destruction or loss has been caused by a lack of conformity of the goods with the contract; and

(d) the consumer shall pay for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use. The payment for decrease in value shall not exceed the price paid for the goods.

BE COMMENTS:

In general BE thinks that this article regulates termination too strictly and will have a big impact on national rules. BE is not in favour of going beyond what was stated in directive 1999/44 and leave the rest to national law. Links with the *geoblocking* regulation have still to be made.

§2 is quite unclear and not really useful in practice.

§3 will lead to many practical difficulties . BE supports the principle that in case of termination of the contract, one should take into consideration current recital (15) of directive 1999/44. This should be added in the provisions as a mandatory rule.

BE is not in favour of granting consumers the right to terminate when the lack of conformity is minor.

Article 14 - Time limits

The consumer shall be entitled to a remedy for the a lack of conformity with the contract of the goods where the lack of conformity becomes apparent within two years as from the relevant time for establishing conformity. If, under national legislation, the rights laid down in Article 9 are subject to a limitation period, that period shall not be shorter than two years as from the relevant time for establishing conformity with the contract.

BE COMMENTS:

BE is in favour of minimum harmonisation concerning this article. BE wishes the re-introduction of the option for MS to allow the parties to agree upon a shorter guarantee for the sale of second hand goods (max. to 1 year).

As stated above, BE is in favour of the suspension of the guarantee period during repair/replacement.

CZECH REPUBLIC

Please, find below the opinion of the Czech delegation on the 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.

Article 9 Consumer's remedies for the lack of conformity with the contract

The Czech Republic would like to echo a very important issue that has been raised several times during the negotiation of the Directive of digital content. According to the Czech law, the consumer might invoke his right to withdraw from the contract in case the non-conforming goods is not repaired or replaced without delay, at the latest within 30 days of the filing of the claim. This is a well-established legal provision. If the fixed period for restoring the goods to conformity is to be replaced by vague term "within a reasonable time" and the trader is not to be obliged to inform the consumer of the approximate time needed to rectify the defect, that will lead only to legal uncertainty for consumers whether they might exercise their right to withdraw from the contract or not. Consequently, the level of consumer protection would decrease.

Article 11 Consumer's choice between repair and replacement

During the last meeting held on 15 and 16 February several Member States expressed their concerns about cycling consumers in never-ending repairs. In this connection it was said that the number of the trader´s attempts to repair the goods should be limited. The Czech Republic would like to support this approach and offer a solution contained in the Czech Civil Code that might serve as an inspiration or basis for further discussion. According to our law, if the consumer cannot use the goods properly due to the repeated occurrence of the defect after a repair or due to a larger number of defects, the consumer shall have the right to withdraw from the contract. This provision is interpreted (also in conformity with established practice of the courts) that "the repeated occurrence of the defect" means the defect appears for the third time – after two attempts to repair; "a large number of defects" means three or more defects that hinder the consumer from proper use of the goods.

Article 13 Termination of a contract only in relation to some of the goods delivered under the contract

During the last meeting held on 15 and 16 February, several Member States expressed doubts about the wording of Article 13 (2) concerning cases when the consumer may request termination of the contract as a whole, even though only part of the goods delivered was non-conforming. Several Member States have pointed out the inappropriateness of the term 'accessory' in this context. The Czech Republic shares this view and would like to offer a solution contained in the Czech Civil Code that might serve as an inspiration or basis for further discussion. Section 2004 (2) of the Czech Civil Code provides: "*If the debtor has performed in part, the creditor may withdraw from the contract only in relation to the non-performed part. However, if such part performace has no meaning* ("*význam*" in Czech, could be also translated as "*interest*") *for the creditor, he may withdraw from the contract as a whole.*". In general, according to the Czech law a principle applies that the right to withdraw from the contract applies only to the part of the obligation which has not been terminated by performance. An exception to this rule is the situation where the individual parts of the performance are tied so closely together that they have no meaning for the creditor separately. While considering such connection, it is necessary to take into account, in particular, whether those parts of the obligation stands as a unity, regarding the economic purpose of the obligation and also any other circumstances.

Article 9 (4) Withholding payment

The Czech Republic considers that the issue of the withhold payment should be regulated by national law.

Article 9 (5) Contribution to the lack of conformity

The Czech Republic would like to express its concern about the possible negative impact of this provision on consumers. We assume that the word "contributed" puts less demands on the causal link and thus has a broader meaning than word "cause". Using this word could lead to legal uncertainty and could have negative effects on the enforcement of consumer rights. On the other hand, the seller is responsible only for the non-conformity existing at the moment of the delivery of the goods and not for the defect caused later, by the consumer. For these reasons, we propose to remove this paragraph from the proposal.

Article 13 (3) c) Consumer's responsibility for destruction or loss of the non-conforming goods

The Czech Republic considers that the issue of responsibility of the consumer in case of destruction or loss of the non-conforming goods should be left on national laws. We would like to stress, that this provision should be applied when the consumer has already terminated the contract because of the non-conforming goods. From our point of view, in that case it is unbalanced to put the risk of destroying / losing on the consumer. For example, according to the Czech legislation, during the transport, the consumer will be no longer the owner of the goods, but according to that provision, the consumer should be still responsible. We also assume that there are more cases, when the consumer should not be responsible; for example, when the destruction or loss is caused by the transporter. If we understand it correctly, the proposal counts only with the case when the damage is caused by the lack of conformity. According to Czech legislation, the consumer could be responsible only if he *caused* the destruction or loss; the level of consumer protection would thus decrease. Because this issue is very complex, the Czech Republic considers that this it should be left on national laws.

Article 13 (3) d) Payment for decrease in value

The Czech Republic would like to stress that we consider unacceptable that the consumer should be obliged to pay for the use of the goods, if he terminates the contract. Such obligation would, in our view, in fact lead to restriction of the consumer's right to terminate the contract because of non-conforming goods. An obligation to compensate the seller with previously unknown amount (up to the value of the price paid for the goods) would discourage consumers from exercising this right. We would also like to point out the decision of CJEU *C 404-2006*, where CJEU ruled that „*Article 3 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.*". Consequently, the level of consumer protection would considerably decrease.

DENMARK

Preliminary written comments on Article 1-13 by the Danish Delega-tion

The Danish Delegation would like to thank the Presidency for the oppor-tunity to submit written comments on Article 1-13 of the sale of goods proposal.

The Danish Delegation would like to stress that the following comments and suggestions are only preliminary and that we reserve our position on the proposal as the Danish Parliament has not yet given its position on the proposal. Therefore, the Danish Delegation might have further comments on article 1-13 as the Council's work evolves.

Article 1

Article 1(2):

DK finds that the Member States should be free to decide whether the Directive should apply to the sale of goods-element in a dual-purposed contract. Alternatively, DK finds that the dominant element of the con-tract should dictate which set of rules applies to the contract as a whole. If the contract element concerning the sale of a good is very small, the Di-rective should not apply.

Additionally, DK finds that the rule is potentially problematic with regard to construction material as a part of a construction contract. It is our under-standing that the Directive might apply to e.g. the bricks in a contract con-cerning the laying of a roof. We understand that the Commission, with a reference to Article 2(e), finds that is not the case, because the outcome (the roof) is not a tangible moveable item. However, the bricks in itself is a tangible moveable item. DK would like clarity on this issue. It is important to DK that construction materials are exempted from the scope this Di-rective; a two year liability period might be too short for construction mate-rials and the contractors liability for construction materials should corre-spond with the contractor's liability for the service performed.

Article 1(3):

DK still supports that the Directive should apply to digital content embed-ded in a good.

Article 2

Article 2(a) and (i):

DK questions the need to define a "contract", when the Directive already gives a definition of a "sales contract".

Article 4

The title:

To ensure alignment with the DCD-proposal, the title of Article 4 should be "Subjective requirements for conformity".

Article 4(1), litra b:

DK are concerned about the consumer protection, when the seller has to "**accept**" the consumer's requirements. We would like to suggest adding a recital explaining the requirements for this acceptance.

Article 4(2):

Article 4 should only relate to the subjective requirements for conformity. Taking into account the ongoing trilouges on the DCD, it could be consid-ered to introduce a new Article (Article 3a) stating that in order to be in conformity with the contract, the good shall meet the requirements in Arti-cle 4, 5 and 6 where applicable.

Article 4(3):

The suggested Article 3a could contain the rules on the possibility to devi-ate from the conformity requirements in Article 5 and 6. Alternatively, DK suggests that the possibility to deviate from the requirements are moved to Article 5 and 6 respectively, for systematic reasons.

Article 5

The title:

To ensure coherence with the DCD-proposal, the title of Article 5 should be “Objective requirements for conformity”.

Article 5(1), litra b:

In order to provide clarity, DK would prefer that “reasonably” is added to the text, so it says “(…) as the consumers may reasonably expect”.

Article 8

Article 8(2):

Danish Stakeholder Organizations have pointed out, that 30 days is a long time after the actual delivery date to assess conformity with the contract.

Article 8(3):

DK cannot support that the burden of proof is reversed for 2 years. This is very burdensome, especially with regard to used goods. We cannot accept that the burden of proof is longer than what is proposed by the Council in its general approach to the DCD. Digital content-products are complex products, and therefore it makes sense that the trader has to lift the burden of proof for a longer period. Also with physical goods, there is a greater risk that the consumer has mishandled the product.

Article 9

DK supports a hierarchy of remedies as introduced in Article 9.

Article 9(2):

DK can support that a repair or replacement shall be completed within rea-sonable time. Because the Directive applies to all kinds of goods and many different types of defects, DK does not find that it suitable to determine a certain time limit.

Article 9(3):

Article 9(3) entails that the consumer always have the right to either repair or replacement. In CSGD Article 3(3) the consumer cannot require the sell-er to repair or replace the good if this is impossible or disproportionate. DK finds that this Directive should contain the same limitations. If a certain good is no longer available and a repair of a minor defect is very expensive – or maybe impossible due to lack of spare parts – the trader should be allowed to offer the consumer a price reduction or a termination of con-tract. DK would also like to draw attention to Article 12 in the DCD-proposal, where the trader does not have an obligation to bring the digital content into conformity if this is impossible or disproportionate.

Furthermore, DK is concerned about the balance in the Directive, when the consumer has the right to terminate the contract in case of minor defects and the consumer is not obligated to notify the seller about the lack of con-formity within reasonable time after the consumer discovered the defect.

Article 9(4):

DK would like to draw attention to the fact that this rule might be burden-some when it comes to very expensive consumer goods bought on the in-stalment plan (e.g. cars). It could be considered unfair if the consumer is entitled to withhold the entire payment in cases where the defect is only minor.

Article 9(5):

DK finds that the rule is unclear and therefore difficult to use. If the rule only refers to situations where the consumer has contributed to the lack of conformity before the time of supply, this should be made clear in the Ar-ticle. DK leans toward preferring the approach in the CSGD.

Article 10

Article 10(1):

Concerning the “unless-clause”, DK is attentive to the comments put for-ward by other Member States, but DK does not find the rule particularly problematic. DK finds that the possibility for the consumer and the trader to agree to derogate from Article 10(1) already follows from Article 18.

Article 10(2):

DK finds that the rule can be potentially problematic in cases where the installation is not a part of the original contract, and the consumer has in-stalled the good himself/herself without any costs and with little effort. This could for example be the case, where a consumer has bought a bed and legs for the bed from another member state. After installing the legs, the consumer realizes that the bed is crooked. It seems to be very burden-some to require the seller to screw new legs on the consumer's bed.

We do however agree that the seller should be required to install the re-placed good, if the good is a washing machine or another good that is ex-pensive or time-consuming to install.

Article 11

DK generally supports Article 11 and the current limitations to the con-sumer's choice between repair and replacement as illustrated by Article 11.

Article 12

At this time, DK leans towards preferring the wording in CSGD Article 3(5) where the consumer may require an appropriate reduction of the price. This allows for a price reduction in cases where the lack of conformity has not resulted in an objective decreased value of the good. Furthermore, it would make it possible to give a price reduction in cases where the de-creased value is difficult to assess. On the other hand, DK can appreciate the value in aligning Article 12 with the DCD-proposal where the price reduction must be proportionate.

Article 13

Article 13(2):

DK finds that the meaning of the term "accessory" needs clarification.

GERMANY

COURTESY TRANSLATION

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, 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 (COM(2017) 637 final)

Drafting Suggestions and Comments DEU

I. Preliminary remarks and reservations

1. Referring to the suggestion of the Presidency (e-mail of 20 March 2018), DEU subsequently provides written comments and drafting suggestions concerning Articles 1 to 15 of the proposed Directive.

2. There is still insufficient explanation that there is a need for action for a new fully harmonized directive on trade in goods. It is necessary to complete the impact assessment, in particular with regard to the ongoing additional costs of the proposed changes.

3. The following comments supplement the oral statements made in the WP and do not replace them. In particular, the reservations, in particular as regards the need for action, the level of harmonization, Article 5b) and Article 8 (3) are maintained.

4. As the final version of the Digital Content Directive (DCD) has not yet been established, consistency with the DCD has not yet been sought in the following. However, subject to the preliminary remark No. 2, DEU still recognizes the need to ensure consistency between the DCD and this Directive.

5. The following notes and drafting suggestions are purely content-related. Editorial comments on the German language version, especially those concerning the translation, are reserved for a separate statement. The following statement therefore does not constitute an editorial endorsement of the German language version.

6. DEU reserves the right to supplement or amend the following drafting suggestions and comments.

II. Drafting Suggestions

Nr.	Proposal for a Directive by COM	Drafting Suggestions DEU	Reasoning
	Article 1 **Subject matter and scope**		
1	*2. This Directive shall not apply to ~~distance~~ contracts for the provision of services. However, in case of sales contracts providing both for the sale of goods and the provision of services, this Directive shall apply to the part relating to the sale of goods.*	**~~2. This Directive shall not apply to distance contracts for the provision of services. However, in case of sales contracts providing both for the sale of goods and the provision of services, this Directive shall apply to the part relating to the sale of goods.~~**	– The first sentence is redundant since it already follows from Article 1(1) that the Directive does not apply to contracts for the provision of services. – In substance, DEU agrees with COM as regards the second sentence, especially following COM's clarification in the WP on 19 December 2017: 1. Contracts which only or far predominantly contain elements of a sales contract should entirely be covered by the Directive. (Example: purchasing an item of furniture including assembly.) 2. Contracts which only or far predominantly contain elements of a service contract should not be covered by the Directive at all. (Example: repairing a water supply including transfer of ownership of the required seal ring.) 3. Mixed-type contracts which contain elements of both a

			sales contract and a service contract should only be covered by the Directive in relation to those elements which concern sales law. (Example: contract to provide a DSL connection including purchase of the router needed to access the connection.) The rule in Article 1(2)(2) of COM's Proposal is misleading, however. It could easily be understood to mean that not only the example cited in 3. above but also the examples cited in 1. and 2. are only to partially fall within the scope of the Directive. The preferred rule as outlined in the above can be realised by deleting the whole of Article 1(2). The scope of the Directive then follows from the definition of a sales contract in Article 2(a) in conjunction with Article 1(1). This rule clearly covers the examples in 1. and 2. above. As regards the example in 3. above, it may be sensible to provide an explanation in a Recital.
2	5. In so far as not regulated therein, this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract.	5. In so far as not regulated therein, this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract **and any obligation to pay compensation**.	– The amendment serves to clarify that the Directive does not contain an exhaustive list of all the remedies for lack of conformity and the Member States can also make provision concerning a claim for damages on the part of the

			consumer.
	Article 2 **Definitions**		
3	(e) 'goods' means any tangible movable items with the exception of *(a)* items sold by way of execution or otherwise by authority of law; *(b)* water, gas and electricity *unless* they are put up for sale in a limited volume or a set quantity;	(e) 'goods' means any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and **electricity shall be considered as goods within the meaning of this Directive where** they are put up for sale in a limited volume or a set quantity;	– The amendment serves to editorially align the text of the Directive to that of the CRD. Definitions in EU legislative acts should be standardised as far as possible. The definition in Article 2(3) of the CRD is also easier to understand because it describes in positive terms in which cases water, gas and electricity are considered goods. The exception plus counter-exception in (b) of this Proposal is unnecessarily complicated.

4	~~*(f) 'durable medium' means any instrument which enables the consumer or the seller to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;*~~	**(f) 'durable medium' means any instrument which enables the consumer or the seller to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;**	– The definition should be included in the list of definitions in Article 2 and not in Article 15.
5	*(g) 'contract' means an agreement intended to give rise to obligations or other legal effects;*	~~**(g) 'contract' means an agreement intended to give rise to obligations or other legal effects;**~~	– The definition of "contract" is redundant and goes well beyond the scope of the Directive.
	Article 4 **Conformity with the contract**		
7	1. The seller shall ensure that, in order to conform with the contract, the goods shall, where *relevant*:	1. The seller shall ensure that, in order to conform with the contract, the goods shall, where **applicable**:	– The term "applicable" is preferable since "relevant" might be misunderstood as a substantive criterion in the sense of "significant" (cf. Article 6(1) GA of the DCD).
8	(a) be of the quantity, quality and *description* required by the contract, which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model;	(a) be of the quantity, quality and **type** required by the contract, which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model;	– The term "description" applies circular reasoning since the description follows from the contractual requirements as a whole. That is why the term "type" is preferable, as used in the French version.
9	3. Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer ~~is~~ shall be valid only if, at the time of the conclusion of the contract, the consumer *knew* of the specific condition of the goods *and the consumer has expressly accepted this specific condition when concluding the contract*.	3. Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer shall be valid only if, at the time of the conclusion of the contract, the consumer **had been separately informed** of the specific condition of the goods.	– The criterion of "knowing" has to be rejected since it is an internal fact and is thus hard to establish and prove. – The criterion "expressly accepted" can be dropped because consumers already express their consent to the derogation by agreeing to the contract after having been informed separately about the derogation.

	Article 5 **Requirements for conformity of the goods**		
10	The goods shall, where *relevant*:	The goods shall, where **applicable**:	– The term “applicable” is preferable since “relevant” might be misunderstood as a substantive criterion in the sense of “significant” (cf. Article 6(1) GA of the DCD).
11	(ii) by the time of conclusion of the contract the statement had been corrected; or	(ii) by the time of conclusion of the contract the statement had been corrected **in a manner of equal value**; or	– The correction may only be effective where it is reasonable to assume that the consumer is also aware of the correction. In particular, where the consumer relied on assurances given in large-scale ad campaigns, it is necessary to have the correction in a similar campaign. The consumer may not lose his rights by way of a concealed correction, for example on the manufacturer’s website.
	Article 6 **Incorrect installation**		
	(b) the goods, intended to be installed by the consumer, were installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.	(b) the goods, intended to be installed by the consumer **or a third party**, were installed by the consumer **or a third party** and the incorrect installation was due to a shortcoming in the installation instructions.	– Consumers are also worth protecting when third parties, for example craftsmen or other professionals, install the goods and do so incorrectly on account of an error in the installation instructions. Even professionals will not always be able to identify errors in the instructions for the installation of very specialised goods.
	Article 7 **Third party rights**		

12	At the time relevant for establishing the conformity with the contract as determined by Article 8, the goods ~~must~~ shall *be free from* any right of a third party, including based on intellectual property, *so that* the goods *can be used* in accordance with the contract.	At the time relevant for establishing the conformity with the contract as determined by Article 8, the goods shall **not be in violation of** any right of a third party, including based on intellectual property **rights**, **which impedes the use of** the goods in accordance with the contract.	– The seller may, in certain circumstances, not be able to provide the consumer with goods which are entirely "free from any right of a third party" because the rights of third parties are reserved in the sales contract or exist in the form of a third-party copyright. It is sufficient for the goods to be free of those rights of third parties which would prevent the consumer using the goods in accordance with the contract. (cf. Article 8 GA of the DCD)
	Article 8 **Relevant time for establishing conformity with the contract**		
13	2. In cases where the goods were installed by the seller or under the seller's responsibility, the time when the installation is complete shall be considered as the time when the consumer has acquired the physical possession of the goods. *In a case where the goods were intended to be installed by the consumer, the time when the consumer had reasonable time for the installation but in any case not later than 30 days after the time indicated in paragraph 1 shall be considered as the time when the consumer has acquired the physical possession of the goods.*	2. In cases where the goods were installed by the seller or under the seller's responsibility, the time when the installation is complete shall be considered as the time when the consumer has acquired the physical possession of the goods. ~~**In a case where the goods were intended to be installed by the consumer, the time when the consumer had reasonable time for the installation but in any case not later than 30 days after the time indicated in paragraph 1 shall be considered as the time when the consumer has acquired the physical possession of the goods.**~~	– The rule in the second sentence is very complicated, yet of relatively little use: Consumers only benefit from a 30-day extension to the guarantee period. This second sentence would, however, by way of the legal guarantee put the risk of accidental deterioration of the goods on the seller even though the seller has no influence either on the goods or on the length of the extension. This is an inappropriate distribution of risks. Further, there is a risk of an evaluative contradiction with Article 6(b) in case the consumer installs the goods later than 30 days after delivery and installs them incorrectly due to a shortcoming in the installation instructions. Under Article 6(b), the precondition for lack of

			conformity is that the goods <u>are</u> installed incorrectly. The mere fact that the installation instructions are incorrect is not sufficient. However, if the consumer installs the goods after more than 30 days, and thus after the point in time defined in Article 8(2) second sentence, there will have been no incorrect installation at the relevant point in time. In such cases, it would be tempting to conclude from Article 8(2) second sentence that the consumer loses his rights under the legal guarantee if he does not install the goods within 30 days. Extending the guarantee period under Article 8(2) second sentence would thus be a poisoned chalice for the consumer. Overall, the disadvantages of the second sentence outweigh its advantages, which is why it should be deleted.
	Article 9 **Consumer's remedies for the lack of conformity with the contract**		
14	3. The consumer shall be entitled to a proportionate reduction of the price in accordance with Article 12 or to terminate the contract in accordance with Article 13 where: (a) *a* repair or replacement are impossible *or unlawful;*	3. The consumer shall be entitled to a proportionate reduction of the price in accordance with Article 12 or to terminate the contract in accordance with Article 13 where: (a) repair **and** replacement are impossible **[or unlawful]**;	– Price reduction and termination should only be possible where both options, i.e. repair and replacement, are impossible. – According to the German understanding of the law, unlawfulness is a subset of impossibility (legal impossibility). If the same applies in other MS, the words “or unlawful” may be deleted.
15	(b) the seller has not completed repair or replacement within a reasonable time;	(b) the seller has not completed repair or replacement within a reasonable time **after the consumer had indicated the lack of conformity to the seller**;	– The amendment clarifies when the time limit begins to run.

16	(c) *a* repair *or* replacement would cause significant inconvenience to the consumer; or	(c) repair **and** replacement would cause significant inconvenience to the consumer**, in which significant inconvenience can usually be assumed where the lack of conformity is not cured despite two attempts of curing be the seller**; or	– Price reduction and termination should only be possible where both options, i.e. repair and replacement, would cause significant inconvenience to the consumer. – Sellers should be permitted two attempts at repair as a legal principle. In order to achieve an appropriate and fair result in each individual case, exceptions should be possible in which more or fewer attempts are permissible.
17		**e) the seller fraudulently concealed the lack of conformity from the buyer**	– If the seller is aware of the lack of conformity and fraudulently conceals it from the consumer, then the trust between the two parties is destroyed. The consumer cannot reasonably be expected to get the fraudulent seller to repair the goods. The seller does not deserve a second chance since he was already aware of the lack of conformity at the time of performance (see Federal Court of Justice, 8 Dec. 2006, case V ZR 249/05; Federal Court of Justice, 9 Jan. 2008, case VIII ZR 210/06).
19		**f) there are special circumstances which justify the immediate price reduction or termination of the contract, taking into account the interests of both parties.**	– A general clause should be included to ensure that justice is served in each individual case. There may well be other cases in which trust between the buyer and seller has been irrevocably destroyed, for instance if the seller, in the case of particularly sensitive contracts (e.g. the purchase of a door lock including installation), acts very carelessly without this going as far as to constitute fraudulent behaviour. A general clause should be included to cover these cases. Article 12(3)(c) of the general approach to the DCD contains a similar

			general clause.
20	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.	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 does not apply if, in the circumstances of the case, in particular because of the relative insignificance of the lack of conformity with the contract, the withholding would be disproportionate.**	– The right to withhold payment of the full purchase price may be disproportionate in the case of a minor fault, for instance when very expensive consumer goods (e.g. high-end lawnmowers) only have a minor optical defect.
21	5. The consumer shall not be entitled to a remedy to the extent that *the consumer has contributed* to the lack of conformity with the contract or its effects.	5. The consumer shall not be entitled to a remedy to the extent that **this would be disproportionate in the circumstances of the case, taking into account in particular the consumer's contribution to** the lack of conformity with the contract or its effects.	– At its meeting on 20 December 2017 COM explained that the provision had consciously been kept vague to give MS leeway during implementation. This function of merely providing a regulatory framework should be stated in more explicit terms in the provision and clarified in a Recital.
	Article 10 **Replacement of goods**		
22	1. Where the seller remedies the lack of conformity with the contract by replacement, the seller shall take back the replaced goods at the seller's expense *unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer*.	1. Where the seller remedies the lack of conformity with the contract by replacement, the seller shall take back the replaced goods at the seller's expense ~~**unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer**~~.	– Because of Article 18, this expressly stated possibility to derogate from the law is repetitious and thus redundant.
23	2. Where the *consumer* had installed *the goods* in a manner consistent with their nature and purpose, before the lack of conformity with the contract became apparent, the obligation *to take back the replaced* goods shall include the removal of the non-conforming goods and the installation of replacement goods, or bearing the costs thereof.	2. Where the **goods** had **been** installed in a manner consistent with their nature and purpose, before the lack of conformity with the contract became apparent, the obligation to ~~**take back the replaced**~~ **the** goods shall include the removal of the non-conforming goods and the installation of replacement goods, or bearing the **necessary** costs thereof. **Member States may limit the remedy referred to in the first sentence to the**	– It is not necessary for consumers to install the goods themselves. It is also worth providing protection in situations in which non-conforming goods are installed by the seller or a third person. Account must be taken of the fact that not just the type of non-conformity set out in Article 6(b) but all types of lack of conformity have to be covered. The provision thus also covers all those cases in which the goods

		bearing of the costs necessary for the removal of the non-conforming goods and the installation of replacement goods.	themselves are installed correctly and the seller alone is responsible for the lack of conformity. – The "costs" should be limited to the "necessary costs" so that consumers do not get someone to carry out an unnecessary and expensive installation at the seller's expense. – According to COM's explanation, the Weber/Putz decision should only be implemented to a limited extent and further details should be left to the Member States or the courts. Given the full harmonisation approach, however, this flexibility must be included in the regulatory part of the Directive, too. If the fully harmonised Directive provides for two entitlements, namely dismantling and installation by the seller or cost reimbursement by the seller, a national rule which only provides for one of these entitlements could be regarded as inadequate implementation.
24	*new*	**Artikel 10a** **Repair** **1. Where the seller remedies the lack of conformity of the goods by means of repair, the consumer shall make the goods available to the seller for this purpose.** **2. Where the goods had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent and repair requires their removal, the obligation to repair shall include the removal of the non-conforming goods and the installation of repaired goods, or bearing the necessary costs thereof. The second sentence**	– It should be clarified that the consumer is required to cooperate on the repair. Without the consumer's cooperation it is often impossible for the seller to undertake the repair (see Federal Court of Justice, 10 March 2010, case VIII ZR 310/08; Federal Court of Justice, 19 July 2017, case VIII ZR 278/16). – A rule should also be included to cover the issue of the costs of dismantling and installation in the case of repairs. In such cases, too, it is conceivable that a great deal of effort first needs to be put into dismantling the installed item before it can be repaired.

		of Article 10(2) shall apply accordingly.	
	Article 11 **Consumer's choice between repair and replacement**		
25	The consumer may choose between repair and replacement unless the option chosen would be impossible*, unlawful* or, compared to the other option, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including: (a) the value the goods would have if there were no lack of conformity with the contract; (b) the significance of the lack of conformity with the contract; (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.	**1.** The consumer may choose between repair and replacement unless the option chosen would be impossible **[or unlawful]** or, compared to the other option, would impose costs on the seller that would be disproportionate, taking into account all circumstances, including: (a) the value the goods would have if there were no lack of conformity with the contract; (b) the significance of the lack of conformity with the contract; (c) whether the alternative remedy could be completed without significant inconvenience to the consumer. **2. If the remedy chosen by the consumer imposes disproportionate costs on the seller and the seller cannot refuse this remedy in accordance with paragraph 1, he may limit the costs to be borne by him to a reasonable amount. When calculating this amount, the value of the goods in a condition conforming to the contract and the significance of the non-conformity must be taken into account.**	– Unlawfulness, a subset of impossibility (legal impossibility), does not need to be included in the list from Germany's perspective (see Article 9 above). – If both types of remedy are impossible, the seller can also refuse them both because he cannot be obliged to do something which is impossible. Under the proposed rule, if one of the two types of remedy was impossible and the other was disproportionately expensive, the seller would have to comply if the consumer requested the disproportionately expensive remedy. It makes neither ecologically nor economically sense, however, to oblige the seller to undertake disproportionately expensive measures without any limitations whatsoever. In its Weber/Putz decision the European Court of Justice expressly permitted exceptions to and limitations of the obligation to reimburse costs. Such limitations do not leave consumers without rights since they still have the option of reducing the price. The Directive should therefore include a limitation in the event of absolute disproportionality.

	Article 13 **The consumer's right to terminate the contract**		
26	1. The consumer shall exercise the right to terminate the contract by *notice* to the seller given by any means.	1. The consumer shall exercise the right to terminate the contract by **declaration** to the seller given by any means.	– The term “declaration” – a well-known term used in relation to declarations of intent – is preferable to “notice”.
27		**2a. The consumer is not entitled to terminate the contract if the lack of conformity is minor.**	– Termination in the case of minor non-conformity should be ruled out. This serves environmental protection purposes and protects sellers against disproportionate burdens. Consumers still have the option of reducing the price, and thus they are not without rights.
28	(a) *the* seller shall reimburse to the consumer the price paid *without undue delay and in any event not later than 14 days from receipt of the notice* and shall bear the cost of the reimbursement;	(a) **The** seller shall reimburse to the consumer the price paid ~~**without undue delay and in any event not later than 14 days from receipt of the notice**~~ and shall bear the cost of the reimbursement**.**	– It should be left to the national legislatures to determine the modalities concerning the unravelling of a contract. German law, for instance, has a fully functional solution to the dilemma of who has to pay first, namely the “synallagmatic” return of performance (contemporaneous performance). – Since the seller has to bear the costs of returning the goods, at the consumer’s request he must also be reasonably expected to pay an advance, since the consumer is generally liable to pay the carrier in advance.
29	(b) *the* consumer shall return, at the seller's expense, to the seller the goods *without undue delay and in any event not later than 14 days from sending the notice of termination*;	(b) **The** consumer shall return, at the seller's expense, to the seller the goods ~~**without undue delay and in any event not later than 14 days from sending the notice of termination**~~; **at the request of the consumer, the seller has to pay a reasonable advance on the return costs to the consumer.**	
30	(c) *where* the goods cannot be returned because of *destruction* or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without *destruction* or loss until that date, unless *the destruction or loss has been caused by a lack of conformity of the goods*	(c) **To the extent that** the goods cannot be returned because of **deterioration** or loss, the consumer shall pay to the seller the monetary value which the non-conforming goods would have had at the date when the return was to be made, if they had been kept by the consumer without **deterioration** or loss until that date**. This does not apply**	– The provision should treat destruction and deterioration in the same way. It can, in specific cases, be very difficult to decide whether something has been completely destroyed or whether it has only been very seriously deteriorated. Further, it is appropriate, in the case of partial deterioration, to also provide for partial compensation so that we are not left with

	with the contract; and	**i. if the non-conformity justifying termination only became apparent during a processing or transformation of the goods,** **ii. to the extent that the seller is responsible for the deterioration or loss or that the damage would also have occurred if the goods had remained with the seller,** iii. **if the deterioration or loss occurred with the consumer, although the consumer showed the care that he customarily exercises in his own affairs.**	an inappropriate "all-or-nothing" decision. – The provision serves risk-sharing purposes in those cases in which after the termination of the contract the goods cannot be returned to the seller. The rule on risk sharing set out in COM's Proposal is, however, too strict and is to the detriment of the consumer. It is even stricter than the risk sharing rule provided for in Article 82 of the CISG for B2B transactions. Since termination is based on the lack of conformity and thus on the seller's conduct, the risk in regard to accidental damage should be borne by the seller (ii). Where a consumer has processed or modified the goods, he cannot be reproached for the deterioration. These cases should be treated in the same way as accidental damage and the seller should bear the risk (i). Consumers should be accorded the option of treating the goods in the same way as their other property. The goods remain their property until the contract is terminated. They should, therefore, be liable only in so far as they treat the goods less carefully than their other property (iii). The above exceptions are based on the rules in Article 82 of the CISG.

31	(d) *the* consumer shall pay *for a decrease in the value of the goods only to the extent that the decrease in value exceeds depreciation through regular use*. The payment *for decrease in value* shall not exceed the price paid for the goods.	(d) **The** consumer shall pay **the monetary value for the use taken of the goods by the consumer**. The payment ~~**for decrease in value**~~ shall not exceed the price paid for the goods.	– There should be a right to compensation in money in the case of normal use. Using high-end goods can bring considerable value despite the good*s lack of conformity. It is not appropriate to only allow the consumer to benefit, given that the seller gets back used goods but has to reimburse the full price paid. Example: A contract for the purchase of a car is terminated on account of non-conformity although the vehicle is still roadworthy (e.g. engine power too low) – the consumer has nevertheless drawn value from using the vehicle. If the buyer did not have to pay any compensation for this use, he would be unjustified enriched since he is repaid the full purchase price. – No rule need to be included in (d) regarding deterioration of the goods if – as suggested above - these cases are covered in connection with destruction in (c).
	Article 14 **Time limits**		
32	*New Paragraph 2*	**2. Member States may introduce or maintain periods longer than those laid down in the first and second sentences of paragraph 1. In the case of used goods, Member States may reduce the periods referred to in the first and second sentence of paragraph 1 to not less than one year.**	– The two-year time limit is inappropriately short for some long-lasting products such as building materials. The Member States should therefore be given the possibility of extending this time limit. – The time limit may be too long in regard to used goods. It severely restricts the trade in affordable used cars. The Member States should therefore be able to shorten the time limit in regard to used goods.

	Article 15 **Commercial guarantees**		
33	(a) pre-contractual information provided by the *seller*, including any pre-contractual statement which forms an integral part of the contract;	(a) pre-contractual information provided by the **guarantor**, including any pre-contractual statement which forms an integral part of the contract;	– It should be noted that the regulation applies both to the manufacturer's guarantee and the seller's guarantee. It is, however, hardly justifiable to bind the manufacturer to contractual promises of the seller. Similarly, it is hardly reasonable to bind the guarantor to advertising claims without the restriction that they must be attributable to him. Under the current version, the guarantor would also be liable for third-party advertising claims to which he has no relationship whatsoever. It is therefore proposed to replace the term "seller" with "guarantor" and to limit the term "advertising" to "associated advertising" (cf. Article 6 (1) of the CSD). – The words "most advantageous…respectively" serve to clarify that the most advantageous condition applies in case all three conditions mentioned in letters a) to c) differ from each other.
34	(b) advertising available at the time of or before the conclusion of the contract; and	(b) **associated** advertising available at the time of or before the conclusion of the contract; and	
35	If the guarantee statement is less advantageous to the consumer than the conditions laid down in pre-contractual information provided by the *seller* or advertising, the commercial guarantee shall be binding under the conditions laid down in the pre-contractual information or advertising relating to the commercial guarantee.	If the guarantee statement is less advantageous to the consumer than the conditions laid down in pre-contractual information provided by the **guarantor** or **associated** advertising, the commercial guarantee shall be binding under the **most advantageous** conditions laid down in the pre-contractual information or advertising relating to the commercial guarantee**, respectively**.	
36	2. *The guarantee statement shall be made available on a durable medium and drafted in plain, intelligible language. It shall include the following:*	2. **The seller shall provide the consumer with a confirmation of the guarantee, on a durable medium within a reasonable time after the conclusion of the guarantee, and at the latest at the time of the delivery of the goods. That confirmation shall include:**	– Under Article 6 (3) CSD, the guarantor only had to provide the guarantee in a specific form 'at the consumer's request'. To extend consumer rights, this restriction was deliberately deleted. However, this raises the question of when has the guarantee statement to be made available, which was not a relevant question before. According to COM's Proposal, the provision is a form requirement, i.e. the guarantee statement must be made available at the time of its submission in the form of paragraph 2.

			However, since the contract of sale can be concluded by any means, it would in fact be impossible to give a commercial guarantee in compliance with this form requirement when using certain distribution channels. For example, in the case of teleshopping or (depending on the technical configuration) when concluding a contract by sms, chat, messenger-app or social networks, it is technically not possible to adhere to the form requirement of paragraph 2 at the time the contract is concluded. It does not seem appropriate to penalize certain distribution channels and to make it more difficult to issue a commercial guarantee. The problem can be solved by making it clear that the guarantee statement in the form of paragraph 2 can also be made available at the time of delivery. The provision in paragraph 2 does anyway not serve to inform the consumer before the conclusion of the contract. Article 6(1)(m) CRD already fulfils this purpose. Rather, the purpose of this provision here is to ensure that the consumer can store the essential information on a durable medium and access it quickly at the time when he wants to make a claim under the commercial guarantee. – In order to minimize the administrative burden for the seller and for the purposes of legal clarity and uniformity, the wording is aligned with Article 8 (7) CRD.

37	*3. For the purpose of this Article, 'durable medium' means any instrument which enables the parties to store information addressed personally to them in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.*	**~~3. For the purpose of this Article, 'durable medium' means any instrument which enables the parties to store information addressed personally to them in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.~~**	– Moved to Article 2(f)

IRELAND

Article 1 Subject matter and scope

Paragraph 1

1. In the interests of consistency between the two instruments, there is a case for aligning the wording of paragraph 1 more closely with that of the wording of Article 1 of the general approach on the DCD. Though not essential, a reference to the aims of the proposal - to contribute to the proper functioning of the internal market while providing for a high level of consumer protection - is desirable.

Paragraph 2

2. Paragraph 2 states that in the case of *sales contracts* providing for both the sale of goods and the provision of services, the Directive shall apply to the part relating to the sale of goods. Recital (12) states that where *a contract* includes elements of both sales of goods and provision of services, the Directive should apply only to the part relating to the sale of goods. Paragraph 2 and recital (12) appear to be inconsistent in that, under the recital, the Directive would apply to goods supplied under a services contract, while under paragraph 2 it would not so apply. In its guidance on the CRD, the Commission gave as an example of a contract covering both goods and services that should be considered as a services contract a contract for the repair, renovation or construction of an annex to a building. There is a case in our view for applying the Directive to goods supplied under this and other types of services contract. This could be done by deleting 'sales' in the second line of paragraph 2. Such an amendment would be consistent with the approach taken under the DCD. Article 6 of the general approach provides that where a single contract between the same supplier and the same consumer includes in a bundle elements of supply of digital content or a digital service and elements of the provision of other services or goods, the Directive will apply only to the elements of the contract concerning the digital content or digital service.

3. Paragraph 2 should presumably refer also to contracts for digital content or digital services as well as contracts for services.

4. A sales contract that provides for installation of the goods can be regarded as a contract that provides both for the sale of goods and the provision of services. Article 6 on incorrect installation could be seen therefore as an exception to the rule in the second sentence of paragraph 2, though any resultant inconsistency may be averted by the provision in the Article which makes any lack of conformity resulting from incorrect installation a lack of conformity of the goods.

Paragraph 3

5. There is a case for aligning the wording of paragraph 5 with that of Article 3(3) of the general approach on the DCD to state that the Directive 'shall not apply to any tangible medium which incorporates digital content in such a way that the tangible medium serves exclusively as carrier of digital content.'

Paragraph 5

6. A reference to the right to damages might be added to the illustrative list of general contract law aspects not regulated by the Directive.

Embedded digital content

7. If in line with the general approach on the DCD, the sales Directive is to apply to embedded digital content, a number of changes and additions to the present text will be required, in particular to the provisions of Articles 4 and 5 on conformity with the contract. The Commission non-paper on the treatment of goods with embedded digital content is a useful starting point for the consideration of these changes. The required amendments are probably best considered as a bloc when the outcome of the DCD trilogues on the application of that Directive to embedded content is known.

Goods supplied in instalments

8. There is a need to clarify whether the Directive is to apply to goods supplied in instalments such as a twelve-month subscription to a magazine or newspaper. If the Directive is to regulate goods supplied in instalments, the application to instalment deliveries of the provisions of Article 8 on the time for establishing conformity would require consideration.

Article 2 Definitions

(b) 'consumer'

9. We would favour augmenting the definition of 'consumer' to provide in line with recital 17 of the CRD that where a contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer. This could be done in a recital or, as proposed by IMCO, by an addition to the definition of 'consumer'.

(g) 'contract'

10. We do not see a need for this definition and, as was done with the corresponding definition in the DCD, think that it could be deleted.

(h) 'repair'

11. Article 9(1) states that in the case of a lack of conformity with the contract, the consumer shall be entitled to have the goods brought into conformity by repair or replacement. Paragraph (h) states that 'repair' means in the event of a lack of conformity bringing goods into conformity with the contract. The definition is essentially circular, does nothing not done by Article 9(1) and could be deleted.

(i) 'free of charge'

12. The definition is similar to that at Article 3(4) of the CSD. Though the ECJ interpreted 'free of charge' expansively in the *Quelle* and *Weber/Putz* cases and made it clear that the cost items specified (postage, labour and materials) were illustrative and not exhaustive, the reference to postage is perhaps too restrictive. While postal monopolies were still largely in place when the CSD was enacted, goods are now delivered by a variety of carriers. The term 'carriage' used in Article 8(1)(b) might be added to the list of cost items in the definition so that line 2 would refer to 'postage or carriage'.

Article 3 Level of harmonisation

13. If a minimum harmonisation approach is agreed on certain provisions such as time limits, the words 'unless otherwise provided for in this Directive' should be added to Article 3 as was done in Article 4 of the CRD (Level of harmonisation). It is not clear why these words were not added to Article 4 of the DCD given the minimum harmonisation status of Article 9a of the Directive (Time limits).

Article 4 Conformity with the contract

Paragraph 1(a)

14. The second part of the subparagraph on correspondence with sample or model would be better placed with the objective conformity requirements in Article 5. The corresponding provision in the DCD on compliance with sample or model forms part of the objective conformity requirements of Article 6a. It is not unreasonable to permit an exception to the requirement that goods correspond to their sample or model in cases where the consumer was informed of, and accepted, it. Transferring the provision on correspondence with sample or model to Article 5 would allow for such cases.

Paragraph 1(c)

15. This provision refers to the pre-contractual information required for distance and off-premises contracts under Article 6 of the CRD, paragraph 5 of which states that this information shall form an integral part of these contracts. The pre-contractual information requirements for on-premises, or face-to-face contracts, at Article 5 of the CRD are not subject to any similar stipulation. As on-premises contracts will for the foreseeable future account for the majority the transactions regulated by the Sales Directive, paragraph 1(c) has the potential to cause confusion about the rights applicable to on-premises and off-premises contracts as well as between the rights and obligations under this Directive and the CRD. A similar provision in the original text of the DCD was deleted and replaced by a recital stating that the requirements of the contract included those arising from the CRD information requirements that formed an integral part of the contract. We would favour a similar solution here.

Paragraph 2

16. In the case of the corresponding provision in the DCD, Member States took the view that the Article on third party rights should be a free-standing provision and should not form part of the conformity rules. In the interests of consistency, a similar approach should perhaps be taken in paragraph 2 and the reference to Article 7 deleted. If however it is concluded that the IP issues around goods are different to those around digital content, we would have no problem with the retention of the reference to Article 7 in paragraph 4.

Paragraph 3

17. The suggested inclusion of a similarly worded provision in Article 6a of the DCD gave rise to concerns that it was formulated in too sweeping a way and might act as an inducement to suppliers to press consumers for waivers of the objective conformity requirements. The provision agreed in Article 6a(2) of the general approach of the DCD states that there shall be no lack of conformity if at the time of the conclusion of the contract the consumer was informed that a particular characteristic of the digital content deviated from the conformity requirements and expressly accepted the deviation when concluding the contract. Paragraph 3 should be replaced by a similar provision.

Article 5 Requirements for conformity of the goods

Paragraph (a)

18. The corresponding provision at Article 6a(1)(a) of the DCD contains an additional stipulation that fitness for usual purposes shall take into account, where applicable, any existing national and Union laws, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct. It can be argued that a provision of this kind is more appropriate to digital content as the relative recency of, and rate of change in, the digital economy means that expectations of what constitutes fitness for usual purposes are less well established than for goods. We are inclined to think however that laws, technical standards and industry codes are as relevant to many goods as they are to digital content and that an addition dealing with them should be made to paragraph (a).

Paragraph (b)

19. Paragraph (b) would be more appropriately placed after paragraph (c) as the latter is the more general provision. While recital 18 states that any reference to what can be expected of or by a person in the Directive should be understood to be a reference to what can reasonably be expected, we would prefer if 'reasonably' were inserted before 'be expected' where the latter occurs in the text. It cannot be assumed that consumers and traders will read recitals to the same extent as they may read the text.

Paragraph (c)

20. As recital (23) states, ensuring longer durability of consumer goods is important for achieving more sustainable consumption. In keeping with this aim, paragraph (c) should make express reference to the durability as well as the qualities and capabilities of goods. Recital (23) further states that product specific Union legislation is the most appropriate way to introduce durability and other product related requirements in relation to specific types or groups of products and that the Directive should therefore be complementary to the objectives followed in such Union product specific legislation. In our view, the inclusion of durability among the objective conformity criteria in paragraph (c) would help achieve this desired complementarity. It would be a flexible criterion which would be assessed in line with the normal performance of the specific goods in question and the consumer's reasonable expectations about them. It would also give the consumer a remedy where goods did not meet normal standards or reasonable expectations as to their durability.

21. More broadly, there is a case for adding an indicative list of qualities and performance capabilities in paragraph (c) as proposed by IMCO. The IMCO amendment refers to quality and performance features 'including in relation to appearance, durability, functionality and security'. The suggested addition of 'appearance' has merit in our view. Functionality and security may be more appropriate to digital content, but we would support the substitution of 'safety' for 'security'.

Article 6 Incorrect Installation

22. This Article does not appear to give rise to significant issues. The addition of 'where those instructions were provided by the seller' at the end of paragraph (b) should be considered along the lines of the corresponding provision at Article 7(b) of the general approach of the DCD. A recital might also clarify that incompleteness or a lack of clarity in installation instructions should be considered 'shortcomings' in these instruction as is done in recital 30 of the DCD.

Article 8 Relevant time for establishing conformity with the contract

Paragraph 1

23. The proposed rules on the time for establishing conformity with the contract are based on the provisions on the passing of risk at Article 20 of the CRD. The first sentence of Article 20 which corresponds to paragraph 1(a) applies in contracts 'where the trader dispatches the goods to the consumer'. The use of 'dispatches' appears to reflect the fact that the CRD provision was framed with distance contracts in mind. The relationship between paragraphs 1(a) and (b) might perhaps be clearer if paragraph 1(a) were said to apply 'where the seller hands over or dispatches the goods to the consumer'. Paragraph 1(b) could be amended as follows to align it more closely with the CRD provision: 'the goods are handed over by the seller to the carrier commissioned by the consumer to carry the goods where that carrier was not proposed by the seller.' The need for the final clause of paragraph 1(b) referring to cases where 'the seller proposes no means of carriage' is not clear to us. The CRD provision makes an exception to the passing of risk to the consumer on delivery to the carrier in cases where the consumer chose a carrier proposed by the seller. That circumstance seems to be adequately provided for in the second clause of paragraph 1(b).

24. Given the close relationship between Article 8 and the CRD provisions on passing of risk, there is a case in our view for incorporating in this Directive Article 20 of the CRD on the passing of risk and Article 18 on delivery.

Paragraph 2

25. In cases where goods are intended to be installed by the consumer, there clearly needs to be a fixed time for establishing conformity with the contract for the purposes of the duration of the consumer's entitlement to a remedy. The 30 day time limit after delivery proposed in the second part of paragraph 2 might be on the short side in some cases and could be replaced by a 60 day time limit.

Paragraph 3

26. In view of its importance, the burden of proof provision in paragraph 3 should form a separate Article. It seems unlikely that the proposed two-year period for the reverse burden of proof will be accepted given that a one-year period has been agreed for digital content which, unlike goods, is not subject to wear and tear. We are not opposed to a similar one-year period for goods but will take a final view in the light of the outcome and balance of the proposal as a whole.

27. While the burden of proof provision in the general approach of the DCD applies to failures of supply as well as a lack of conformity, the burden of proof provision for sales contracts would apply only to lack of conformity. It can be argued that, regardless of its merits or practicality, it would be inappropriate to include a burden of proof provision on failures of delivery in this Directive given that the rules on delivery are located in the CRD. It is the case however that concerns about non-delivery are one of the factors that deter consumers from engaging in cross-border transactions, particularly as pre-payment is the norm in such transactions. Conversely, there is some evidence in the case of transactions conducted through third-party marketplaces of consumers wrongly claiming non-delivery and receiving a refund of the price.

Notification Requirement

28. We are not in favour of the inclusion of a requirement for consumers to notify sellers of a lack of conformity within a specified time. We agree with recital (25) that such a requirement can cause consumers to lose valid and well-substantiated claims for remedies, particularly in cross-border transactions. It is in consumers' interest to report defects promptly and the evidence suggests that they generally do so. Where they fail to do so, they make it more difficult to secure redress for their claims.

Article 9 Consumer's remedies for lack of conformity with the contract

Scheme of Remedies

29. The fully harmonised hierarchy of remedies proposed in Article 9 would remove the long held and highly valued right of Irish consumers to reject faulty goods as a remedy of first resort and would not be acceptable politically or to consumers. In its place we would accept either a free choice of remedies or, if that is considered too sweeping a change, a provision permitting Member States to retain established contract law remedies such as the right to reject. We note in this context that one of the studies undertaken for the fitness check of consumer law found that 45 per cent of consumers across the EU reported that they always asked first for a termination of the contract where goods do not conform to the contract. The study concluded that 'a relatively large share of consumers prefer a free choice of remedies in case a good turns out to be defective'.

Paragraph 1

30. Paragraph 1 should arguably refer to the consumer's right to have goods brought into conformity in accordance with Article 11 as well as Article 10.

Paragraph 3

31. We have no problem with 'unlawful' in subparagraph (a) but could agree to its deletion if, as has been done in the DCD, a recital clarifies that 'impossible' covers legal as well as factual impossibility.

32. A number of Member States have suggested that in subparagraphs (a) and (c) 'repair *and* replacement' should replace 'repair *or* replacement'. We understand the reasoning behind this suggestion but have a concern that it could be read as meaning that the consumer had to submit the goods to both remedies (repair and if this did not work replacement) before he or she would be entitled to proceed to price reduction or termination. This could follow also from *a contrario* reading of subparagraphs (a) and (c) compared with subparagraph (b) where 'repair *or* replacement' would remain. An alternative form of words might be considered, for example - 'having the goods brought into conformity by either repair or replacement would be impossible or unlawful (subparagraph (a)); 'having the goods brought into conformity by either repair or replacement would cause significant inconvenience to the consumer' (subparagraph (c)).

Alternatively, subparagraph (a) could state that 'neither repair nor replacement is possible' and paragraph (c) that 'repair or replacement would each cause significant inconvenience to the consumer'.

33. We would support the incorporation of the following amendments of, and additions to, paragraph 3 in line with the corresponding provision at Article 12(3) of the general approach of the DCD:

- subparagraph (a) to be amended to state that the seller has not completed repair or replacement in accordance with paragraph 2;

- the addition of a new subparagraph (ba) to cover cases where a lack of conformity appears despite the seller's attempt to bring the goods into conformity;

- the words 'or without significant inconvenience to the consumer' to be added to subparagraph (d) after 'within a reasonable time'.

If these changes are made, the current subparagraph (c) could be deleted. If Article 9 is amended to give consumers a free choice of remedies, the addition of a right to terminate for a lack of conformity of a serious nature provided for at Article 12(3) DCD would be unnecessary. If Article 9 is amended to allow Member States to retain established national remedies such as the right to reject, the addition of a right to terminate for a serious lack of conformity may be of benefit to consumers in Member States without such national remedies.

Paragraph 4

34. We have an open mind on paragraph 4. It is a potentially useful right for consumers, but if retained may need some elaboration or qualification in respect of the proportion of the outstanding price that the consumer is entitled to withhold. If as was the case with the corresponding provision in the DCD, a majority of Member States favour reserving the issue to national law, we could accept this solution.

Paragraph 5

35. We have serious reservations about this provision. It should be replaced by the provision at Article 2(3) of the CSD which provides that there is no lack of conformity where this has its origin in materials supplied by the consumer. Though we cannot conceive of other ways in which the consumer could have contributed to a lack of conformity existing at the time of delivery, if such ways are shown to occur their incorporation in specific terms in paragraph 5 could be considered.

Article 10 Replacement of goods

36. We think it would be more logical to have Article 10 follow Article 11. We would also favour the inclusion of a provision on the modalities of repair similar to that at Article 10(1). The same issues arise regarding responsibility for the collection and cost of return of goods, and of compensation for the use of, goods requiring repair as arise for goods that are to be replaced. Other than the 'free of charge' stipulation, the CSD does not deal with the modalities of collection and return of goods that have to be brought into conformity. If these matters are to be regulated in this Directive, the provisions should apply to both repair and replacement.

37. An option that could be considered would be to have a single Article dealing with repair and replacement. Its first paragraph would be the the current Article 11. Its second paragraph would be the current Article 10(1) amended to cover goods to be repaired as well as replaced. Its third paragraph would be the current Article 10, and its fourth paragraph would be the current Article 10(3) again amended to apply to goods to be repaired as well as replaced.

Paragraph 1

38. While we share the reservations about the 'unless' clause expressed by delegations during the first reading of Article 10, there is perhaps a case for permitting an agreed departure from the seller's obligation to take back the goods, but not for the requirement that the cost of return be borne by the seller. In practice, consumers often themselves take back faulty goods in on-premises transactions and arrange for the return of faulty goods in distance transactions. If the 'unless' clause is retained, it should make clear that it relates only to an option for the consumer to return the goods.

Paragraph 2

39. Paragraph 2 should apply in cases where the goods were installed by the seller or under his responsibility as well as in cases where the goods were installed by the consumer. Though the *Weber/Putz* cases concerned situations where the consumer or someone acting for the consumer had installed the goods, the judgment of the Court stated that the obligation on the seller to remove the installed goods and to install replacement goods existed regardless of whether the seller was obliged to install the goods under the contract. A recital might clarify the status of the additional elements of the ECJ judgment in *Weber/Putz,* namely the good faith requirement and the possible limitation of the consumer's right to reimbursement to a proportionate amount of the cost of removing the defective goods and installing replacement goods.

Paragraph 3

40. A similar prohibition of compensation for prior use should apply to goods that are repaired.
Geoblocking

41. As the Commission stated, the obligation on the seller to take back goods to be replaced in Article 10(1) was drawn up prior to the adoption of the Geoblocking Regulation. Though not expressly stated in paragraph 1, the obligation to take back the goods is generally to be understood as requiring the seller to take back the goods from the consumer's residence. In geoblocking cases where the seller is not required to deliver the goods to the consumer's country of residence let alone his place of residence, it could be seen as anomalous to require the seller to take goods back from a place to which he was not required to deliver them in the first place. Though we do not have a fixed position on the issue at this point, we recognise that it is one that requires consideration.

Article 11 Consumer's choice between repair and replacement

42. 'Remedy' should be substituted for 'option' in lines 1 and 2. The words 'in order to have the goods brought into conformity' might also be inserted after 'replacement' in line 1. We agree that the commas before and after 'taking into account all circumstances' should be removed to make it clear that this stipulation applies only to the criterion of disproportionate costs.

Prioritisation of repair over replacement

43. IMCO have proposed that the remedy of replacement would be presumed to be disproportionate if the costs of repair would be lower than, or equal to, the costs of replacement. FR have proposed that where the consumer opts to have the goods brought into conformity, the seller shall offer to repair the goods unless repair is impossible or its cost would be clearly disproportionate compared to replacement. While we are sympathetic to the aim of these proposals to encourage sustainable production, they raise some issues. The assessment of the relative cost of the two options would seem to rest with the seller. A consumer who would prefer to get a new replacement item rather than to have a defective item repair would on the face of it have to accept the trader's assessment that repair would be as or less costly than replacement under the IMCO proposal. Though prioritising repair in this way would indirectly aid the goal of greater sustainability, the trader's assessment will be based on cost rather than environmental considerations. Some consumers may argue that while sellers would secure cost advantages from giving priority to repair, consumers denied their preferred remedy of replacement are the ones who would have to bear the costs of this policy priority. We are not opposed to the proposal to give priority to repair, but the issues which it raises require further consideration.

Article 12 Price reduction

44. As payment when the goods are handed over is the norm in consumer on-premises transactions and pre-payment is the norm in online transactions, price reduction will generally require the seller to reimburse part of the price to the consumer. We think therefore that there would be merit in requiring the seller to make the reimbursement without undue delay, to bear the cost of the reimbursement, and unless the consumer agrees otherwise, to use the same means of payment as the consumer used to purchase the goods. A fixed time limit for reimbursement such as the 14 day period for reimbursement in the case of termination in Article 13(3)(a) may not be feasible however as there is no clear starting point for this period comparable to receipt of the notice or statement of termination.

45. The corresponding provision at Article 12(4) of the general approach of the DCD contains an additional provision stating that, where the contract stipulates that the digital content or service shall be supplied over a period of time in exchange for payment, the reduction in price shall apply to the period of time during which the digital content or service has not been in conformity. Unless it is decided that the sales Directive will not apply to goods delivered in instalments, a similar provision should be included in Article 12.

Article 13 The consumer's right to terminate the contract

Paragraph 1

46. Paragraph 1 could be amended in line with the corresponding provision at Article 13 of the general approach on the DCD, namely that 'the consumer shall exercise the right to terminate the contract by means of a statement to the seller expressing the consumer's decision to terminate the contract.' If this change is made, 'receipt of the statement' should replace 'receipt of the notice' in paragraph 3(a).

Paragraph 2

47. It was acknowledged during the first reading of paragraph 2 that the proposed accessory exception was couched too narrowly and needed to be recast. In some cases where the consumer should be entitled to terminate the contract for goods that are in conformity, the conforming goods may be more than an accessory in the normally understood sense of the term, but rather an integral part of a set of goods, such as a suit of clothes, a set of crockery or a suite of furniture. The right to terminate in relation to conforming goods in such cases should apply to any other goods which the consumer purchased as an accessory to the non-conforming goods or which form part of a set of goods intended to function as an integrated unit.

Paragraph 3 (a)

48. The combined effect of subparagraphs (a) and (b) is that in some cases the seller may have to reimburse the consumer before he or she has received the goods back. While we understand why this is a cause of concern, there does not appear to be any way of equalising the distribution of risk in the cases regulated by the subparagraphs. Either the seller faces the risk that he will have made the reimbursement but may not get the goods back or the consumer faces the risk that he will return the goods but not receive the reimbursement. We think on balance that the solution proposed in subparagraphs (a) and (b) is the correct one. In online transactions where prepayment is the norm, the consumer bears the risk that the goods will not be delivered even though payment has been made. Sellers also have the option of shifting to all their customers the cost of any abuses by consumers who receive reimbursement but do not return the goods. A consumer who returns goods but does not receive reimbursement has no comparable option open to him and will generally sustain a proportionately higher loss.

49. We think that, unless the consumer agrees otherwise, the seller should have to make the reimbursement using the same means of payment as were used by the consumer to purchase the goods.

Paragraph 3 (b)

50. The provision at Article 10(1) on the obligation on the seller to take back the goods at his or her expense in the case of replacement allows the parties to agree otherwise. We think that there is a case for a similar provision here so that the parties could agree that the consumer did not have to return the goods. There may be cases where it would be unreasonable or infeasible to require the consumer to return the goods and where the seller might not want the goods returned.

Paragraph 3(c)

51. As we understand it, paragraph 3(c) is intended to cover situations where the consumer's entitlement to a full refund of the price in the event of termination should be substantially discounted due to the consumer's inability to return the goods to the seller because of their loss or destruction. A consumer claiming a full refund of the price of a car that was lost or destroyed before it could be returned to the seller would therefore be reimbursed the sale price less the value of the car at the time it was to have been returned - i.e. the economic value that the returned car would have had to the seller. If however the destruction of the car was caused by a lack of conformity - for example faulty wiring that led the car to go on fire - the consumer would be entitled to reimbursement in full. If this is the intention of the provision, it is not sufficiently clear from its current wording. Given the complexity of a rule of this kind and the relatively small number of cases it is likely to regulate, we think that paragraph 3(c) is probably best deleted. It is difficult finally to conceive of cases where the loss, as opposed to the destruction, of goods could be caused by a lack of conformity.

Paragraph 3(d)

52. While we think that the principle behind paragraph 3(d) is not unreasonable, we have a concern that ascertaining what constitutes depreciation through regular use may prove difficult and contentious in practice. If the subparagraph is to be retained, we think that a reference to normal use or use in accordance with the nature and purpose of the goods might be preferable to a reference to regular use. The CSD leaves the question of compensation for use of the goods prior to termination to be regulated by national law. We did not include a provision of this kind in the Regulations that gave effect to the Directive and would accept a solution that left the matter to national law in this proposal also.

Termination for Minor Defects

53. Article 3(6) of the CSD provides that the consumer is not entitled to have the contract rescinded if the lack of conformity is minor. The proposed Directive does not retain this provision. Recital (29) states that considering that the right to terminate the contract is an important remedy which applies where repair or replacement are not feasible or have failed, the consumer should enjoy the right to terminate the contract in cases where the lack of conformity is minor. The general approach of the digital content Directive provides however at Article 12(5) that, where digital content or a digital service is supplied in exchange for payment of a price, the consumer shall be entitled to terminate the contract only if the lack of conformity is not minor.

54. We are not in favour of precluding termination where a lack of conformity is minor. This right of termination applies only where repair or replacement are not available or have not been undertaken within a reasonable time or without significant inconvenience. Applying a further requirement that the lack of conformity be non-minor adds an unnecessary element of uncertainty and dispute to the exercise of remedies by the consumer. Sellers are likely to be more willing than consumers to countenance legal action in support of a contention that a defect is minor and that the consumer should not be entitled to the remedy of termination. It is relevant to note that in the *Soledad Duarte* case which was referred to the the ECJ (C-32/12), a Spanish court held that a sliding roof in a car which continued to let in large amounts of rain despite several attempts at repair was a minor fault that did not justify termination. In our view, most consumers would not see this as a minor fault or as one for which price reduction would be an adequate remedy.

FRANCE

Article 1: Subject matter and scope

The French authorities wish to point out that there is no provision in the text ensuring that it dovetails with other EU legislation. Such dovetailing is particularly important as regards texts relating to liability for **faulty products**, given the close relationship between the issues raised, and those relating to **intellectual property** rights, which are governed by a body of law, particularly at EU level. The directive, which applies to cultural objects, is designed to cover works protected by copyright, and therefore it is important that the proposal does not undermine this legal environment. We suggest the following wording for Article 1: 'This Directive shall not affect intellectual property rights, in particular, in the case of copyright, the rights and obligations provided for by Directive 2001/29/EC'.

Paragraph 3: **we welcome this paragraph, which makes a judicious distinction between durable media and tangible media** in the same way as the proposal for a directive on the supply of digital content.

Paragraph 4: we believe that **public auctions should be excluded from the scope of this directive, as they are from the scope of Directive 1999/44/EC. Public auctions comply with a specific set of rules**, particularly with regard to the personality of the seller and the conditions for movement of cultural goods which must be brought to the buyer's attention. However, **the wording proposed by the text is not satisfactory; the following phrase in particular is not clear:** 'where consumers have the opportunity of attending the sale in person'.

We welcome the inclusion of **digital content 'embedded' in a good (including connected objects) and embedded digital services in the scope of the proposed directive.** This is more logical from the consumer's point of view, and would also allow the issue of extending product lifespans to be taken into account when dealing with these new products, resulting in greater opportunities for compensation for the consumer (extended time limits for certain product categories, for example).

Lastly, we support the proposal from the Services of the Commission (non-paper 6561/18) to allow additional services, which fall outside the scope of the proposal for a directive, to continue to be governed by the relevant national or European legislation, and to allow Member States to remain free to provide for the consequences of termination of the sales contract for those additional services.

Article 2: Definitions

Points (a) and (g): if consistency is to be ensured with the compromise agreed by the Council regarding digital content, we do not consider **the definition of 'contract' to be appropriate.** The **definition of 'sales contract'** draws on the definitions laid down in Directives 1999/44/EC and 2011/83/EU and can therefore be **retained**. However, in order to take into account the inclusion of embedded digital content in the scope of the directive, the following phrase, from Directive 2011/83/EU, should be added to the definition: *'including any contract having as its object both goods and services'.*

Point (e): we **endorse the proposed definition of 'goods'**, which is closely modelled on the definition laid down in Directive 2011/83/EU. However, a **definition for digital content embedded in a good should also be provided.** In this regard, the definition agreed in the general approach on the digital content directive[1] should be incorporated into Article 2.

Point (h): we wish to point out that the conformity of a good should be assessed cumulatively against subjective and objective conformity criteria; the **words 'with the contract' should therefore be deleted.** To avoid any ambiguity, we suggest that **a definition of non-conformity be enshrined in Article 2, including compliance with both subjective and objective conformity criteria. Furthermore, the definition of 'repair' should be extended to include the bringing into conformity of embedded digital goods.**

We would also point out that the **proposal for a directive does not address the issue of platforms and enhancing their transparency** (seller quality, claimant's rights, contact point for complaints). This is a major gap in a text dealing with cross-border sales, which have grown exponentially thanks in part to online platforms (for example, if a consumer purchases a good from a Chinese seller on an online platform, who should that consumer contact in the event of a dispute?).

Lastly, we request that the concept of 'durable medium' in Article 15(3) be moved to Article 2.

[1] '"embedded digital content" means digital content present in a good, whose absence would render the good inoperable or would prevent the good from performing its main functions, irrespective of whether that digital content was pre-installed at the moment of the conclusion of the contract relating to the good or according to that contract installed subsequently.'

Article 3: Level of harmonisation

We do not feel that the impact assessments or REFIT results clearly illustrate the economic benefit of adopting a maximum harmonisation directive, given that the obstacles to cross-border trade seem to lie more in other (mainly fiscal) legislation than in substantive consumer law.

We also believe that **the maximum harmonisation that the proposal seeks to achieve poses a major threat to the current level of French consumer protection.**

– Firstly, maximum harmonisation, which guides the current legal framework, is not suited to consumer law, which is constantly evolving and needs to be able to adapt to rapidly changing products and consumer expectations, especially with regard to product digitalisation and the proliferation of innovative products (particularly electric and electronic equipment, motor vehicles, textile products and furniture), and to take into account environmental considerations (product sustainability, combating waste).
– Secondly, it is particularly important to us that French consumers should continue to be able to use the warranty of title and the guarantee against latent defects alongside the guarantee of conformity, and that the period for the reversal of the burden of proof be aligned with the two-year warranty period, which would assure the effectiveness of the protection afforded to the consumer.

We would therefore like the following provisions to be subject to a minimum harmonisation clause:

– Article 14 on time limits;
– Article 8(3) on the duration of the presumed prior existence of a fault;
– Article 9 on remedies;
– **Article 11 on the consumer's choice between repair and replacement** (if our proposal to prioritise – for environmental reasons – repairing goods over replacing them to bring them into conformity is not retained).

Article 4: Conformity with the contract

We would like the directive to include the following provisions from Directive 1999/44/EC:

– the insertion of an opening phrase[2] indicating that: 'The seller must deliver goods to the consumer which are in conformity with the contract of sale';

– the inclusion of the term '**description**' in point (a) of paragraph 1[3];

In paragraph 2, **we ask for the reference to Article 7 to be removed**. This reference implies that compliance with Article 7 is an element of conformity with the contract, with the consumer being able to make use of the remedies provided for in case of lack of conformity.
However, in French law, the sale of a product in violation of intellectual property rights implies the marketing of a product which is unlawful because it is recognised as counterfeit. The unlawful nature of the subject of a contract for the sale of goods renders the contract null and void, since the subject of the contract is regarded as not for sale.
The current wording therefore amounts to regulation of the validity and subsequently the invalidity of contracts, and thus undermines the possibility for Member States to regulate general aspects of contract law. This difficulty was also encountered in the negotiations on the digital content directive, and a solution was found which could be used in the sale of goods directive to the French authorities' satisfaction[4].

Paragraph 3: we could only accept the **possibility of agreements which derogate from the objective requirements for conformity** (Article 5) or the provisions on installation of the goods (Article 6) if the agreements were precisely circumscribed, as in the compromise found in the general approach on the supply of digital content[5].

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[2] Article 2(1) of Directive 1999/44/EC, reproduced in Article 6 of the general approach on the digital content directive.
[3] Article 2(2)(a) of Directive 1999/44/EC.
[4] The legal characterisation regarding the lack of conformity has been moved to a second paragraph of Article 8 on third party rights. This paragraph provides that where a violation of a third party right occurs, the Member State ensures that the consumer is entitled to the remedies for lack of conformity, unless national law provides for the nullity or rescission of the contract.
[5] Article 6a(2) of the general approach: '*There shall be no lack of conformity within the meaning of [Article 5(1)] if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the digital content or digital service was deviating from the conformity requirements stipulated in paragraph 1 and the consumer has expressly and separately accepted this deviation when concluding the contract.'*

Article 5: Requirements for conformity of the goods

We believe that the title of Article 5 does not clearly reflect the distinction between the **objective and mandatory requirements relating to the conformity of the goods** (Article 5) and the **criteria for conformity established by the contract** (Article 4). As a consequence, and to be consistent with the general approach on the digital content directive, the title of Article 5 should be '***Objective*** *requirements for conformity of the goods*'.

Similarly, the opening phrase of Article 5 should be worded as follows, in order to, on the one hand, ensure the objectivity of the requirements in this article and, on the other, to mark the mandatory nature of the cumulative compliance with the subjective and objective requirements for conformity: '***In addition to complying with any conformity requirements stipulated in the contract*** *the goods shall:*', without the words '*where relevant'.*

In paragraph 1(c), we would ask for the **words 'quantity' and 'reasonably' to be added** ('*may reasonably expect*'), again in order to ensure consistency with the general approach on the digital content directive and with Directive 1999/44/EC.

Finally, we support the proposals made by the Commission in non-paper 6561/18, which aim to complement the conformity requirements in order to adapt them to the specific nature of embedded digital content and services, and to include an article on the integration of the embedded digital content or service, using the solutions found in the proposal for a directive on contracts for the supply of digital content, in order to ensure consistency between the two instruments.

Article 7: Third party rights

Firstly, we would highlight that the scope of the directive concerns to a large extent works protected by copyright, such as pictures and paintings, photographs, sculptures, etc.

By their very nature, these goods are not free of third party rights. Some of these third party rights are inalienable and remain attached to the cultural object even after its sale.

For example, the resale right, harmonised by Directive 2001/84/EC, is an inalienable right of the author of the work to receive a percentage of the price obtained for any resale of their work, when one of the parties to the resale (buyer, seller or intermediary) is an art market professional.

Therefore, if a consumer acquires a cultural object from an auction house, and the resale right is paid during this transaction, this does not mean that the cultural object will be 'free' of the resale right, since this could be exercised again if the consumer decides to resell the object.

We would like above all to underline that the wording of the proposal for a directive implies that third party rights, and intellectual property rights in particular, prevent the consumer from using the content. **But it is in fact the supplier's failure to fulfil its legal obligations which impedes the use of the content.** We believe that this wording seeks to hinder copyright, which it compares to a legal defect[6] and essentially opposes to consumers' interests, whilst copyright is in fact the basis for financing the creation of works and ensures that a large and diverse range of products is available to consumers.

We are keen for the consumer to benefit from a high level of protection, and consider that Article 7 should aim to protect the consumer when copyright is not respected by the seller, and that this copyright violation impedes the use of the goods by the consumer. We therefore call for Article 7 to be reworded as follows: '*At the time relevant for establishing the conformity with the contract as determined by Article 8, the goods shall be free from* ***any violation*** *of any right of a third party, including based on intellectual property, so that the goods can be used in accordance with the contract.*'

Article 8: Relevant time for establishing conformity with the contract

In paragraphs 1 and 3, the words '***with the contract***' should be removed, since these paragraphs do not only deal with conformity with the contract, but also objective conformity.
In paragraph 3 and in connection with Article 14, **we are very keen that the duration of the presumed prior existence of a fault should be aligned with the two-year period for the legal guarantee of conformity, which would assure the effectiveness of the protection afforded to the consumer**. In this regard, we observe that these two points cannot be analysed separately, and would like them to be covered by two successive provisions, as in Articles 9 and 10 of the digital content directive.

[6] Recital 21, which clarifies the phrase 'free from any right of a third party' in Article 7, indeed provides that '***third party rights and other legal defects might effectively bar*** *the consumer from enjoying the goods*' and that the '*seller should ensure that the goods are free from any right of a third party,* ***which precludes*** *the consumer from enjoying the goods in accordance with the contract*'.

In paragraph 1(b), for online sales, particularly cross-border, it seems astonishing that the seller **should propose no means of carriage** to the consumer[7]. Moreover, this scenario should not be retained, since it enables the seller to easily protect themselves from the risk of the product being stolen or damaged, to the detriment of the consumer.

Finally, we observe that this article should be expanded to cover the scenario in which the consumer installs the embedded digital content themselves.

Article 9: Consumer's remedies for the lack of conformity with the contract

We support removing the hierarchy of remedies. The consumer must be able to **choose equally between having the goods brought into conformity, partial reimbursement or termination of the contract**.

Below we propose new wording for Article 9, incorporating: the stipulation that **the reasonable period referred to in Article 9(2)** of the amended proposal (Article 10(2) in the wording we have proposed) must in any case be **less than two months**; the **deletion of the adjective 'unlawful'** from Articles 9(3) and 11 (Articles 9(2) and 10(1) in the wording we have proposed) to qualify certain repair or replacement scenarios; and **the deletion of Article 9(5)**, which we see as dangerous for the consumer:

Article 9
Consumer's remedies for the lack of conformity
1. **In the case of a lack of conformity, the consumer shall choose between having the goods brought into conformity, a proportionate reduction of the price or termination of the contract.**
2. However, the seller may not give effect to the consumer's choice, and may ask the consumer to opt for another remedy, where:
(a) the remedy envisaged by the consumer is impossible; or
(b) the consumer's choice entails a cost which is clearly disproportionate compared to another remedy, taking into account in particular the value which the goods would have had if they had been in conformity with the contract and the extent of the defect.
3. The consumer shall not be entitled to a remedy where he or she was, or should have been, aware of the lack of conformity when concluding the contract.

[7] This scenario is also not provided for in the French Consumer Protection Code (See Article L 216-4 of the code, which provides that: 'Any risk of loss of or damage to goods is transferred to the consumer at the moment when the consumer, or a third party designated by the consumer, other than the carrier proposed by the professional, takes physical possession of the goods'.

Article 10: Replacement of goods and Article 11: Consumer's choice between repair and replacement.

However, in our view, **if the consumer opts for having the goods brought into conformity**, the directive ought to establish an **order of priority** between the two means of achieving this, **in favour of repair, reserving replacement for cases where repair is not technically feasible** or only **at manifestly disproportionate expense**.

Introducing such an order of priority would make it possible to take account of **environmental considerations, and in particular the prevention of waste**. These issues are currently the subject of a joint review in connection with the European Commission's roadmap on **the circular economy**. In our view it is essential, therefore, to use this directive as an opportunity to begin taking action along these lines.

To accurately reflect this hierarchy between the two means of bringing the goods into conformity in the text, **we propose reversing the order of Articles 10 and 11**.

Moreover, we request removal of the option for the parties to derogate from the principle that the seller should bear the costs of replacement, previously set out in Article 10(1).

We propose changing the wording as follows:

Article 10

Bringing goods into conformity

1. If the consumer opts to have the goods brought into conformity, the seller shall offer to repair the goods, unless repair is technically impossible or the cost thereof would be clearly disproportionate compared to replacement, taking into account in particular the value which the goods would have had if they had been in conformity with the contract and the extent of the defect.

2. Goods shall be brought into conformity at no cost to the consumer and within a reasonable period of time, which must at all events be less than two months.

3. 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.

4. The time period provided for in Article 8(3) shall be extended by the period during which the goods are unavailable while they are being brought into conformity.

Article 10~~0~~1

Replacement of goods

1. Where the seller remedies the lack of conformity ~~with the contract~~ by replacement, the seller shall take back the replaced goods at the seller's expense~~ unless the parties have agreed otherwise after the lack of conformity with the contract has been brought to the seller's attention by the consumer~~.
2. Where the consumer had installed the goods in a manner consistent with their nature and purpose, before the lack of conformity ~~with the contract~~ became apparent, the obligation to take back the replaced goods shall include the removal of the non-conforming goods and the installation of replacement goods, or bearing the costs thereof.
3. *(unchanged)*

Article 13: The consumer's right to terminate the contract

In our view, it would be difficult to apply the partial return provided for in paragraph 2 to an overall package or price. For example, a lack of conformity affecting only one unit of a fitted kitchen, the price for which is not specifically stated in the contract, could give rise to a dispute over the relevant unit's value.

In paragraph 3(a), as in the digital content directive, we would like it to be made clear that **the seller must reimburse the consumer using the same means of payment** that the latter used to purchase the goods.

In paragraph 3(c) we question the scenario evoked by this wording: '*if they had been kept by the consumer without destruction or loss until that date*'. In any event this wording seems superfluous in relation to the preceding wording. **We therefore ask for it to be deleted.**

CYPRUS

Article 2 – Definitions

Definition of 'legal guarantee'

- Although 'commercial guarantee' is formally defined, both in the current proposal and in CRD, there is no corresponding definition for 'legal guarantee'.
- Even though the term 'legal guarantee' is widely used, also in EU official[8] and legal texts (CRD Art. 5 and Art. 6), the lack of a formal legal definition for the term may create legal uncertainty. Also, the lack of a formal definition of 'legal guarantee' can lead to a misuse (intentional or not) of the word 'guarantee'.
- Consequently, we propose that a definition of the term 'legal guarantee' should be added in Article 2 of the new Directive, as follows:

  'legal guarantee' means the legal rights of the consumer in the event of lack of conformity as provided for in this Directive;

- Once defined, the term can be used within the text of the Directive, such as Article 15(2)(a), which could be modified as follows:

  (a) a clear statement of the ~~legal~~ rights of the consumer under legal guarantee ~~as provided for in this Directive~~ and a clear statement that those rights are not affected by the commercial guarantee; and

  (b) the terms of the commercial guarantee that go beyond the legal guarantee ~~rights of the consumer~~,

[8] http://eur-lex.europa.eu/summary/EN/l32022

Definition of 'producer'

- We kindly request confirmation that the current/proposed definition of ***'producer'*** covers all possible business parties that could potentially provide commercial guarantees to consumers.
- For example, if hypothetically an online platform decides to offers consumers an (additional) commercial guarantee for goods traded on its website, would the platform fall within the following definition? [9]

  'producer' means the manufacturer of goods, the importer of goods into the Union or any person purporting to be a producer by placing their name, trade mark or other distinctive sign on the goods.

Article 3 – Level of harmonisation

We support the adoption of a full harmonisation directive. We believe that the full harmonisation will enhance cross-border trade between the Member States. Moreover, the implementation of the Directive will be easier and more practical for Member States and easier for the consumers to be aware / informed of their rights. However, although in principle we support full harmonization, we might deviate from that position in some articles depending on the final drafting of each provision and the way it will affect the rights of the consumers as they are currently provided under our law.

Article 4 – Conformity with the contract

- As regards Art. 4(3), we recommend that it should be explicitly provided that **the burden of proof shall be on the trader** that *the consumer knew of the specific condition of the goods and that he/she has expressly accepted this specific condition when concluding the contract*.

Article 5 – Requirements for conformity of the goods

- We request that the **availability of spare parts/replacements/consumables** that are essential for the use of the goods will be included in the requirements for the conformity with the contract. A relevant provision is provided explicitly in the existing national legislation that transposed the Directive 44/1999.

9https://sale.aliexpress.com/__pc/BhQPgEWPNM.htm?spm=2114.11010108.1000001.1.5778649bSKqy8W

Article 6 – Incorrect installation

- We kindly request confirmation that the proposed wording of Art. 6(b) *("**shortcoming**")* covers cases where the installation instructions are per se correct, nonetheless unclear or confusing.
- For example, would an incorrect installation which is due to the fact that the installation instructions are in Chinese be regarded as lack of conformity?
- We accordingly propose that a better clarification of *"shortcomings"* could be provided in the recitals of the directive.

Article 8 – Relevant time for establishing conformity with the contract

- We support the COM proposal for the extension to two years, of the period during which the **burden of proof** for the lack of conformity is in favour of the consumer (Art. 8(3)).

Article 9 – Consumer's remedies for the lack of conformity with the contract

- We agree that *"repair or replacement shall be completed within a reasonable time"*, however we propose that, additionally, **a maximum time period should be set**. We therefore suggest that Art. 9(2) be modified as follows:

  2. A repair or replacement shall be completed:

  (a) within a reasonable time, which in any case must not exceed thirty (30) days, and

  (b) without any significant inconvenience to the consumer,

  taking account of the nature of the goods and the purpose for which the consumer required the goods.

- We also support that the **two years legal guarantee period should be suspended during the** time needed for the goods to be repaired or replaced.

Article 10 – Replacement of goods

- We support that the phrase *"**unless the parties have agreed otherwise**"* (Art. 10(1)) be deleted.

Article 15 – Commercial guarantees

- We note that:
  - A commercial guarantee is a prominent motive for the consumer to purchase a product, and it therefore works in favour of the seller, even when the seller is not the guarantor.
  - Art. 15(2) provides that *"The guarantee statement shall be made available on a durable medium and drafted in plain, intelligible language…"*, while Art. 15(4) provides that *"Non-compliance with paragraph 2 shall not affect the binding nature of the commercial guarantee for the guarantor"*. However, it is not clear who has the responsibility to fulfil the provisions of Art. 15(2).
  - It is common for goods imported into the EU from third counties to be covered by a commercial guarantee from the manufacturer; however the guarantee statement (if available) often does not fulfil the requirements of Art. 15(2). For such cases, an investigation against the guarantor (third country manufacturer) may be complex or impossible.
- Given that the seller himself benefits from the availability of a commercial guarantee, we propose that **both the producer and the seller be set clearly liable for the fulfilment of the provisions of Art. 15(2)** (ie. the seller shall be responsible for the availability and appropriateness of the guarantee statement of goods being sold in his/her store, although he/she may not be the guarantor). We therefore propose that Art. 15(2) be amended as follows:

  2. <u>Both the producer and the seller shall be fully and exclusively liable</u> for the <u>commercial</u> guarantee statement <u>to</u> ~~shall~~ be made available <u>to the consumer</u> on a durable medium and drafted in plain, intelligible language. <u>The commercial guarantee statement</u> ~~It~~ shall include the following:

- We also propose that the phrase *"guarantee statement"* used in Art. 15 be replaced with ***"commercial guarantee statement",*** so as to avoid any confusion between the commercial and legal quarantee, as proposed above.

Please note that all the above-mentioned comments are of preliminary nature. Cyprus reserves the right to provide more comments and suggestions in due course.

HUNGARY

1) **Subject matter and scope (Article 1)**

1. In Paragraph 1 we suggest to use the phrase "*lack of conformity*" instead of "*non-conformity*", because of the resemblance in wording to the similar regulation of the DCD and because we find it to be more precise.
2. In Paragraph 2 we suggest deleting the first sentence and the conjunction "*however*" in the second sentence, because these seem to be irrelevant in light of the scope of the directive as it is laid down in Paragraph 1.
3. Also in Paragraph 2 second sentence we suggest deleting the modifier "*sales*" from the phrase "*sales contract*", because we find that the current wording distorts the uniform definition of sales contracts, which definition also refers to contracts under which ownership of goods to be manufactured or produced by the trader is transferred (basically mixed contracts which include service elements) according to Article 2 Point *a).*
4. According to Paragraph 5, the Directive shall not affect national general contract law rules. It remains questionable for us to interpret this regulation as to whether the national regulations referring to general legal institutions force under national law which for example allow remedies based on hidden defects to be enforced after the generally ensured time limit for lodging claims expires, a principle that should generally be applied not only in the ones between trader and consumer, but also in every contractual situation, can remain in force or not. This question is also relevant to our remarks expounded in more detail in connection with Article 3 (*see below*).

2) **Definitions (Article 2)**

5. In Point *c)* we suggest considering the use of the more exact definition of "*trader*" instead of "*seller*", because the definition of seller should not be reduced to contracts falling under the scope of the Directive. Our other argument for the use of the suggested phrase is that the definitive characteristic of these contractual situations is the certain parties involved (which necessarily include a trader on one side and a consumer on the opposite side).
6. Another thing worth mentioning is that we feel the definition of "*contract*" under Point *g)* to be exceeding the scope of the Directive (which could lead to problems despite the preliminary text indicating that it is only for the purpose of this Directive). We suggest deleting the point in question.

3) Level of harmonisation (Article 3)

7. The contract law aiming to protect consumers differs in Members States because the Directive 1999/44/EC through minimum harmonisation granted the possibility to Member States to keep their national regulation if it was more favourable for consumers than the provisions of the mentioned Directive. To avoid a similar fragmentation in related regulations the proposal aims to fully harmonize the provisions which are laid down in it, which concept – if it does not lead to unfavourable position for Hungarian consumers compared to the Hungarian legislation in force –is a supportable proposition in general.

On the other hand we have doubts (particularly in light of Article 1 Paragraph 5), that it is consistent with the concept of full harmonization, if the law of a Member State differs between various categories of goods (e. g. consumer durables) and they have different regulation for these categories. We find that in this regard the interpretation of Article 1 Paragraph 5 and Article 3 leads to different conclusions.

In light of the above we would suggest that the proposal includes distinctive rules for special categories of goods like used or durable goods. The other approach would be to enable Member States to further differentiate the category of goods and to have the right to lay down specific rules for these types of goods, because we have the notion, that the generic regulation of the proposal is too excessive in a number of questions (for example same applicable time limits and available remedies for both new and used goods).

One further issue to be raised in relation with Article 1 Paragraph 5 and Article 3 is that there are certain types of remedies which are not included in the proposal (e.g. the right to reject) and the related legislation of several Member States operate with them. We believe that Members States, who have more favourable legislation then the rules laid down in the proposal should be permitted to retain these regulations via the use of the standstill clause or making some of the proposal's provisions enable Member States to diverge in a positive way from them, if their respective rules are in force at the time of the proposal's entry into force.

Furthermore we would emphasize that in spite of repeated urging of Member States the discussion regarding the level of harmonisation (and thus Article 3) did not happen in the previous meetings yet, which makes the compilation and commentation of remarks all the more difficult.

4) Conformity (Article 4)

8. We suggest using the phrase "*make available*" in Paragraph 1 instead of the current "*show*", because we find that the latter refers to contracts between those present too much.

9. According to our interpretation it is not clear from the proposal, whether it is giving effect to the provision of Directive 1999/44/EC which stipulates that there shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity. It remains questionable for us, whether Article 4 Paragraph 3 of the proposal has the same purpose of the above or – intentionally – it only does this partially as a condition of exclusion from contractual requirements, and the instances of exemption are in fact regulated under Article 9 Paragraph 5. In the case of the latter, the lack of conformity occurs even if the consumer should have been aware ("*or could not reasonably be unaware of*") of the lack of conformity, but owing to his contribution he shall not be entitled to remedy to the given extent.
If Article 4 Paragraph 3 does not enforce neither the referred provision of Directive 1999/44/EC nor the other possible interpretation featured above, we find that the proposal lacks an important provision, which would hinder the consumer in gaining advantage on an unlawful act he has committed. In this case the proposal should be amended accordingly.

5) Requirements for conformity of the goods (Article 5)

10. In Article 5 Point *a)* we suggest deleting the phrase "*all*" because we find that it does not have any added value.

11. In connection with Point *b)* we suggest to clarify the meaning of "*accessory*" because the phrase has different meaning when used as a legal or as a material terminology. For example from a legal point of view accessory also includes the embedded digital content, which would not fall under the scope of the proposal in the absence of an explicit reference to it (*if the relevant proposition is going to be accepted and the proposal properly amended, of course*).

6) Incorrect installation (Article 6)

12. We have only one remark regarding Article 6, which we have already stated verbally during a previous meeting. We think that the "*shortcoming*" in the installation instructions should be defined more precisely as it is in Recital 20 currently.

7) Third party rights (Article 7)

Initially we would like to state, that the compromise wording of the corresponding Article 8 of DCD is currently still under debate which makes it difficult to give remarks on Article 7 of the proposal at hand.

13. Unlike the proposal Hungarian legislation does not have an explicit regulation in the assessment of conformity for the good to be free from any right or demand of a third party, including intellectual property rights. This can be nonetheless derivable from the Hungarian rule of legal warranty, so the proposal can be supported in this regard. Worth to mention is that the transferred property right can be flawed because of limitation or hindrance of acquisition.

14. At the same time in the quoted Article we find the phrase "*the goods shall be free from <u>any</u> right of third party, including based on intellectual property*" to be having such an excluding meaning, which requires the goods sold to be completely free of any kind of intellectual property right of a third party. In our view, based on legal certainty of trade it cannot be required or expected for a good to be bought being fully exempt from intellectual property rights of third parties. The regulation probably would like to create a legal warranty obligation, but our notion is, that in its current form means a lot more serious legal restriction than that and it goes beyond the boundaries (both in purpose and substance) of remedies for lack of conformity, therefore the wording should be revisited and clarified.

8) Relevant time to establishing conformity (Article 8)

15. A rather major difference from the Hungarian legislation in force is the rule which presumes that the time interval during which the lack of conformity becomes apparent and is deemed to be already existing at the time of the conclusion of the contract is 2 years (instead of the Hungarian regulation of 6 months). During this period according to the burden of proof the trader has the obligation to prove that the good was not faulty at the relevant time for establishing conformity. The wording of the proposal (in our view) would basically set the time period during the consumer has the position of the person entitled to warranty from 6 months to 2 years. We would consider it necessary to thoroughly analyse, whether this provision could be evaluated as a disproportionate burden for traders and that the reversal of the burden of proof as regulated in the proposal is appropriate in case of all types of goods, or it is fit only to certain categories like durable consumer goods. As a compromise we propose to use a time period of 1 year instead of the proposal's 2 years, like in the DCD. In our view it has to be considered, that although raising the time limit of the reversal of the burden of proof seems basically a consumer friendly approach, the traders are probably going to be willing to incorporate the additional costs resulting from it in the price of goods, which at the end is going to the expense of consumers. Because of this, we would propose setting the time limit of the reversal of the burden of proof in 1 year, similar to the compromise proposal of the DCD.

9) Consumer's remedies for the lack of conformity (Article 9)

First of all we would like to state, that Hungary fully agrees with the logic and structure of the two step hierarchy of remedies proposed in the text.

16. The proposal does not include the option available under Hungarian warranty rights, that the obligee has the right – if the repair or replacement of the good has not been done by the obligor – to repair the defect himself or have it repaired by a third party at the obligor's expense instead of asking for price reduction or withdrawal from the contract. During the previous meetings the Commission stated that the consumer's remedies specified in the proposal are exhaustive and the Member States do not have the option to have further types of remedies under national law.

In light of this, we suggest to amend the proposal and integrate the option mentioned by us in the list of possible remedies. We find it relevant to mention, that the last phrase of Article 10 Paragraph 2 ("*or bearing the costs thereof*") already has a provision with similar meaning to our proposal, but only for the option of replacement. If the suggested amendment of the proposal is not supported, we recommend minimum harmonization as an approach for possible remedies.

17. In Article 9 Paragraph 3 Point *c)* we find the phrase "*unlawful*" – objected by several Member States – to be deleted, since in our view the definition of impossibility also includes material and legal impossibility as well. If clarification is needed we suggest adding a clarifying recital to the text.

18. In comparison to Directive 1999/44/EC the proposal has a new – for consumers disadvantageous – approach that according to Article 9 Paragraph 5 the consumer shall not be entitled to a remedy to the extent that he contributed to the lack of conformity or its effects.
If we interpret the rule set in the said Paragraph as the consumer shall not be entitled to a remedy if he contributed to the lack of conformity with the inappropriate use of the good or with any active or passive behaviour after the performance of services, the proposal is a setback in consumer protection compared to the regulation of the Hungarian Act of 2013 on the Civil Code (hereinafter referred to as CC). The CC namely does not necessarily obstruct the consumer from remedies; it only evaluates among the burden of costs for example the oblegee's non-compliance with the maintenance obligation (as a case of the consumer's contribution to the defect).
According to Article 6:166 Paragraph 2 of the CC if the defect is attributable in part to the consumer's failure to fulfill maintenance obligations, the costs incurred in connection with the fulfillment of guarantee obligations shall be covered by the consumer to the extent commensurate to his involvement, if he had sufficient information relating to maintenance, or if the obligor has provided the information required to that effect.

If the proposal aims forfeiture on the consumer's side, it cannot be supported by us because of the preservation of the higher protection level of Hungarian legislation. On the other hand, during the meeting the Commission stated that Article 9 Paragraph 5 has been drafted so general to allow a broader national legislation to identify the exact rules regarding the consumer's contribution to the lack of conformity.

A further interpretation of Paragraph 5 is that at the time of the conclusion of the contract the consumer knew the good was faulty and accepted this circumstance. In this case however, according to Article 6:157 of the CC (and Article 4 Paragraph 3 of the proposal) the lack of conformity cannot be determined, so the consumer is naturally not entitled to any of the remedies. We find this to be emphasized because in our view the approach and solution of Hungarian legislation with regard to its result is more appropriate to achieve the aim of the proposal, but in light of the full harmonisation rule in Article 3 we have concerns, whether our solution is deemed as an acceptable transposition without any further amendment.

10) Replacement of goods (Article 10)

19. Article 10 Paragraph 3 exempts the consumer from any payment arising from the use of the replaced goods in case of a lack of conformity. To avoid possible abuses of the regulation, we suggest adding the criteria of applying this rule only in case of the intended use of goods.

11) Consumer's choice between repair and replacement (Article 11)

20. Similar to Article 9 Paragraph 3 we suggest deleting the phrase "*unlawful*" because in our view the definition of impossibility includes legal impossibility as well.

12) Price reduction (Article 12)

We do not have any additional comment on this Article.

13) The consumer's right to terminate the contract (Article 13)

21. We would find it necessary to further examine, whether the right of consumers to terminate the contract in case of minor defects is in line with the proportionality of the hierarchy of remedies. We would also like to see additional proof that the thus drastic raising of consumer protection level does not eventualy lead to disproportionate burden for traders and is not going to cause a significant increase in price of goods.

22. According to Article 13 Paragraph 2, where the lack of conformity relates to only some of the goods delivered under the contract, the consumer may only terminate the contract to this extent. We are not in favour of this regulation and find that at least as an exception the consumer should be entitled to terminate the contract as a whole even if the lack of conformity only occurs in conjunction with a part of the goods delivered. We suggest exploring the solution of allowing the consumer to terminate the contract as a whole in cases where the consumer would have not concluded the contract – as a whole – without the defective goods.

14) Time limits (Article 14)

Although Article 14 has already been part of the agenda of several meetings, so far no profound discussion has been made about it, so our remarks are to be considered preliminary.

23. Our understanding is that the proposal aims to unify the time limit under which the lack of conformity becomes apparent and the consumer shall be therefore entitled to a remedy.
According to the system of the Hungarian CC the consumer's right to seek remedy from the trader has a limitation period of 2 years. The running of this limitation period is suspended if the consumer cannot excercise his right for excusable reasons. One such circumstance can be if the lack of conformity becomes apparent only after a longer period of time. In such cases, the right to remedy can be excercised in a 1 year period after the hindrance ceases to exist, even if the limitation period (2 years after fulfillment of the contract) has been already passed or there is a period shorter than 1 year remaining of it. Because the CC does not include a mandatory time limit for enforcement of claims, the consumer is theoreticly entitled to remedy also in cases where the lack of confomity becomes apparent after a considerably longer period. The practical limit of this is the consumer's liability in these cases to proove the lack of conformity has already existed at the time of fullfilment. This is more difficult over time, the further we get from the fullfilment of the contract, because goods wear out, go obsolete, their expected lifespan can run out. In such cases the replacement or repair of the good shall not be deemed as a remedy, but as a burden for the owner (the consumer). The rules for hidden defects is regulated in Hungary according presented, so in a theoretical approach the intended regulation of the proposal for time limits would result in lowering the level of consumer protection from the Hungarian point of view.

With regards to the Hungarian legislation for hidden defects in addition the following should be mentioned. Our former Civil Code mentioned the hinderance of recognizing a hidden defect expressly as a case of the limitation period to be suspended. Because the logic of the new CC featured above, this case is not included *expressis verbis* in the text of the Act, but is nontheless one of the most important occurance of the suspension of the limitation period when considering consumer's remedies for the lack of conformity. According to the generic rule of suspension (Article 6:24 Paragraph 1 of the CC) the exculpation showcased above can be deducted from the wording of the regulation.

It is questionable for us however, that without any specification of the proposal in this regard the Hungarian legislation can remain as it is in force right now. If the answer to this question is no, we recommend that the time limit would be extended at least in cases concerning durable consumer goods.

24. The proposal does not include the provision of Directive 1999/44/EC, which allowed Member States to set a 2 month period within the consumer must inform the seller of any lack of conformity. Hungarian legislation therefore has a provision, according to which in the case of a contract between consumer and trader the notification on the lack of conformity is deemed to be done without delay if it is within 2 months of the recognition of the defect. This means that until this moment, the damage consequences occurring from the delay of the oblegee cannot be taken into consideration. On the other hand, taken into account all circumstances of the given case it is entirely possible that a notice given well after the 2 months period has passed shall be deemed as timely appropriate. The sanction of the notice being out of time is in Hungarian law that the oblegee shall bear the damages arising thereof.

If according to the proposal the consumer is entitled to inform the trader within 2 years as from the relevant time for establishing conformity after the lack of conformity becomes apparent, we suggest reconsidering to amend the text (in line with the Hungarian legislation) as following. A provision should be added, that in case the consumer does not notify the trader of the lack of conformity without undue delay (so without any reasonable delay from the discovery of the defect) the consumer shall bear the damages resulting thereof. In our opinion without such a provision the shifting of the burden of proof would mean a disproportionate burden for the trader.

25. Another unclear case for us is when the consumer continues to use the defective good after the discovery of the defect which leads to further deterioration of its condition. Does this case fall under provisions of Article 9 Paragraph 5 as a contribution of the consumer to the effects of the lack of conformity which means that he is not entitled to remedy? In our view such behaviour on the consumer's side should not mean losing the right to remedy, but should be taken into consideration when assessing damages.

15) Commercial guarantees (Article 15)

26. We do not find the unified regulation of commercial guaranties to be supported, because our opinion is that these guarantees are contracted voluntarily – beyond legal requirements – by traders, so it does not seem to be justifiable to regulate them in a strict legal framework. If acting accordingly, we find it has a high chance that traders are going to be less willing to voluntarily grant extra guarantees (for example longer time limits or additional services) to consumers.

27. We find it crucial to clarify, whether the national regulations of guarantees for certain categories of goods can be kept in light of the rules set in Article 3 (full harmonisation) on one hand and contrary to them the ones in Article 15 Paragraph 5 on the other.

16) Right to redress (Article 16)

28. The proposal leaves it to national law to regulate the possibility for traders to pursue remedies against persons liable in the chain of transactions before them, if they are liable to consumers for the lack of conformity resulting from an act or omission by those third persons. The question at hand is already regulated accordingly in Hungary, so we can fully support the proposal in this regard.

17) Enforcement (Article 17)

29. With regards to Article 17 Paragraph 2 we would like to receive clarification on whether the entitlement of public bodies or their representatives, consumer organisations or professional organisations for representation of consumer interest means the right to take measures against companies failing in their general commercial practice to fulfill the requirements set in the proposal or to pursue directly the customer's claims against them in specific individual cases. The latter interpretation is discrepant from Hungarian legal provisions and therefore it cannot be supported by us.

18) Mandatory nature (Article 18)

30. As a general rule the Article forbids such contractual agreements, which exclude the application of the legislation set to transpose the provisions of the directive, derogate from them or varies their effect to the detriment of the consumer. A new element is the rule that these agreements are only prohibited before the lack of conformity is brought to the seller's attention (but not if they are concluded accordingly afterwards the latter). The rules set in the Article are nonetheless to be supported by us.

We would like to stress that all our remarks mentioned above are preliminary and we retain the right to derogate from them according to the evolution of the text and the results of future meetings.

NETHERLANDS

Article 2, paragraph g

We propose to delete this paragraph. This should be left to the Member States.

Article 8, paragraph 2

We propose to delete the second sentence of this paragraph. The 30 days addition is a (very) small part of the guarantee period and is of little added value to the consumer. It does however complicate things. There we believe it is better to delete this sentence.

Article 10

We think there should be a distinction between two situations:

a. Retrieval is complicated and may even cause damage if the goods are retrieved (for instance kitchen tiles); and
b. Retrieval is fairly simple, and the trader is for instance a platform that does not run a tile business.

We suggest to arrange this by adding a new paragraph 3 to Article 10:

3. The trader is not obliged to remove the installed goods, or bear the costs thereof, if the consumer has installed the goods, and is able to retrieve the goods without costs or causing damages.

(the current paragraph 3 should be made 4)

Article 13, paragraph 3, sub c

We propose to delete sub c, since it is unnecessary and complicated. The text is confusing and will lead to legal uncertainty for both the consumer and the seller.

SLOVENIA

Art. 1

Art. 1(1) We would like that this para. would be more aligned to the Digital Content Directive. Like Art. 1 of the Directive for the supply of digital content (DCD) we would like that directive stresses the purpose of the directive, i.e. not only to contribute to the proper functioning of the internal market but also providing for a high level of consumer protection by laying down common rules on certain requirements concerning sales contracts concluded between the seller and the consumer. Furthermore, like in the DCD there is a need to explicitly specify what is regulated with this directive, putting down an exhaustive list.

Furthermore, we would like to propose that for the purposes of clarity the phrase "sales of goods" should be inserted additionally in Art. 1(1).

Art. 1(2) According to Slovenian Consumer Law Act (point 19 of Art. 1) a sales contract shall be any contract under which a company undertakes to transfer the ownership right of goods to the consumer and the consumer undertakes to pay the purchase consideration to the company. For the purposes of this Act, a sales contract shall also be any contract having as its object both goods and services.

Mixed contracts, which provide both for the sales of goods and provision of services are therefore deemed to be sales contracts. That is why we are concerned about the 1(2) of the directive which excludes services out of the scope of the directive.

Although this approach was taken over from the Consumer Rights Directive 2011/83/EU (as is stated in the recital 12 of the proposal), the latter is not so clear on that point itself. The recital 50 of the preamble to the directive, regarding the right to withdrawal, states that" for contracts having as their object both goods and services, the rules provided for in this Directive on the return of goods should apply to the goods aspects and the compensation regime for services should apply to the services aspects«. The Consumer Rights Directive itself does not explicitly says this but defines mixed contracts exclusively as sales contracts. Art. 2(5) of that Directive defines contracts having as their object both goods and services as sales contracts.

At the Meeting of the Council Working Party the Commission explained that contracts for the provision of services are excluded from the scope of the directive, and that in case of mixed contracts the directive only applies for the sales part of the contract. However, Member States are free to extend the scope of this directive also to these contracts/Member States can regulate the service part of the contract as they wish, i.e. they can extend the remedies also to services. Member States are not allowed to regulate differently only the sales part of the contract. Does this mean that Member States like Slovenia that already have a prescriptive definition of a mixed contract and apply rules for the sales of goods in these cases may retain the existing definition? If this is the case, this should be clearly stated in the recital, accompanied also with an example.

We would prefer the solution proposed by the European parliament in amendment 41 which also defines mixed contract as a sales contract: "Art. 2a) 'sales contract' means any contract under which **the trader** transfers or undertakes to transfer the ownership of goods, including goods which are to be manufactured or produced, to the consumer and the consumer pays or undertakes to pay the price thereof, ***including any contract having as its object both goods and services.***

Art. 1(4) According to Slovenian consumer law a guarantee period for used goods is reduced to one year after the delivery of the goods. (Art. 37b: If the contract between the seller and the consumers concerns a used item, the seller shall not be liable for material defects on goods that appear more than one year after the item was delivered.) The possibility of the Member States to introduce a shorter guarantee period for used goods has been deleted in the new proposal. We would like to keep the current text of the directive in this regard.

Art. 1(5) should be aligned with the 3(9) of the Digital Content Directive ("this Directive shall not affect **the possibility of Member States to regulate** general contract **law aspects**, such as…., or **the right to damages**)

Art. 2

- **2(a): we support the definition of the sales contract**, as we already have it in our national legislation: however, we would also like to keep the definition of the mixed contract, which is also sales contract under our national law
- We support definitions **in 2b)-d), f);** we also support the recital clarifying the cases of dual purpose contracts are left to national law and therefore Member States remain free to determine in these cases (recital 10f Digital Content Directive)
- **We support the deletion of g) (contract)**
- **2h)** repair/replacement mean, in the event of lack of conformity, bringing goods into conformity with the contract; therefore, also replacement should be added to the definition

Art. 3

Regarding the level of the harmonisation we cannot support this provision in general (maximum harmonization), since there are parts of the directive, where the national level of consumer protection would be reduced in a substantial way (for example with the introduction of the hierarchy of remedies for the consumer). Therefore, as already states at the Working party, the level of harmonisation shall be subject to the debate within each separate article. The final position on this article will be only possible after the final text of the directive.

Art. 4

Firstly, we would like to insert a new sentence in the introduction, stating that the seller shall deliver to the consumer goods which are in conformity with the contract (similar as in the Digital Content Directive).

Art. 4(3) The consumer's knowledge of the specific condition of the goods – we think that the wording of this article should be more aligned to the wording of the digital content directive. It should be clear that the consumer shall be specifically informed that a particular characteristic of the good was deviating from the conformity requirements in (1); furthermore, we are not convinced that Art. 6 is also included, we think that this reference should be deleted.

Art. 5

We would like to stress more the importance of objective criteria in the title of the article (objective conformity criteria), as well as in Art. 4 (subjective conformity criteria). Additionally, we would like that an introductory sentence, similar as in the Digital Content Directive would be introduced in para. 1, as follows: "(1) **In addition to complying with any conformity requirements stipulated in the contract,** the goods shall…."

We would like that the reasonable expectations of the consumer should be included (**point b**) …as the consumer may reasonably expect; **point c)** …which the consumer may reasonably expect….").

Regarding the new reference to accessories (packaging, installation instructions or other instructions) we support this addition.

Art. 5c) We are also concerned about the formulation in Art. 5c) which is to broad, including also public statements made by or on behalf of the seller or other persons in earlier links of the chain of transactions. It would be in our opinion too burdensome for the consumer to check/investigate who made the public statement and the seller could avoid the liability when the consumer was not aware of the public statement.

We support the idea that the situation when the consumer provides the material for the production of the goods should be clarified in the directive. However, we are not convinced that the right and balanced solution is Art. 9(5) of the directive, but would rather take over the solution from Art. 2(3) of the Consumer Sales Directive. According to experience in practice, this would prevent consumers from effectively exercise their remedies, since businesses could use this provision set as a condition for the remedies to pay a compensation for bad use of the goods. Furthermore, also a duty of the seller to inform/to warn the consumer in case when material provided by the consumer has defect that could be noticed by a diligent examination of the material, could be introduced.

We propose the following: There shall be no lack of conformity within the meaning of paragraph 1 if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the goods was deviating from the conformity requirements stipulated in paragraph 1 and the consumer has expressly and separately accepted this deviation when concluding the contract, or if the lack of conformity has its origin in materials supplied by the consumer.

Art. 6

We support the recital which would explain the term "shortcoming in the installation instructions".

Furthermore, we support the addition already included in the Consumer Sales Directive that this article only applies when the installation was agreed as part of the sales contract.

Art. 9

As already stated in the Working party we do not support the introduction of the hierarchy of remedies in case of lack of conformity. According to our national law the consumer can choose freely between different remedies and we would like to keep this high level of consumer protection.

9(2) regarding the deadline for the seller to bring the goods in conformity we would like to have a stricter formulation of the deadline and would therefore like to add an end-term; we propose the following wording: "A repair or replacement shall be completed within a reasonable time **but not later than X days";** since most of consumer cases are not dealt within the courts but by our administrative authorities a fixed deadline is crucial, but also in order to prevent the seller to delay the repair/replacement; if this, as it seems was not possible, then we would prefer another more clear term, as it has already been suggested (**without undue delay**). In support of this, we would also like to stress that the amendments of the European Parliament also include deadlines for repair and replacement of goods (see amendments 95, 97).

9(3)a) we would like to ask for deletion of the term "unlawful" since this is already inherent to

9(4) Similar as in the Digital Content Directive we do not support the inclusion of the right to withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract. According to our national law the consumer in case of a lack of conformity can choose freely which remedies he will opt for. If the consumer estimates that the lack of conformity was such that it cannot count as a fulfilment of the contractual obligation, then the consumer can object in the sense of exceptio non rite adimpleti contractus and is entitled to other legal consequences of the non-performance (termination), including the withhold the payment of the price. If the consumer estimates that the performance with non-conformity can count as a fulfilment of the contractual obligation, he can invoke the remedies for non-conformity, but he must fulfil his contractual obligation in full.

However, he may adapt it according to the nature of non- conformity, for example the consumer who accepts the goods with a defect must pay the price, but he can reduce the price to the actual value of the goods if he notifies the defect and fulfils the conditions for invoking the remedies- reduction of price). However, we could support a recital similar as in the Digital Content Directive that the Member States that would like to introduce such a right are free to do so.

9(5) We would like to propose the deletion of this paragraph, since there is a potential risk that the seller could use this right in order to avoid the liability for non-conformity, stating that the latter is a consequence of the action of a consumer; we would prefer the formulation in Art. 2(3) of the 1999/44/EC Directive ("**There shall be deemed not to be a lack of conformity for the purposes of this Article** if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, **or if the lack of conformity has its origin in materials supplied by the consumer)**.

Moreover, regarding the question if Member States are entitled to introduce other remedies in case of non-conformity, we would like to stress the importance for the Member States to keep this possibility, especially as regards the right to reject. There is currently no such right in the Slovenian Consumer Law. However, we would like to keep the possibility to introduce such a right later, during the possible reform of the national consumer legislation.

We also support the idea that Art. 11 shall be included in Article 9, in order to make the text of the directive more comprehensible. In this regard, we find the amendment 83 of the European Parliament could be a way forward, introducing the new para 1a) to Article 9.

Art. 12

We propose the following addition in bold (also the EP amendment 100): **"The consumer shall exercise the right to a proportionate reduction of the price by means of an unequivocal statement setting out his decision, notified to the trader.** The reduction of the price……"

Art. 13

13(1) we propose the following addition (as the EP suggests in amendment 101): "The consumer shall exercise the right to terminate the contract **by means of an unequivocal statement setting out his decision to terminate the contract, notified to the trader. Where contracts are concluded by digital means, the trader shall provide the consumer with an easy digital** means **to terminate the contract."**

13(2): we propose the following changes (see also EP amendment 103): Where the lack of conformity with the contract relates to only some of the goods delivered under the contract**, which are separable from the other goods,** and there is a ground for termination of a contract pursuant to Article 9 **in relation to those non-conforming goods,** the consumer may terminate the contract only in relations to those **separable** goods and any other goods, which the consumer acquired as an accessory to **or in conjunction with** the non-conforming goods**, unless the consumer cannot be expected to accept performance of the part of the contract in relation to the goods which are in conformity.**

13(3) a) We could support this paragraph, providing some changes would be added as follows (see also EP amendment 105): the seller shall reimburse to the consumer **all sums paid under the contract** without undue delay and in any event not later than 14 days from receipt of the **returned goods.** The seller **shall carry out the same reimbursement suing the same means of payment as the consumer used to pay for the goods, unless the consumer expressly agrees otherwise. The trader shall not impose any fee on the consumer in respect** of the reimbursement.

13(3) 13/3(c): we propose that the paragraph to be changed as follows: "Notwithstanding paragraph (3) (b) the consumer does not have to return the goods to the seller if, due to the lack of conformity of the goods with the contract, the destruction or loss of the goods occurs." We are not sure the consumer should be able to exercise his right to terminate the contract if the destruction or loss of the goods occurs because of another reason as the seller cannot verify the justification of the consumer's claims of the lack of conformity goods with the contract.

13/3(d): we propose the deletion of this paragraph. Apart from the potential difficulties in calculating the extent of a decrease in the value of the goods that exceeds depreciation through regular use, we are also afraid that traders would use this option as a way of preventing consumers from effectively exercise the right to terminate the contract (by imposing on a consumer obligation to pay costs that do not realistically reflect a decrease in the value of the goods). Furthermore, differently than with the right of withdrawal where a consumer may exercise his right to change his mind and withdraw from a distance or off-premises contract without giving any reason, the reason for the termination of contract because of a lack of conformity does not lie in the consumer's sphere. It does not seem fair to impose on a consumer a burden of such costs as he might have reasonably believed that the purchased good is without fault and therefore used it however he deemed appropriate.

SLOVAKIA

Slovakia is in favour of a hierarchy of remedies for the lack of conformity and also within this hierarchy we would like to see in the text of the directive preference of repair before replacement of the product. During the discussion on 16/2/2018 we heard a lot of arguments against this solution, but also arguments supporting our opinion. We do admit that it is necessary to determine some exceptions from the general rule, for instance in case of cross-border sale it may be logistically complicated and expensive to repair a product.

Also it would be very useful to indicate how many times should be the product repaired, for instance if after second repair the specific fault appears for the third times, consumer can require replacement instead of the repair (it is obvious that that specific piece is defective).

The suspension of guarantee period during the repair should be axiomatic and we also prefer in case of replacement the beginning of new guarantee period – for the new product.

FINLAND

Article 1 (Subject matter and scope)

- Firstly, we have major concerns relating to the second sentence of paragraph 2 according to which in the case of sales contracts providing both for the sale of goods and the provision of services, the Directive shall only apply to the part relating to the sale of goods.

  In our view, it would be complicated to apply two set of rules in these situations. In practice, the two sets of rules would apply e.g. in cases where a car or household appliance is repaired and the service provider also supplies the necessary spare parts. Furthermore, two sets of rules would also apply in cases where a construction contracts or a renovation of a building includes also the supply of building materials.

  According to the COM, the provisions of the Directive would not at all apply to the spare parts used in the repair of the car since the intention is not to transfer the ownership of those goods to consumer as referred to in the definition of "sales contract". However, in our view, this is not sufficiently clear on the basis of the current text.

  We would like to propose the following wording for further consideration: Provisions relating to sale of goods shall not apply if the seller of the goods also undertakes to perform work or other services on condition that the services constitute the preponderant part of the obligations of the seller.

- Secondly, we have also serious concerns relating to contracts for the sale of building elements, which are regarded as goods according to the proposal. Chapter 9 of our Consumer Protection Act includes specific provisions on these contracts. The provisions of the chapter are applied to 1) the sale of building elements, 2) contracts including also the installation of building elements, and 3) construction contracts with significant economic value. Specific characteristics of these contracts have been taken into account in the wording of the provisions. As it might be difficult to introduce these more subtle wordings in the proposal, the best way forward might be to exempt these products altogether from the scope of the Directive.

- Thirdly, due to full harmonization character of the Directive, we have some concerns relating to contracts for goods to be manufactured by the seller. In addition to provisions on the sale of goods, the seller has an obligation to provide advice to the consumer in the cases where the consumer supplies essential proportion of the materials. It is not acceptable that we could not apply any longer this obligation.

- Finally, in our view, the first sentence of paragraph 2 is not necessary and it is also slightly misleading since the Directive already includes provisions relating to (incorrect) installation, which is considered as a service.

Article 2 (Definitions)

a) sales contract

- FI notes that the structure of the amended proposal is different to Directive 1999/44/EEC. Due to the new structure, the amended proposal includes also a definition of sales contract. FI reserves the right to make further comments on this issue after more indepth discussions have taken place.

f) commercial guarantee

- FI reserves the right to make written comments on the definition of commercial guarantee after having had the first discussions on this matter in the Civil Law Committee.

g) contract

- The GA on DCD does not include a definition of a contract. It should be deleted from this Directive as well.

h) repair

- FI has doubts on the added value of the definition of repair taking into account that it merely repeats what is already said in Article 9. Moreover, the definition covers also replacement of a good even though this is surely not the intention.

- If the definition is kept in the text, the words “with the contract” should be deleted since the Directive should include both subjective and objective criteria for assessing the conformity of the good.

Article 3 (Level of harmonization)

- FI supports the full harmonization as a starting point. We note, however, that in several significant issues the proposal would lower the level of consumer protection in Finland. This is not acceptable.

- FI reserves the right to submit further comments on the issue of harmonization in the light of the discussions and changes made on substantive articles in course of the negotiations.

Article 4 (Conformity with the contract) and Article 5 (Requirements for conformity of the goods)

- The GA of DCD should be taken as a starting point when drafting provisions relating to conformity of the goods. Hence, the conformity of the good should be assessed in the light of subjective and objective criteria in a similar manner as in DCD. Article 4(3) should be aligned with the corresponding provision of DCD, i.e. Article 6a(2) of the GA.

- Furthermore, the following comments and suggestions should be taken into account when drafting provisions on the conformity of goods:

    - FI would suggest adding the word “type” in Article 4(1)(a). The provision relating to showing (or rather making available) a sample or a model in Article 4 (1)(a) should be treated as an objective criterion and therefore removed from subparagraph (a).

      The subparagraph would thus read as follows: “a) be of the type, quantity, quality and description required by the contract.”

    - Article 4(3) should be aligned with the corresponding provision of DCD, i.e. Article 6a(2) of the GA.

- In Article 5(a) a reference should be made to applicable national and Union laws and technical standards when assessing whether the sold good is fit for normal purposes.

- Article 5(b) includes a reference to packaging. According to FI, appropriate packaging should be an objective criterion in the cases where packaging is necessary to preserve or protect the goods.

- The proposed scope of Article 5(c) is too limited. It is of crucial importance that subparagraph (c) would also cover the security of a good, including security updates, as well as the durability of a good. FI notes that adding durability in the text is not important only for attaining a high level of consumer protection, but also for ecological reasons.

  The paragraph (c) would thus read as follows: " c) possess security, durability and other qualities as well as performance capabilities which are normal …"

  Finally, we note that the proposal does not include a provision saying that a good is regarded defective also in situations where the seller has, before the conclusion of the contract, failed to disclose to the consumer relevant information on the characteristics or the use of the good which the seller could not have been unaware of and which the buyer could reasonably expect to be informed about. This is particularly important in sale of second-hand goods.

Article 6 (Incorrect installation)

- According to FI, Article 6(b) should cover also situations where a third party, e.g. a firm, is doing the installation for the consumer, but due to a shortcoming in the installation orders the installation is done incorrectly.

The corresponding amendment should made to text of DCD.

Article 7 (Third party rights)

- FI reserves the right to provide comments later on Article 7, in particular in the light of the negotiations on DCD.

Article 8 (Relevant time for establishing conformity with the contract)

- FI notes that in Article 8(1)(b) the last part "where the seller proposes no means of carriage" is superfluous and could be deleted.

- Furthermore, the second sentence of Article 8(2) would be difficult to apply in practice and could cause unnecessary disputes between the parties.

- Altogether, FI wonders whether it would be better to have a more simple provision saying that relevant time for establishing conformity should be the time when the risk passes to the consumer.

- The provision could read as follows": The lack of conformity of the goods shall be determined with regard to their characteristics at the time when the risk passes to the consumer. The seller shall be liable for any lack of conformity that existed at that time even if it appeared only later."

- According to FI, the period of two years provided in Article 8(3) is too long. It would be unreasonable from the point of view of the seller, in particular because the proposal does not contain any obligation for the consumer to notify the seller of the defect within a reasonable after he/she discovered or ought to have discovered the defect.

Article 9 (Consumer's remedies for the lack of conformity with the contract)

- Like elsewhere in the text, the reference to the contracts should be deleted from the title.

- The structure of the provisions relating to consumer's remedies could be improved along the following lines:

  - The text should start with a chapeau article on consumer's remedies. For the text, see Article 12(01) of GA on digital content and services.

  - The chapeau article would be followed by an article on consumer's right to have the goods brought into conformity. In essence, it would include the provisions of Article 9(1), Article 11, Article 9(2) and Article 10.

  - Third article would concern other remedies of the consumer. In essence, it would include Article 9(3) and (4).

- Regarding the substance of Article 9, FI is of the view that the consumer should not have a right to terminate the contract in the cases where a lack of conformity is only minor. This would be unreasonable for the sellers in particular in the case of the sale of high-value goods.

  Furthermore, we have the following comments:

  - According to Article 9(1), it is the seller who brings the goods into conformity. This is not always practical from the point of view of either party. In the cases where the good, e.g. consumer's car becomes defective far away from home (and the place of business of the seller) and it is necessary to do the repair at once before even having contacted the seller, it is reasonable that the consumer would be entitled to get compensation for the repair costs. On the basis of the current text, it is unclear whether Member States could introduce such a rule at the national level taking into account Article 3 on the level of harmonization. This should be clarified at least in the recitals.

- In Article 9(3)(a) and (c) the word “or” should be replaced by “and”. In subparagraph (a), the word “unlawful” should be deleted from the main body of the text and a recital similar to the one in the DCD should be added.

- In our view, paragraph 4 is going too far by providing that the consumer may withhold any outstanding part of the price. The consumer should not have the right to withhold an amount that evidently exceeds the claims that the consumer is entitled to on the basis of the defect.

- According to the COM, Article 9(5) replaces the latter part of Article 2(3) of Directive 1999/44/EEC relating to the cases where the lack of conformity has its origin in materials supplied by the consumer. In our view, the current provision is much clearer than the proposed provision, which could give rise to disputes between the parties.

Article 10 (Replacement of goods)

- The end of Article 10(1) starting with words “unless the parties have agreed otherwise …” is superfluous taking into account Article 18 of the proposal. Hence, FI suggests it to be deleted.

- It is unclear why only those cases where the consumer has installed the goods are regulated in Article 10(2). In our view, paragraph 2 should concern also those cases where the seller has installed the goods.

Article 11 (Consumer’s choice between repair and replacement)

- Like elsewhere in the text, the words “with the contract” should deleted after the word “conformity”. Moreover, the word “unlawful” should be deleted from the body of the text and instead the matter should be explained in the recitals.

Article 12 (Price reduction)

- FI is still examining the effects of the proposed change of the wording in the light of the explanations given by the COM. FI enters a positive scrutiny reservation.

- Similarly as elsewhere in the text, the words “with the contract” should be deleted after the word “conformity”.

Article 13 (The consumer’s right to terminate the contract)

- The COM stated in the introduction of Article 13 that this article would not affect Member States' rules concerning 1) the right of the consumer to receive interest on the price which is reimbursed to the consumer and 2) the right of the seller to receive compensation for the benefit of using the goods before the termination of the contract. FI is of the view that these matters should be clarified in the recitals.

- As for paragraph 2, FI notes that the consumer has, according to the FI legislation, the right to terminate the contract also in relation to future instalments provided that the consumer has good grounds to conclude that a breach entitling the termination of the contract will also occur in respect of one or more future instalments. According to the explanation given by the COM, Member States could keep in force such a rule in spite of the full harmonization character of the Directive. FI is of the view that this should be clarified in the recitals.

- FI is doubtful whether a fixed deadline should be introduced in Article 13(3)(a). When subparagraph (a) is read together with subparagraph (b) of Article 13(3), it seems that the seller might be obligated to reimburse the price paid before getting the goods back.

- Furthermore, the deadline of 14 days in subparagraph (b) is unreasonably short for the consumers, in particular in the cases where the good has been installed and it might take some time to organize the removal of the good or, due to the nature of the good, it cannot be returned by post.

- Article 13(3)(c) and (d) regulate the consequences of passing of risk to the consumer. In our view, these matters should be left to national legislation. Moreover, FI notes that the passing of risk is not regulated in Article 11 even though the same incidents (the destruction or loss of the good or the decrease of the value of the good) might occur also when the seller is obligated to replace the sold good.

- If the above mentioned subparagraphs were kept in the text, it would be necessary to redraft them in a clearer manner.

UNITED KINGDOM

We would like to provide the Presidency with the UK position on the level of harmonisation of Article 9 ahead of the next meeting. Whilst we understand the reasons for achieving full harmonisation in relation to remedies, the current drafting risks a significant loss of consumer protection in the UK (because of our common law system, which sits alongside legislation). As drafted, the Article summarises the entirety of the remedies regime available to consumers.

We query the current drafting of Article 9 and its intended interplay with other, national remedies. As drafted, the Article summarises the entirety of the remedies regime available to consumers, with subsequent Articles providing a greater level of detail about individual remedies. This is also the case in current Directive 1999/44/EC (Article 3 – Rights of the Consumer), but that Directive further provides that rights under it "shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability" (Article 8).

There is no such clause in the Sales of Goods proposal, meaning that, in the event of non-conformity with the contract, UK consumers could be barred from accessing a number of remedies available to them under non-statutory sources of law (i.e. common law and equity). Such remedies include damages for breach of contract; specific performance; and the consumer's possibility to deduct his losses from any sums he owes to the trader (i.e. if he has not yet paid). The UK's Consumer Rights Act 2015 (which implements the 1999 Directive) provides that such remedies remain available to the consumer: (1) in addition to some of the statutory remedies (provided there is no double recovery); (2) instead of statutory remedies; or (3) where no statutory remedy is provided.

We would like to understand whether the Commission's proposal intends to exclude national rights such as those described above, in contrast to the 1999 Directive. If it does, we could not support this because it could result in significant loss of consumer protection.