

Brussels, 20 February 2018

## Orgalime comments on the proposal for a Directive on certain aspects concerning contracts for the sales of goods

### EXECUTIVE SUMMARY

Orgalime believes that with the six EU consumer rights Directives, European consumers are adequately protected now and – as the Fitness Check showed – in the future. Therefore, we are sceptical about the motives behind the proposal for a new Directive and question the need to regulate further. We would hope that the principles of better regulation should continue to apply. If, however, new legislation is to be introduced, we are convinced that the applicability of the proposed Directive for the sale of goods should be strictly limited to business-to-consumer relations.

In particular, if such legislation is to be introduced:

- There should be no fragmentation into different sale channels
- The hierarchy of consumers' remedies and the duty to notify non-conformity should be maintained
- The guarantee period and the period of the reversal of the burden of proof should not be extended
- Full harmonisation for business-to-consumer contracts, at a reasonable level, should be followed

Moreover, the alignment of rules will be necessary to ensure balanced overall consistency of the European legal framework.

### INTRODUCTION

Orgalime represents a fundamentally healthy industry that is a major export sector. We are very committed to the simplification of international trade for engineering companies, including SMEs, by issuing model contracts and general conditions. These publications are widely used in cross-border business, both within and outside the EU. In the past, Orgalime has followed the discussion on the harmonised European contract framework (European Contract Law dossier,

*Orgalime, the European Engineering Industries Association, speaks for 42 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 23 European countries. The industry employs some 11 million people in the EU and in 2016 accounted for more than €2,000 billion of annual output. The industry accounts for over a quarter of manufacturing output and a third of the manufactured exports of the European Union.*

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subsequently the Common European Sales Law (CESL)), and has contributed its expertise and the viewpoint of businesses actually involved in the field.

On 9 December 2015, the European Commission proposed two legislative initiatives on contract law: the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (COM(2015) 634) (DCD) and the Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015) 635) (OSD) – Online Sales of Goods Proposal)<sup>1</sup>. With the European Parliament and the Council both in favour of an extension of the scope of the Online Sales of Goods Proposal from online to offline sales, the Commission extended the scope to all sale channels by presenting an amended proposal (COM(2017) 637 – Sales of Goods Proposal)<sup>2</sup> on 31 October 2017.

The Council has so far focused its discussions on the Proposal for a Directive on Contracts for digital content, adopting a general approach<sup>3</sup> in June 2017.

We now have the pleasure to comment on the Sales of Goods Proposal.

## FREEDOM OF CONTRACT FOR BUSINESS-TO-BUSINESS

As a preliminary remark, we want to underline that Orgalime is pleased with the fact that the proposal only covers business-to-consumer relations and not business-to-business transactions. The principle of **freedom of contract** is a fundamental rule of contract law in all European legal systems and ensures that businesses can easily conduct cross-border commercial transactions based on negotiated contracts or standard contracts and general terms and conditions. We believe that this principle should not be undermined in business-to-business relations. Therefore, Orgalime does not see the need for regulation in the area of business-to-business relations. Unlike consumer law, in business relations there is generally no need to protect one party in a particular way.

The fact that in all legal systems in Europe freedom of contract is a determining principle of contract law means that businesses can conduct cross-border commercial transactions based on negotiated contracts or standard contracts and general terms and conditions of business relatively easily.

### No need for action on a new proposed Directive on sales of goods in the Business to Consumer sector

First of all, Orgalime welcomes the fact that the European Commission wants to strengthen the Digital Single Market through measures to improve, on the one hand, consumers' confidence in cross-border online sales, and, on the other hand, the global competitiveness of European companies. Nevertheless, we do not see any need for action on the planned re-design of the European Consumer Sales and Guarantees Directive.

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<sup>1</sup> COM(2015) 635 final

<sup>2</sup> COM(2017) 637 final

<sup>3</sup> Available here: <http://data.consilium.europa.eu/doc/document/ST-9901-2017-ADD-1/en/pdf>

The research the Commission conducted in the run-up to the current legislative procedure already shows that it is not legal barriers, but rather cultural or language barriers ("home bias") that can hinder cross-border sales. Serious consumer concerns are principally related to questions regarding the protection of personal data, the security of cross-border payments, high delivery costs, long shipping times and high return-shipping costs.

Furthermore, the results of the Fitness Check on EU consumer rights, during which the Commission assessed six relevant Directives from European consumer rights law,<sup>4</sup> confirm that the mandatory consumer rights provisions already in place are sufficient. The final report from 23 May 2017<sup>5</sup> clearly shows that the existing Directives are still fit-for-purpose, also in light of digitisation and the growth in electronic online retailing. A suitable way to reach the objectives of the assessed Directives would be to pursue better enforcement of the present Regulations combined with consumer awareness-raising efforts in this field.

Therefore, there is no need for a further change or tightening of consumer rights in general, and the Consumer Sales and Guarantees Directive in particular.

This situation is not changed by the impact assessment of the European Parliamentary Research Service, published in June 2017, on the extension of the scope of the Online Sales of Goods Proposal from online only to both online and offline sales<sup>6</sup>, which preceded the European Commission's revised proposal to cover also offline contracts. From the perspective of Orgalime, this study does not raise the real question: is there any need for a new Directive or a change of the guarantees law at all? Instead, the study solely deals with how a Regulation on this matter could be adopted and ignores the results of the Fitness Check on EU consumer rights mentioned above.

### **Orgalime's comments on the individual provisions of the Sales of Goods Proposal**

As stated before, Orgalime does not see any need for action when it comes to a possible re-design of the Consumer Sales and Guarantees Directive for online as well as offline sales. Should the EU legislator nevertheless strive for harmonisation on this matter, the following aspects would need to be taken into account.

#### **Scope of the Directive (no fragmentation into different sale channels)**<sup>7</sup>

The scope of the proposal covers only sales of goods in business-to-consumer relations.

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<sup>4</sup> Within the Fitness Check on EU-consumer rights following six directives were assessed:

- the Unfair Commercial Practice Directive 2005/29/EC (UCPD)
- the Unfair Contract Terms Directive 93/13/EEC (UCTD)
- the Price Indication Directive 98/6/EC (PID)
- the Consumer Sales and Guarantees Directive 1999/44/EC (CSGD)
- the Injunctions Directive 2009/22/EC (ID)
- the Misleading and Comparative Advertising Directive 2006/114/EC (MCAD).

<sup>5</sup> Accessible: [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=44639](http://ec.europa.eu/newsroom/document.cfm?doc_id=44639)

<sup>6</sup> Accessible: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603258/EPRS\\_STU\(2017\)603258\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603258/EPRS_STU(2017)603258_EN.pdf)

<sup>7</sup> See article 1 of the proposal.

Orgalime believes that it is essential to apply the same rules to online and offline transactions, as the way in which the contract is concluded should not lead to two different legal regimes. Our industries need a coherent set of rules, in line with the better regulation principle.

In this respect, there are no general concerns regarding the current efforts, reflected in the new European Commission proposal, to extend the scope of the Online Sales of Goods Proposal from online to offline sales, provided that our comments are taken into account.

Both sales channels should retain a uniform guarantee law. The special characteristics of online and distance sales are represented sufficiently in the fully harmonised 14-days right of withdrawal.

To the extent possible, alignment between contract rules for 'digital content' and 'goods' is the most effective way of ensuring that legislation remains future-proof in the case of goods with embedded digital content. This could mean, for example, aligning provisions on a hierarchy of remedies (for non-conformity) or on the guarantee period.

#### *Hierarchy of consumers' remedies<sup>8</sup>*

Orgalime agrees with the fact that the proposal foresees a hierarchy of remedies in cases of non-conformity of goods. This is a fundamental rule which should be maintained.

#### *No termination of the sales contract for a minor non-conformity<sup>9</sup>*

Article 9 no. 3 of the Sales of Goods Proposal foresees that consumers have the right to terminate the contract even if the lack of conformity is minor. This goes against the current legal framework of many Member States. These States have transposed the rule in the Consumer Sales and Guarantees Directive<sup>10</sup>, which foresees an exception for minor non-conformity situations.

This is an important exception and Orgalime stresses that it should be kept.

This newly proposed article would lead to an unreasonable disadvantage for industry and therefore is not supported by Orgalime. In particular when it comes to high-value goods, if the consumer were to terminate the contract for minor non-conformity, there would be a considerable loss in value in cases of return or resale. This would cause a massive one-sided burden for companies. Also, from the perspective of the conservation of resources and environmental protection, the Directive sends a wrong message, since repair would perhaps be possible and more effective: even small scratches, purely cosmetic defects, a technical malfunction of secondary importance or simply another packaging type than expected could lead to the termination of the contract.

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<sup>8</sup> See articles 9-13 of the proposal.

<sup>9</sup> See article 9 of the proposal.

<sup>10</sup>Directive 1999/44/EC (CSGD)

## Guarantee period<sup>11</sup>

Orgalime agrees with the European Commission's proposal to provide a legal guarantee period of two years. However, an extension of this period is being discussed by various parties. Orgalime does not support an extension of the legal guarantee period, in particular the suggestion to create a lifespan guarantee. Already today, sellers and manufacturers can, on a voluntary basis, provide the buyer with a statement that goes beyond the statutory requirements. This statement should remain voluntary to respect freedom of contract and keep competition fair.

Once again, we refer to the results of the Fitness Check on EU consumer rights, which considered the existing European consumer rights Regulations sufficient – including as regards legal periods. The vast majority of Member States have not chosen a longer period than two years when transposing the existing Directives into national law. Even in those Member States that exceptionally chose a longer period than two years, about 96 percent of the guarantee cases are claimed within two years after conclusion of contract<sup>12</sup>.

## Lack of duty to notify and timing to establish the conformity of the product<sup>13</sup>

In the case of lack of conformity, it should be solved as quickly and effectively as possible. In this context, the consumer's duty to notify the lack of conformity is of paramount importance not only to prevent further damage to the goods, but also to avoid dangerous or improper handling of the goods on the part of the consumer. If the consumer does not notify the lack of conformity within a reasonable time, the consumer should lose the right to invoke the non-conformity of the product. Orgalime believes that the draft Directive should be amended in this regard, maintaining the duty of the consumer to notify the lack of conformity.

## Period for the reversal of the burden of proof

The current proposal foresees the extension of the reversal of burden of proof to two years<sup>14</sup>. In most Member States of the European Union, according to the transposal of the Consumer Sales and Guarantees Directive, the legislation foresees a six-month period during which any lack of conformity shall be presumed to have existed at the time of delivery. The current state of discussions between the institutions seems open to allowing Member States to keep their existing higher protection regarding the guarantee period. Orgalime supports keeping the current six-month time period.

## Level of harmonisation<sup>15</sup>

In principle, Orgalime agrees with the Commission's proposal on a full targeted harmonisation approach, ensuring coherence in cross-border trade. That means: should the draft Directive on the

<sup>11</sup> See article 14 of the proposal.

<sup>12</sup> This shown in a presentation by the EU Commission held at IMCO and JURI committee of the European Parliament on 5 September 2016.

<sup>13</sup> See article 8 of the proposal.

<sup>14</sup> See article 8 paragraph 3 of the proposal.

<sup>15</sup> See article 3 of the proposal.

sales of goods be agreed upon, Orgalime would prefer a full harmonisation basis rather than a minimum one.

Without full harmonisation, there would not be any improvement to the current legal situation – neither for companies, burdened with a large number of different national regulations, nor for consumers, confronted with these confusing provisions. Rather, the Member States would be allowed to keep or even establish different levels of consumer protection.

However, if full harmonisation is pursued, it must be enforced based on the requirements stated above. In this respect, EU-wide full harmonisation of the proposed Directive on the sales of goods should take the results of the Fitness Check on EU consumer rights into account and use the existing provisions – which have been assessed as useful and sufficient – as a basis for full harmonisation.

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