

# DIGITALEUROPE recommendations on proposed Tangible Goods Directive

Brussels, 17 May 2018

## Key recommendations

- The Directive's hierarchy of remedies for goods not in conformity with the contract should encourage sustainable consumption: **at first instance the trader should be allowed to choose between repair and replacement.** If the choice is given to consumers, there will be a significant increase in the number of electronic devices replaced rather than repaired – often unnecessarily.
- The length of legal protection should be set at two years. **Longer legal protection periods (e.g. through restarting the period every time a good is replaced) would cause substantial costs to manufacturers, which could lead to increases in retail prices.**
- This Directive is not the appropriate legislative instrument to regulate the durability of goods. **Adding the concept of durability to the list of conformity requirements would cause confusion** to consumers, traders and manufacturers. Product durability depends on many variables, and there is no agreed industry definition or standard to measure it.
- **Heightening consumer protection with regards to faulty goods should be achieved through the better enforcement of legal protection period rules, not through introducing commercial guarantees for durability.** If Council and Parliament were to agree on including durability guarantees in the Directive, at the very least the relevant provisions should clearly state that those guarantees are voluntary.

## 1. Introduction

The European Commission published in December 2015 a package of legislative proposals aimed at boosting eCommerce in Europe. Part of this package is the proposed Directive on contract rules for the online and other distance sales of goods (hereafter referred to in this paper as Tangible Goods Directive or TGD). Further to the amended proposal published by the European Commission in October 2017<sup>1</sup> and the report adopted by the European Parliament's IMCO Committee on 27 February 2018,<sup>2</sup> DIGITALEUROPE calls on the Council to take into consideration the DIGITALEUROPE recommendations discussed in this paper while developing its own position on the proposed Directive.

## 2. Extension of the Directive's scope to all sales contracts

DIGITALEUROPE strongly welcomes the fact that the Commission's 2017 amended proposal for the TGD extends the scope of the proposed Directive to offline sales.

1 [Amended proposal for a TGD, 31/10/2017.](#)

2 [IMCO report on the amended proposal for a TGD, 27/02/2018.](#)

The original Commission proposal would have created separate regimes for online/distance and offline sales. This would have provided a competitive advantage to the online/distance sales channel, which would have been the most favourable one to the consumer – to the detriment of other sales channels.

### 3. Hierarchy and choice of remedies

DIGITALEUROPE has a few concerns regarding the TGD’s provisions on remedies, both in terms of the Commission’s proposal and in terms of the IMCO report:

- **Hierarchy of remedies**

DIGITALEUROPE believes that neither the Commission’s proposal (Art. 9-11) nor the Parliament’s IMCO report promote sustainable consumption sufficiently through the part of the Directive regulating hierarchy of remedies for goods which are not in conformity with the contract (i.e. faulty goods). Replacement and repair of products are placed at the same level and the choice of remedy is left to the consumer. Allowing the consumer to choose the remedy would lead to a significant increase of the number of electronic devices replaced rather than repaired – often unnecessarily. This legislative choice not only contradicts the EU’s circular economy policy (which promotes a more sustainable economy and an increased reparability of products), but it would also have grave consequences for the environment and jobs in the European repair sector, a cost impact on manufacturers (leading gradually to retail price increases for consumer electronics and IT goods), and a loss of innovation borne through knowledge acquired from repairing defective products.

DIGITALEUROPE believes that the trader is best placed to choose between repair and replacement and, only if this fails, the consumer should be entitled to a refund or a reduction of price.

- **Repair deadline**

With regards to the period during which the repair of the product should be completed, we recommend that the TGD refers to a ‘reasonable period of time’. The strict one-month deadline proposed in Art. 9 a (new) of the IMCO report would be disproportionate in some instances, as the capacity to respect this requirement will very much depend on the nature of the products.

- **Contract termination/price reduction**

It would be disproportionate to allow consumers to receive a price reduction or to terminate the contract after only one attempt from the trader to bring the good into conformity (IMCO report Art. 9(3) b a (new)).

- **Removal and installation costs in case of replacement**

In the cases where a good is replaced, the obligation under Art. 10(2) (Commission proposal) to remove the faulty good and install the replacement good or the obligation to bear the relevant costs should be put on the trader only for the removal and installation of goods that would require the trader’s assistance. It should be borne in mind that some products would require consumers only to un-plug the faulty good and plug in the replacement good.

### 4. Legal protection period

The vast majority of consumer claims that the good is not in conformity with the sales contract are made in the first two months after the consumer acquires the good. For this reason, DIGITALEUROPE strongly believes that the legal protection period should last two years and that the burden of proof should be reversed six months after the consumer acquires the good. If the TGD were to introduce a longer legal protection period,

the cost of goods would increase substantially: manufacturers would need to make allowances for a much higher volume of returns and requests for repair or replacement. As an example, one of DIGITALEUROPE's members estimates that, if the legal protection period were to be increased in a particular Member State from two to 5 years, the cost of goods would increase (on average) by 29,4%. And higher costs for manufacturers could easily lead to an increase of the retail prices of goods.

We would also like to stress our concerns with regards to the IMCO report amendment which provides that the legal guarantee period restarts in situations where a good or a component of a good is replaced (IMCO report Art. 9(1)(c)(new)). DIGITALEUROPE believes that this could lead to instances of fraud: a consumer could bring his/her product back to the trader right before the end of the legal guarantee period, once again at the end of the next legal guarantee and so on and so forth. Moreover, a legal regime envisaging the endless renewal of the legal protection period would likely lead to increase in retail prices, as costs for manufacturers would certainly rise.

Finally, the IMCO report has deleted Art. 14, which stated that the consumer is entitled to remedies for lack of conformity which becomes apparent within two years, and has inserted it instead into Art. 8(1). We believe that such a change would create legal uncertainty. We recommend maintaining Art. 14 as originally drafted by the Commission, so that it is clear that the two-year limit applies to all types of lack of conformity and all types of remedies.

## 5. Durability

The IMCO report includes provisions and references related to the durability of products, which DIGITALEUROPE believes should not be part of the TGD. We agree with the Commission's view, as stated in recital 23 of its proposal for the TGD, that the TGD is not the appropriate instrument to introduce rules related to the durability of goods, and that product-specific legislation would be the right place to encourage longer durability of consumer goods and sustainable consumption.

DIGITALEUROPE strongly opposes Articles 5(1)(c) and 2(1)(f)(a)(new) of the IMCO report, which provide that durability is a requirement for the conformity of goods and is defined as *'the ability of a product to maintain its required performance over a given period, assuming a normal or average rate of usage, under the influence of foreseeable actions'*. This definition is vague and would be very difficult to apply in practice – what constitutes *'normal or average rate of use'*, or *'foreseeable actions'*? Such terms would cause endless disputes between consumers, traders and manufacturers. The durability of goods depends on many variables. Determining it would be particularly challenging, if not impossible. There is no industry definition, no standard, and no agreed measurement of expected lifespan. Durability also highly depends on how the consumer uses the good and under what conditions (indoors/outdoors, humidity levels etc).<sup>3</sup>

## 6. Commercial guarantees

DIGITALEUROPE would like to express its concerns with regards to the Art. 15 on commercial guarantees, both in terms of the Commission's proposal for the article and the way it has been amended in the IMCO report:

- Content of commercial guarantees

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<sup>3</sup> For more arguments against including in the TGD provisions related to the expected lifespan and the durability of goods, see [DIGITALEUROPE's paper on expected lifespan](#) (31.07.2018).

We believe that Art. 15(1), which regulates the content of commercial guarantees given by manufacturers and traders, should be drafted in a clearer way. As currently drafted, the article implies that manufacturers' commercial guarantees are binding for any pre-contractual information provided by traders and any advertising carried out by traders, which is illogical: for competition law reasons, manufacturers must refrain from influencing the trader's pricing and, therefore, have a limited possibility to control how a trader promotes a particular product. In view of this, Art. 15(1) should be amended to clarify that manufacturers' commercial guarantees are legally binding only for pre-contractual information and advertising emanating from the manufacturers themselves, not from the traders.

- **Commercial guarantee statements**

The Commission's text for Art. 15(2) provides that commercial guarantee statements should be made available on a durable medium, and Art. 2(f) states that 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'*. Even though we agree that commercial guarantees statements should be given to consumers in a durable medium, we suggest that the text of Art. 2(f) is amended so that it allows for commercial guarantees to be made available as PDF documents which consumers can download from the websites of manufacturers or traders (depending on who provides the guarantee). To achieve this, the phrase *'addressed personally to him'* should be deleted from Art. 2(f). If the article is not amended, it will force manufacturers and traders to email the guarantee statement directly to each consumer who is entitled to it, which would cause significant administrative costs and might even be practically impossible: in the case of manufacturer commercial guarantees, manufacturers are not always aware of which consumer has bought which good from which trader.

- **Commercial guarantees of durability**

Through Art. 15(5)(a)(new), the IMCO report introduces a new type of commercial guarantee for durability. As already discussed in this paper, DIGITALEUROPE believes that the concept of durability should not be included in the TGD. In addition, we believe that the introduction of a new, third type of guarantee – which would exist in parallel to legal guarantees and the 'traditional' commercial guarantees regulated in Art. 15(1) and (2) – is likely to create confusion rather than improve consumer protection levels. A high level of consumer protection should be achieved through the strict enforcement of rules on the legal protection period, rather than through the introduction of a new guarantee layer.

That said, if Council and Parliament were to agree that the TGD should introduce a commercial guarantee for durability, the Directive should clearly state that such guarantees are voluntary. Commercial guarantees, as currently envisaged in the Sales and Guarantees Directive (Art. 6 Directive 1999/44), are voluntary and key for competition. Companies should remain free to decide whether or not to offer them to their customers – irrespective of whether they wish to offer a 'traditional' commercial guarantee or a 'durability' commercial guarantee. In this regard we suggest that the IMCO report phrase (used in Art. 15(5)(a)(new)) *'a producer giving a guarantee of durability'* should be replaced by the phrase *'a producer may give a guarantee of durability'*.

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## ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE's members include in total over 35,000 ICT Companies in Europe represented by over 60 Corporate Members and 39 National Trade Associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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