Position Paper
of the German Bar Association

by the Committees on European Contract Law and on Intellectual Property


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Summary

The DAV welcomes the proposal for this Directive in principle. However, in the view of the DAV, the proposal goes too far in its endeavour to establish a high level of consumer protection. Thereby wrong incentives are given to consumers. Further, the DAV suggests considering whether the scope of application of the Directive should remain restricted to consumer contracts or whether it would be preferable to expand the scope also to B2B-contracts. Finally, the restriction of the scope of application to distance sales contracts results in undesirable differentiations. Apart therefrom, the proposal requires improvement in many details.

I. General

By the full harmonization as envisaged by the proposed Directive in the regulated areas, a fragmentation of applicable law among various member states is overcome but, on the other side, this will result in a fragmentation within the autonomous law of the individual member states. Therefore, the DAV suggests to consider on the one side expanding the scope of application and on the other side limiting the level of consumer protection envisaged by the Directive in a way which makes it amenable for the Member States to shape the consumer protection in their own autonomous law in a way which comes close to that according to the Directive in order to avoid fragmentation (see item 1 below).

In any event, the Directive is aimed at achieving a high level of consumer protection. Even if one supports this aim, the proposed Directive goes too far in this respect by combining several elements (see item 2 below).
Apart therefrom, the draft is imprecise and in part self-contradictory in several details, particularly in the German version of the draft but, to some extent, also in the English version (which it is assumed has served as a working basis) – see item 3 below.

1. **Scope of the Directive**

   The proposal assumes as its basis that for distance sales and in particular for the online sale of goods there is a need for uniform law applying to consumer contracts exceeding the consumer acquis achieved so far. Based on this assumption, the proposal suggests to restrict the scope of application of the Directive to:
   
   - consumer contracts and
   - distance sales.

   By this the limitation of the scope of application the aim pursued by the Directive, to promote the trade between the Member States, particularly trade by contracts made online, is negatively affected for two reasons:

   (a) The restriction of the scope of application to consumer contracts has the result that contracts made online between traders continue to be subject to the non-harmonized laws of the individual Member States. For the supplier it is frequently difficult to discern whether the purchaser acts as a consumer or as a trader as well. The aim pursued by the harmonization, to save the supplier the cost of adjusting its contract terms to the individual laws of the Member States which might become applicable, will be missed for this reason if in all cases where the purchaser is a trader, non-harmonized laws are applicable.

   It is true that the parties could select the supplier’s law for B2B-contracts without being limited by mandatory provisions of the customer’s domestic law pursuant to Art. 6 para. 2 Rome I (Regulation (EC) No. 593/2008). for consumer contracts. However, this then would have the result that the trader as a buyer would be confronted with laws differing in particular in respect of the warranty provisions.

   Therefore, the DAV suggests expanding the scope of application of the Directive also to B2B-contracts, however with appropriate adjustments for
the application to B2B-contracts. At least, it should be provided that the requirements of the Directive are non-mandatory in B2B-contracts and can be excluded or varied also by standard contract terms.

(b) If the scope of application of the Directive is limited to distance sales, this has the further consequence that for the purchasing consumer different laws will apply depending on whether he or she purchases in a stationary retail shop or online or otherwise by a distance contract. Specific provisions for distance contracts are necessary in respect of information requirements and rights of revocation. This is the subject of the Consumer Rights Directive 2011/83/EU. By this Directive, the legal position of a consumer purchasing goods in a distance contract is improved as compared to the one in other cases, particularly with regard to the right of revocation, however, the improvement relates to aspects which are specifically related to the particularities of a distance sale.

To the extent the proposed Directive digresses from the requirements of the Directive 1999/44/EC, the differences are not related to the particular conditions of a distance sale. Irrespective of whether the autonomous law of an individual member state grants in one respect or the other a level of consumer protection which is higher or lower than that contemplated for distance sales in the proposed Directive, this has the result that the consumer enjoys a different level of protection depending on whether he purchases through one channel or the other. If the consumer becomes aware of this difference, the difference may work to the detriment of that channel of distribution which grants a lower level of protection.

For this reason, the DAV suggests to consider whether the aim of the Directive can be better achieved if the principle of full harmonization is applicable to all consumer sales of goods. If this suggestion is followed, the Directive can no longer be presented quite as clearly under the flag “single digital market”. However, this would not affect the fact that the promotion of the digital single market would be the cause for corresponding changes to the Directive 1999/44/EC. It is not inappropriate that, for the sake of a coherent regulation, a Directive, whilst necessary because of the situation in one area (digital sale of goods) in its scope of application, goes beyond
the area for which its necessity arises. In any event, the level of the consumer protection provided by the Directive should be fixed at a level which corresponds to that in the majority of Member States so that it need not be feared that a large number of Member States would grant significantly a higher or lower level of consumer protection for contracts not made as distance sales.

2. Consumer protection

The draft intends to achieve the high level of consumer protection by granting to the consumer in the case of non-conforming goods the following rights:

− right for replacement, and, in the second stage, “termination” of the contract,
− for a period of two years from the date of the passage of risk,
− with a shift of the burden of proof to the detriment of the seller who needs to prove the conformity of the goods at the time when the risk passed, if the “non-conformity” becomes apparent within two years after that date,
− without an obligation of the purchaser to give notice without delay of a non-conformity that has become apparent and
− without obligation for the purchaser in the case of a replacement or “termination” of the contract to pay a compensation for the reduction of value resulting from the normal use of the goods or a remuneration for their use in the meantime.

(a) In their combination these rights of the purchaser mean an unjustified benefit, not to say an intended, or at least consciously accepted, enrichment of the purchasing consumer. Beside this, the combination of the last two elements (no obligation to give notice of non-conformity and no obligation to pay a remuneration or compensation for the reduction in value or for the benefit of use) results even in an incentive for the consumer to continue the use of an (insignificantly) non-conforming good, particularly if the good concerned would have a limited period of life even if fully conforming, in order to return that good claiming its non-conformity within
the framework of a claim for a replacement or termination of the contract. Such consequences could be appropriate only if they were meant as a penalty for the seller. However, for the protection of the consumer, the rights of the purchaser in case of non-conformity must not depend on culpability on the part of the seller. On this basis, however, the consequences of non-conformity must be limited in a way which avoids an enrichment of the purchaser at the expense of the seller. The Draft Directive fails fundamentally in this respect.

(b) Further, according to the draft, the right to terminate the contract and the right for replacement would apply also in the case of minor non-conformity if that cannot be cured by repair. With regard to the right for replacement, this is in line with Directive 1999/44, but it digresses from that Directive with regard to the right of termination. In this respect, the DAV points out the following:

Any good returned to the seller for replacement or in connection with the termination of the contract will in many cases not be saleable anymore from an economic point of view (i.e. considering the cost of selling) and will therefore be scrapped. This means economic and, more importantly, ecological waste. The production of each and every industrial product uses up a multiple amount of raw materials and other materials compared to the final product. On average, one may assume a material intensity or MIPS-factor (Material input per service unit) of 30:1, in many products the factor is much higher, for smartphones for instance it is in a range of 400:1.\(^1\) Each wasted good (correspondingly each item for its replacement) therefore uses up on average 30 times its own mass of “nature”. If the replacement/termination of the contract may be claimed also on the grounds of minor non-conformity, the consumer protection in this respect collides with the ecological policy within the meaning of securing sustainability. This should be duly taken into account when shaping the consumer protection (see also Recital 23 of the proposed Directive).

\(^1\) Source: Friedrich Schmidt-Bleek, Grüne Lügen, 2nd ed. 2014, pp. 58 et seqq; 266 et seqq. The criticism of this approach by other ecological institutions focuses on its disregard of additional damage to the environment.
3. Wording of the proposal

The wording of the proposed Directive is unclear or inconsistent in many respects. As the Directive intends full harmonization, it is not permissible for the national legislator in the implementing act to overcome such in clarity for the sake of unequivocal legislation by going beyond the level of consumer protection required by the Directive. Therefore, the Directive needs to be worded in a clear and consistent manner. The current draft is subject to multiple criticisms in detail on this ground. This applies in particular to the German version. But also the English version – which is assumed to be the result of preparatory work in the English working language – shows significant deficiencies in this respect.

II. Details

The following comments follow, without priorization, the sequence of the provisions in the Directive. Because of the importance attached to the Recitals in connection with the interpretation of a Directive, also some of the Recitals are addressed. However, where any of the operative provisions being criticized is already announced in the Recitals, the following comments are limited to the operative article with the corresponding provision. To the extent that the individual point of the criticism relates only to the German version, those comments are presented in an Annex to the German version of this position paper.

1. Recital 22

This Recital emphasizes the principle of the freedom of contract also in respect of the requirements of conformity but then it continues that, in order to avoid circumventions, the "mandatory rules on criteria of conformity" need to be complied with. This is contradictory. Only provisions relating to the consequences of non-conformity of the goods can be mandatory. The parties must be free to agree among themselves on what is the subject of the obligation.

2. Recital 25

In this Recital it is pointed out that a consumer may suffer legal detriments if, according to the national law of his or her Member State there is no obligation to notify a non-conformity without delay whilst according to the applicable law of the
seller, there exists an obligation to notify. In the view of the DAV, these considerations of the Recital do not take sufficiently into account the effect of Art. 6 para. 2 Rome I (Regulation (EC) No. 593/2008).

3. **Article 2 para. c**

   The definition of a “legal person” that may be the seller is different in the English version and the German version. According to the German version, the inclusion of a legal person into the definition irrespective of whether that person is of a public or private nature (presumably it should say: organized under public law or private law) whilst the English version refers to the point of whether the legal person is publicly or privately owned. This should be clarified. If (as in the German version) also legal persons of public law should be included in the definition, the German version should read “irrespective of whether the latter is organized under public law or private law”.

4. **Article 2 para g**

   According to this provision, a commercial guarantee must also cover the situation that goods "do not meet these specifications or other requirements not related to conformity". The meaning of this is unclear.

5. **Article 2, additional definition**

   In line with the comments in the Recital 18, it should be defined (as in Art. 5 para. 2 of the draft of the Common European Sales Law, CESL) that a consumer may expect (only) “what can reasonably be expected”.

6. **Article 4 para 1 (c)**

   This provision relates to

   "any pre-contractual statement which forms an integral part of the contract".

   A similar wording can be found in Article 15 para. 1 (a). The wording is unclear. It may mean a qualification i.e. a limitation, i.e. the following:

   “Any pre-contractual statement if that statement forms an integral part of the contract.”
Or, if used in the plural as in (the German version of) Article 15 para. 1 (a):

“those pre-contractual statements which form an integral part of the contract.”

On the other hand, these words may also be understood in that way that pre-contractual statements (always) from an integral part of the contract.

If the latter is intended, it would not be appropriate. It would have the consequence, amongst others, that it is impossible to define a complete wording of the individual contract. Further, it would be necessary to clearly distinguish these statements from “public statements made by or on behalf of the seller or other persons in the earlier links of the chain of transactions” as referred to in Art. 5 (c).

A wording in line with that of Directive 1999/44, Art. 2 para. 2 (d) would be preferable, which provides that in determining the requirements of conformity, statements made shall be “taken into account”.

7. **Article 5 para (a)**

According to this provision, goods must be fit for “all the purposes for which goods of the same description would ordinarily be used”. This requirement may in the individual case be inconsistent with the requirement according to Art. 4 para. 1 (b) (particular purpose of use notified to the seller). It should be clarified that the fitness for the specific purpose takes priority over the normal purpose of use and that the fitness for the normal purpose is not required if it is inconsistent with the particular purpose of use as notified and the seller has pointed out to the consumer that there is this inconsistency.

8. **Article 5 para (c)(i)**

According to this provision, the purchaser has to show that he

“was not and could not reasonably have been aware of”

the relevant statement.

This wording is unclear for two reasons:
(a) It is unclear already whether the wording “could not reasonably have been aware” is the same as the negation of the provision “reasonably should have been aware”; the latter would mean according to the German understanding (as reflected in the implementation of the corresponding provision of Art. 2 para. 4 of Directive 1999/44/EG by § 434 para.1 third sentence of the German Civil Code) that the ignorance is not the result of a failure to apply proper care and diligence.

(b) Even if one assumes that the wording “could not reasonably have been aware” is meant in the sense that there is no situation where the seller reasonably should have been aware of the statement, it is unclear what criteria determine the seller’s duty of care.

It should be clarified to what extent (in which manner) a seller needs to inform himself of statements which the producer or any other person in the chain of contracts (or third parties on their behalf) have made in respect of the goods.

9. **Article 8 para 2, second sentence**

This provision refers to the situation when the consumer has acquired physical possession of the goods. The German wording does not correspond to the English, moreover, both versions are unclear. According to the English version, it seems that a reasonable time for installation, with a maximum of 30 days after the point in time specified in para. 1 should be decisive. According to the German version, reference seems to be made to the time when the installation has actually been made or, if it has not been made, the expiration of a reasonable time for installation, with a maximum of 30 days. A clearer wording both for the German and the English version would be appropriate. Further, it should be reviewed whether the beginning of the time for installation or the maximum time of 30 days which is set at the date when the goods were handed over to the carrier is appropriate. Depending on the means of carriage, a significant portion of the 30 days period may have elapsed already at the time when the consumer receives the goods.
10. **Purchaser's obligation to give notice**

The Draft Directive does not contain a provision under which the consumer is required, within an appropriate period of time, to give notice of a non-conformity that has become apparent. Pursuant to Art. 5 para. 2 of the Directive 1999/44, the Member States may provide for such a requirement. According to the introductory comments of the proposal, the majority of Member States have made use of this possibility, albeit with differing periods within which such notice must be given. The DAV recommends to provide for such a requirement to give notice. In this connection, different legal consequences of a failure to give such notice are conceivable:

(a) One possibility would be that the consumer loses the rights based on the non-conformity if he or she does not give notice of non-conformity within an appropriate period (for instance two months) after it has become apparent.

(b) If this sanction does not seem to be appropriate, one might also consider as a sanction that the consumer who claims the right for replacement or to terminate the contract is obliged to pay an appropriate remuneration for the use of the good for the time since the expiration of the period for complying with the requirement of notice up to the date when the notice effectively was given (in this respect see also item 13 below).

(c) In addition, a provision should be considered under which it is presumed that the consumer has become aware of a non-conformity within a certain period (for instance again two months from the date defined in Art. 8 para. 1) unless the consumer states in reasonable detail that and why the non-conformity came to his or her knowledge only at a later point in time.

11. **Article 8 para 3**

(a) This provision creates the presumption that a non-conformity that has become apparent within two years existed already at the time of the passing of the risk. That period is inappropriately long. Effectively it means in many cases an obligation of the seller regarding the durability of a good.

(b) The reversion of the burden of proof means a significant burden on the seller. The longer the period is for which the reversal of the burden of proof applies, the more difficult it becomes for the seller.
(i) If the good supplied is a serial product and new items of that series are still available or the non-conformity has been claimed only in relation to an extremely small number of the total number of items sold, the question arises whether the presumption can be rebutted by proving the conformity of the still existing new item or the fact that for the vast majority of items of the same kind that have been sold, no claims of non-conformity have been made. Also in cases of a serial production, there may be so-called “lemons” or “duds” so that the proof of the singularity of the problem that has become apparent may not be sufficient.

(ii) If the non-conformity relates to performance capabilities or the functionality of the product, the question arises whether and for how long the presumption is justified when in reality it is an issue of the time period for which the performance capabilities must be satisfied.

(iii) If the product requires maintenance and the “non-conformity” can also be the result of a failure of proper maintenance, the seller will hardly be able to prove that there was no sufficient maintenance. Appropriately, in such a case, it should be for the consumer to prove (by the normal maintenance records) that the product has been appropriately maintained and serviced and the non-conformity has arisen in spite of maintenance.

If the presumption applies only in respect of non-conformities that have become apparent within six months, these aspects have a much lesser weight than in case of a significant extension of this period of six months.

(c) Finally, it should be stated expressly that the presumption is rebuttable. The German version suggests such interpretation. The English text “presumed” rather suggests an irrebuttable presumption. In Article 5 para. 3 of the Directive 1999/44 it was therefore stated expressly that the presumption is rebuttable (“unless proved otherwise”).

12. **Articles 9 and 13**

One of the remedies of the seller is referred to in the draft as “termination” of the contract. This term is not quite appropriate for a remedy which is intended to
result in a reversal of the contractual performances and not just for a termination for the future, as, for instance, under German law one would use the word “termination” (Kündigung) for contracts with continuing performances of both sides over a certain period of time. In line with Directive 1999/44 (Article 3 paras. 2 and 6) or with the CISG-Convention (see Art. 49 of the CISG-Convention), it would be preferable to use the terms “avoidance” or “rescission”.

13. **Article 10 para 3**

According to this provision, the consumer is not liable for a reduction of the value or a remuneration for the use of the goods. Similarly, according to Art. 13 para. 3d in case of termination the consumer is liable for reduction of the value only if that reduction exceeds the reduction resulting from the normal use. These provisions are to be seen in conjunction with:

- the absence of an obligation to give notice of a non-conformity,
- a guarantee period of two years, and
- the reversal of the burden of proof (Art. 8 para. 3).

In combination, this package of consumer rights gives false incentives and results in an unjustified enrichment of the consumer which is to be avoided according to Recital No. 31. Appropriately, these provisions should be supplemented by a provision that:

- the consumer is obliged to pay a compensation for the use of the good (corresponding to a normal rent) as from the time when he or she became aware of the non-conformity, less the times for which the seller was in default with its guarantee obligations, and
- the consumer must at least state at what time he or she became aware of the non-conformity and, if that time is more than, for instance, two months after the passage of risk, why he or she became aware of it so late.

14. **Article 11**

The right to replacement (just as the one to termination) in principle is intended to apply even if the non-conformity is only minor. Apart from the inappropriate burden on the seller, which may result from this, it should be noted that this
provision may result in an increased burden on the environment (see already section I.2. above).

15. **Article 13 para 3**

In respect of the legal remedies, reference is made to items No. 10 and 13.

16. **Article 15**

See item 6 regarding Article 4 para 1 (c) above.

17. **Article 16**

According to this provision, the right of redress shall be available only if the liability of the ultimate seller is based on an act or omission of a person in earlier links of the chain of transactions. This does not reflect the provision in Art. 5 para. (c) according to which the seller may be responsible also for public statements of persons acting on behalf of persons in the chain of transactions. Further, the provision appears to be circular as the right of regress is directed against the “person or persons liable”. This assumes that the right for the redress assumes the liability whilst it is the purpose of Article 16 to create such liability. Therefore, the first sentence of Article 16 should read approximately as follows:

“Where the seller is liable to the consumer because of a lack of conformity with the contract resulting from an act or omission by a person in earlier links of the chain of transaction (including public statements made by or on behalf of any such persons), the seller shall be entitled to pursue remedies against the person in the chain of transactions who is responsible for the act or omission resulting in the seller’s liability or on whose behalf a public statement has been made which results in such liability.”

It should be reviewed how much space such a provision would leave to the national legislator to specify the person within that range of potentially liable persons against whom the right of redress is to be directed.