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COMMISSION STAFF WORKING DOCUMENT

on the Impacts of fully harmonised rules on contracts for the sales of goods

supplementing the impact assessment accompanying the 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

Accompanying the document

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) N°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}

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1 WHAT IS THE PROBLEM AND WHY IS IT A PROBLEM

1.1 Background

On 9 December 2015, the Commission adopted two proposals for directives on digital contracts, the proposal for a directive on certain aspects concerning contracts for the supply of digital content (DCD)¹ and the proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods (OSD).² These two proposals were accompanied by an impact assessment.³ These proposed Directives aim at boosting cross-border online trade by removing regulatory barriers for businesses and increasing consumer confidence through fully harmonised key consumer contract law rules.

Against the background of the fast pace of commercial and technological change due to digitalisation, the Commission decided at that time to urgently tackle the key obstacles that hamper online cross-border commerce by proceeding as a priority with a proposal on online and other distance sales. However, in the Communication accompanying the digital contracts proposals the Commission clearly stated its intention to continue its assessment on offline sales, with a view of ensuring consistency of rules across the sales channels. To ensure this coherence, the Commission committed to continue the data collection and analysis concerning face-to-face sales, as part of its Fitness Check of consumer and marketing law (REFIT) which included also the application of the Consumer Sales and Guarantee Directive (CSGD), and to submit all relevant findings to co-legislators.⁴

Following up on this commitment, the Commission submitted to co-legislators the new data from the Fitness Check concerning the CSGD as soon as they became available: a first analysis was submitted to co-legislators in August 2016, while the final analysis of all data gathered in the context of the Fitness Check on the CSGD was submitted in September 2016. Finally, in April 2017, the Commission forwarded to co-legislators advance copies of the full final reports of the two studies underpinning the analysis of the Fitness Check, prior to their publication.

The Report on the Fitness Check of consumer and marketing law⁵ received a positive opinion by the Commission's Regulatory Scrutiny Board on 2 May 2017⁶ and was published on 29 May 2017. The Fitness Check Report is supported by 3 lots of external studies.⁷ Lot 1 study⁸ evaluated the Unfair Commercial Practices Directive⁹ the Unfair Contract Terms Directive¹⁰, the Price Indication Directive¹¹, the Misleading and Comparative Advertising Directive¹², and

1 COM (2015) 634 final.

2 COM (2015) 635 final.

3 SWD (2015) 274 final.

4 COM (2015) 633final, p.8.

5 SWD (2017) 209 final

6 2016/JUST/023, available at https://ec.europa.eu/info/publications/fitness-check-consumer-and-marketing-law_en.

7 The studies for the Fitness Check of consumer and marketing law are available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

8 Study for the Fitness check of consumer and marketing law, May 2017.

9 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

10 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

11 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

12 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version).

the Injunctions Directive.¹³ A separate Lot 2 study assessed the CSGD. The results of the Lot 2 study are presented in two separate reports.¹⁴ Lot 3 study¹⁵ was dedicated to gathering information about consumer awareness and experience of exercising their rights. It included a large-scale consumer survey and mystery shopping exercises and behavioural experiments. The method and analytical approaches followed in these studies are described in more details in Annex 4 of the Report on the Fitness Check of EU consumer and marketing law.¹⁶ An evaluation of the Consumer Rights Directive (CRD)¹⁷ was conducted in parallel to the Fitness Check and a report¹⁸ on the application of the Consumer Rights Directive (CRD)¹⁹, accompanied by an evaluation report²⁰, was also published on 29 May 2017.

The European Parliament (EP) rapporteurs of both the lead committee for the Internal Market and Consumer protection (IMCO) and the associated committee for Legal Affairs (JURI) for the OSD proposal have tabled amendments which extend the scope of the OSD proposal to all contracts of sale concluded between a seller and a consumer and repeal the CSGD (amendments 29 and 64 in IMCO and amendments 9 and 39 in JURI). In that context, IMCO requested an ex-ante impact assessment from the European Parliamentary Research Service in order to assess the impacts of these amendments. The impact assessment was published on 14 July 2017²¹, and confirmed that the adoption of amendments 29 and 64 would be likely to have generally positive impacts for businesses and consumers. Finally, on 25 July 2017 the Commission published the 2017 edition of the Consumer Conditions Scoreboard, based on dedicated representative surveys of consumers and retailers in all EU countries.²²

Supplementing the impact assessment submitted by the Commission in December 2015, this Staff Working Document of the Commission presents a comprehensive overview of the findings and data gathered through the above-mentioned different sources as regards the possible impacts of fully harmonised rules on consumer contracts for the online and offline sale of goods. The present document builds on the December 2015 impact assessment: firstly, it aims to update the description of the problem to be tackled, taking into account recent data and evidence for both online and offline sales, and secondly it aims to deepen the analysis of the impacts of the preferred policy option in the light of the amended Commission proposal which extends the scope to all consumer sales.

13 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version).

14 a) Study on the costs and benefits of the minimum harmonisation under the Consumer Sales and Guarantees Directive 1999/44/EC and of potential full harmonisation and alignment of EU rules for different sales channels and b) Study on the costs and benefits of extending certain rights under the Consumer Sales and Guarantees Directive 1999/94/EC, May 2017. The Lot 2 reports are referred to in this document as "Lot 2a Study" and "Lot 2b Study" respectively.

15 Consumer Market Study to support the Fitness Check of EU consumer and marketing law, May 2017.

16 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p. 134 et seq.

17 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083>

18 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

19 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083>

20 SWD (2017)169

21 http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU%282017%29603258.

22 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=117250.

1.2 The need of uniform rules for all consumer sales of goods

1.1.1 *The Fitness Check analysis confirmed that the obstacles to cross-border trade are relevant for both online and offline sales of goods.*

The wide analysis undertaken for the OSD proposal identified the differences in national consumer contract laws as obstacles to cross-border trade. This analysis already showed that many of the issues identified were relevant for both online and offline sales of goods.

In the Communication accompanying the digital contracts proposals the Commission committed to gather additional data concerning face-to-face sales in the context of the Fitness Check of consumer and marketing law, stating in particular that *“If the outcome of the REFIT exercise will confirm the preliminary results of the ongoing analysis - which seems to be pointing towards the need for a Commission initiative on offline sales of goods – these conclusions could feed into the progress made by the co-legislators on the proposal for online sales of goods, for instance by expanding its scope.”*²³ Indeed, the Fitness Check results concerning the application of the CSGD (the rules of which will be replaced by the amended Commission proposal) complemented the analysis underpinning the OSD proposal and largely confirmed its policy choices.

The Fitness Check of EU marketing and consumer law and the evaluation of the CRD confirmed that the directives subject to the evaluation have contributed towards a high level of consumer protection across the EU and a better functioning internal market, and have helped to reduce costs for businesses when offering their products and services cross-border.²⁴ According to the business interviews carried out in the context of the REFIT Fitness Check, businesses that sell their products/services in other EU countries benefit most from the harmonised legislation that facilitates selling cross-border to consumers in other EU countries.²⁵ In particular, the CRD has fully harmonised certain rules related to contracts between traders and consumers, including contracts for the sale of goods (mainly concerning pre-contractual information requirements and the right of withdrawal). By eliminating differences among Member States' national laws, the full harmonisation approach of the CRD has contributed significantly to the functioning of the business-to-consumer internal market, ensured a high common level of consumer protection and increased legal certainty and confidence for traders and consumers, especially in the cross-border context.²⁶

However, the Fitness Check of EU marketing and consumer law confirms that there are still areas where minimum harmonisation of the currently applicable consumer contract law rules has created legal fragmentation, which in turn creates obstacles to a genuine internal market. The Fitness Check analysis confirms that a better functioning internal market cannot be achieved by national laws alone: EU consumer protection rules remain relevant in the context of deepening the internal market, notably due to the increasing number of intra-EU consumer transactions.²⁷

As regards the CSGD in particular, the Fitness Check analysis confirms that the results of its implementation, when it comes to the cross-border dimension, are not so positive. The minimum harmonisation approach of this Directive which leads to different national rules does not encourage consumers to buy from other EU countries or businesses to sell to other

23 SWD (2015) 633 final/2, p.8.

24 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p. 73.

25 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.74.

26 See results of the evaluation of the Consumer Rights Directive, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

27 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.68.

EU countries.²⁸ The cost-effective implementation of the CSGD is therefore hampered by the existing national differences that hinder cross-border trade.²⁹ This prevents consumers and businesses from benefiting to the full from the opportunities of the internal market.

The Fitness Check analysis recognises that problems arising from different national rules implementing the CSGD are relevant both for distance sales, where the Commission already attempts to fully harmonise the key contract law rules in its proposal for a Directive on online and other distance sales of goods, and for face-to-face sales. The evaluation also largely confirms that the Commission's policy choices in the proposal on distance sales of goods are justified, and emphasises the need to keep consistency in the legal regimes for distance and face-to-face sales in this area.³⁰

1.1.2 Public consultation and stakeholders' consultation confirm the need for uniform EU rules across sales channels.

The need to maintain coherence between consumer contract law rules applicable for distance and face-to-face sales has also been repeatedly emphasised by all stakeholders. Both the OSD proposal and the Fitness Check of consumer and marketing law, including the CSGD were supported by a wide range of consultation activities, including each time a broad online public consultation. The consultation process for the OSD proposal and the Fitness Check of EU consumer and marketing law are presented in detail in Annex 2 of the impact assessment accompanying the digital contracts proposals and in Annex 3 of the Fitness Check Report.

In the context of the public consultation preceding the adoption of the digital contracts proposals,³¹ all participating Member States, business associations and consumer organisations strongly warned against the negative effects of a possible divergence of rules applicable to online and offline sales of goods. All opinions received by national parliaments on the proposal for online and other distance sales of goods opposed a possible creation of different rules for distance and face-to-face sales of goods.

The consultation underpinning the REFIT results³² also showed that national authorities, business and consumer organisations alike strongly support having a single set of rules on offline and online consumer sales. They believe that this would improve transparency, reduce complexity and make the system easier to understand for both consumers and traders. This would make it easier to buy and sell across borders, boost competition, cut traders' compliance costs and reduce prices for consumers.

The impact assessment commissioned by the European Parliament also drew from a wide stakeholder consultation carried out via detailed surveys with consumer organisations, business organisations and legal practitioners as well as with in-depth interviews. The majority of business associations (including the major EU umbrella associations as well as business organisations at national level) which were consulted in the context of the EP's impact assessment supported a uniform set of rules for both sales channels and considered that the benefits of a proposal for fully harmonised rules for the consumer sales of goods with an extended scope, covering both distance and face-to-face sales, will exceed the costs.

28 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.78.

29 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.80.

30 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p. 78.

31 Annex 2 of the Impact Assessment accompanying the digital contracts proposals.

32 REFIT Lot 2a Study, p.44.

1.1.3 The progress made so far in the legislative procedure points to the need for uniform EU rules across sales channels.

During the recent Informal Justice and Home Affairs Council of 7 July 2017, the vast majority of Ministers expressed their firm conviction that the rules applicable to consumer sales of goods need to be the same regardless of the sales channel.

Ensuring the coherence of rules for all sales of goods has also been a major concern in the European Parliament from the beginning of discussions on the OSD proposal. This led the rapporteurs of both the lead IMCO committee and the associated JURI committee to table amendments extending the scope of the OSD proposal to face-to-face sales, based on a targeted impact assessment that focusses specifically on the impacts of the scope extension.

1.3 Differences in national consumer contract law rules affect EU businesses and consumers

1.1.4 Existing legal framework

An extension of the scope of the proposal to offline contracts makes the scope of the proposal similar to the scope of the CSGD. The CSGD currently applies both to online and to offline sales of goods, and provides consumers across the EU with a minimum harmonisation level of protection, by laying down a set of conformity requirements and remedies in case a good turns out not to be in conformity with the contract of sale. As shown in Table 1, 14 Member States have gone on different points and to a different extent beyond the minimum standards set in the Directive, in particular regarding the hierarchy of remedies, the legal guarantee period and the period for reversal of the burden of proof. In addition, the CSGD allows Member States flexibility as to whether to introduce a notification obligation on consumers; the resulting scenario is also diverse.

Table 1 – Legal status quo in relation to 4 key provisions of Directive 1999/44/EC³³

Member States	Key provisions of the CSG Directive			
	Duration of legal guarantee (years)	Notification obligation on consumers	Reversal of burden of proof period	Hierarchy of remedies
Austria	2	No	6 months	Yes
Belgium	2	Yes	6 months	Yes
Bulgaria	2	Yes	6 months	Yes
Croatia	2	Yes	6 months	Free choice
Cyprus	2	Yes	6 months	Yes
Czech Republic	2	Yes	6 months	Yes
Denmark	2	Yes	6 months	Yes
Estonia	2	Yes	6 months	Yes
Finland	No fixed time limit	Yes	6 months	Yes
France	2	No	2 years	Yes
Germany	2	No	6 months	Yes
Greece	2	No	6 months	Free choice
Hungary	2	Yes	6 months	Yes
Ireland	6	No	6 months	Yes + short term right to reject

³³ SWD(2017) 209 final, Report on the Fitness Check of EU consumer and marketing law, Annex 5, p.148. Table established by external consultants for the purpose of the Fitness check of EU consumer and marketing law. Situation as of July 2016.

Member States	Key provisions of the CSG Directive			
	Duration of legal guarantee (years)	Notification obligation on consumers	Reversal of burden of proof period	Hierarchy of remedies
Italy	2	Yes	6 months	Yes
Latvia	2	Yes	6 months	Yes
Lithuania	2	Yes	6 months	Free choice
Luxembourg	2	Yes	6 months	Yes
Malta	2	Yes	6 months	Yes
Poland	2	No	1 year	Yes
Portugal	2	Yes	2 years	Free choice
Romania	2	Yes	6 months	Yes
Slovakia	2	Yes	6 months	Yes
Slovenia	2	Yes	6 months	Free choice
Spain	2	Yes	6 months	Yes
Sweden	3	Yes	6 months	Yes
The Netherlands	No fixed time limit	Yes	6 months	Yes
United Kingdom	6 (5 in Scotland)	No	6 months	Yes + right to reject

An extension of the scope of the proposal to offline contracts aligns it with other key consumer contract law directives which grant contractual remedies in case products or services do not correspond to the contract. These other directives follow a technology-neutral approach and apply therefore to both online and offline sales. This legislation follows intentionally this approach because contractual remedies should be the same independently of the distribution channel. The extension of the scope makes the proposal therefore more consistent with those other pieces of consumer contract law legislation.

Where, within consumer legislation, there are differentiations between distance and face-to-face sales, those differences do not concern contractual remedies in case products or services do not correspond to the contract. They concern instead other rights and obligation of the parties which are created in the respective legislation because they respond to either the fact that when shopping at a distance, consumers do not have access to the same 'look and feel' as when shopping in a 'brick-and-mortar' shop or are subject to specific marketing methods which may lead to undue influences on the transaction decisions of consumers.

The extension is also consistent with the outcome of the Fitness Check of other pieces of consumer legislation. In the Fitness Check stakeholders viewed the possibility of having different rules for different sales channels as creating confusion for consumers. It would also create legal uncertainty for businesses.

1.1.5 Differences in mandatory consumer contract law rules create costs for businesses

The differences in consumer contract law rules have been a cost factor for businesses already before the advent of e-commerce and the possibilities that e-commerce offers to traders to reach out to customers in other Member States. E-commerce and the growing digitisation has exposed more strikingly than before the regulatory barriers that prevent businesses from reaping the full benefits of the Single Market.

The Rome I Regulation allows contracting parties to choose which law applies to their contract and determines which law applies in the absence of choice. A trader who "directs his activities" to consumers in another country may either apply the consumer's national law or

choose another law (in practice almost always the trader's national law). In this latter case, however, the trader must also respect the mandatory consumer contract law rules of the consumer's country to the extent that those rules provide a higher level of consumer protection. If they choose to apply the consumer's national law, they will need to adapt to the national law of each of the Member States they sell to. If they choose to apply their own law, they still need to find out about the consumer's national law to determine whether there are more protective mandatory consumer contract law rules to which the trader will also have to adapt. Therefore, businesses which intend to sell to consumers in another Member State and need to adapt their terms and conditions or want to assess in advance the legal and financial risk in the event of disputes are faced with additional contract law-related costs.

The one-off contract law-related costs incurred by businesses to sell in one other Member State have been estimated at around EUR 9,000.³⁴ These costs weigh more on micro and small enterprises with a small turnover. For instance, the decision of a micro enterprise active in retail trade to export to four Member States would entail contract law-related costs of approximately EUR 36,000, which would surpass 10 % of its annual turnover.³⁵ Faced with these costs, many businesses, in particular SMEs, prefer to stick to their own domestic markets and thus lose opportunities for expansion and economies of scale.

These costs are also relevant for businesses selling offline. Costs related to identifying the foreign law and adapting the company's terms and conditions or even the business model accordingly are similar also in the face-to-face context e.g. where a company opens a physical shop in another EU country and needs to apply to the local consumer legislation of that country.³⁶

1.1.6 Businesses perceive differences in consumer contract law rules as significant barriers to cross-border sales.

For all businesses active in cross-border sales, be it online or offline, differences in consumer contract-law rules represent significant barriers.

Some 57 % of businesses have indicated that differences in Member States' e-commerce laws discourage them from selling across borders.³⁷ In 2014³⁸ "differences in national consumer protection rules" and "differences in national contract law" were reported as important obstacles to developing online sales to other EU countries by respectively 41 % and 39 % of online retailers. According to the most recent data available, this perception remains: two out of the four most important obstacles to cross-border trade for retailers currently selling online relate to differences in national contract law (38.1 %) and differences in national consumer protection rules (37.4 %).³⁹

This is closely linked with the relatively low levels of confidence of retailers to sell cross-border online, as reported in the latest EU-wide survey⁴⁰: 58 % of all EU retailers declared being confident selling online; however, less than half of them (27.2 %) were confident to sell

34 SWD (2015) 274 final, Impact Assessment accompanying the digital contracts proposals p.12 and Annex 5. REFIT Lot 2a Study p.40-41.

35 Estimate based on the average annual turnover per firm category according to Eurostat Structural Business Statistics.

36 REFIT Lot 2a Study (see footnote 14), p.40-41.

37 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), p.53.

38 Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015) p.43.

39 Survey on retailers' attitudes towards cross-border trade and consumer protection 2016 p.123-124. These obstacles were reported as most important right after the "higher risk of fraud and non-payments in cross border sales" (39.7 %) and "differences in national tax regulations" (39.6 %). For more information: http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/survey_consumers_retailers/index_en.htm

40 Survey on retailers' attitudes towards cross-border trade and consumer protection 2016, p.120.

both domestically and to other EU countries, while 30% reported being confident only when selling to consumers in their own country. In turn, these lower levels of confidence in cross-border e-commerce are linked to the low levels of the actual cross-border e-commerce uptake by retailers: over a third of retailers (34.4 %) sell online to final consumers in their country, but less than one in eight retailers sell online to consumers in other EU countries (11.2 %).⁴¹

A vast majority of business organisations responding to the public consultation for the digital contracts proposals in summer 2015 insisted on the negative effects of legal fragmentation and on the costs that differences in national legislations impose on businesses.⁴²

The recent analysis carried out in the context of the Fitness Check of EU consumer and marketing law shows that such differences affect businesses regardless of their sales channel: 42 % of retailers selling offline and 46 % of retailers using distance sales channels consider the costs of compliance with varying consumer protection and contract law rules as important barriers to their cross-border sales.⁴³

1.1.7 Consumers' confidence in buying goods cross-border is growing, but the lower level of cross-border purchases persists.

Although recent data show an important increase of consumers' confidence in buying online, there is still a difference between consumers who are confident to buy domestically (72.4 %) and cross-border (57.8 %). It should be noted that confidence in online shopping varies between Member States. The increase observed for the EU-28, both for domestic and cross-border online purchases, is mainly driven by a few Member States with particularly high levels of confidence and a significant weight in European e-commerce.⁴⁴

However, the increased consumer confidence does not also translate into an equally increased uptake of actual cross-border purchases. According to Eurostat data, in 2016, almost half of all EU consumers (49.1 %) bought online from sellers in their country. However, the same year only 17.5 % bought online from sellers from other EU countries, compared to 15.9 % in 2015.⁴⁵ Another recent survey taking as a basis consumers who use the internet for private purposes brought comparable results. According to this survey, 67.4 % bought domestically and 18.9 % cross-border within the EU.⁴⁶

As regards online cross-border purchases, a quarter of the top 12 main concerns reported by EU online consumers are related to their rights with regard to non-conforming products: 20 % believe that it will not be easy to get a faulty product replaced or repaired, 20 % think it will not be easy to return products and get reimbursement and 15 % are concerned that the product will not be delivered at all or that wrong or damaged products will be delivered.⁴⁷ According to more recent data⁴⁸, the degree of problems with cross-border online purchases in the EU is 21.9 %. Although this figure has decreased compared to 2014 (-5.8 %), a very considerable

41 Survey on retailers' attitudes towards cross-border trade and consumer protection 2016, p.105.

42 Annex 2 of the Impact Assessment accompanying the digital contracts proposals.

43 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.100-101.

44 The highest levels of confidence for domestic online purchases were reported in the United Kingdom (87.6 %), Ireland (84.6 %), Germany (84.5 %) and Austria (84.4 %). For cross-border online purchases the United Kingdom again leads the ranking with 77 %, followed by Ireland (76 %), Austria (75.6 %) and Luxembourg (75 %). Consumer Conditions Scoreboard–2017 Edition, p.90-91.

45 Eurostat Community survey on ICT usage in households and by individuals (isoc_ec_ibuy), table available at Consumer Conditions Scoreboard – 2017 Edition, p.94.

46 Survey on consumer attitudes towards cross-border trade and consumer protection 2016, p.14. http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/survey_consumers_retailers/index_en.htm

47 GfK for the European Commission, "Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most", 2015.

48 Survey on consumer attitudes towards cross-border trade and consumer protection 2016, p.195.

share of online cross-border consumers continue to report problems with damaged or wrong products (8.2 %), late delivery (15,4 %) or no-delivery (4.1 %).⁴⁹

As regards offline cross-border purchases, the most recent data show that 15.8 % of all EU consumers have bought offline from another EU country in 2016.⁵⁰ The recent REFIT Fitness Check data show that for 72 % of consumers, differences in consumer rights for faulty products are a very important/important factor to consider when buying offline in another EU country.⁵¹

Even though the situation in terms of consumers' lack of trust in cross-border purchases appears to have improved, the most recent data show also that the supply-side obstacles leading to the low uptake of cross-border e-commerce by businesses have a detrimental effect on the consumers' ability to reap the benefits of a Digital Single Market. According to the latest available data, a quarter (24.2 %) of online cross-border shoppers face problems with limitations in terms of cross-border delivery or payment, or are redirected to a website in their own country where the prices are different, and the level of these problems has increased by 6.7 percentage points compared to 2014.⁵² Consequently, consumers are still faced with a narrower range of goods at less competitive prices.

2 WHY THE EU NEEDS TO ACT

When selling goods to consumers in other EU countries, businesses are confronted with different mandatory contract law rules resulting from the possibility given to Member States to go beyond the minimum requirements set in the CSGD. Rules on the sales of goods in the CSGD are of a minimum harmonisation nature and therefore allow for different implementations by Member States. This has led to differing national rules and consequently transaction costs for cross-border sales.

The objective of removing consumer contract law barriers and thereby promoting the internal market for the benefit of businesses and consumers cannot be adequately achieved by Member States. Each Member State individually would not be able to ensure the overall coherence of its legislation with other Member States' legislations. Only a coordinated intervention at Union level aiming at removing existing diverging national approaches in the EU consumer laws by way of full harmonisation can contribute to the completion of the internal market by solving this problem.

Fully harmonised consumer contract law rules will secure the development of consumer rights in a coherent manner while ensuring that all consumers in the EU benefit from the same high level of consumer protection. It will create legal certainty for businesses which want to sell their goods in other Member States. It will also reduce costs for businesses as they will no longer have to face different consumers mandatory rules resulting from the current possibility given to Member States to go beyond the minimum requirements set out in the CSGD.

Thus it will create a single set of rules ensuring that, whether domestically or cross-border, online or offline, consumers enjoy the same high level of consumer protection across the European Union and traders can sell to consumers in all Member States based on the same contractual terms. Traders' compliance costs will be reduced and consumers will be granted a high level of protection. As also highlighted in the impact assessment commissioned by the

49 Survey on consumer attitudes towards cross-border trade and consumer protection 2016, p.199.

50 Survey on consumer attitudes towards cross-border trade and consumer protection 2016, p.21.

51 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law p.100.

52 Survey on consumer attitudes towards cross-border trade and consumer protection 2016, p.173.

EP, action at EU level, in particular action also encompassing offline sales, would be more effective than action at national level.

Harmonised rules will also enhance legal certainty for businesses which want to sell their goods in other Member States, by providing a consistent legal basis for coordinated enforcement actions under the Consumer Protection Cooperation Regulation.⁵³ Enforcement actions would in turn be largely facilitated by the proposed uniform fully harmonised rules. Thus the enforcement of EU legislation will be strengthened for the benefit of EU consumers. Such a result can only be achieved by an action at the EU level.

Compared with previous attempts to harmonise fully or in an optional manner consumer contract law, the present proposal follows a different approach. Firstly, it is more targeted only including rules that have been identified⁵⁴ as creating obstacles to cross-border trade. It does not attempt to harmonise fully other areas of consumer contract law like unfair contract terms or much more comprehensively even the entire range of the contractual relationship between the parties. Secondly, it uses the instrument of a directive which gives Member States a margin to adapt the rules to their national legal orders.

3 WHAT IS THE IMPACT OF FULLY HARMONISED RULES FOR BUSINESSES AND CONSUMERS

Businesses would benefit from a uniform set of consumer contract law rules at EU level. They would incur the costs of legal adaptation to the new rules only once and would thereafter be able to sell abroad based on the same set of rules to as many Member States they wish to, without having to face additional consumer contract law-related costs. All businesses, regardless of their size or the country where they are established, would be able to sell everywhere in the EU based on one set of rules, and therefore be able to expand their activity and benefit from economies of scale. This would be particularly beneficial for SMEs, representing 99 % of all European businesses, which are often confined to a small home market with high production and development costs. A reduction of e-commerce costs would enable SMEs to achieve growth through exports and economies of scale that cannot be achieved from the domestic market alone.

Businesses would benefit from a higher volume of transactions. By reducing contract law-related consumer concerns, the total number of consumers shopping online cross-border could reach almost 70 million.⁵⁵ The average sum spent annually by consumers in online cross-border shopping could also be increased by 13.6 %.⁵⁶ This market expansion could be

53 Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)

54 See the Impact Assessment accompanying the digital contracts proposals p. 48 to 50 and Annex 2

55 JRC, The Macro-economic Impact of e-Commerce in the EU Digital Single Market (2015). The estimated increase in cross-border buyers when contract law related barriers are removed is based on a regression analysis carried out on data from the "Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most" (GfK for the European Commission, 2015). When extrapolating this increase to the general population, a conservative estimate consists of replicating only the relative increase in cross-border buyers from the survey sample to the general population as represented in Eurostat data (15 % of people buying online from other EU countries); a more optimistic scenario applies the percentage point increase in the survey sample to the population of citizens purchasing online (50 % according to Eurostat). Thus, the indicative range of 64.4 to 69.6 million consumers buying online cross-border provides a realistic estimate.

56 Idem. The calculation refers to the average sum of money spent by persons buying online cross-border intra EU. The estimate (referring to the intra EU online cross-border purchases) is based on the data from the Consumer Survey "Identifying the main cross-border obstacles to the Digital Single Market and where they matter most," (GfK for the European Commission, 2015). See also the Impact Assessment accompanying the digital contracts proposals, p.14.

particularly beneficial for SMEs, for whom finding customers is currently the most pressing problem.⁵⁷

Consumers would enjoy better prices and an increased variety of offers. Just looking at e-commerce, fully harmonised rules would increase consumer welfare. Increased competition will lead to increased availability of a wide variety of products at more competitive prices. Consumer prices would drop in all Member States, ranging from -0.35 % in Spain to -0.05 % in Lithuania and Romania. The average decrease in consumer prices across the EU can be estimated at -0.25 %. Household consumption, which mirrors consumers' welfare, would equally rise in every Member State, ranging from +0.05 in Lithuania to +0.38 in Spain, with an average of +0.23 for the EU28. This corresponds to about EUR 18 bn.⁵⁸

In addition, if consumers were to shop more cross-border online or offline, they would be able to take advantage of existing price divergences between Member States. For example, a Swedish consumer could pay 32 % less buying clothes in Germany while a Maltese consumer could pay 23 % less buying household appliances in Italy.⁵⁹ Whilst these price differences do not take account of factors such as differences in taxation and delivery costs (in part to be addressed by other initiatives in the Digital Single Market strategy), they nevertheless point to important potential opportunities for consumers.

Finally, consumers would benefit from a wider variety of offers: it has been estimated that lower online prices would constitute just one third of the total consumer welfare gains from an integrated EU market for e-commerce in goods, as two thirds of the gains would come from increased choice.⁶⁰

Therefore, a single set of EU-wide high consumer protection rules would further empower EU consumers to take advantage of an increased offer and strengthened market competition, thus directly contributing to the shaping of a true single market.

3.1 Costs and cost savings for businesses resulting from fully harmonised rules for the sales of goods

All businesses selling goods to consumers would have to incur one-off costs to adapt to new fully harmonised rules for the sales of goods. These costs have been estimated at about EUR 6,800 per company.⁶¹ Depending on whether they sell only domestically or also cross-border, businesses may at the same time also save on current or future costs and thus overall benefit from fully harmonised rules throughout the EU.

3.1.1 Businesses currently selling online

- Retailers selling online cross-border (about 400,000 businesses⁶²) would face implementation costs amounting in total to about EUR 2.7 bn. These businesses would

57 This was reported as a major difficulty by 22.4 % of SMEs: http://ec.europa.eu/growth/smes/business-friendly-environment/performance-review/files/annual-report/infographics_en.pdf.

58 JRC, The Macro-economic Impact of e-Commerce in the EU Digital Single Market, <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98272.pdf>.

59 Calculated based on data from Eurostat 2016, Price level indices (EU28=100), Purchasing power parities (PPPs), price level indices and real expenditures for ESA 2010 aggregates [prc_ppp_ind].

60 Civic Consulting for the European Commission: Consumer market study on the functioning of e-commerce and Internet marketing and selling techniques in the retail of goods, 2011. The consumer welfare gains from an integrated EU market for e-commerce in goods assume a 15 % share of internet retailing.

61 Calculations based on data from the IFF Research study "Consumer Rights and Business Practices (March 2013), prepared for UK Department for Business Innovation and Skills. The average costs to adapt terms and conditions to new national legislation would amount to about £5,133 (approx. EUR 6,800 as calculated in October 2015). See REFIT Lot 2a Study p. 41.

62 REFIT Lot 2a Study p. 34

however save the contract law-related costs to sell in additional Member States, amounting to about EUR 9,000 per company for one single additional Member State. The total estimated cost-savings resulting from the estimated increased cross-border activity of these companies can be calculated as follows:

According to earlier data, businesses already selling online cross-border have reported that they would increase the number of Member States they sell to, if common contract law rules applied in the EU.⁶³ As shown in Table 2 below, among businesses currently selling cross-border to one country, 40 % reported they would start selling to 1-2 additional countries, 31 % to 3-5 additional countries and 8 % to 6 or more additional countries. Among businesses currently selling cross-border to two or three countries, 31 % reported they would start selling to 1-2 additional countries, 33 % to 3-5 additional countries and 17 % to 6 or more additional countries. Finally, among businesses currently selling cross-border to four or more countries, 17 % reported they would start selling to 1-2 additional countries, 35 % to 3-5 additional countries and 27 % to 6 or more additional countries. According to calculations based on recent data⁶⁴, 30.4 % of online cross-border retailers currently sell to 1 Member State, 32.4% sell to 2–3 Member States and 37.2 % sell to 4 or more Member States.

Based on the data from the above mentioned sources, it can be estimated that 114,112 businesses would start selling to an average of 1.5 additional Member States and could thereby save a total of about EUR 1.5 bn costs (114,112 companies X 1.5 additional countries X EUR 9,000). About 132,544 businesses would start selling to an average of 4 additional countries and could save a total of about EUR 4.8 bn costs (132,544 companies X 4 additional countries X EUR 9,000). Finally, about 71,936 businesses would start selling to 6 or more additional countries. Taking a conservative approach and assuming that these businesses would sell to an average of 7 additional countries, they could thereby save a total of at least EUR 4.5 bn costs (71,936 companies X 7 additional countries X EUR 9,000).

This shows that the total benefits from contract law-cost savings due to increased cross-border sales, for retailers who already sell online cross-border, could reach EUR 10.8 bn.

Table 2: Cost savings from increased cross-border activity, for retailers currently selling online cross-border

Companies currently trading to	Would trade to (% of companies)		
	1-2 additional countries (=1.5)	3-5 additional countries (=4)	6 or more additional countries (=6)
1 country	40 %	31 %	8 %
2-3 countries	31 %	33 %	17 %
4 or more countries	17 %	35 %	27 %

Companies currently trading to	Would trade to (number of companies)		
	1-2 additional countries (=1.5)	3-5 additional countries (=4)	6 or more additional countries (=7)
1 country: 121,600 ⁶⁵	48,640	37,696	9,728

63 See Annex III to the Impact Assessment accompanying the Regulation for a Common European Sales Law. Data based on the results of Flash Eurobarometer 321.

64 Survey on retailers' attitudes towards cross-border trade and consumer protection 2016. Calculations based on responses to question D2T p.152. 25.3 % of EU retailers sell cross-border. 7.7 % (i.e. 30.4 % of online EU retailers selling cross-border) sell to 1 MS, 8.2 % (i.e. 32.4 % of online EU retailers selling cross-border) sell to 2-3 MS and 9.4 % (i.e. 37.2 % of online EU retailers selling cross-border) sell to 4 or more MS.

65 30.4 % of the 400,000 companies currently selling online cross-border

2-3 countries: 129,600 ⁶⁶	40,176	42,768	22,032
4+ countries: 148,800 ⁶⁷	25,296	52,080	40,176
Total	114,112	132,544	71,936

Companies expected to sell to	Would save costs of (EUR)
1-2 additional countries (average 1.5): 114,112	EUR 1,540,512,000
3-5 additional countries (average 4): 132,544	EUR 4,771,584,000
6+ additional countries (conservatively estimated average of 7): 71,936	EUR 4,531,968,000
Total	EUR 10,196,640,000

Basis: 400,000 retailers currently selling online cross-border; EUR 9,000 per company per additional Member State

- Retailers selling online only domestically (about 930,000 businesses) would face the adaptation costs of EUR 6 800, amounting in total to about EUR 6.3 bn. These businesses would not directly benefit from cost savings resulting from harmonisation across the EU. However, all these businesses would be given an incentive to expand more easily across borders, as they would no longer have to face additional contract law-related costs in order to sell to other Member States. Many of these businesses can therefore be expected to start cross-border sales in the near future.

- According to most recent data⁶⁸, 94 % of retailers currently selling online only domestically plan to continue selling online over the next 12 months. 15 % of those retailers plan to start selling cross-border.⁶⁹ This means that about 131,130⁷⁰ businesses currently selling online only domestically can be expected to start cross-border sales in the next 12 months. Taking into account that EU traders involved in B2C cross-border e-commerce sell on average to 3.21 Member States, this means that each of these businesses would save about EUR 28,890 (3.21 X EUR 9,000), and the total cost savings would amount to about EUR 3.8 bn. (131,130 X 3.21 X 9,000)

It is important to note that the above-mentioned analysis is a conservative estimate, which only takes into account the share of online domestic retailers who already now plan to start selling cross-border in the next 12 months. It does not take into account the online retailers who would be incentivised to sell cross-border by the reduction of contract law-related costs, or the online retailers who will start selling cross-border within a time frame of more than 12 months.

3.1.2 Businesses currently selling offline

- Retailers selling offline cross-border (about 225,000 businesses⁷¹) would incur implementation costs of about EUR 1.5 bn. However, these businesses would at the same time save the contract law-related costs to sell in other Member States, which amount to about EUR 9,000 per company for selling to one single additional Member State. These cost savings could therefore reach already for one single additional Member State an amount of about EUR 2 bn. This would be considerably higher if the businesses concerned would export to more than one additional Member State. For instance, if only half of those companies

66 32.4 % of the 400,000 companies currently selling online cross-border

67 37.2 % of the 400,000 companies currently selling online cross-border

68 Survey on retailers' attitudes towards cross-border trade and consumer protection, 2016, p.113.

69 Survey on retailers' attitudes towards cross-border trade and consumer protection, 2016. Calculated based on the breakdown of responses to Q1b "Does your company plan to continue to sell online over the next 12 months?" per current sales channel and domestic or cross-border activity.

70 94 % of 930,000 businesses (= 874,200) X 15 % = 131,130.

71 EP Research Centre, Online and other Distance Sales of Goods - Impact Assessment of substantial amendments (2017), p.35.

(112,500) sold to two additional Member States instead of one, they would save EUR 18,000 each and therefore the total cost-savings would amount to about EUR 3 bn.

- Retailers selling offline only domestically (about 1.6 million businesses⁷²) would incur implementation costs of about EUR 10.9 bn, without benefitting from the harmonisation of rules across sales channels and in the EU. However, many of those businesses are expected to start selling online in the near future, following the growing market trend. According to industry data, online retail as a share of total retail in Europe grows steadily: from 6.3 % of total retail sales in 2013, it grew to 7.2 % in 2014 and reached 8.4 % in 2015.⁷³ Recent Eurostat data confirm this trend, showing that the share of e-commerce retail has already reached 9 % of total retail.⁷⁴ For 2017, industry data foresees that the volume of total online sales in Europe will be worth EUR 598 bn, while total online revenue of EUR 660 bn is predicted for 2018.⁷⁵ Industry data also confirm the global trend: from 7.4 % of the total retail market worldwide in 2015, by 2019 worldwide online sales are expected to make up for 12.8 % of total retail spending.⁷⁶

Among businesses that can be expected to start selling online in the future, many can also be expected to start selling cross-border, as the online channel is likely to facilitate their expansion beyond their respective national market. Indeed, recent data show that almost 9 % of businesses currently selling only offline envisage selling online cross-border in the next 12 months.⁷⁷ It can therefore be estimated that about 144,000 businesses (9 % of 1.6 million businesses) would start selling online cross-border in the near future, and would therefore benefit from cost savings of about EUR 9,000 for each additional Member State they export to. As estimated based on earlier data,⁷⁸ EU traders involved in B2C cross-border e-commerce sell on average to 3.21 Member States. This means that each of these businesses could save EUR 28,890 (3.21 X EUR 9,000), and the total cost savings would amount to about EUR 4.2bn (144,000 companies X 3.21 countries X EUR 9,000).

It should be noted that the above analysis is for several reasons a conservative estimate. It only takes into account the share of offline retailers who already now plan to start selling online cross-border in the next 12 months. It does not take into account the businesses which would be incentivised to sell online cross-border by the reduction of contract law-related costs, or those businesses that will start selling online cross-border within a time frame of more than 12 months. If one considers that 62 % of EU retailers that are either active or interested in online cross-border trade have reported that they would "definitely" or "to some extent" start or increase their online cross-border sales if the same rules for e-commerce applied in the EU,⁷⁹ it is reasonable to assume that more businesses would engage in online cross-border trade and therefore the cost savings from increased online cross-border trade, as a result of fully harmonised rules, would be significantly higher.

72 EP Research Centre, Online and other Distance Sales of Goods - Impact Assessment of substantial amendments (2017), p.37.

73 Centre for Retail Research, "Online Retailing in Europe, the U.S. and Canada 2015 – 2016", http://www.retailmenot.com/corp/static/filer_public/86/ed/86ed38d1-9cb9-461c-a683-ab8e7b4e1ffc/online_retailing_in_europe_us_and_canada.pdf.

74 Eurostat 2016, Enterprises' total turnover from e-commerce, Retail trade, except of motor vehicles and motorcycles (10 persons employed or more)

<http://ecommercenews.eu/ecommerce-europe-reach-e509-9-billion-2016/>

76 http://www.emarketer.com/public_media/docs/eMarketer_eTailWest2016_Worldwide_ECommerce_Report.pdf

77 Consumer Conditions Scoreboard – 2017 Edition, p.110.

78 Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2014). See detailed calculations in Annex 5 of the Impact Assessment accompanying the digital contracts proposals.

79 Flash Eurobarometer 413 "Companies engaged in online activities" (2015), Q.11 breakdown by type of product and sector (B2B-B2C).

Furthermore, business associations interviewed in the context of the EP impact assessment⁸⁰ confirmed that they could have a role in helping businesses -and especially SMEs- selling offline domestically with the transition to the new rules, by providing information or preparing standard contractual documentation and, therefore, absorbing part of the adaptation costs. Hence, the one-off adaptation costs might actually be in practice much lower than the ones estimated in this paper.

3.1.3 Costs and benefits for companies must be assessed from a medium-to-long-time perspective

The table below summarises the calculated costs and cost savings to companies resulting from fully harmonised rules in the first period after their entry into force.

Table 3: Comparison of costs and cost savings from fully harmonised contract law rules for the sale of goods

Type of costs/savings	Retailers selling online cross-border	Retailers selling online only domestically	Retailers selling only offline cross-border	Retailers selling only offline and only domestically	Total costs/benefits
One-time adaptation costs	EUR 2.7 bn	EUR 6.3 bn	EUR 1.5 bn	EUR 10.9 bn	EUR 21.4 bn
Savings from future online cross-border expansion	EUR 10.8 bn	EUR 3.8 bn	EUR 2.0 bn	EUR 4.2 bn	EUR 20.8 bn

The table shows that fully harmonised consumer contract law rules would result in significant cost-savings for businesses currently selling online or planning to sell online. This is due to the fact that, compared to offline-only retailers, online retailers are much more likely to benefit from the removal of differences between national contract laws, as the online channel facilitates much more their cross-border activity. In addition, businesses selling offline cross-border will also benefit from the removal of differences in national consumer contract laws

While total costs to a limited extent still exceed total cost savings in the short term because of the currently still high number of companies selling only offline and domestically, it is important to note that in the medium-to-long term the balance will be changed as more companies will adopt an omni-channel sales strategy and, being incentivised to sell across borders, will be more comfortable to expand their export to additional Member States.

Indeed, offline-only retailers will be more and more motivated to also engage in online and in cross-border sales in order to respond to the growing market trends and challenges. The EP impact assessment confirms that harmonising rules across sales channels and lifting regulatory barriers across Member States would represent an incentive for businesses to operate both in different Member States and through different sales channels. These trends are likely to bring a reduction of the number of businesses selling only offline and only domestically and, therefore, to reduce the number of businesses that would incur adaptation costs not counterbalanced by any savings.⁸¹

80 EP Research Centre, Online and other Distance Sales of Goods - Impact Assessment of substantial amendments (2017), p.37.

81 EP Research Centre, Online and other Distance Sales of Goods - Impact Assessment of substantial amendments (2017), p.38.

It should also be noted that several Member States are considering revising their legislation in the field of sales of goods (such as BE, CZ, LT and FR). All businesses in these countries will in any event incur similar costs to adapt to the new national law. Harmonising at EU level for both online and offline sales would present the advantage of triggering adaptation costs only once, while at the same time giving incentives to companies that are interested to sell cross-border but do not do so currently because of differences in consumer contract law rules.

In the longer term, the adaptation costs to be borne by companies will be offset not only by cost savings, but also by the efficiency gains enabled by a more integrated, competitive market. The adaptation costs could therefore be seen as an investment in business opportunities provided by a larger "home market". This likely explains why the majority of EU businesses support the full harmonisation of European contract law for the sales of consumer goods⁸², and most of the business associations consider that the benefits of extending the scope of the proposed Directive to offline sales would exceed the costs.⁸³

Finally, the net costs for businesses would in any case be outweighed by the macroeconomic benefits that the proposal would produce. According to the macroeconomic modelling conducted on the original proposal (only covering online sales, which will likely be the primary channel by which companies will sell cross-border), removing contract law-related barriers will generate an increase of EU GDP of about €4 billion per year.

3.2 Aligned rules for online and offline sales is consistent with the omni-channel market trend

A focus on those areas where the cost savings already now clearly outweigh the one-time adaptation costs, i.e. the introduction of new rules only on online sales or even including offline cross-border sales would, -as pointed out by all stakeholders- would create major problems in terms of legal fragmentation and consequently legal and operational costs for businesses. This would affect in particular the omni-channel businesses that sell both online and offline: if the new consumer contract law rules only covered the online sector, those businesses would need to face the costs of adapting to the new rules for their online sales channel and at the same time apply the currently existing rules for their offline channel.

The number of these omni-channel retailers is already very high and growing. Recent data show that in 2015, 1.32 million retailers (37 % of all retailers in EU-28)⁸⁴ sold both face-to-face and at a distance and, according to industry data, their number is expected to increase further, as many offline-only retailers will have to adapt to the online market trend and to competition pressure exerted by retailers selling online or both online and offline. According to most recent data⁸⁵, the share of companies selling both face to face and at a distance has increased in 2015 from 36 % to 39 % and at the same time the incidence of those selling only face-to-face has dropped from 56 % to 53 %, compared to 2014. The recent Commission e-commerce sector enquiry shows that the average proportion of sales via independent distributors selling only offline is already decreasing steadily (from nearly 58 % in 2005 to around 34 % in 2015). This increase in online sales and omni-channel retailing follows the growing consumer demand and consumers' expectations of being able to switch back and

82 SWD(2015)274 final/2

83 EP Research Centre, Online and other Distance Sales of Goods - Impact Assessment of substantial amendments (2017), p. 39.

84 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law p.62.

85 Survey on retailers' attitudes towards cross-border trade and consumer protection, 2016.

forth between online and physical shops before making their purchase,⁸⁶ while opening up new business opportunities and creating a market expansion effect (i.e. a total sales increase).

A possible divergence of rules for online and offline sales would jeopardise this growing market trend and would impose considerable costs on omni-channel retailers. The current 1.32 million omni-channel retailers and all retailers who will start selling through both channels in the future would be penalised with increased operational costs for maintaining two separate business models depending on the sales channel. Although there are no data available for quantifying these operational costs, the business organisations consulted for the EP impact assessment pointed out that having a different set of rules for online and offline sales (and, thus, different contracts, customer service lines etc.) would be extremely burdensome for omni-channel businesses.⁸⁷ More generally, this would hamper both consumer expectations and the development of a prolific business environment.

Recent data show that the growth of online sales has a positive impact on total sales and on the overall economy. An analysis focusing on three categories of consumer electronics products (portable PCs, portable media players and digital cameras) shows that both retailers and consumers benefit from e-commerce.⁸⁸ While results indicate a business stealing effect, i.e. offline sales decrease to some extent due to the appearance of the online channel, there is also a market expansion effect: total sales increase, i.e. selling online allows retailers to expand their total sales.

This market expansion effect is expected to result in higher levels of economic activity and thus is likely to have an overall positive impact on the level of employment in the EU. The modified proposal creates a level playing field between online and offline sales and therefore does not interfere with the overall trend of increasing online sales, which is driven by digitalisation and internet penetration. Whilst this overall trend can be assumed to have a somewhat negative effect on physical stores, companies will need staff to handle increased online orders, for example in customer service and logistics.

In any case the overall impact of e-commerce on the EU economy is positive and equal to 0.14 % in terms of GDP (about EUR 19 bn.). The impact of this new trade technology and reduction in cross-border trade costs that it triggers is very similar to other trade-costs reducing technologies and innovations, and trade opening policy measures in general. They increase the efficiency of trade and thereby benefit the economy, despite negative effects in some sectors.⁸⁹

3.3 EU businesses and consumers need a forward looking approach

Addressing the contract law-related obstacles to cross-border e-commerce in the EU is not a stand-alone project; it is an important element of a broader package of measures put forward in the context of the Commission's Digital Single Market strategy⁹⁰, which aim to address all major obstacles to a truly integrated market.

86 According to the MIT Technology Review report "Beyond the checkout cart", more than 80% of store shoppers check prices online. Moreover, the trend of showrooming has shown that people go in-store to review a product, and then go online to find the product at a cheaper price (<http://www.tlcmarketing.com/Market/uk/Article/Post/Marketing--trend-report-2015-the-omnichannel-experience>, <http://www.forbes.com/sites/danielnewman/2014/07/22/the-omni-channel-experience-marketing-meets-ubiquity>, <http://marketingland.com/why-brands-should-go-omni-channel-in-2014>).

87 EP Research Centre, Online and other Distance Sales of Goods - Impact Assessment of substantial amendments (2017).

88 The Impact of Online Sales on Consumers and Firms: Evidence from Household Appliances, <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98079.pdf>

89 JRC, The Macro-economic Impact of e-Commerce in the EU Digital Single Market, <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98272.pdf>. Estimated by comparing the 2011 level of e-commerce take-up with an hypothetical situation in which e-commerce does not exist.

90 COM(2015) 192.

As confirmed in the Mid-term review of the Commission's Digital Single Market strategy⁹¹, *"people and businesses in the EU have the inherent strengths needed to take advantage of the Digital Single Market....The completion of the EU Single Digital Market also needs a clear and stable legal environment to stimulate innovation, tackle market fragmentation and allow all players to tap into the new market dynamics under fair and balanced conditions. This will provide the bedrock of trust that is essential for business and consumer confidence."*

A recent industry initiative⁹² also points out that *"Europe has no shortage of successful entrepreneurs and innovative ideas. In fact [...] Europe boasts more entrepreneurs per capita than the United States, a country generally taken as a benchmark for entrepreneurial excellence."*⁹³ *The problem, however, is that European companies seldom grow to scale. [...] Their innovative ideas remain the exclusive domain of local economies, sometimes confined to a single European Union member state. [...] Access to large domestic and even larger international markets is key [...] that's why Step 1 in any programme intended to help start-ups must focus on facilitating access to markets and removing barriers to growth."*

This is exactly what the Digital Single Market strategy is set out to do: create an open market where it is as easy for businesses and people to operate effectively anywhere in Europe as it is at home. The means to achieve this goal is a combination of several Digital Single Market strategy initiatives, designed to work together in a complementary manner.

Together with fully harmonised⁹⁴ rules for the supply of digital content⁹⁴, a set of uniform EU-wide consumer contract law rules for the sales of goods will reduce costs for businesses selling products and services across borders while also ensuring a high level of consumer protection in the EU. Addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or establishment⁹⁵ will enable consumers to shop freely across the EU; at the same time the existence of a uniform set of contract law rules for the sale of goods will reduce the differences between national consumer contract laws and remove one of the main reasons why businesses 'geo-block'. New rules on affordable cross-border parcel delivery services⁹⁶ will benefit small businesses and consumers who are currently prevented from selling and buying more across the EU due to high delivery charges for cross-border services. Finally, simpler value-added tax declaration procedures⁹⁷ will enable businesses that currently find it difficult and costly to comply with many different national systems to benefit from fairer rules, lower compliance costs and reduced administrative burdens when selling goods and services online across the EU.

The combination of all these measures will therefore enable more and more businesses in the near future to overcome the current obstacles and expand their activities across sales channels and across borders.

These measures will also further contribute to strengthening the European Union's position in the world, as a strong European Union rests on a fully integrated internal market and an open global economic system. The digital revolution is sweeping aside barriers of geography and distance, opening up new trade opportunities for EU SMEs and consumers in a global e-

91 COM(2017) 228 final, p.2

92 Scale Up Europe - A Manifesto for Change and Empowerment in the Digital Age (2016), <https://ec.europa.eu/digital-single-market/en/news/launch-scaleup-manifesto-digital-assembly-2016>.

93 OECD, Entrepreneurship at a Glance 2016 (2016), http://www.oecd-ilibrary.org/industry-and-services/entrepreneurship-at-a-glance-2016_entrepreneur_aag-2016-en.

94 COM (2015) 634 final.

95 COM(2016) 289.

96 COM(2016) 285.

97 COM(2016) 757.

commerce market now estimated to be worth over EUR 12 trillion.⁹⁸ E-commerce means even small online businesses can access customers across the globe, cutting down on compliance costs. EU consumers also benefit from the elimination of trade barriers, enjoying access to products and services from all continents.⁹⁹

By taking "*ambitious political steps towards a connected Digital Single Market*", among others "*by modernising and simplifying consumer rules for online and digital purchases*",¹⁰⁰ the EU can become an even stronger market place, a competitive trade partner in the global environment and a place where consumers are well protected and enjoy wider choice and effective rights. This will further empower EU businesses and consumers to face the challenges and benefit from the opportunities of the digital age.

3.4 The right balance for a high level of consumer protection

The key substantive provisions should cover the main differences of national consumer mandatory rules which affect consumers' and traders' decision to engage in cross-border trade. These provisions should strike a balance between a high level of consumer protection that can ensure consumers are confident and well protected in the Digital Single Market and at the same time not imposing disproportionate costs on businesses. The aim is to achieve at the same time a high level of consumer protection and a significantly increased legal certainty for businesses through full harmonisation. Data shows that the rules envisaged could be applied to both online and offline sales.

3.1.4 Remedies

Regarding consumer remedies, the CSGD provides for an order in which remedies can be exercised (as a first step repair or replacement of the goods, as a second step reduction of the price or termination of the contract). The large majority of Member States has implemented this approach.

By retaining a 'hierarchy of remedies' the proposed Directive would maintain the current level of consumer protection in 20 Member States¹⁰¹ and decrease it for five Member States which currently have no hierarchy of remedies¹⁰² and two Member States where beside the hierarchy of remedies a short-term right to reject is currently in place.¹⁰³

In the public consultation carried out for the digital contracts proposals, the 'hierarchy' was supported by business associations while the vast majority of consumer associations supported a free choice of remedies.

According to recent consumer data including both online and offline sales,¹⁰⁴ 77 % of EU28 consumers (online and in-store purchasers) think that it is reasonable for a seller to offer a repair or replacement –and not a refund- when a problem with a product occurs for the first time.

The consumer survey carried out in the context of the REFIT Fitness Check shows that in the vast majority of cases, consumers who discovered a defect obtained a remedy (11 % repair, 42 % replacement, 31 % price reduction or refund).¹⁰⁵ Furthermore, the majority of EU

98 Unctad, Information Economy Report, 2015.

99 European Commission, 'Trade for all' 2015, p.20.

100 Political Guidelines of President Juncker, July 2014

101 AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, HU, IT, LV, LU, MT, NL, PL, RO, SK, SE.

102 EL, HR, LT PT, SI.

103 UK, IE.

104 Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015).

105 SWD(2017) 209 final, Report of the Fitness Check of consumer and marketing law, p.100.

consumers (51 %) either do not ask for an immediate price reduction or termination or do so only if the problem is not solved by repair/replacement. Interestingly, with the exception of Portugal this is also the case in the countries where there is currently a free choice of remedies. In Croatia, Lithuania and Greece 67 %, 60 % and 50 % of consumers respectively do not directly ask for a price reduction or termination, despite the fact that the law allows them to do so.¹⁰⁶

Business associations consulted in the context of the REFIT Fitness Check believe that a 'hierarchy' is a balanced arrangement, avoiding both excessive costs for traders and a 'throw away' culture. However, 74 % of retailers interviewed agreed that it would be fair for consumers to ask for a full refund if the repair or replacement is not carried out within a specified period,¹⁰⁷ and 59 % of the retailers interviewed also agreed that it would be fair for consumers to ask for a full refund if they are not satisfied with the first attempt to repair or replace a faulty good.¹⁰⁸

A 'hierarchy of remedies' is therefore consistent with consumers' expectations and actual behaviour as to the remedies sought when a problem with a product occurs for the first time.

3.1.5 The legal guarantee period

The CSGD provides for a minimum period of 2 years during which the seller is liable for a lack of conformity that existed already at the time of delivery of the good. The very large majority of Member States have implemented a 2-year period in their national law, while in five Member States a longer period applies.¹⁰⁹ Therefore, a 2-year legal guarantee period would maintain the current level of consumer protection in 23 Member States and decrease it in the remaining 5 Member States.

In the public consultation carried out for the digital contracts proposals, a 2-year legal guarantee period was widely favoured by the vast majority of business associations. Consumer organisations, on the other hand, supported a longer legal guarantee period of up to 6 years, especially for durable goods.

Recent consumer data concerning both online and offline sales¹¹⁰ show that between 34 % and 43 % of consumers considered two years as a reasonable length for the legal guarantee for white, brown and grey goods.¹¹¹ If one adds the shares of consumers who consider a shorter guarantee period as reasonable, the study shows that between 43 % and 59 % of consumers consider a legal guarantee period of up to 2 years as reasonable.

The same survey showed that the knowledge of the relevant length of the legal guarantee period is low in Member States where a longer period applies (compared to the EU average of 41 % of consumers who were aware of the actual length of the legal guarantee period in their country). In Sweden, just 7 % of consumers were aware of the 3-year legal guarantee period, while 36 % thought that the legal guarantee period was one year and 20 % two years. In the United Kingdom and Ireland, only about 1 % of consumers were aware about the 6 year

106 Results of the consumer survey carried out in the context of the Fitness Check of EU consumer and marketing law, as submitted by the Commission to the Council and the European Parliament in September 2016 (Table 16, p.25).

107 REFIT Lot 2b Study, p.54-55 and 112.

108 REFIT Lot 2a Study, p.105.

109 In SE there is a 3-year legal guarantee period, in FI and NL the length of the legal guarantee period is linked to the expected average life-span and in the UK and IE a longer prescription period applies (6 years, 5 in Scotland).

110 Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015).

111 White goods: Electrical goods used domestically such as refrigerators and washing machines. Brown goods: Light electronic consumer durables such as TVs, radios, cameras. Grey goods: Computing equipment, laptop, smartphones etc.

limitation period, while 53 % and 61 % respectively believed that the legal guarantee was one year and 22 % and 6 % respectively thought it was two years. In Finland and the Netherlands, 53 % and 50 % of consumers respectively believed that the legal guarantee period is one year and 12 % and 22 % respectively thought it was two years, while only 5 % and 7 % respectively responded that there is no time limit in their country.¹¹²

The REFIT Fitness Check consumer survey¹¹³ also brought similar results. According to this survey Member States with varying legal guarantee periods or where the length is related to prescription periods are amongst those with a very low level of knowledge of the legal guarantee period by consumers (Finland 22 %, Netherlands 12 %, United Kingdom 9 %).

In addition, according to the REFIT Fitness Check consumer survey,¹¹⁴ 45 % of recent problems with defective goods the consumers discovered the defect within less than 1 month. For 26 % of defective products, the defect was discovered between 1 and 6 months, for 16 % between 6 months and 1 year, for 9 % between 1 year and 2 years, and for only 4 % of products the defect was reported to appear more than two years after the purchase.

According to the business data collected for the REFIT Fitness Check,¹¹⁵ an average of 13 % of the responding businesses consider that a possible full harmonisation of the legal guarantee period at 2 years would lower costs compared to the status quo. This share is higher for companies in Member States where the length of the guarantee period is currently longer: In Sweden, Finland, United Kingdom and the Netherlands, the share was 38 %, 35 %, 20 % and 14 % respectively.

The REFIT Fitness Check business data¹¹⁶ also show that a possible extension of the legal guarantee period to 3 years would result in major, moderate and minor costs for 22 %, 20 % and 18 % of businesses respectively, while a possible extension to 5 years would result in major, moderate and minor costs for 37 %, 17 % and 11 % respectively. 28 % and 36 % of retailers respectively expect no cost of such an extension.

In the Netherlands and in Finland where the length of the legal guarantee period is based on the duration of the expected average life-span of the product, the business survey carried out for the REFIT Fitness Check¹¹⁷ shows that, 31 %, 18 % and 15 % of retailers expect, respectively, major, moderate or minor costs from the possible introduction at EU level of a legal guarantee period linked to the lifespan, whereas 30 % expect no costs. When asked about possible benefits, 59% of businesses reported that they expect no benefits from the possible introduction of such a system. Moreover, stakeholders from the Netherlands and Finland which have experience with a length of the legal guarantee period corresponding to the duration of the expected average life-span of the product argue that it is difficult to devise and apply a system that is able to address the complexity and to keep up with the continual changes and development of products, while establishing clear criteria.

Therefore, the available data show that whilst the views about a uniform length of a legal guarantee period in the EU vary depending on the respective current national rules, the 2-year legal guarantee period, which is set as a minimum by the Consumer Sales and Guarantees Directive, effectively caters for a very large proportion of the defects in goods discovered by

112 Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015), p.42-43.

113 REFIT Lot 2a Study, p.84.

114 REFIT Lot 2a Study p.49-50.

115 REFIT Lot 2a Study, p. 52.

116 REFIT Lot 2b Study, p.34.

117 REFIT Lot 2b Study, p.62.

consumers, since in 96% of recent problems with defective goods the consumers discovered the defect during the first 2 years from purchase.

3.1.6 Burden of proof

The CSGD provides for a minimum period of six months during which the burden of proof is reversed in favour of the consumer. 25 Member States have implemented a 6-month reversal of the burden of proof period, while 1 Member State¹¹⁸ has implemented a 1-year period and 2 Member States¹¹⁹ have implemented a 2-year period.

Therefore, a fully harmonised 2-year period of reversal of the burden of proof would increase the level of consumer protection in 26 Member States and maintain the current level of consumer protection in the 2 remaining Member States.¹²⁰ A fully harmonised 1-year period of reversal of the burden of proof would increase the level of consumer protection in 25 Member States, maintain the current level of consumer protection in 1 Member State¹²¹ and decrease the level of consumer protection in 2 Member States.¹²²

In the public consultation carried out for the digital contracts proposals, business associations were in favour of maintaining the period of 6 months which corresponds to the current minimum harmonisation CSGD rules, while an extension was very largely supported by consumer organisations.

A recent study on legal and commercial guarantees, which covered both online and offline sales, showed that in practice only a minority of businesses insist on consumers proving the seller's liability within the entire 2-year legal guarantee period, and that there is very limited change in sellers' behaviour before or after the 6 months from the purchase on this point. According to these data, a longer period for the shift of the burden of proof to the seller would not make a significant difference in practice, as it often operates de facto throughout the entire 2-year legal guarantee period.¹²³

REFIT Fitness Check data confirm that the majority of retailers do not request proof of the existence of the defect at the time of delivery. The survey indicates that 31 % of retailers ask for such a proof and 8 % only after six months, while 46 % usually do not ask for it.¹²⁴

Some consumer associations and authorities consider that a longer period for the reversal of the burden of proof (2 years) could facilitate consumer redress, lead to less disputes on the origin of the fault and as a result lower costs for complaints handling. In contrast, some business associations rather expect higher consumer prices due to more admissible consumer claims.¹²⁵

The REFIT Fitness Check business survey showed that about 60 % of businesses believed a harmonised two-year period would entail no or only up to moderate costs.¹²⁶ Businesses from Member States where the period of reversal of burden of proof is currently already longer than six months reported much less concerns in terms of costs, even where this extension is a

118 Poland.

119 France and Portugal.

120 France and Portugal.

121 Poland.

122 France and Portugal.

123 Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015) p.61, Figure 32.

124 REFIT Lot 2a Study, p.94.

125 REFIT Lot 2a Study, p.53 et seq.

126 REFIT Lot 2a Study, p.103.

rather new rule¹²⁷. Whereas in France 67 % of respondents reported no costs at all or prevailing benefits, the same was true for 55 % in Portugal and 21% in Poland.¹²⁸

The stakeholders' consultation and available data show that an extension of the reversal of the burden of proof period is strongly advocated by consumer organisations, and not strictly opposed by businesses. In order to reach a balanced solution, the appropriate length for a reversal of the burden of proof period should combine the benefits of a fully harmonised period with an extended protection for the vast majority of Member States where currently a 6-month period is in place.

3.1.7 Notification of the defect by the consumer

The CSGD left Member States the possibility to introduce an obligation for consumers to notify the trader about the lack of conformity within a specific deadline. The majority of Member States (21) have introduced such a notification obligation, while 7 Member States¹²⁹ have not imposed this obligation on the consumer. Therefore, the absence of a notification duty would increase the level of consumer protection in 21 Member States and maintain the current level of protection in the remaining 7 Member States.

In the public consultation carried out for the digital contracts proposals, consumer organisations argued that a notification obligation would be disproportionately burdensome for consumers and that the latter are anyway always interested in notifying the trader of any defect as early as possible. On the other hand, most business associations argued that a lack of notification could impair the ability of the trader to adequately repair or replace a defective product.

Recent consumer data concerning both online and offline sales¹³⁰ suggest that consumers are in general rather active and react in a short time after they discover a fault, which limits the need to provide for a specific notification deadline. Depending on the type of product, between 37 % and 58 % of problems were followed up immediately when the problem occurred and between 25 % and 32 % of problems were followed up within one week.

The business survey carried out for the REFIT Fitness Check showed that the removal of national rules requiring consumers to notify the seller within a specific deadline is considered to entail no or only up to moderate costs by 62 % of interviewed businesses.¹³¹ Moreover some of the authorities and consumer associations consider that it can reduce disputes about whether this deadline had been kept and thus result in lower costs for complaints handling. Some business associations however expressed the view that such a removal would encourage consumers to postpone the notification of the problem and raise the costs of remedying the situation.¹³²

The stakeholders' consultation and available data indicate that an obligation on the consumer to notify the seller of a defect within a specific deadline has limited value in practice, as the majority of EU consumers already take action immediately or within one week after the problem occurs. On the business side, the absence of such a notification duty does not seem to raise serious concerns or to lead to significant costs.

127 The length of the reversal of the burden of proof was raised to two years in Portugal in 2003, to one year in Poland in 2014 and to two years in France in 2016.

128 REFIT Lot 2a Study, p.98.

129 AT, DE, EL, FR, IE, PL, UK.

130 Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015).

131 REFIT Lot 2a Study, p.58.

132 REFIT Lot 2a Study, p.56 et seq.

3.1.8 The impact of the proposal is overall beneficial for EU consumers

The proposed Directive implies an overall increase in consumer protection across the EU. However, in some Member States consumers' rights would be reduced on one or two specific aspects as shown in Table 1. In most of these cases it is impossible to pronounce as to whether the overall level of protection would in fact decrease or increase: this depends on the importance attached by consumers to each of these aspects. For example, in a few Member States consumers would no longer have a free choice of remedies for defective goods, but they could more easily exercise their right to remedies since they would no longer need to prove that the defect existed already at the time of delivery at any point during the legal guarantee period.

Beyond the important issue of consumers' rights, which would also benefit by the legal certainty brought by the proposal since consumers would enjoy the same level of protection whether they buy online or offline, domestically or cross-border, the proposal would yield a number of economic benefits for consumers in terms of wider choice of products at more competitive prices. The impact assessment accompanying the original proposal estimated that a full harmonisation of consumer contract rules would increase household consumption in the EU by €18 billion from its current level.