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# Introduction of a lifespan guarantee in the proposed online sales and digital content directives

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Impact assessment of  
substantial amendments

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FINAL STUDY

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**Ex-Ante Impact Assessment Unit**

PE 610.999 –October 2017



Impact assessment of proposed substantial amendments  
introducing a commercial lifespan guarantee in the proposed  
online sales and digital content directives

Final Study  
by Centre for European Policy Studies (CEPS)  
and Time.lex





## Abstract

This study was requested by the European Parliament's Committee for the Internal Market and Consumer Protection (IMCO) as part of Parliament's general commitment to improving the quality of EU legislation, and in particular its undertaking to carry out impact assessments of its own substantial amendments when it considers it appropriate and necessary for the legislative process.

The aim of this study is to conduct an ex-ante impact assessment of proposed substantial amendments from the Internal Market and Consumer Protection (IMCO) and Legal Affairs (JURI) Committees introducing a commercial lifespan guarantee in the European Commission's 2015 proposals for an online sales directive (OSD) and a digital content directive (DCD). The impacts of these amendments have been analysed through the development of specific policy options. Two non-legislative options, implying that none of the amendments are implemented, are assessed first: 1) a Zero Option, which considers the implementation of the OSD and DCD in their present form; and 2) a soft-law approach (Option 1), which includes the conditions of the Zero Option plus specific non-legislative initiatives aimed at raising consumer awareness about commercial lifespan guarantees.

Three distinct legislative options are also defined, by integrating specific aspects of the proposed amendments. The core criteria concern the mandatory/optional nature of the supply of commercial lifespan guarantees and the method used to determine that lifespan. Within Option 2 (subjective duration of lifespan), suppliers are free to set the lifespan and to provide a commercial lifespan guarantee, but they are obliged to notify consumers if this guarantee exists. Within Option 3 (normal duration of lifespan) and Option 4 (binding technical standards for the determination of the lifespan), the supply of a commercial lifespan guarantee is mandatory. For the former, however, the provider must define a lifespan for products of the same category 'that can reasonably be expected by a normal prudent consumer', whereas the lifespan for the latter results from legally constraining technical standards. For each legislative option, two sub-options are developed by considering a liability solely on the manufacturer (2a, 3a and 4a), or a joint liability between the manufacturer and the trader (2b, 3b and 4b).

Key findings of the impact assessment reveal that the two preferred options are Options 2 and 4. The former is certainly less ambitious than the latter and will result in less benefits overall, but it will also involve fewer costs and, unlike Option 4, it could be implemented within a relatively short period of time. Overall, to achieve the specific objectives of enhancing sustainable consumption and cross-border exchanges of durable products, Option 4 should definitely be the most adequate option. Within Option 3, the ambivalence related to the notions of a 'reasonable' or 'normal' lifespan should result in more costs than benefits, in particular regarding legal uncertainty.

As regards the sub-options, given that the manufacturer is responsible for the design of the product, a liability solely on the manufacturer, as shown in Options 2a and 4a, should *a priori* be a preferred option. Nevertheless, a significant share of manufacturers (SMEs in particular) do not have interfaces to interact directly with consumers and would face severe difficulties in organising such a process, especially on a cross-border basis. As the trader remains the main contact point for consumers, a joint liability framework (Options 2b and 4b) should also be an interesting approach, provided that adequate mechanisms are in place between the trader and the manufacturer.

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## **Main acronyms used**

CRD: Consumer Rights Directive (2011/83/EU)

CSD: Consumer Sales Directive (1999/44/EC)

DCD: Proposal for a digital content directive (2015 proposal)

EDD: Ecodesign Directive (2009/125/EC)

IoT: Internet of Things

OSD: Online and other sales directive (2015 proposal)

## Executive Summary

### Context and problem definition

The European Commission's proposal for a Directive on online and other distance sales of goods<sup>1</sup> (OSD) amends and, by extension, may replace<sup>2</sup> the consumer sales and guarantee Directive (CSD).<sup>3</sup> The OSD provides for a "legal guarantee" for the conformity of products with the purchase contract, implying that the trader, selling a product to a consumer, is liable for the non-conformity of the product with the contract. The right of the consumer to claim a remedy based on non-conformity is subject to two time limits provided in Article 14 OSD: 1) the non-conformity must become apparent within two years as from the delivery (the "period of the legal guarantee" provided in Article 14, first sentence); 2) if applicable, national legislation subjects the claim to a limitation period, and then this period cannot be shorter than two years from the delivery (the "limitation period" provided in Article 14, second sentence).

The legal liability of the trader, often called a "legal guarantee" although the wording is not applied in the provisions of the OSD, covers the non-conformity of a product at the time of delivery. If the non-conformity becomes *apparent* within the liability period of two years, the non-conformity is presumed to have existed at the time of delivery, at least "in embryonic form".<sup>4</sup> The consumer must prove that the lack of conformity exists and that it became apparent within the period of two years of delivery, but not that its cause or origin is attributable to the seller.<sup>5</sup> The trader carries the burden of proof that the alleged non-conformity of the good would not have existed at the time of delivery (e.g. that its non-functioning must have been caused by circumstances after delivery, such as an accident or wrong use of the product). This period during which the burden of proof regarding the existence of the cause of the non-conformity at the time of delivery is on the trader is the period of "*reversal of the burden of proof*". It used to be for a duration of six months under the CSD but it is extended to two years in the OSD proposal.

Thus, these rules imply that a consumer is entitled to claim a remedy for a non-conformity that appears after several months, and *up to two years*, after the delivery of the good, and that the non-conformity is presumed to have existed at the time of delivery unless the trader proves otherwise.<sup>6</sup>

It is accepted in legal literature that a certain durability, or fitness for the purpose of a good during a certain period of time (the expected or normal lifespan) can be part of the characteristics that a consumer may reasonably expect, and thus an exceptionally short lifespan may reveal the unsuitability of a good for the use to which goods of the same type are

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

<sup>2</sup> If the co-legislators decide to extend the scope of the OSD to offline sales.

<sup>3</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>4</sup> CJEU, C-497/13, 4 June 2015, Faber, rec. 72 ([www.curia.eu](http://www.curia.eu)).

<sup>5</sup> CJEU, C-497/13, 4 June 2015, Faber, rec. 70-71 ([www.curia.eu](http://www.curia.eu)).

<sup>6</sup> The *limitation period* of the claim of the consumer is governed by national law, but cannot be shorter than the liability period of two years. Theoretically it can have a length of several years (Art. 14, 2<sup>nd</sup> sentence, OSD).

usually required.<sup>7</sup> This may, according to the circumstances of the case, be regarded as a lack of conformity and may then lead to the remedies provided by law, if such a short lifespan is apparent within the liability period of two years. It is important to understand however, that the legal liability period is not a lifespan or durability guarantee: it does not require that all goods must have a lifespan of at least two years.<sup>8</sup> If a good breaks down after one year and the consumer claims that it should have had a lifespan of two years, he must still demonstrate that his expectation was correct. If that is accepted, the cause of the lack thereof will be presumed to have existed at the time of delivery until the seller proves otherwise.

The consumer's right to claim a remedy for an alleged short life of a purchased product is limited, whereas the non-conformity must appear within a period of two years after delivery. Due to the provided full harmonisation of the liability period, consumers are not able to claim remedies for lifespan issues beyond this two-year period, and thus consumer protection will decrease in Member States where a longer liability period is currently applicable.<sup>9</sup>

The period during which the burden of proof regarding the existence or non-existence of the non-conformity is borne by the trader has been extended from six months to two years in the OSD proposal. As such, it will be easier for consumers to claim a non-conformity during the entire two-year liability period. Nevertheless, this limited liability period during which a non-conformity must appear, would still provide insufficient protection for consumers regarding the lifespan of more durable products, in particular household appliances and consumer electronic products that normally should have a lifespan of three to four years or longer. Recital 23 of the OSD proposal acknowledges that ensuring longer durability of consumer goods is important for achieving more sustainable consumption patterns and a circular economy. However, the Commission stated that product-specific Union legislation is the most appropriate approach to introduce durability in relation to specific types or groups of products, using adapted criteria for this purpose. The OSD should only be complementary to product-specific legislation.

Some organisations advocate the introduction of a longer legal guarantee period or the introduction of a specific commercial guarantee for the lifespan of products. The commercial guarantee, as a general concept, is hardly regulated by the CSD or the OSD proposal. According to the definition in Article 2(g) of the OSD proposal, "commercial guarantee" means any undertaking by the trader or manufacturer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract.

Under the current legislation,<sup>10</sup> the commercial guarantee is merely a *voluntary* statement of a guarantor, setting out the warranted characteristics of the good, the remedies if these are not fulfilled, and the conditions of the guarantee. Much of the content is regulated by the terms of the guarantee itself, and guarantees may cover certain defects, certain components, or

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<sup>7</sup> Bianca, M. and Grundmann, S. (eds), *EU Sales Directive*, Intersentia, 2002, p. 158.

<sup>8</sup> Smits, J., "The new proposal for harmonised rules for the online sales of tangible goods: conformity, lack of conformity and remedies", study for European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, 2016, p. 11.

<sup>9</sup> United Kingdom, Ireland, Sweden, the Netherlands and Finland, as explained *infra*.

<sup>10</sup> See for comprehensive overviews: Wiewiorowska, A., "Consumer sales guarantees in the European Union", Dissertation, 2011; ECC-Net, "Commercial warranties: are they worth the money? Legal guarantees and commercial warranties on consumer goods in the EU, Iceland and Norway".

good functioning in general. A lifespan guarantee should be a guarantee of good functioning, implying that a consumer must simply prove the conditions of the guarantee in case of breach. Such guarantee involves a continuous support and is not focused on defects existing at the time of delivery, although a guarantor can prove that certain conditions after the delivery, such as the correct use of a product are not respected. The legal framework regarding such guarantees is largely based on contractual freedom, where the branding policy of traders or manufacturers shapes the guarantee as an instrument of competition between brands.

The remedy system provided under the legal guarantee is not applicable. In order to avoid misleading consumers, the OSD proposal only requires transparency obligations in Art. 15. In principle, the territorial scope, the conditions (e.g. registration), timeframe, remedies, charges for repairs and transfer to second-hand buyers can be governed by the terms and conditions; but, during the period of the legal guarantee both guarantee systems co-exist and the legal rights cannot be suppressed. Furthermore, the OSD proposal states that the rules regarding commercial guarantees are not to be regarded as rules of full harmonisation; the national legislators may have rules that fill in legal gaps, as long as the minimum protection subsists.

According to the amendments, the commercial guarantee would no longer be regarded as a merely *voluntary* or additional legal instrument. It is regarded as a mandatory instrument, or at least according to some of the amendments, if the manufacturer or trader would opt not to provide such a guarantee, he would have an obligation to disclose explicitly that he does not provide such a guarantee, and thus there would at least be a mandatory *negative declaration*, creating at least awareness. The guarantor could be the manufacturer or the trader of the relevant product.

Insecurity about the legal risks in cross-border transactions, in the offline or online environment, may impact the development of cross-border transactions. This has been demonstrated in relation to insecure traders who need to assess the possible compliance cost of different consumer legislation in the absence of harmonised protection. This is also the case on the consumers' side, where insecurity about the possibilities to obtain redress for non-conforming products,<sup>11</sup> in this case possibly beyond the two-year legal guarantee period, may obstruct cross-border transactions for certain products for which lifespan is considered an important factor. On the other hand, the development of the Internet of Things (IoT) and smart products require a focus on the continuous good functioning of products which must remain updated and connected *throughout* their normal lifespan. The notion of *conformity* as a static condition at the time of delivery of a product is partially outdated and should be completed with support obligations under the form of a guarantee of good functioning.

Furthermore, a legal regime that limits consumers' legal rights to remedies and requires the appearance of issues within a period of two years after delivery will not advance the objectives of sustainable production and consumption. Whereas the development of product-specific regulations may take a long time, the commercial guarantee system might support the developments in this field by focusing on the lifespan requirements, although the commercial guarantee remains a contractual instrument that was not designed for *regulatory* purposes, especially in the environmental field.

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<sup>11</sup> See the references in the body of the study, and in general in the Commission's impact assessment SWD(2015) 274 final.



## Methodology

The objective of this study requested by the European Parliament's Committee on Internal Market and Consumer Protection is to assess the implementation, application and effects of the introduction of the amendments:

- Amendments **384, 385, 386, 387 and 388** (Article 15a (new)) (to be read in conjunction with Amendments 150, 151, 153 and 192 (recitals)) to the draft report of the Committee on Internal Market and Consumer Protection (IMCO) on the Commission's 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 (COM (2015) 635 final, 2015/0288 (COD), IMCO Rapporteur P. Arimont);
- Amendments **198 and 199** (Article 15a (new)) to the draft Opinion of the Committee on Legal Affairs (JURI) on the Commission's 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 (COM (2015) 635 final, 2015/0288 (COD), JURI Draftsperson H. Hautala); and
- Amendment 635 (Article 8b (new)) to the draft joint report of the Committee on the Internal Market and Consumer Protection (IMCO) and the Committee on Legal Affairs (JURI) on the Commission's Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (COM (2015) 634 final, 2015/0287 (COD), IMCO/JURI Co-rapporteurs: E. Gebhardt/A. Voss)).

This evaluation is conducted by assessing to which extent the introduction of the amendments can, on the one hand, enhance the single market for goods and, on the other, boost sustainable consumption. Eight policy options are identified, especially by placing the focus on how lifespan should be determined and how traders and manufacturers should share liability. The study analyses the impact of the amendments and related policy options on businesses (SMEs vs. large companies, manufacturers vs. traders), consumer protection (consumers have been segmented when possible) and environment and sustainable consumption.

The collection of data and information to achieve the objectives of the study was based on desk research and a limited number of interviews with field experts. The list of countries includes Finland, France, Germany, Ireland, Italy, the Netherlands and Poland. A special focus was also placed on associations that represent specific stakeholders at EU level. As shown in Annex 1, 33 interviews were conducted, including seven with consumer associations, ten with manufacturer associations, six with retailer/repairer associations, four with environment associations and six with legal experts (see Annex 1 for further details).

The objective is to quantify each of these impacts based on an appraisal of all the information collected through desk research and interviews (see impact matrices on efficiency and effectiveness in Annexes 2 and 3). There are several reasons why the study did not provide accurate statistics on the costs and benefits of each option. First, given the scarcity and unavailability of quantitative data for a thorough impact assessment, few relevant statistics could be found and used for the purpose of the study. This scarcity is mainly due to the fact that the quantitative literature that assesses the role of consumer law in the development of a sustainable economy is so far rather limited.

As regards the consultation, the original objective was to collect statistics via the development of quantified impacts for each question, based on a scale from 1 (lowest likely impact) to 5

(highest likely impact), as shown in Annex 6. Nevertheless, some serious concerns regarding the robustness of the final results explain why these statistics have not been used in that study. First, the sample is rather small (33 stakeholders). Secondly, for several questions, a significant number of stakeholders did not have the possibility to provide a quantitative assessment. Thirdly, there was an overuse of the extreme ratings (1 or 5), as each group of stakeholders had very contrasting positions on the issues analysed. Whereas the reactions of retail and manufacturer associations to the possible introduction of a commercial guarantee for lifespan ranged from hostile to very hostile, consumer associations were rather supportive and the few environment associations interviewed were from supportive to very supportive.

The assessment of the different options in the present study is based on effectiveness and efficiency and an assessment of the coherence of the amendments with the legal framework of the consumer *acquis*, as well as the competences in view of the principles of subsidiarity and proportionality. The adopted methodology is in alignment with the impact assessment methodology and requirements as described in the Commission's 2015 Better Regulation Guidelines.<sup>12</sup>

The principles that are set out in the different amendments have been analysed and bundled (see Annexes 4 and 5) as policy options (see e.g. the different principles regarding the determination of the lifespan, the mandatory or optional character, the liable person and the concerned goods). Effectiveness relates to the extent to which the proposed options achieve the intended general, specific and operational objectives. Efficiency is defined as the overall impact of the proposed options on social welfare. It implies an evaluation of both the expected costs and the expected benefits of each option. Coherence refers to avoiding unnecessary overlaps, contradictions or uncertainties throughout the legal texts (internal coherence) and the legal framework of the consumer *acquis* (external coherence).

### **Policy options**

Based on the analyses of the amendments, eight policy options have been developed. First, under the Option zero, none of the assessed amendments would be introduced (see Table 1 in section 3). The analyses are then conducted on the impact assessment of old or recent legislation, the implementation of the two proposals on distance sales of goods and sales of goods with digital content (without the amendments assessed in the present study) and the impact of future technological/market development. The second option, the 'soft law' approach, is based on the same assumption as the Option zero and, in addition, includes non-legislative initiatives that could contribute to achieve the objectives of the amendments, including awareness campaigns to spur consumers to ask for lifespan guarantees.

The remaining options all imply legislative actions in relation to the implementation of the amendments. The core determination of these options is based on how "lifespan" will be determined (see Annexes 4 and 5) and on the mandatory/optional aspects of the supply of commercial lifespan guarantee. The final impact of the amendments will indeed primarily depend on how the determination of lifespan and related commercial guarantees will be regulated, implemented and enforced. The possibility to choose freely the duration of the commercial guarantee without a binding impact of the "normal lifespan" can be found in Amendments 199 and 384. Amendments 387 ("its minimum foreseeable lifespan") and 388

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<sup>12</sup> 2015 Better Regulation Guidelines, chapter 3: Guidelines on impact assessment ([http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap3\\_en.html](http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.html)).

("its minimum expected life") are unclear in that respect. Conversely, Amendments 198, 385, 386 and 635 refer to a "normal" lifespan or lifespan that can be reasonably expected.

Regarding the choice to provide a commercial guarantee, the possibility for the trader/manufacturer to explicitly refuse a commercial lifespan guarantee, and thus avoid the related liability and compliance costs, is foreseen in several Amendments (384, 387, 388 and 198). This free choice is not foreseen in Amendments 199, 385, 386 and 635, according to which the normal lifespan must be given and the trader/manufacturer will be liable if the lifespan is not met.

Within Option 2, the new legislation would imply that the guarantor chooses 1) whether or not he will grant a commercial guarantee for the lifespan of the products, and 2) if he does opt for such a guarantee statement, he is free to set forth the duration of the guaranteed lifespan in his own discretion. In case the guarantor decides not to provide a lifespan guarantee, this information has to be explicitly disclosed.

Option 3 is a legislative option with more profound impact. The guarantor is not entitled to choose a subjective duration of a lifespan but must guarantee the actual normal lifespan of the product as a product belonging to a particular category of products, or the lifespan that can be reasonably expected. The information obligation is reinforced because the statement of the guarantor can be examined by enforcement authorities in case of complaints.

Option 4 is a legislative option with profound regulatory impact since there is an obligation to provide lifespan information (in line with Option 3) and a commercial guarantee based on strict legal requirements (for example, based on the eco-design Directive). The underlying idea is that the normal lifespan of products must be safeguarded by specific regulations, beyond the contractual relationship between consumer and trader or manufacturer. For the products that are thus regulated, it is not the open notion of a 'normal lifespan' that must be guaranteed and that can be assessed by enforcement organisations, but a minimum or normal lifespan, as is set forth by binding product-specific standards. If this route would be followed, it might be preferable to use the eco-design Directive (EDD) as the principal instrument to form the legal basis for product-specific requirements.<sup>13</sup>

For each Option 2, 3 and 4, two sub-options have been defined (2a, 2b, 3a, 3b, 4a and 4b). For 2a, 3a and 4a, the obligations related to each general option would be imposed on the manufacturer, and the consumer would have a direct claim against the manufacturer (in line with Amendments 384, 385, 386, 388, 198, 199 and 635) and the liability of the retailer will be judged according to the normal rules. Or (sub-options 2b, 3b and 4b), the obligations of the related option would be imposed on the trader (retailer) and the consumer has a claim against the retailer, similar to the remedies currently provided under the legal guarantee in the CSD, or there is joint liability with the manufacturer. This hypothesis is foreseen in Am 387 only. The trader, in his turn, may have an action in redress against the manufacturer if that is provided under national law.

Also, for each of the general options, a variation can be found in the limitation of the relevant scope of products. The amendments refer to the sellers/producers of technical products (Am. 385, 386 and 387), energy-related or energy-consuming products (Am. 198, 199, 384, 388), durable products (Am. 385), or, in relation to the DCD, a technical good in which digital content or a digital service is embedded (Am. 635). The assessment through efficiency and

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<sup>13</sup> As proposed by Tonner, K. and Malcolm, R., "How an EU lifespan guarantee model could be implemented across the European Union", study for European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2017, throughout part 2.

effectiveness will give some examples to show the pros and cons of applying the new rules to different groups of products.

### **Effectiveness**

Under effectiveness, two specific policy objectives will be assessed: on the one hand, enhancing the cross-border exchange of products and on the other, enhancing sustainable production and consumption. The first specific objective relies on the removal of barriers for cross-border demand of products through increased consumer confidence, as well as the removal of barriers for cross-border supply of products through increased legal certainty on the side of traders (see impact matrix for effectiveness in Annex 2).

#### *Cross-border demand and supply*

Whereas consumers indicate that the price is the most important criterion for their purchase decisions, it is clear that their right to a *legal redress* in case of non-conformity is one of the top factors influencing their purchasing decisions.<sup>14</sup> About 42-46% of retailers (offline and online) state that the additional costs of compliance with fragmented consumer protection and contract law are important barriers to their cross-border sales development.<sup>15</sup> The fragmentation of consumer law due to the minimum harmonisation effect of the CSD may have an impact on both traders' and consumers' confidence alike.

Under the Zero Option (baseline scenario), there could be a moderate increase in general confidence to engage in cross-border sales, due to the full harmonisation under the OSD, probably more for traders than for consumers, under the condition that they are not negatively affected by possible national regulations regarding the commercial guarantee. Furthermore, consumer trust may be boosted if product-specific regulations would set lifespan requirements, even if the OSD would not be modified in that respect. Nevertheless, even though they may have more clarity on their rights regarding redress for product issues thanks to full harmonisation, consumers still do not have any real remedies after two years. For those with lifespan concerns, no reassurances are provided. As indicated above, consumers in certain Member States will lose their current protection beyond the two-year period. The evolution regarding smart products, furthermore, will demand a focus on ongoing conformity of products, rather than a correction of non-conformity established at the time of delivery of a product.

Within the soft law option (Option 1), initiatives might have limited impact overall on the development of the single market. In particular, the efficiency of the cross-border awareness campaign should be significantly dampened by the complexity of the rules related to legal guarantees and commercial guarantees.

Option 2 may provide more transparency on the guaranteed lifespan of products, and may boost the development of realistic lifespan guarantees for certain product groups if *competition* forces traders or manufacturers to do so. However, clarification is needed regarding the concrete implementation of this option, and it cannot be excluded that the content of the commercial guarantee must be partially regulated where absolute freedom of contracts regarding the modalities of the commercial guarantee, e.g. regarding conditions, remedies, charges and transferability to second-hand buyers, would not provide sufficient protection to consumers. Especially concerning smart products, a lifespan guarantee may

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<sup>14</sup> Manfredi, V., "Consumer sales: REFIT fitness check results", European Commission presentation to EP, 5 September 2016.

<sup>15</sup> Explanatory Memorandum for the Commission's OSD-proposal.

warrant a certain ongoing duration of the use of the product, involving, as the case may be, updates, connectivity and preventive maintenance. This is an advantage of the commercial guarantee under Options 2, 3 and 4. Overall, and depending on its implementation, this option may have a moderate effect on increased consumer trust through better awareness and transparency, whereas traders (manufacturers if applicable) may feel more confident because they can be held liable for up to what they have guaranteed and not more than that (although the caveat of stricter national rules regarding commercial guarantees must be made for this option as well; see Art. 15.4 of the OSD).

The advantage of Option 3, when compared to Option 2, is that it requires information about the real lifespan of a product, and thus would provide more valuable information than the voluntary choice of guarantee under Option 2. If executed correctly, this information would be more valuable for consumers' confidence than Option 2. However, the vagueness and difficulties in assessing the required lifespan may result in very diverse outcomes in the Member States and lack of enforcement. In that respect, it is regarded as ineffective for stimulating traders' or manufacturers' trust as well as consumers' trust. Based on information collected via the consultation and further desk research, Option 3 might be the least efficient to achieve the specific objective of single market. This assessment confirms the view of many stakeholders and experts that such an approach of lifespan might prove difficult and costly to implement and enforce.

Where Option 4 can be implemented, it may be regarded as effective for consumer protection and, more, consumer trust, also in cross-border purchasing situations. Clarity and harmonisation may have a strong effect. Manufacturers and traders will have compliance costs, but at least they will operate in a harmonised, level playing field and they are able to calculate their risks. Easier enforcement, together with consumer actions that are based on harmonised standards and not on uncertain or fragmented concepts, may result in effective progress. This route, however, would need a modification of the scope of the EDD (should the EDD be used for the technical standards) and the drafting of the product-specific standards as implementation measures may take considerable time.

#### *Sustainable consumption*

The second specific objective of sustainable consumption contains two operational objectives: the design of more sustainable products (push the market) and the purchase by consumers of more sustainable products (pull the market).

Under the Option zero, even if they are harmonised under the OSD, the current rules regarding consumer sales will not have an impact on sustainable consumption or design of durable products, because there is no incentive for manufacturers to take this aspect into consideration from that perspective. The current limitation of the legal guarantee for two years does not contain risks in the long run. On the consumer side, there seems to be a tendency to discard products before they stop working. As regards the soft law option, the taxation support for eco-friendly appliances or other behaviour that favours the circular economy could constitute an incentive to support sustainable consumption, and could contribute to close the gap between repair and replacement costs.

Within Option 2, the increased awareness of consumers may result in a stronger demand for durable products and respective commercial guarantees. However, in oligarchic markets, this could lead to short guarantees or the absence thereof. Furthermore, certain manufacturers or traders could choose to put cheap products on the market to target a large share of consumers

for whom the price is the decisive criterion for purchases. Competition in the market would be the main driver, not environmental concerns.

Although the amendments do not cover the question of remedies in-depth, it would be important to 'channel' the best type of remedies for each specific product group, meaning that the voluntary aspect of commercial guarantees should become stricter as far as remedies are concerned. For instance, old-fashioned products should be replaced if their energy consumption, CO<sub>2</sub> emission or other characteristics have a negative environmental effect.

This aspect seems easier to achieve under a regime of product-specific regulations such as in Option 4, or at least in combination with such a system. Regulations may force the manufacturer to design sustainable products, and on the other hand, could set forth the appropriate *remedies* as well as requirements that may favour repairs where necessary (e.g. through the availability of spare parts, software updates, etc.).

In the framework of sustainable production and consumption, there is an advantage to Option 3 in that a 'normal' lifespan must be indicated, and thus the consumer can really take requirements of durability into consideration, whereas Option 2 is merely based on choice. However, the vague rule leaves much insecurity, fragmented implementation and enforcement issues (*supra*), and is based on an instrument that is deemed not suitable for the regulatory aspect that is expected of it. Consumer claims will only be important for the individual consumers who dare to file claims based on vague requirements, but they will not result in clear, harmonised standards.

Finally, the urge to develop sustainable products will all the more arise if manufacturers risk their own liability, and the cost cannot be pushed to the traders of the network. This may especially be true if costly repairs are risked. In that respect, Options 2a, 3a and 4a should be more effective. Nevertheless, Options 2b, 3b and 4b offer more possibilities to consumers where they may have claims in joint liability.

## **Efficiency**

The analyses of benefits in the context of efficiency places the focus on the reinforcement of healthy competition, the benefits of consumer, benefits in specific fields, the development of pan-European products and the enhancement of legal certainty (see the impact matrix for efficiency in Annex 3).

The assumption is that competition on the intrinsic qualities of products rather than on attached financial services such as extended guarantees is healthier and more beneficial for the economy in general. The mindset of the amendments, as analysed in legislative Options 2, 3 and 4, is that commercial guarantees should be provided free of charge, resulting in the disappearance of competition primarily on attached guarantees as financial services (which can be the case with business models that are for instance based on the sale of cheap products as a 'loss leader'). However, competition on products will be directly shaped primarily by Option 4, provided that the applicable standards are of high quality, whereas the notions of 'reasonable' and 'normal' lifespan in Option 3 should result in misunderstandings on the part of both consumers and producers, and Option 2 does not provide sufficient mechanisms to directly reinforce competition on the quality of the products.

Risk-averse consumers who were purchasing a product without defects and a commercial guarantee for lifespan should benefit more from Options 2, 3 and 4 than consumers with low-risk aversion who were not purchasing commercial guarantees. Should free commercial lifespan guarantees be generalised in Options 3 and 4, this benefit will be reinforced with

these options. As regards defective products, consumers who were not purchasing commercial lifespan guarantees should be the big winners of Options 2, 3 and 4. This is especially true with Options 2b, 3b and 4b, where the joint liability of sellers and manufacturers imply that consumers could directly notify their claims to their main contact point, the seller.

Given its high challenge related to compliance, Option 4 should have the largest positive impact on investment in research and development. Also, Options 3 and 4 should greatly benefit consumers in sectors where the demand for long lifespan is high (this should be *a priori* the case for expensive goods that are less shaped by fashion/latest taste/trends: home appliances, etc.).

The soft-law approach should be weak regarding the development of pan-European products, as none of the initiatives are constraining. Furthermore, mandatory information disclosure on practices in terms of guarantee and lifespan should reinforce cross-border comparability of products (Options 2, 3 and 4). However, whereas European standards enhanced with Option 4 should greatly contribute to the emergence of European products, the high legal uncertainty resulting from Option 3 might be critical for both suppliers and consumers. Options 2b, 3b and 4b are much preferred in a cross-border context, as many manufacturers do not have the necessary interface to deal directly with non-resident consumers (especially small producers).

Legal certainty remains high with Option 2, as the lifespan and related conditions of usage, etc. are defined solely by the supplier. For Option 4, the legal certainty should be even reinforced, as for all products covered, the legal reference is the detailed standards that in theory apply to all manufacturers when they are defining their lifespan. Conversely, 3, as it has been designed (mostly on the basis of Amendments 198, 385, 386 and 635), should offer the lowest level of legal certainty of all options: if any dispute should arise, the legal authority should in principle have much more freedom than in other options on how to decide.

The analysed costs concern direct costs, enforcement costs, indirect costs on compliance, indirect costs related to sub-optimal decision of consumers and indirect cost related to reduced efficiency.

Direct costs on producers (compliance costs, etc.) should be highest with Option 4, resulting from the implementation of the technical standards, and lowest with the soft law approach. As regards learning cost of consumers, the soft-law approach should reinforce the ability of consumers to understand the additional information, but the non-constraining dimension of this approach makes it hypothetical. Added information under Option 2 should help consumers better understand the practices of providers, whereas the likely ambiguities surrounding the concepts of 'normality' or 'average' with Option 3 should make the learning cost relatively high for consumers.

Surveillance costs should be highest for Option 3, as a result of the difficulty to set a benchmark. Similarly, following the notification of a claim, assessing if a specific usage is the core reason behind the failure of a product should be most expensive with Option 3.

Indirect compliance costs occur when costs generated by compliance with legal rules are passed on downstream in the form of higher prices. For Option 2, these costs should be proportionate to the share of suppliers that were providing expensive commercial guarantees. The increase in prices should also depend on the amount of costs related to the review of internal processes for determination of lifespan (highest for Option 4) and on the number of new claims (highest for Options 3b and 4b, especially if commercial guarantees for lifespan are mandatory).

Some costs could be generated should consumers rely on a second-best, socially optimal course of action. The more the new rules will result in higher prices (limited for Options 1 and 2, significant for Option 3 and likely very significant for Option 4), the more consumers might be encouraged to purchase cheap products from outside the EU, which are likely to be less compliant with both the existing (safety, etc.) and new rules. It is also likely that for some groups of products, consumers might not notify their claims if no quick solution is available (such as replacement): these costs could be higher with Options 2a, 3a and 4a, owing to the difficulty to notify claims.

Another type of indirect costs concerns remedies. Although the repair of the product is generally analysed as the option with the lowest negative impact on environment, the 'cost gap' recorded between repair and replacement has kept on decreasing in the last decade, owing to continuous contraction in repair jobs, low availability of spare parts, increasingly impatient consumers and marketing strategies. If the generalisation of guarantees for lifespan leads to more replacements in some sectors because the related repair industry cannot cope with possible increasing demand from consumers or simply because the majority of consumers systematically opt for replacement, then the cumulative impact on the environment might even prove to be negative. This depends highly on what is the existing preference in each sector. No matter which option is chosen, the absence of focus on remedies remains one of the main limitations of the amendments.

Finally, should the guarantee for lifespan be generalised, Options 3 and 4 could distort further monopoly or monopsony situations between traders, manufacturers or repairers. For instance, in case of a monopoly situation with one large manufacturer and many small traders, Options 2a, 3a and 4a could somehow protect the small traders, albeit to the detriment of consumers. Should the trader be much bigger than manufacturers (monopsony), Options 2b, 3b and 4b should not be sufficient to protect manufacturers, given that large traders are likely to obtain disproportionate advantages through the use of redress mechanisms.

### **Preferred options**

Overall, the two preferred options are Options 2 and 4. The former is certainly less ambitious than the latter and will result in less benefits overall, but it will also involve less costs and, contrary to Option 4, could be implemented within a relatively short period of time. Overall, to achieve the specific objectives of enhancing sustainable consumption and cross-border exchanges of sustainable products, Option 4 should definitely be the most adequate option. Within Option 3, the ambivalence related to the notions of 'reasonable' or 'normal' lifespan should overall result in more costs than benefits.

As regards sub-options, given that the manufacturer is responsible for the design of the product, a liability solely on the manufacturer, as shown in Options 2a and 4a, should *a priori* be a preferred option. Within this framework, direct claims can also avoid the trader being sandwiched between consumers and manufacturers. Nevertheless, a significant share of manufacturers, particularly SMEs, do not have an interface to directly interact with consumers and would therefore face significant difficulties to organise such a process, especially on a cross-border basis. As the trader remains the main contact point for consumers, a joint liability framework (Options 2b and 4b) should also be an interesting approach, provided that adequate mechanisms are in place between the trader and the manufacturer.



## 1. Context and problem definition

### 1.1 Context

The European Commission's proposal for a Directive on online and other distance sales of goods (COM(2015) 635)<sup>16</sup> (OSD) amendments, and, its extension, may replace<sup>17</sup> the consumer sales and guarantee Directive (CSD) 1999/44.<sup>18</sup> The OSD provides for a "legal guarantee" for the conformity of products with the purchase contract, implying that the trader, a final seller selling a product to a consumer, is liable for the non-conformity of the product with the purchase contract. Conformity is tested against, in the first place, the *specific agreement* that was made in view of the presented characteristics of the product (Art. 4), and in second place, the more objective characteristics that are considered normal for goods of the same kind and that can be expected by the consumer (Art. 5). The right of the consumer to claim a remedy based on non-conformity is subject to two time limits provided in Art. 14 OSD: 1) the non-conformity must become apparent within two years as from the relevant time for establishing conformity, normally the time of the delivery or the installation of the product (Art. 14, 1<sup>st</sup> sentence combined with Art. 8); and 2) if applicable national legislation subjects the claim of a consumer to a limitation period, then this period cannot be shorter than two years from the time of the delivery or installation (Art. 14, 2<sup>nd</sup> sentence).

In a recent judgement,<sup>19</sup> under the application of the CSD, the Court of Justice of the European Union clarified the distinction between both time limits, and called the first time limit a "guarantee period" or "liability period", limiting the duration of traders' liability, and the second a "limitation period", limiting consumers' rights to enter claims, which remains essentially governed by national law.

The legal liability of the trader, often called a "legal guarantee" although the wording is not applied in the provisions of the OSD, covers the **non-conformity** of a product at the time of the delivery (Art. 8). If the non-conformity becomes *apparent* within a period of two year,<sup>20</sup> the non-conformity is *presumed* to have existed at the time of delivery, at least "in embryonic form".<sup>21</sup> The consumer must prove that the lack of conformity exists and that it became apparent within the period of two years of delivery, but not that its *cause or origin* is attributable to the trader.<sup>22</sup> The trader carries the burden of proof that the alleged non-conformity would *not* have existed at the time of delivery (e.g. that non-functioning must have been caused by circumstances after delivery, such as an accident or incorrect use of the product). This period during which the burden of proof regarding the non-existence of the cause of the non-conformity at the time of delivery is on the trader, is the period of "*reversal of*

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<sup>16</sup> Commission's 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 (COM (2015) 635 final, 2015/0288).

<sup>17</sup> If the co-legislators decide to extend the scope of the OSD to offline sales.

<sup>18</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>19</sup> CJEU, C-133/16, 13 July 2017, Ferenschild ([www.curia.eu](http://www.curia.eu)).

<sup>20</sup> This "presumption period" is currently six months under the CSD, but is to be extended by the OSD proposal to two years (and thus equal to the length of the legal guarantee period).

<sup>21</sup> CJEU, C-497/13, 4 June 2015, Faber, rec. 72 ([www.curia.eu](http://www.curia.eu)).

<sup>22</sup> CJEU, C-497/13, 4 June 2015, Faber, rec. 70-71 ([www.curia.eu](http://www.curia.eu)).

*the burden of proof*<sup>23</sup>, which used to be six months under the CSD but is extended to two years in the OSD proposal, the same duration as the period of the legal guarantee.

Thus, these rules imply that a consumer is entitled to invoke a non-conformity that appears after several months and up to two years, after the delivery of the good, and that the non-conformity is presumed to have existed at the time of delivery unless the trader proves otherwise.<sup>23</sup>

It is accepted in legal literature that a certain durability, or fitness for the purpose of a good during a certain period of time (the expected or normal **lifespan**) can be part of the characteristics that a consumer may reasonably expect, and thus an exceptionally short lifespan may reveal the unsuitability of a good for the use to which goods of the same type are usually required.<sup>24</sup> This may, depending on the circumstances of the case, especially pre-contractual information that was given, be regarded as a lack of conformity and may then lead to the remedies provided by law,<sup>25</sup> if such short lifespan is apparent within the liability period of two years. In this light, it is important to note that the consumer rights Directive 2011/83 (CRD),<sup>26</sup> which requires certain pre-contractual information regarding the characteristics of sold goods (Arts. 5, 1a and. 6,1 a), does not require explicitly that pre-contractual information would be given regarding the lifespan of the product.

Even if a lack of lifespan can be regarded as a non-conformity if a longer lifespan could have been expected, it is important to understand, however, that the legal guarantee period is **not a lifespan or durability guarantee**: it does not require that all goods must have a lifespan of at least two years.<sup>27</sup> If a good breaks down after one year and the consumer claims that it should have had a lifespan of two years, he must still demonstrate that his expectation was correct, given the terms of the contract and/or the 'normal' objective characteristics. If that is accepted, the cause of the early non-functioning will be presumed to have existed as an inherent issue of the product at the time of delivery until the trader proves otherwise.

The consumer's right to claim a remedy for an alleged short life of a purchased product is limited, whereas the non-conformity must appear within a period of two years after delivery. Under the CSD, this rule was a rule of minimum harmonisation, and the national law of several Member States provided a longer period of the legal guarantee.<sup>28</sup> Due to the provided full harmonisation of the OSD, consumers will not be entitled to claim remedies for durability issues beyond the harmonised two-year period, and thus consumer protection will decrease in these Member States.

The period during which the *burden of proof* regarding the existence or non-existence of the non-conformity is borne by the trader has been extended from six months to two years in the

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<sup>23</sup> The *limitation period* of the claim of the consumer is governed by national law, but cannot be shorter than the liability period of two years. Theoretically it can have a length of several years (Art. 14, 2nd sentence OSD).

<sup>24</sup> Bianca, M. and Grundmann, S., *EU Sales Directive*, Intersentia, 2002, p. 158; Tonner, K. and Malcolm, R., "How an EU lifespan guarantee model could be implemented across the European Union", study for European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, 2017, p. 18.

<sup>25</sup> The remedies are provided in a hierarchical order in the OSD (Art. 9 et seq.), with an emphasis on repair and replacement where feasible.

<sup>26</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

<sup>27</sup> Smits, J., "The new proposal for harmonised rules for the online sales of tangible goods: conformity, lack of conformity and remedies", study for European Parliament Policy Department on Citizens' Rights and Constitutional Affairs, 2016, p. 11.

<sup>28</sup> United Kingdom and Ireland: six years under Common law (but five years in Scotland), Sweden: three years; the entire expected lifespan of the product in the Netherlands and Finland.

OSD proposal. As such, it will be easier for consumers to claim a non-conformity during the entire two-year liability period. Nevertheless, this limited liability period during which a non-conformity must appear, would still provide insufficient protection for consumers regarding the lifespan of more durable products, particularly household appliances and consumer electronic products that normally should have a lifespan of three to four years or longer. Recital 23 of the OSD proposal acknowledges that ensuring longer durability of consumer goods is important for achieving more sustainable consumption patterns and a circular economy. However, the Commission stated that for these purposes, product specific Union legislation is the most appropriate approach to introduce durability and other product-related requirements in relation to specific types or groups of products, using adapted criteria for this purpose. The OSD should only be complementary to product-specific legislation.

## 1.2 The issue of durability

In recent years, increasing concerns have been expressed by several organisations and literature regarding an alleged short lifespan of products. Sometimes, even a strategy of 'programmed death' or 'planned obsolescence' of certain products has been suspected.<sup>29</sup>

Some organisations advocated that the expected lifespan of a product should be taken into consideration when determining the consumers' right to remedy for the lack of conformity of a more durable good. Some advocated on behalf of a general extension of the period of the legal guarantee,<sup>30</sup> but, in general, such solution was not defended because it would seem inefficient to hold all traders of all products liable during three years or more. Research indicates that for 96% of recent cases with defective goods, the consumers discovered the defect during the first two years after purchase; in countries currently applying longer legal guarantee periods, the percentage of defects reported to have appeared later than two years after purchase was similarly small (from 2% in Sweden to 7% in Finland).<sup>31</sup> Thus, a general extension of the trader's liability period<sup>32</sup> with elevated compliance and insurance costs was deemed not feasible. The normal lifespan of a good varies from one good to another, and thus the period during which the trader may be held liable for any lack of conformity of the goods should therefore vary accordingly.

In a study searching for a possible solution,<sup>33</sup> Tonner and Malcolm concluded that a "lifespan guarantee" could not define on its own the lifespan of specific products and suggested that the gap could be filled though implementing regulations based on an amended ecodesign Directive 2009/125 ("EDD").<sup>34</sup> The EDD is a framework Directive enabling product-specific legislation for the design and production of product categories that are currently within their implementation phase and which focuses on products with energy consumption. It could be

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<sup>29</sup> See Montalvo, C., Peck, D., Rietveld, E., "A longer lifetime for products: benefits for consumers and companies", for European Parliament Policy Department for Economic and Scientific Policies, study for IMCO Committee, 2016, p. 61 et seq. (criticising the wording).

<sup>30</sup> See e.g. BEUC, "Durable goods: more sustainable products, better consumer rights", 2015, p. 12.

<sup>31</sup> Manfredi, V., "Consumer sales: REFIT fitness check results", European Commission presentation to EP 5 September 2016.

<sup>32</sup> Under the system of the legal guarantee, the trader (final seller) is liable, not the manufacturer of the goods.

<sup>33</sup> Tonner, K. and Malcolm, R., "How an EU lifespan guarantee model could be implemented across the European Union", op. cit., 2017.

<sup>34</sup> Directive 2009/125/EC of 21 October 2009.

broadened, however, to take into account other relevant product groups and other environmentally-friendly criteria for production into consideration.<sup>35</sup>

Nevertheless, there will remain a wide field of product groups for which a lifespan will not be defined by a regulation. To cover that field, the study recommends an obligation for a manufacturer to provide a commercial guarantee, in which he has to indicate the minimum lifespan of his product.

### 1.3 The commercial guarantee

The **commercial guarantee**, as a general concept, is hardly regulated by the CSD and the OSD proposal. According to the definition of Article 2g of the OSD proposal, “commercial guarantee” means any undertaking by the trader or manufacturer (the **guarantor**) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract.

Under the current legislation,<sup>36</sup> the commercial guarantee is merely a **voluntary** statement of a guarantor, setting out the warranted characteristics of the good, the remedies if these are not fulfilled, and the conditions of the guarantee. Much of the content is regulated by the terms of the guarantee itself. Commercial guarantees come with many variations. A commercial guarantee can limit its scope to a particular notion of material defect or non-conformity as described in the guarantee; it can even apply to certain components. It can provide an additional benefit in comparison to the equal guarantee where it clarifies specific forms of remedies, or a longer guarantee period, or other features. A broad and general kind of commercial guarantee is a **guarantee of good functioning**.<sup>37</sup>

A **lifespan guarantee** is essentially a guarantee of good functioning during an indicated period of time. The guaranteed correct functioning, fitness for purpose and performance of a product must be fulfilled during the timeframe indicated in the guarantee. If the consumer claims a shortcoming of the product in breach of the guarantee, he is not required to prove that a non-conformity was present at the time of the delivery of the product. Depending on the wording of a guarantee, the guarantee may even include obligations of the guarantor to carry out preventive maintenance and/or to keep spare parts available during the indicated timeframe. An aspect of *continuity* completes the legal notion of conformity, as a static notion placed at the time of delivery. On the other hand, circumstances interfering after the delivery or installation of a product, such as incorrect use, disrespect of certain conditions (temperature), irregular maintenance etc. can be set forth in the guarantee as exclusion

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<sup>35</sup> See also Montalvo, C., Peck, D., Rietveld, E, “A longer lifetime for products: Benefits for consumers and companies”, Brussels, 2016; European Commission Communication: Ecodesign Working Plan 2016-2019 (European Commission, Communication “Ecodesign Working Plan” COM(2016) 773 final, Brussels, 30.11.2016) and the EU Action Plan on a Circular Economy (European Commission, Communication Closing the loop - An EU action plan for the Circular Economy COM(2015) 614/2 adopted on 2.12.2015).

<sup>36</sup> See for comprehensive overviews: Wiewiorowska, A., “Consumer sales guarantees in the European Union”, Dissertation, 2011; ECC-Net, “Commercial warranties, are they worth the money? Legal guarantees and commercial warranties on consumer goods in the EU, Iceland and Norway”.

<sup>37</sup> See Wiewiorowska, op. cit., p. 171.

grounds, and the guarantor may have to prove such liberating circumstances in a manner comparable to the burden of proof of the trader under the legal guarantee system.

The European legal framework does not pay much attention to the content of such guarantees as these are regarded as an *additional* protection beyond the legal minimum rights of consumers.<sup>38</sup> They are also regarded as an exponent of **contractual freedom** between the guarantor and the consumer, based on the consumer's informed consent, but largely influenced by the business model and the branding policy of manufacturers or traders, in a more or less competitive market. The aspect of **competition** has always been emphasised.<sup>39</sup>

The hierarchical **remedy** system provided under the legal guarantee<sup>40</sup> is not applicable. Many types of commercial guarantees set forth limited remedies, in order to protect the guarantor. A commercial guarantee may e.g. provide the replacement of a non-functioning product as a sole remedy and depending on the circumstances, such replacement may come cheaper to the guarantor than repair. On the other hand, a commercial guarantee cannot affect the legal rights of the consumer. If an issue under the guarantee can be considered a non-conformity under the legal guarantee, it can be argued that the consumer has the right to opt the legal remedies, although it must be said that the co-existence of a legal and commercial guarantee is a difficult matter.<sup>41</sup> In order to avoid misleading of consumers, the OSD proposal requires **transparency** obligations in Art. 15. It is stated that the commercial guarantee shall be *binding* on the guarantor, whether the guarantee is laid down in a guarantee statement, advertising or other pre-contractual information. Furthermore, a guarantee statement must be made available on a durable medium and drafted in plain, intelligible language. It must include a clear statement that the OSD provides *legal rights* for the consumer, which are not affected by the commercial guarantee. It must include: the terms of the commercial guarantee that go beyond the legal rights of the consumer, information about the duration, transferability, territorial scope and existence of any charges which the consumer might incur in order to benefit from the commercial guarantee, the name and address of the guarantor and, if different from the guarantor, the person against whom any claim is to be made and the procedure by which the claim is to be made (Art. 16, 2 b OSD). Under the CSD, commercial guarantees were required to be *free of charge* in order to fall under the CSD, but that requirement is no longer set forth in the OSD.

Due to contractual freedom,<sup>42</sup> the *territorial scope* can be set freely by the guarantor (although competition law may interfere in this respect), that the consumer may have to pay charges in order to benefit from the guarantee, that the *transfer* of the guarantee to second-hand buyers can be governed by the terms of the guarantee, that certain *conditions* such as *registration* can be required, the *exclusions* can be set forth (such as incorrect maintenance or use of the product) etc.. Furthermore, the OSD proposal states in Art. 15.4: the rules regarding commercial guarantees are not to be regarded as rules of full harmonisation; the national legislators may have additional rules that fill in legal gaps, as long as the minimum rules are respected. These requirements are softly sanctioned by Art. 15.3, stating that if the formal requirements are not fulfilled, the guarantee shall nonetheless apply.

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<sup>38</sup> The OSD refers to an undertaking in addition to the legal obligation (definition in Art. 2 g).

<sup>39</sup> See e.g. Bianca and Grundmann (eds.), op. cit., p. 221; Wiewiorowska, op. cit., p. 11 and 14.

<sup>40</sup> Art. 9 et seq. OSD.

<sup>41</sup> Wiewiorowska, op. cit., pp. 132-139. Indeed, it can be argued that a consumer who has chosen to claim on the basis of a commercial guarantee, would no longer be entitled to invoke the legal guarantee, but this question is very complicated and may depend on the concrete drafting of the commercial guarantee.

<sup>42</sup> The legal framework of Unfair Terms in Consumer Contracts, and the Consumer Rights Directive still apply.

## 1.4 The digital content Directive

Whereas the amendments are more obviously linked to the OSD, the one amendment in relation to the **DCD** requires explanation. The purpose of the DCD is to introduce a more harmonised framework of EU contract law rules on B2C contracts for the supply of digital content and digital services, in particular rules on the consumer remedies for cases of lack of conformity or lack of supply of digital content or digital services. The legal framework of the Member States in this field is very fragmented, as only some Member States have introduced specific legislation or are on the brink of such introduction to fill the existing gap.<sup>43</sup> Like the OSD, the proposed directive aims at a high level of consumer protection and increased legal certainty with a view to building greater confidence amongst European consumers when buying cross-border and with a view to making it easier for businesses, to sell EU-wide.

The proposal is under its current wording applicable to the supply of digital content as data or media (e.g. digital movies or audio, data, information, software), provided as a product on a carrier (e.g. DVD) or through *services* (e.g. downloadable or streaming content). Furthermore, the directive may apply to some categories of products that contain *embedded digital content*. The exact delineation of this category of products has been difficult in practice, since many 'basic' products contain embedded digital content in the form of software necessary for their mere operation. On the other hand, there are more and more "smart" products or "connected" products, that contain embedded digital content for their operation, but on the other hand also rely on connections to third parties, thus enabling the provision and the updating of necessary data (e.g. apps, navigation systems, data provided through OTT equipment, smartTV, consoles), the communication of user data to monitor the correct functioning or correct use of the product (more and more smart appliances, cars), to enable the taking of control over a product where necessary, etc. Such products are dependent on the continuous communication of external data, often through different providers.

The correct functioning of such products, in accordance with the legitimate expectations of consumers, is not so much a matter of conformity at the time of the delivery of the product (although issues such as interoperability may exist at that time), which is the classical vision under the CSD and OSD, but even more an issue of *continuous* maintenance and support, even if provided by different players (e.g. software developers, data providers, storage providers, connectivity providers and monitors). A part of the literature has proposed to include this evolution in the framework of the OSD,<sup>44</sup> involving many changes to the draft (e.g. the notion of conformity, burden of proof, and other principles).

In this study, we assume as a working hypothesis that products containing embedded digital content necessary for their mere operation, fall within the scope of the OSD, whereas "smart" products would fall under the scope of the DCD insofar as the conformity requirement of supplied digital content is concerned (not hardware defects). In this respect, Amendment 635 aims for the introduction of a guarantee that is labelled as a commercial lifespan guarantee, although the notion of a commercial guarantee is not defined nor regulated in the current DCD proposal.

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<sup>43</sup> Currently the United Kingdom, Ireland and the Netherlands.

<sup>44</sup> Wendehorst, C., "Sale of goods and supply of digital content- two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age", study for European Parliament Policy Department on Citizens' Rights and Constitutional Affairs, 2016.

## 1.5 Assessment of the Amendments

The impact assessment study entails an assessment of certain proposed substantial amendments currently discussed by the European Parliament that aim at introducing a commercial lifespan guarantee in the OSD and DCD ("the Amendments"). In this study, the OSD and (presumably) future replaced CSD are deemed to include products with digital content in the meaning of embedded software.<sup>45</sup>

According to the **Amendments**, the commercial guarantee would no longer be regarded as a merely *voluntary* or additional legal instrument. It is regarded as **mandatory instrument**, or at least according to some of the Amendments, if the manufacturer or trader would opt not to provide such a guarantee, he would have an obligation to disclose explicitly that he does not provide such a guarantee, and thus there would at least be a mandatory negative declaration. Thus, the legal instrument that until present has only been regarded as an exponent of contractual freedom, would have a different function, and would have to provide more consumer protection by creating awareness about durability, and/or inform the consumer about guaranteed lifespan of products. The guarantor could be the manufacturer or the trader of the relevant product. Some stakeholders tried to make a link between such guarantee and product-specific regulations of lifespan in the framework of an extended ecodesign Directive.

The amendments in their entirety and their detailed analyses can be found in Annexes 4 and 5.

## 1.6 The policy problem

The impact assessment takes as a baseline the OSD proposal, *by assumption extended to apply to online and offline products*, without the Amendments that are to be assessed, introducing a commercial guarantee for the lifespan of products, and compares the key provisions of the Amendments against the objectives of the legislation: 1) **enhancing the cross-border exchange of products** through increased consumer confidence and increased confidence of traders regarding doing online cross-border business with consumers and 2) **enhancing sustainable production and consumption**.

### 1.6.1 Enhancing cross-border exchange of products

The Commission stated that the general objective of the OSD is to contribute to faster growth of opportunities offered by creating a true Digital Single Market to the benefit of both consumers and businesses. By eliminating the key contract law-related barriers hindering cross-border trade, the rules of the OSD proposal will reduce the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law. A similar concern exists in relation to the DCD, where national legislation is in general not yet developed.

Research indicates that on the supply side the volume of cross-border online sales is much lower than for online domestic sales.<sup>46</sup> Similarly, only a fraction of consumers has purchased products online from another EU country, whereas almost 50% of consumers purchase online

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<sup>45</sup> Council of the European Union, "Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) - General approach", 1 June 2017 (<http://data.consilium.europa.eu/doc/document/ST-9901-2017-INIT/en/pdf>).

<sup>46</sup> Explanatory Memorandum for the Commission's OSD-proposal.

domestically.<sup>47</sup> Thus, businesses and consumers are too often confined to their domestic markets.

Whereas *consumers* indicate that the price of a product is the most important criterion for their purchase decisions, it is clear that their right to a legal redress in case of non-conformity of a purchased product is one of the top factors influencing their purchasing decisions, regardless of the purchasing channel or whether it is a domestic or cross-border transaction.<sup>48</sup> About 42% to 46% of *retailers* (offline and online) state that the additional costs of compliance with fragmented consumer protection and contract laws are important barriers to their cross-border sales development.<sup>49</sup> Thus, the fragmentation of consumer law of the Member States due to the minimum harmonisation effect of the CSD may have an impact on both traders' and consumers' confidence alike.

After entry into force of the OSD and DCD proposals, and a presumed application of the rules to offline products as well, the *principle of full harmonisation* of the legal guarantee period of two years would decrease the level of consumer protection in the Member States where currently a longer legal guarantee period can be applied.<sup>50</sup> According to the business sector and the legal experts, the lack of harmonised consumer legislation in general may have a negative impact on the decision of small traders to venture into cross-border online selling, and such traders would feel more comfortable if their risk exposure in cross-border sales would be clearer, taking into consideration that the legal protection of the consumer's home state may apply to the purchase if the trader directs her business to that state (which is usually indeed the case).<sup>51</sup> The harmonisation of the rights of consumers regarding non-conformity of goods without the Amendments regarding commercial guarantees (the baseline scenario for the study) can be considered comforting for traders, because there is no longer a legal risk of compliance costs in relation to a possible liability after the harmonised two-year time limit. This general limitation will reduce legal assessment costs when targeting other countries and may reduce financial reserves for compliance costs in case of non-conformity. However, according to Article 15.4 OSD-proposal, the *Member States may lay down additional rules on commercial guarantees* insofar as those rules do not reduce the protection set out in Article 15. Thus, national laws may set specific requirements for commercial guarantees, and this would again increase the legal uncertainty of traders offering commercial guarantees when dealing with non-resident consumers. Since lifespan guarantees would be provided by commercial guarantees as a competitive issue, part of a business model and branding policy, beyond the harmonised legal guarantee period of two years, this uncertainty may have a negative effect on the decision of traders to provide commercial lifespan guarantees, even in a harmonised legal environment.

On the other hand, it is unclear whether *consumers* are really bothered by legal uncertainty regarding their protection in the field of lifespan of purchased products, and whether such uncertainty would have an impact on their decision to make online cross-border purchases.

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<sup>47</sup> Ibid.

<sup>48</sup> V. Manfredi, op. cit.

<sup>49</sup> V. Manfredi, op. cit.

<sup>50</sup> Longer legal guarantee periods exist in Sweden (three years), United Kingdom and Ireland (six years, but five years in Scotland), and during the normal lifespan of the relevant product in The Netherlands and Finland. However, this could in certain cases be balanced through the extension of the period where the presumption of the intrinsic non-conformity can be applied (resulting in the reversal of the burden of proof for a duration of two years instead of the current six-month period).

<sup>51</sup> This is a consequence of Art. 6 Rome I Regulation 593/2008 (indicating the law applicable to consumer contracts).



Research indicates that many consumers purchase on the basis of the criterion of the product's price only or mainly.<sup>52</sup> Many tend to buy cheap products, even from traders outside the EU. It has been demonstrated that 1/3 of products are discarded by consumers while these are still in working order.<sup>53</sup>

The criterion of lifespan must be accepted as having a moderate impact on the purchase of products by some consumers and for certain categories of products. On the other hand, many consumers indicate that their *confidence in obtaining redress* for non-conforming products in general is an important criterion for their purchasing decisions,<sup>54</sup> and for those consumers and/or product groups for whom durability is indeed an important factor, full harmonisation may in general provide more overall certainty (if they are sufficiently educated in this field). Specifically, regarding durability, however, the impact of the OSD (minus the Amendments) is a give-and-take: in five countries, the full harmonisation will reduce the current consumers' remedies for durability issues, while on the other hand in all countries the advantageous period for reversal of the burden of proof is extended from six months to two years. However, all in all, consumers will have to rely on voluntary commercial guarantees for durability.

### 1.6.2 *Enhancing sustainable consumption and production*

The current rules regarding consumer sales, even harmonised under the OSD, will not have an impact on sustainable consumption or the design of durable products, because there is no incentive for manufacturers to take this aspect into consideration from that perspective. The restricted period of the legal guarantee up to two years limits the risks in the long run. In the absence of sanctions under consumer law or civil law, the driver for more sustainable production would have to come from product-specific **regulations** such as the EDD. On the consumer side, there seems to be an important tendency to discard products before they stop working.<sup>55</sup> Although the behaviour of consumers will vary according to different categories of products, involving different levels of investment, there is in general a behaviour problem that may be caused by a relative low replacement cost for goods, whereas the cost of repairs is often found disproportionate, and the availability of spare parts and qualified repair shops is not always obvious.<sup>56</sup> Even if claims for short lifespan can be stimulated due to the extension of the period where the consumer must not prove the inherent cause of the non-conformity in the OSD proposal, the full harmonisation will result in less claims in countries where claims are currently allowed after two years.

The study will assess whether mandatory or voluntary commercial guarantees for the lifespan of products may have a positive effect on the production side or the consumption side in the framework of a sustainable and circular economy. It will also explore whether some classic characteristics of the instrument should be modified in order to introduce a more effective or efficient instrument, such as the *voluntary* nature and the contractual freedom to set forth the remedy, as a purely contractual matter. In other words, should the contractual commercial guarantee lose its pure contractual nature as an additional protection for the consumer, and

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<sup>52</sup> "Non-paper on data relevant for the coherence between contract rules for goods purchased face-to-face and those proposed for distance contracts", Ref. Ares (2016)4158608, p. 2 and Annex, Tables I.3 and 4.

<sup>53</sup> UmweltBundesamt, "Einfluss der Nutzungsdauer von Produkten auf ihre Umweltwirkung: Schaffung einer Informationsgrundlage und Entwicklung von Strategien gegen Obsoleszenz", 2015, pp. 15 and 17.

<sup>54</sup> *Non paper on data relevant for the coherence between contract rules for goods purchased face-to-face and those proposed for distance contracts*, Ref. Ares (2016)4158608, p. 2 and Annex, Tables I.3 and 4.

<sup>55</sup> UmweltBundesamt, op. cit.

<sup>56</sup> This is emphasised by industry organisations, but also by the German UmweltBundesamt in the cited study; see also e.g. Montalvo et al., op. cit., p. 73.

should it receive an extra function as an instrument supporting an environmental policy? Furthermore, the policy should take into account the different roles of manufacturers and traders in view of the objectives.

## 2. Methodology

The objective of the study is to assess the implementation, application and effects of the introduction of Amendments 384, 385, 386, 387, 388, 150, 151, 153, 192, 198 and 199 in the proposal on certain aspects concerning contracts for the online and other distance sales of goods (OSD), and Amendment 635 in the proposal on certain aspects concerning contracts for the supply of digital content (CDC). The adopted methodology to achieve this objective is in alignment with the impact assessment methodology and requirements as described in the Commission's 2015 Better Regulation Guidelines (in particular chapters 4, 5 and 6 thereof dedicated to impact assessment)<sup>57</sup> and corresponding parts of the Toolbox.<sup>58</sup> This implies that the study adopted the following analytical steps: defining the problem (see section 1.2 above), setting policy objectives, identifying available policy options by challenging each amendment and comparing benefits and costs of these policy options.

This evaluation will be conducted by assessing the extent to which the introduction of the amendments can, on the one hand, contribute to enhance the single market for goods and, on the other, boost sustainable consumption. Eight policy options have been identified, especially by placing the focus on how a "guaranteed" lifespan should be determined and how traders and manufacturers should share liability. The study analyses the impact of the amendments and related policy options on businesses (SMEs versus large companies; manufacturers versus traders), consumer protection (consumers have been segmented when possible) and environment and sustainable consumption. The objective is to quantify each of these impacts.

The collection of data and information to achieve the objectives of the study was based on desk research and a limited number of interviews with field experts. The list of countries covered includes Finland, France, Germany, Ireland, Italy, the Netherlands and Poland. To finalise the selection of countries, several criteria were applied, such as legal systems in terms of guarantees and lifespan (for example, Finland and the Netherlands have very specific systems in that respect), other contract law specificities, overall legal tradition, level of sustainable consumption, overall environmental performance, geographical balance and size, etc. To a certain extent, this list of countries could provide an interesting benchmark for the issues analysed.

A special focus was also placed on associations that represent specific stakeholders at EU level. As shown in Annex 1, 33 interviews were conducted, including seven with consumer associations, ten with manufacturer association, six with retailer/repairer associations, four with environment associations and six with legal experts (see Annex 1 for further details).

The objective is to quantify each of these impacts based on an appraisal of all the information collected through desk research and interviews (see impact matrices on efficiency and effectiveness in Annexes 2 and 3). There are several reasons why the study did not provide accurate statistics on the costs and benefits of each option. First, given the scarcity and unavailability of quantitative data for a thorough impact assessment, few relevant statistics could be found for the purposes of the study. This scarcity is mainly due to the fact that quantitative literature that assesses the role of consumer law in the development of a sustainable economy is so far rather limited.

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<sup>57</sup> 2015 Better Regulation Guidelines, chapter 3: Guidelines on impact assessment ([http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap3\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm)).

<sup>58</sup> Better Regulation Toolbox ([http://ec.europa.eu/smart-regulation/guidelines/toc\\_tool\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm)).

As regards the consultation, the original objective was to collect statistics via the development of quantified impacts for each question, based on a scale from 1 (lowest likely impact) to 5 (highest likely impact), as shown in Annex 6. Nevertheless, some serious concerns regarding the robustness of the final results explain why these statistics have not been used in that study. First, the sample is rather small (33 stakeholders). Secondly, for several questions, a significant number of stakeholders did have the possibility to provide a quantitative assessment. Thirdly, there was an overuse of the extreme ratings (1 or 5), as each group of stakeholders had very different positions on the issues analysed. Whereas the views of retail and manufacturer associations were hostile to very hostile to the introduction of a commercial lifespan guarantee, consumer associations were rather supportive and the few environmental associations interviewed were supportive to very supportive.

The assessment of the different options in the present study is based on effectiveness and efficiency and an assessment of the coherence of the Amendments with the legal framework of the consumer *acquis*, as well as the competence in view of the principles of subsidiarity and proportionality. The adopted methodology is in alignment with the impact assessment methodology and requirements as described in the Commission's 2015 Better Regulation Guidelines.<sup>59</sup>

The principles that are set out in the different Amendments have been analysed and bundled (see Annexes 4 and 5) as policy options (see e.g. the different principles regarding the determination of the lifespan, the mandatory or optional character, the liable person and the concerned goods). Effectiveness relates to the extent to which the proposed options achieve the intended general, specific and operational objectives. Efficiency is defined as follows: efficiency relates to the overall impact of the proposed options on social welfare. It implies an evaluation of both the expected costs and the expected benefits of each option. Coherence refers to avoiding unnecessary overlaps, contradictions or uncertainties throughout the legal texts (internal coherence) and the legal framework of the consumer *acquis* (external coherence).

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<sup>59</sup> 2015 Better Regulation Guidelines, chapter 3: Guidelines on impact assessment ([http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap3\\_en.html](http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.html)).

### 3. Policy options

Table 1. Summary of policy options to be assessed

Option 1: Soft law approach	No new legislation, but specific initiatives: -Promoting the development of well-known standards to determine the lifespan -Promoting the development of labels -Promoting the disclosure of information on the detailed conditions of usage and maintenance -Promoting the development of a market (primary and second-hand) for spare parts -Promoting education of traders and consumers alike -Using tax instruments -Promoting awareness campaigns to encourage consumer to consider guarantees in their purchase	
Option 2a: "Subjective duration for lifespan" – Manufacturer	New legislation: the guarantor chooses 1) whether or not he will grant a commercial guarantee for the lifespan of the products, and 2) if he does opt for such a guarantee statement, he is free to set forth the duration of the guaranteed lifespan at his own discretion (Amendments 199 and 384) In case the guarantor decides not to provide a lifespan guarantee, this information must be explicitly disclosed (Amendments 384, 387, 388, 198).	Obligation to choose imposed on the manufacturer of the good
Option 2b: "Subjective duration for lifespan" – Joint		The manufacturer and the trader are jointly liable (Amendment 387)
Option 3a: "Normal duration for lifespan" – Manufacturer	New legislation: the guarantor is not entitled to choose a subjective duration of a lifespan but must guarantee the actual normal lifespan of the product as a product belonging to a particular category of products, or the lifespan that can be reasonably expected (Amendments 198, 385, 386 and 635). The information obligation is reinforced because the statement of the guarantor can be examined by enforcement authorities in case of complaints.	Obligation to set forth a normal lifespan on the manufacturer of the good
Option 3b: "Normal duration for lifespan" – Joint		The manufacturer and the trader are jointly liable (Amendment 387)
Option 4a: "Binding technical standards for the duration of lifespan" – Manufacturer	New legislation: for the products that are regulated, it is not the open notion of a "normal lifespan" that must be guaranteed, that can be assessed by enforcement organisations, but a normal lifespan as is set forth by binding product-specific standards.	Obligation to set forth a standard lifespan on the manufacturer of the good
Option 4b: "Binding technical standards for the duration of lifespan" – Joint		The manufacturer and the trader are jointly liable (Amendment 387)

### 3.1 'Zero' Option (no implementation of the amendments)

Under this option, none of the assessed amendments would be introduced. The assessment of this option thus entails a forward-looking analysis of how the situation would evolve in the absence of further policy intervention. This, in the case at hand, implies that the following elements are taken into account:

- The impact of **old or recent legislation** that might not have fully produced its effects.
- The impact of the **two proposals** on online sales of goods (OSD) and digital content Directive (DCD) (without the amendments assessed in the present study).
- The impact of **future technological/market development**.

The objective of the assessment will be to analyse to which extent these different pieces of legislation and potential future trends might positively contribute to the development of sustainable consumption and the single market. The implicit question is to understand if additional consumer rules that introduce a commercial lifespan guarantee are really needed for the gradual transition to a sustainable economy and a robust single market.

The basic assumption of this Option zero is that the two proposals on the online sale of goods and supply of digital content will be implemented by extending the scope to offline sales of goods, thereby repealing Directive 1999/44/EC. The ability of the existing content of the two proposals to address the issues emphasised by the amendments will be assessed. Among the old or recent legislation that could serve this purpose, the focus will be placed on the ecodesign Directive which provides rules for improving the environmental performance of products.

Detailed analyses on how the legal dimension of this Option zero is shaped can already be found in section 1 on the "definition of problem and context". In particular, focus is placed on how and to which extent the two proposals for an OSD and DCD integrate the concept of commercial guarantee, and some analyses are conducted on the concept of durability.

Concerning technological evolutions, it is important to take account of at least one relevant aspect: the fast development of the **Internet of Things (IoT)** in numerous products, including cars and home appliances: it is expected that the high volume of (personal) data produced via the IoT on how consumers use their products could contribute to continuous electronic advice that is highly personalised to each user and that should contribute to better usage and maintenance. Furthermore, it is expected that such products will depend on continuous connectivity, data communication and updates in order to *remain* fit for purpose. This implies that several external suppliers, other than the trader or manufacturer of the 'smart' product, will have to fulfil their support obligations to keep a product 'fit' (updated, interoperable, useful and secure). The notion of conformity will only partially refer to the characteristics of a product at *the time of delivery*, but will in addition require a component of continuous maintenance.

### 3.2 Option 1: 'Soft law' approach

Another option could entail that EU institutions and/or national governments rely on soft law initiatives. The purpose would therefore not be to legislate but to focus on specific **non-legislative initiatives** that could contribute to achieve the policy objectives of the amendments. In particular, supervisors and policymakers could implement specific policies to:

- Facilitate the implementation of existing EU law provisions.
- Stimulate businesses to expand their commercial guarantees by including lifespan commitments.
- Raise consumer awareness on the possibility to request these guarantees.

Several national authorities have already implemented such initiatives, with more or less success. Even though some of them have not been effective, they could be explored further for certain aspects of the objectives analysed in the present impact assessment. Non-legislative initiatives aimed at encouraging producers and traders to expand their commercial guarantees by integrating the concept of lifespan should be mostly taken at national levels. Nevertheless, the European Commission could recommend and encourage national authorities to act in that direction.

Policymakers could foster the development of industry-led solutions to market problems that have emerged in the application and enforcement of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. For instance, despite Article 3 of the CSD, which stipulates that any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer<sup>60</sup> (taking account of the nature of the good and the purpose for which the consumer requires the good), very often the option of repair cannot meet these conditions mainly because of market issues. One of the main drivers behind this long time span to repair products with defects resides in the scarcity of spare parts available on the market and a non-transparent repairer's market.

Against that background, some non-legislative initiatives could be taken to stimulate the development of an efficient market of spare parts. In particular, authorities could encourage the emergence of a second-hand market for spare parts for sectors such as home appliances, as is already the case for the automobile sector. The development of this market could include digital content and software upgrades. Whenever possible, different sectors could be involved: spare parts used for consumer electronics could for instance be exchanged on this second-hand market for other economic sectors.

For example, a Marseille-based spare parts platform was launched in 2016,<sup>61</sup> in the southeast of France leading to an increase in the automotive spare parts market. It is too soon, however, to make any reliable estimation of the outcome of such initiatives.

Several non-legislative initiatives should be emphasised further to encourage businesses to provide commercial guarantees for the lifespan of the product. In particular, the focus should be placed on six types of policies:

- The determination of the lifespan could be facilitated **by the development of well-known standards**. This information would serve only as a benchmark and has no legal value. These standards are already well disseminated in the Netherlands, where the trade association for electronic retail (UNETO-VNI) specified an average lifespan for specific types of electronic products (under normal use and circumstances, and

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<sup>60</sup> 16 Member States (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Finland, France, Germany, Italy, Latvia, Malta, the Netherlands, Romania, Slovakia, Spain and Sweden) have followed this approach, while other Member States have gone beyond this minimum requirement offering the consumer from the beginning a free choice between repair, replacement or termination.

<sup>61</sup> See <https://www.automotiveworld.com/news-releases/psa-retail-launches-marseille-spare-parts-platform/>

also by quality levels) based on the experiences shared with their repair shops.<sup>62 63</sup> One condition for such an initiative to be efficient is that the related standards are well known by both providers and consumers. Then, consumers could notably have an idea of the robustness of the products they purchase.

- Without compelling producers and sellers to systematically display the lifespan of their products, another possibility would be to **develop labels** for the businesses that offer the best commercial guarantees to include lifespan commitments. This system could be organised by public authorities, or by trader/consumer associations. One practical way to implement these initiatives would be to integrate the elements of the quality of the commercial guarantee directly in existing labels.

For instance, Austria has established a technical standard (a sort of label of excellence) defining labelling criteria for durable, repair-friendly electronic appliances. In order to obtain a label, products must meet certain design requirements such as accessibility of components in a machine to allow for easy repair and use of standardised interfaces and marketing designs that simplify repair and widens the range of spare parts.<sup>64</sup>

In 2015, Sweden launched the Miljönär label, an ecolabel aimed at promoting a longer lifespan of products and their reuse and repair. The label is awarded to businesses (e.g. shoe repair or second-hand shops) that re-use products by giving them a second life instead of selling new products.<sup>65</sup>

- Another initiative could concern information disclosure to consumers. Authorities could require manufacturers and sellers alike to provide **detailed conditions of usage and maintenance** in order to ensure that products will last broadly as expected.
- On the trader side, distribution channels could further emphasise the notion of guarantees and lifespan during the selling process. When offline distribution channels are involved, this would mean that **all sellers have an adequate knowledge** of the notions of lifespan, commercial and legal guarantees as well as of all related rights and obligations of producers and consumers. As regards online channels, the objective would be to encourage comparative websites and e-commerce platforms to give the possibility **to compare products by type of guarantee** as well.

Many sector-specific websites, mostly dedicated to electronic devices such as smartphones, tablets and laptops, already provide detailed comparisons of the existing commercial guarantees offered by manufacturers. However, this feature should be adopted by online marketplaces and price comparison tools, thus allowing consumers to also include the provision of guarantees among the essential features to be considered when buying a product.

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<sup>62</sup> The development of this table was initially conducted only based on the data produced at distribution level.

<sup>63</sup> These standards and the related methodology can be found at <https://www.uneto-vni.nl/onze-leden/waar-staan-onze-leden-voor/gebruiksduurverwachting> (in Dutch).

<sup>64</sup> See [http://www.beuc.eu/publications/beuc-x-2015-069\\_sma\\_upa\\_beuc\\_position\\_paper\\_durable\\_goods\\_and\\_better\\_legal\\_guarantees.pdf](http://www.beuc.eu/publications/beuc-x-2015-069_sma_upa_beuc_position_paper_durable_goods_and_better_legal_guarantees.pdf)

<sup>65</sup> See <http://www.wastecsmart.eu/en/news/innovative-ecolabel-inspiring-sustainable-consumption> and <http://miljonär.se/miljonarmarket/>



- Finally, a more interventionist approach could use **taxation tools** to persuade businesses to engage further in lifespan commitments. This would entail that manufacturers that offer more sustainable products and commercial guarantees for the products' lifespan would be partly subsidised. This already exists for ecodesign products – and therefore could be reinforced with the contractual elements.

For instance, Sweden has recently adopted fiscal initiatives to incentivise the sectors of repair, recycling and circular economy, by decreasing the costs of repairs with the reduction of the VAT rate on some products (e.g. bicycles, clothes). Furthermore, if consumers opt for repairing certain products, they will benefit from a deduction of 50% in their taxes.<sup>66</sup> According to Sweden's Minister for Financial Markets and Consumer Affairs, the VAT cut, by reducing the cost of repair, will stimulate the repair market and responsible consumer behaviour. However, since the initiative has been launched only at the beginning of 2017, it is too soon to estimate its effectiveness.

In parallel, some actions of national authorities could contribute **to shape somehow the behaviour of consumers**. In particular, some well-targeted awareness campaigns could induce consumers to consider commercial lifespan guarantee as one of the key arguments for purchase decision. These campaigns should integrate educational components and clearly explain what are the respective implications, rights and obligations of commercial guarantees and legal guarantees. The educational component should be key, given the findings of the Consumer Conditions ScoreBoard 2015<sup>67</sup> and the Commission Fitness Check (2017)<sup>68</sup> on the relatively poor awareness of many consumers of their rights related to guarantees and remedies.

Combined with the skills of sellers and the online comparison of products by guarantees, such initiatives should allow consumers to have a proper knowledge of the guarantees' mechanisms. Lastly, such campaigns should raise consumers' awareness of the environmental dimension resulting from sound practice of the commercial lifespan guarantee.

From March 2014 to March 2016, the European Commission's DG Justice launched an EU-wide awareness raising campaign (Consumer Rights Awareness Campaign<sup>69</sup>) directed both at consumers and traders. The campaign targeted eight Member States – Bulgaria, Cyprus, Spain, Greece, Italy, Latvia, Poland and Portugal – and aimed at promoting consumers' and traders' awareness of their rights when buying and selling products. In particular, one of the objectives of the initiative was meant to explain the EU legislative framework on guarantees, providing information on the conformity requirements and the liability of sellers. The campaign included a dissemination phase across the Member States, with the organisation of events by stakeholders at national level. Overall, thanks to the distribution of content through different

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<sup>66</sup> See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0214+0+DOC+PDF+V0//EN>

<sup>67</sup> According to the Consumer Conditions Scoreboard 2015, only 41% of European respondents knew that they have the right to a free repair or replacement and only 33% knew that they do not need to pay for a return of unsolicited product.

<sup>68</sup> The Consumer Survey of the European Commission's Fitness Check (2017, see the final report in [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332), p. 32) shows that the length of the legal guarantee period and the rights regarding the choice of remedies for defective goods were respectively the first and third elements that consumers knew the least. This is problematic given that consumers assess that the legal guarantee period for goods and the availability of means to obtain remedy or redress are among the four most important factors to make a purchase (p. 67).

<sup>69</sup> See [http://ec.europa.eu/justice/newsroom/consumer-marketing/events/140317\\_en.htm](http://ec.europa.eu/justice/newsroom/consumer-marketing/events/140317_en.htm)

channels (including social media and news websites), the outcome of the campaign was positive, as it contributed to enhanced consumers' knowledge of their rights.

Overall, the soft law option could be perceived as a **necessary preparatory step** before entering more legislative actions. Another approach would be to use these initiatives at least to support the implementation of one of the legislative options 2, 3 or 4.

### 3.3 Option 2: 'Subjective duration' for lifespan

Option 2 is a legislative option with limited impact. Within this framework, suppliers will have the obligation to either 1) inform the consumer of the specific minimum lifespan of a consumer product that is guaranteed, where the duration of the guarantee is freely chosen by the guarantor, or 2) formulate an explicit statement that no lifespan guarantee is given.

Option 2 is a legislative option that expands the principle of the commercial guarantee that is currently already included in the CSD and in Article 15 of the OSD proposal. The option is built on the hypothesis of full harmonisation as provided in the OSD, the extension of the period for reversal of proof up to two years and the harmonisation of the regimes for online and offline sales of consumer goods.

The **legal guarantee** of the CSD and OSD is a *compulsory* obligation of a *trader* (final seller) to deliver goods purchased by a consumer at the time of delivery in conformity with what is agreed, or what the consumer may reasonably expect, and this obligation can be sanctioned if the non-conformity appears within two years. Conversely, under the current legislation and the OSD proposal, a commercial guarantee is a *voluntary undertaking* of a manufacturer, intermediary trader or a trader/retailer (the guarantor), given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising (Article 1(2)(e) CSD and Article 2(g) OSD). The latter guarantee is legally binding under the conditions of the guarantee and cannot affect the legal rights of the consumer. A commercial guarantee must therefore expand the legal rights of the consumer in terms of guaranteed characteristics or duration, or specific guarantees or remedies, or regarding the guarantor against whom the consumer may claim any of the provided remedies (normally providing a direct claim against the manufacturer, whereas the legal guarantee only provides a claim against the trader (final seller) of the product.

This option examines the introduction of a commercial lifespan guarantee combined with an information obligation.<sup>70</sup>

The commercial guarantee would become part of a mandatory obligation to provide relevant information about the lifespan of the product and to provide a commercial guarantee for that lifespan, or, alternatively, inform explicitly that no lifespan guarantee will be given by the trader/manufacturer,

The technique of the commercial guarantee is chosen because the extension of the duration of the legal guarantee would not provide an effective solution. The legal guarantee period is applicable to *all* consumer goods and even if it would be extended to three years, it will not be sufficient to cover lifespan issues for more durable goods that are not fit for their purpose after three years. On the other hand, however, some goods have a shorter lifespan (e.g. the

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<sup>70</sup> The basic model of this mandatory commercial guarantee can be found in the law of Greece. Article 5(4) Law 2251/94 provides for a mandatory commercial guarantee imposed on the supplier of new durable consumer goods. The duration of the guarantee must be reasonable in the light of the possible lifespan of the goods.

classical example of flowers) and thus there would be no need to extend the period of the guarantee to an overly long period. The legal guarantee as a general rule, can only be applied for durability issues if certain exceptions would be allowed for goods that are deemed to be more or less durable (as is currently the case in Finland and the Netherlands).

The lifespan guarantee must essentially be a guarantee of *good functioning*, and thus different from the liability based on the static notion of a non-conforming product, assessed at the time of delivery. The consumer is entitled to a working product without having to prove a non-conformity. This may be helpful, even during the two-year period of the legal guarantee. This is even more useful for smart products that need continuous updating and exchange of data in order to remain fit for purpose.

Option 2 requires a legislative adaptation, but with a limited impact on the obligations of the relevant guarantor; where the guarantor (trader/manufacturer) may **choose**: 1) **whether or not she will** grant a commercial guarantee for the lifespan of the products, and 2) if she does opt for such a guarantee statement, she would be **free to set forth the duration** of the guaranteed lifespan in her own discretion.

There is no referral to certain standards, nor to a 'normal' lifespan, nor to the reasonable or legitimate expectations of consumers regarding goods of a similar nature. The possibility to choose freely the duration of the commercial guarantee without a binding impact of the "normal lifespan" can be found in Amendments 199 and 384 (see Annexes 4 and 5). Amendments 387 ("its minimum foreseeable lifespan") and 388 ("its minimum expected life") are unclear in this respect. On the contrary, Amendments 198, 385, 386 and 635 refer to a "normal" lifespan or lifespan that can reasonably be expected (which will be examined under Option 3).

The trader/manufacturer could refuse the commercial guarantee and thus avoid the related liability and compliance costs (see Annexes 4 and 5). In that case he must state explicitly that he will give no commercial guarantee. The possibility to explicitly refuse a commercial guarantee for the lifespan is foreseen in several Amendments (384, 387, 388 and 198). It is sometimes thought that a manufacturer/trader would not have an interest in explicitly stating that no lifespan is guaranteed and that he will be encouraged to guarantee at least a minimum lifespan. This is debatable, however.

This free choice is not foreseen in Amendments 199, 385, 386 or 635, according to which the normal lifespan information must be given and the trader/manufacturer will be liable if the lifespan is not met. This variation closely resembles the legal guarantee.

As a minimum, this policy option will result in specific **information** being communicated to the consumer, which may remind him of the issue of durability of a product, and this criterion might influence his transactional decision, even if a commercial guarantee is refused. Furthermore, this option has an advantage of clarity, because the guaranteed lifespan that the consumer is entitled to expect is clear and fixed.

The information obligation can be included in the OSD or in a later amendment of the Consumer Rights Directive, where the pre-contractual information requirements of purchased goods are set out (Art. 6).

We discard the possibility to require an **additional payment** for such commercial guarantee. This possibility is not included in the Amendments and would not add to the currently existing possibilities to obtain a paid guarantee (which can be regarded as an insurance rather than a

guarantee). The requirement of additional payment would be contrary to the current definition of the commercial guarantee.<sup>71</sup>

Option 2 can be subdivided in two sub-options referring to the person who should be targeted with the obligation to make a choice between giving a commercial guarantee as chosen by him, or to state explicitly that no such guarantee will be given:

- Sub-option 2.a: According to this sub-option, the obligation to choose between a commercial guarantee for a chosen duration and an explicit statement that no guarantee is given, should be imposed on the **manufacturer** of the good who is liable.
- Sub-option 2.b: According to this sub-option, the obligation to choose between a commercial guarantee for a chosen duration and an explicit statement that no guarantee is given, should be imposed on the **trader** of the good, or at least there should be **joint liability**.

The **manufacturer** seems usually best placed to know what he can guarantee or not, whereas he is aware of possibly critical components and the manufacturing process.

On the other hand, the **trader** is the point of contact for the consumer, who will often receive complaints in the first stage and may make a first assessment of the claims of the consumer. As a matter of policy, it would be interesting to assess whether or not the trader should be held responsible for statements made by a manufacturer, whereas he may claim any losses from the manufacturer in his turn (right of redress, which is already foreseen in the actual CSD and OSD).

### 3.4 Option 3: Normal duration for lifespan

Option 3 is a legislative option with more profound impact. The supplier will have the obligation to inform the consumer of the normal minimum lifespan of a consumer product that is guaranteed, with (as a variation) a possibility to formulate an explicit statement that no lifespan guarantee is given.

Option 3 is a legislative option that reduces some of the flexibility included in Option 2.

According to this option, the manufacturer or trader will have a mandatory obligation to set forth a "normal" lifespan of the product, albeit a lifespan for products of the same category "that can reasonably be expected by a normal prudent consumer".

The guarantor will not be entitled to choose a subjective duration of "a lifespan" but will be forced to guarantee the actual normal lifespan of the product as a product belonging to a particular category of products, or the lifespan that can reasonably be expected (criteria set forth in Amendments 198, 385, 386, 635; whereas Amendments 387 and 388 are unclear in this respect). Thus, the information obligation is reinforced because the statement of the guarantor can be examined by enforcement authorities when consumers may complain about an 'incorrect' lifespan.

According to this model, the 'correct' minimum lifespan for goods of a certain category can be determined in accordance with national or sectoral practices, and if any dispute should arise about the actual duration, the authority that must decide whether the dispute will be entitled to apply the method that it deems best suited in accordance with the benchmarking

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<sup>71</sup> It must be said, however, that this part of the definition is not maintained in the OSD proposal.

information that is available (this could be sectoral lists of lifespan, lists used by insurance companies, lists made by consumer organisations, etc.). The determination of the normal duration would be regarded as an issue of enforcement that should not be regulated by harmonising rules at EU level. There could be an advantage in that this policy grants more flexibility for certain countries, cultures or business sectors, while on the other hand this option may result in less legal certainty, because the indicated lifespan can be regarded as incorrect for the kind of product. Furthermore, the actual lifespan can be judged taking into consideration not only the normal category of similar goods, but also the actual circumstances of the purchase, such as the price, that would correspond with reasonable expectations regarding more or less quality of product.

We focus below on a more detailed design of this policy option through several sub-options and variations.

Regarding the liable person:

- Sub-option 3.a: According to this sub-option, the obligation to set forth a normal lifespan and thus the mandatory guarantee of the lifespan, would be imposed on the **manufacturer** and the consumer would have a direct claim against the manufacturer (Amendments 384, 385, 386, 388, 198, 199 and 635); the liability of the trader will be judged according to the normal rules; the basic idea is more in line with the product liability Directive, where the “producer” or manufacturer is regarded as the most important target for the claims involved;
- Sub-option 3.b: According to this sub-option, the obligation to set forth a normal lifespan and thus the mandatory guarantee of the lifespan, would be imposed on the **trader** and the consumer has a claim against the trader, similar to the remedies currently provided under the legal guarantee in the CSD, or there is joint liability with the manufacturer. This hypothesis is foreseen in Amendment 387 only. The trader, in his turn, may have an action in redress against the manufacturer if that is provided under national law; however, if the manufacturer would formulate the commercial guarantee, both the manufacturer and the trader may be held liable at the choice of the consumer (e.g. joint liability); the basic idea is more in line with the principles of the legal guarantee of the CSD and the line between the legal guarantee and the commercial guarantee is rather thin.

As a variation, we examine whether an information obligation regarding the normal lifespan of the product should be possible without a commercial guarantee in which case the seller or producer would be forced to state explicitly that they refuse a commercial guarantee covering that 'normal' lifespan. This variation is embedded in Amendment 199 (which is focused on the producer). From a legal point of view, the impact of an explicit negation of a commercial guarantee must be examined in circumstances where the normal lifespan will be indicated, possibly in a misleading manner, which raises the question whether other remedies are open under the Consumer *acquis* of the EU (e.g. under the unfair commercial practices Directive in case of misleading information). On the other hand, it is questionable whether a normal lifespan can be indicated by a trader or manufacturer while at the same time any guarantee in that respect would be rejected.

A variation can be found in the limitation of the relevant scope of products. The Amendments refer to the sellers/producers of technical products (Am. 385, 386, 387), energy-related or energy-consuming products (Am. 198, 199, 384 and 388), durable products (Am. 385), or a technical good in which digital content or a digital service is embedded (Am. 635). The study will examine whether a certain definition of the scope of products should be preferable.

Furthermore, variations can be found in the required remedy system. The current system based on the legal guarantee is hierarchical: at a first level the consumer may claim the repair or replacement of a non-conform product whereas at a secondary level the refund of (a part of) the purchase price and/or termination of the contract will come into play. For commercial guarantees, the remedies are less strictly formulated; they are part of the terms and conditions of the commercial guarantee. It is possible that the introduction of a lifespan guarantee requires more flexibility regarding possible remedies, since the commercial guarantee will only be relevant after a period of more than two years, where the purchased product has been fit for its purpose during at least two years. On the other hand, the requirements of a circular economy may favour some remedies that may have a better impact from that perspective.

At first view, replacement of a product by a new product does not always seem an adequate sanction if the new product would have a new 'normal' lifespan of e.g. 4 years, because that would result in an unreasonable extra value for the consumer. On the other hand, termination of a purchase contract for a product that has been fit for purpose during at least two years should also be subject to a test of reasonableness. However, some remedies may have a more consistent impact in view of sustainability (e.g. repairs that extend the life of products instead of replacements), and thus the remedies may be set forth in a less flexible manner. A fact is that the current remedy system is based on contractual freedom (usually unilateral terms and conditions) and is not focused on non-conformity of products that are supposed to be durable and possible gaps should be assessed. The Amendments do not specify specific remedies in general, and refer to general statements only (Am. 198, 386, 388, 635).

### **3.5 Option 4: Binding technical standards for the duration of lifespan**

Option 4 is a legislative option with profound regulatory impact: a mandatory obligation to provide lifespan information (and a commercial guarantee based on strict legal requirements (e.g. based on the Eco-design Directive)).

This option is a combination of the information obligation regarding the lifespan of the product (Amendments 199, 385, 386, 387 and 635), the commercial guarantee and product-specific regulation of the minimum lifespan of consumer products, or at least some categories of consumer products. The underlying idea is that the normal lifespan of products must be safeguarded by specific regulations, beyond the contractual relationship between consumer and trader or manufacturer. For the products that are thus regulated, it is not the open notion of a 'normal lifespan' that must be guaranteed, that can be assessed by enforcement organisations, but a minimum or normal lifespan as it is set forth by binding product-specific standards. This approach to determine lifespan is not contained in any of the Amendments.

If this route would be followed, it would be preferable to use the eco-design Directive (EDD) as the principal instrument to form the legal basis for product-specific requirements. There is quite a considerable consensus for the use of this legal instrument.<sup>72</sup> However, this route would need a modification of the scope of the EDD, which may take some time, and it is clear that the process of drafting the product-specific standards as implementation measures will need considerable time as well. The EDD is only a framework Directive for specific regulations, which are currently only focused on the energy saving aspects of products and not (yet) a regulation of the lifespan of products. Thus, it is clear that it will not be possible to cover all categories of products via this option, and that there will always be a need for a more general

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<sup>72</sup> See e.g. Tonner and Malcolm, op. cit. and Montalvo et al., op. cit., confirmed by many stakeholders.

solution as set forth under the abovementioned options. In that respect, Option 4 is rather a possible additional option to the above listed options, while the method of the commercial guarantee can be used to sanction the non-respect of the standards by producers, thus reinforcing the enforcement of the EDD.

Within the framework of the CSD and the OSD, the drafting of the link between the guarantee and the regulation must not necessarily refer to the EDD. It would be sufficient to keep the principle of the commercial guarantee and the information obligation regarding the minimum lifespan of products of a certain category. The legal text may state that where the minimum or normal lifespan of products is regulated by product-specific community regulations or standards, the manufacturer will have an obligation to indicate the minimum or normal lifespan and to give a guarantee regarding that lifespan. We discard a possibility to explicitly reject a commercial guarantee in that respect, since such statements would be very inconsistent and result in confusion.

It must be said that such a binding referral to rigid standards regarding the lifespan of products is currently **not foreseen in the Amendments**. However, this policy option has been extensively explained and defended in the study of the EP Policy Department for citizens' rights "How an EU Lifespan Guarantee Model Could be Implemented across the European Union" (2017).

The design of the policy option can take into consideration a limitation of the scope of products as suggested above. This would impact the use of the EDD in particular, because the EDD currently applies only to energy related product groups. One of the policy options is to keep the scope broad in theory, so that in principle all product categories with a significant environmental impact can be covered if so wanted, but to apply the EDD gradually and carefully to product groups on a transitional basis.

The EDD sets forth production requirements and the compliance with such requirements is essentially a responsibility of the manufacturers of the consumer products. However, in terms of responsibility for commercial guarantees a distinction can be made between the roles of manufacturers and retailers. In that respect, variations can be assessed following the distinction made under the above listed options.

## 4. Effectiveness

In the sections 4 and 5, we offer insights on the possible impact that would be associated with the alternative policy options analysed in section 3 above. The comparison of the alternative policy options is based on three criteria: effectiveness, efficiency and coherence.

The focus of section 4 is on effectiveness, which is defined as follows: effectiveness relates to the extent to which the proposed options achieved the intended general, specific and operational objectives.

### 4.1 Specific objective: Enhancing cross-border exchange of products

The specific objective of **enhancing the cross-border exchange of products** relies on the removal of barriers for cross-border *demand* of products through increased consumer confidence, as well as the removal of barriers for cross-border *supply* of products through increased legal certainty on the side of traders. Research indicates that on the supply side the volume of cross-border online sales is much lower than online domestic sales.<sup>73</sup> Similarly, only a fraction of consumers has purchased products online from another EU country, whereas almost 50% of consumers purchase online domestically.<sup>74</sup> Thus, businesses and consumers are too often constrained to their domestic markets.

Whereas *consumers* indicate that the price is the most important criterion for their purchase decisions, it is clear that their right to a legal redress in case of non-conformity (in general) is one of the top factors influencing their purchasing decisions, regardless of the purchasing channel or domestic or cross-border transactions.<sup>75</sup> About 42% to 46% of *retailers* (offline and online) state that the additional costs of compliance with fragmented consumer protection and contract law are important barriers to their cross-border sales development.<sup>76</sup> The fragmentation of consumer law due to the minimum harmonisation effect of the CSD may have an impact on traders' confidence and consumers' confidence alike.

#### 4.1.1 Zero Option (baseline scenario)

Under **Option zero** (baseline scenario), the current legislation regarding consumer sales would be adapted via the OSD and DCD proposals, without incorporating any of the Amendments. The *principle of full harmonisation* of the period of the legal guarantee of two years would apply, and thus the level of consumer protection in the Member States where currently a longer legal guarantee period can be applied, in general, or specifically for lifespan issues, would decrease.<sup>77</sup>

According to the business sector and the legal experts, the lack of harmonised consumer legislation in general may have a negative impact on the decision of **small traders** about

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<sup>73</sup> Explanatory Memorandum for the Commission's OSD-proposal

<sup>74</sup> Ibid.

<sup>75</sup> V. Manfredi, op. cit.

<sup>76</sup> Ibid.

<sup>77</sup> Longer legal guarantee periods exist in Sweden (three years), United Kingdom, Ireland (six years, although five years in Scotland), and for lifespan issues in the Netherlands and Finland (as long as the 'normal' lifespan). However, the lower protection could in certain cases be balanced through the extension of the period where the presumption of the intrinsic non-conformity can be applied (resulting in the reversal of the burden of proof for a duration of two years instead of the current six-months).



cross-border online selling, and such traders would feel more comfortable if they would be more certain about their risk exposure when they are selling cross-border, taking into consideration that the legal protection of the consumer's home state may apply to the purchase if the trader directs his business to that state (which is usually indeed the case).<sup>78</sup> This is particularly true for smaller traders who cannot afford important legal resources to assess such risks. The harmonisation of the rights of consumers regarding non-conformity of goods without the Amendments regarding commercial guarantees can be considered comforting for traders, because there is **no longer a legal risk of compliance costs for liabilities after the harmonised two-year limitation**, whereas this risk existed in five member states under the minimum harmonisation regime. This general limitation will reduce legal assessment costs when targeting other countries and may reduce financial reserves for compliance costs in case of non-conformity. Thus under the Option zero, there could be a moderate positive effect of the harmonisation on *cross-border offerings* of consumer products, albeit that stakeholders emphasize that other barriers for cross-border trade should be tackled as well.

There is however an important **caveat**: according to Article 15,4 OSD-proposal, the *Member States may lay down additional rules on commercial guarantees* insofar as those rules do not reduce the protection set out in Article 15. This rule provides minimum harmonisation regarding the requirements for commercial guarantees. Thus, national laws may set specific requirements for commercial guarantees, and this would again increase the legal uncertainty of traders offering commercial guarantees when dealing with cross-border consumers. Since lifespan guarantees would be provided by commercial guarantees as a competitive issue, part of a business model and branding policy, during and beyond the harmonised legal guarantee period of two years, this uncertainty may have a negative effect on the decision of traders to provide lifespan commercial guarantees, even in a harmonised legal environment.

On the other hand, it is unclear whether **consumers** are currently really bothered by legal uncertainty regarding their protection in the field of lifespan of purchased products, and whether such uncertainty would have an impact on their decision to purchase online cross-border. Complex goods involving an important investment of the consumer such as automobiles and larger household equipment, are seldom purchased online, because consumers want to see and feel such goods. It is in that category of goods that lifespan concerns may have an impact on the transactional decision of the consumer. Data indicate that many consumers purchase on the basis of the criterion of the product price only.<sup>79</sup> Many tend to buy cheap products, even from traders outside the EU. It has been demonstrated that 1/3 of products are discarded by consumers while these are still in working order.<sup>80</sup> The criterion of lifespan must be accepted as having a moderate impact on the purchase of products by *some* consumers and for *certain categories of products*.

On the other hand, many consumers indicate that their confidence in obtaining redress for non-conform products is an important criterion for their purchasing decisions, and for those consumers and/or product groups for whom durability is indeed an important factor, full harmonisation may *in general* provide more overall certainty (if they are sufficiently educated in this field). Specifically regarding durability, however, the impact of the OSD (minus the Amendments) is a give-and-take: in five countries, consumers will lose their right to claim remedies beyond the two-year legal guarantee period, due to the full harmonisation of this period, while on the other hand in many countries the period during which the trader carries

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<sup>78</sup> This is a consequence of Article 6 Rome I Regulation 593/2008.

<sup>79</sup> V. Manfredi, op. cit.

<sup>80</sup> Umweltsbundesamt, op. cit.

the burden of proof regarding the fitness of the product is extended from six months to two years. All in all, consumers will have to rely on voluntary commercial guarantees for durability.

On the other hand, the market should be prepared for a revolution involving the introduction of more and more 'smart' or 'connected' products, that rely on the correct and continuous supply and communication of digital content, not only for the basic operation of the product itself (embedded software *sensu stricto*), but also for their usefulness, correct handling, safety and security. Smart products will depend on connectivity in order to receive necessary data or updated data (e.g. navigation data), will have to send user data (e.g. to monitor the use of a device, e.g. in cars), will rely on connections to store data in the cloud, will need a connection in order to be controlled remotely where necessary etc. Although sensors are often needed to function well, the hardware aspects of such products are less complex and offer less risks than the risks related to the need for a continuous digital content, which is dependent on several parallel ancillary agreements with software developers, connectivity providers, storage providers etc. Several studies predict a tremendous increase of such products and thus an increase of internet connections via all kinds of objects (Internet of Things, IoT).<sup>81</sup>

Whereas the conformity of such product *at the time of the delivery* of the product is still relevant, and issues of interoperability<sup>82</sup> with software or hardware or other non-conformities may exist at that moment, it is obvious that the usefulness, the fitness for purpose and in general the correct functioning of such product will also depend on the continuous connectivity and the continuous maintenance, updating and communication of data. Apps and data such as navigation data must be updated, diagnosis of issues through remote connection must remain possible etc. The "lifespan" that the consumers expect is thus not only dependent on a non-conformity that is present at the time of delivery of a product, but rather a non-conformity that occurs afterwards, e.g. due to lack of updates, or, inversely, an incompatibility created as a consequence of forced updates. The concept of "*non-conformity*" will thus need an additional component that is not based on a static assessment *of the good at delivery*, and in that respect the reversal of the burden of proof will also be less relevant. The legal guarantee system does not contain a right to receive continuous support in order to keep a product in working order in conformity with the consumer's expectations. Such continuous support should be provided under a *commercial guarantee*, should cover *good functioning* during a certain period of time. As stated above, the concept of the commercial guarantee under the OSD is regarded as a voluntary legal instrument, based on contractual freedom. Furthermore, according to Art. 15 OSD, member states would be able to regulate commercial guarantees beyond the minimum rules of the OSD on this particular field. Thus, this system would not be able to provide a sufficiently secure, and even less harmonised, legal environment to cope with products depending on external digital content.

The **DCD proposal** deals with the supply of digital content, including mixed products where hardware and digital content are combined (but in that case will only apply to the supply of the digital content). It is expected that products with basic embedded software that is necessary for their operation will fall under the scope of the OSD, whereas smart or connected products, depending for their functioning on the continuous exchange of digital content fall under the scope of the DCD, unless the OSD and DCD would entirely be merged.<sup>83</sup> The current

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<sup>81</sup> See the Commission's SWD, "Advancing the Internet of Things in Europe", SWD (2016) 110 final of April 2016. The number of IoT connections within the EU is estimated to increase from approximately 1.8 million in 2013 to almost 6 billion in 2020 (p. 7). Comparable predictions were made by GfK and Gartner.

<sup>82</sup> Underlined in the Consumer Rights Directive, as necessary pre-contractual information (art. 6, 1 r and s).

<sup>83</sup> See e.g. the note of the Presidency to the Council of the European Union of 1 June 2017, 9901/17, p. 5. In the study

version of the DCD proposal stipulates as a principle that the conformity of the supplied digital content must exist at the time of delivery thereof; where *the contract provides* that the digital content shall be supplied over a period of time, lack of conformity may occur during the duration of that period (art. 10 DCD proposal). The notion of conformity under the DCD is much shaped by what is agreed in the actual contract between the supplier of the digital content and the consumer (art. 6 DCD), and much less by objective reasonable expectations. The problem is that in the case of a smart product, the trader of the product as such is often not the supplier of the digital content. The exchange of digital content is governed by separate ancillary agreements, agreed with several service providers and/or software providers, through the click-wrap method.<sup>84</sup> The consumer who buys a smart product *as a product* will accept such unilateral terms and conditions, in many cases even without reading. Thus, Article 6 states that digital content must be *updated as stipulated by the contract*, whereas the consumer may not understand the implications of the relevant contractual provisions, nor understand how these will provide a normal use over a certain, reasonably expected, period of time. Thus it will often not be clear what he can prove as *reasonable expectations* regarding the product as a whole, including all necessary updates for its normal functioning.

Thus we conclude that under Option zero, in relation to **tangible products** there could be a moderate increase in general confidence, probably more for traders than for consumers, under the condition that they are not bothered by possible national regulations regarding the commercial guarantee. Regarding durability issues, however, the legal framework provides no claims for consumers after the 2-year legal guarantee. Regarding products that require follow-up for their normal functioning, whether via updates, or the provision of external digital content, in particular **smart products** that depend on several ancillary contracts/suppliers, the DCD may provide harmonised rules where the national laws of the Member States have currently no rules in place, apart from a few exceptions. This may boost the confidence of traders and consumers as far as a gap is filled. However, the legal guarantee system offers inadequate protection to **keep** the product as a whole in conformity with reasonable expectations of consumers, including the expected duration of use. They will have to rely on several contracts in relation to the supply of digital content, whereas such contracts will usually be unilateral click-wrap contracts that will not be negotiated. Even if the legal framework for tangible goods on one hand, and the framework for products depending on digital content on the other hand would be harmonised each on their own, and such harmonisation may boost the trust of traders and consumers in that respect, important differences *between* both legal frameworks may again have a negative influence on the general confidence.

On the other hand, consumer trust may be boosted if *product-specific regulations* would set lifespan requirements, or standards in relation to the digital aspects (safeguarding especially issues of interoperability and compatibility), even if the OSD would not be modified in that respect. Under Option 4 a possible link between consumer protection and such regulations will be examined.

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Wendehorst, C., "Sale of goods and supply of digital content – two worlds apart?", European Parliament Policy Department on Citizens' Rights and Constitutional Affairs, 2016, a considerable effort was done to incorporate the provisions of the DCD proposal in the OSD proposal, in order to promote the application of one legal instrument to the sale of tangible goods and the supply of digital content.

<sup>84</sup> See e.g. Wendehorst, op. cit.

#### 4.1.2 Option 1: Soft law

**The awareness** of consumers about their rights under the CSD is limited to basic knowledge about the legal guarantee.<sup>85</sup> In the countries where consumers may claim their rights beyond the two-year guarantee period, they have little knowledge about the duration of their rights. The finesse of the relationship between the legal guarantee and the commercial guarantee is not known. The European Commission acknowledged this and has focused on information campaigns in the past to alleviate the uncertainty of consumers, but admits that information campaigns have a limited effect and are insufficient to induce an effective change in consumer knowledge and behaviour. Information campaigns are only effective if they contain simple messages. The rules and concepts of the legal and commercial guarantees are however so complex and refined that simple messages are impossible (see e.g. the issues of the burden of proof, the possible remedies).

Consumers would find it even hard to know whether or not their home law would govern the contract with the trader, since this assessment is based on the question whether or not the trader's website is 'directed' to their home country, in accordance with the Rome I Regulation and the case law of the Court of Justice of the European Union. Harmonised rules may make it easier to grasp the basic rules, but this is still a complex matter. On the other hand, information campaigns can create more awareness about the importance of obtaining clarity on the lifespan of products and to be more vigil about commercial guarantees in relation thereto, as an important element of protection of the consumer's interests, and as an important aspect of the move towards a more circular economy. However, a true change in that respect depends on other circumstances as well, such as the cost gap between repairs and replacements (see efficiency for more details on this).

Taxation regimes and subsidies may furthermore provide benefits for manufacturers or traders engaging in more sustainable production and consumption, as well as second-hand and repairer's markets. Education of consumers in order to change their behaviour is deemed a *necessary* complement of any regulatory measure, but in itself the effectiveness is moderate at best.

#### 4.1.3 Option 2: 'Subjective duration' for lifespan

**Option 2 is essentially based on information to the consumer, in combination with the current system of competitive voluntary commercial guarantees.** According to this option, the manufacturer or trader is **free** to provide a commercial guarantee or not, and the duration of the guarantee is **chosen** by him, according to his business model, the characteristics of the product, branding policy, etc. The innovation with regard to Option zero, is that the manufacturer (trader if applicable) has an obligation to indicate clearly that no lifespan guarantee is given if he does not grant such a guarantee. The method of a '**negative declaration**' may create more awareness for consumers when they assess their options for a certain purchase. They may compare the price of products and can take the absence of a lifespan guarantee in consideration. From the point of view of consumer protection, this option respects the fact that a large part of consumers are not focused on such a criterion and are mainly influenced by the price of products.<sup>86</sup> This category of consumers can buy their products without having to pay more elevated prices because the traders of such products have limited compliance costs. Similarly, this option grants a sufficient protection in the case of products that can be easily replaced and where lifespan is not really a concern.

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<sup>85</sup> Confirmed by all legal experts.

<sup>86</sup> V. Manfredi, op. cit.

The *awareness* of the lifespan criterion as a possible criterion for the purchase is however important, and thus it is necessary that the negative declaration is sufficiently and immediately **visible**. Legal experts state almost unanimously that consumers seem to become 'lost' in an overflow of information, and that it is absolutely important for crucial information to stand out in a clear, immediately visible manner. This concern is valid for the negative declaration, as well as for the lifespan that is guaranteed, if the manufacturer chooses to give a lifespan guarantee for the duration chosen by him. Where products must be accompanied by the **energy-label**, this label could serve as the indicator for the duration of the guarantee. However, this would create confusion, because under this policy option the lifespan would be a voluntary duration of a guarantee chosen by the trader or manufacturer, without reference to a 'true' or minimum lifespan, whereas the energy-label currently provides information that must be tested and must be correct. Any inconsistency in this respect may mislead consumers.

Whereas the indication of the duration or the "no guarantee" should be immediately visible, the content of the guarantee should be drafted in a more comprehensive manner.<sup>87</sup> Article 15 OSD proposal refers to the guarantee statement that must be available on a durable medium, although other pre-contractual statements and advertising may contain guarantee statements as well. Whereas the lifespan guarantee must fulfil a specific protective function, also in view of the environmental policy, there can be no doubt that a formal guarantee statement is required. Other statements, e.g. in advertising, may provide better conditions beyond the lifespan guarantee that should be free of charges, against additional payment, based on contractual freedom.

This option remains close to the current philosophy of the commercial guarantee as a voluntary instrument provided by a manufacturer or a trader, that is based on a business model and branding policy and that is influenced by the degree of **competition** on the market.

This solution was suggested by a study of Tonner and Malcolm,<sup>88</sup> since an extension of the **legal** guarantee period for a longer period than two years was considered inefficient.<sup>89</sup>

### **Advantages**

This option offers at least an **awareness** to the consumer, even in case of a negative 'no guarantee' declaration. Consumers who are not interested in durability can buy cheaper products with informed consent. Other consumers may pay more for better guarantees. This option offers **flexibility**, taking into consideration the concerns of consumers and the business models of traders or manufacturers, whereas the other options are more rigid regarding the duration of the lifespan that must be guaranteed. Where the guarantor offers a guarantee with a short duration, the same advantage of flexibility can come into play.

A major advantage of this option is that it provides **clarity and certainty** to the manufacturer, trader and the consumer. If no lifespan is guaranteed, the consumer will be reminded of such fact, and he may take this into consideration. If the manufacturer or trader decides to grant a guarantee, he will **be free** to choose the guarantee period. He can set the duration according to the characteristics of his product, his business model and marketing policy and is not confronted with uncertain criteria such as '*normal lifespan*' or '*reasonable expectations of the*

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<sup>87</sup> See also our further remarks concerning the *modalities* of commercial guarantees, which can be set by a guarantor in a very extensive manner.

<sup>88</sup> Tonner and Malcolm, "How an EU lifespan guarantee model could be implemented across the European Union", 2017.

<sup>89</sup> See above, in the section on problem definition for further analyses.

*consumer'* that may be decided by some court or administrative enforcement authority, in any EU Member State. He can calculate the compliance cost and may act on the competition within his market. If he plays on durability he is free to do so (as certain brands use this as a marketing feature). In combination with harmonised rules on consumer protection, the manufacturers and traders should feel more secure. The consumer on the other side, knows what he can expect and he may decide on an intended transaction on the basis of what can be expected (informed consent). He will probably pay more for a product where the durability is guaranteed, at least where the nature of the product commands a concern about its durability.

Furthermore, the commercial **lifespan guarantee** should be regarded as a **guarantee of good functioning** during the indicated period, ideally of the product as a whole (a variation could be a guarantee on certain components, but this should be avoided with a good definition of a lifespan guarantee). A guarantee of good functioning implies that the product must *remain* in good functioning, provided that the conditions of use and maintenance are respected by the consumer. The consumer must not prove that a non-conformity was present at the time of the delivery, and even the (reversal of) the burden of proof is not an issue.<sup>90</sup> If malfunctioning occurs, the consumer must prove that the product is in breach of the guarantee of good functioning during the indicated guarantee period, and the guarantor will have to prove that the conditions are not fulfilled (e.g. proving incorrect use, accident, incorrect maintenance). The guarantee provides an aspect of **continuity** and depending on the wording of the guarantee, this could involve preventive maintenance by the guarantor, the availability of spare parts and/or a repairer network.

Whereas the lifespan guarantee has obviously an important meaning after the two-year period of the legal guarantee, it may have an important impact **during that period** as well. Taking into consideration that most products reveal non-conformities during, and not after, the two years after delivery, this is an important factor. As indicated above, the legal guarantee period is not a guarantee of durability. If, under the *legal regime*, a consumer claims after one year after delivery that a product should have had a lifespan of more than one year, this will not automatically be considered as a non-conformity. The consumer will have to prove that he could rightfully expect a lifespan of more than one year, on the basis of statements or objective, justified expectations. Furthermore, the issue that causes the early breakdown must have been present at the time of delivery (but this will be presumed, and the trader will have to reverse that presumption). The outcome of such claim will be uncertain and may depend on a judgement by enforcement authorities. A lifespan guarantee would create a much more secure situation, because the justified expectations are set forth in the guarantee document.

The *continuity* of the guaranteed functioning is especially important for **smart goods** that depend on continuous updating of data, monitoring or remote control, the exchange of user data etc. The legal guarantee with its static criterion of conformity at the time of delivery offers no warranty concerning the important continuous performance that is necessary to *keep* such products useful, updated, compatible, safe and secure. Only a lifespan guarantee may assure the consumer in that respect (whereas the complex network of connected service providers should be covered by such a guarantee, admittedly not always easy to achieve in practice). In this respect, it is important to try to apply a coherent liability system to **all kinds of concerned products**, be it durable products, energy-consuming products or products depending on digital content.

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<sup>90</sup>For further analyses, see above, pp. 22-23.

Furthermore, if the guarantee is given by a reputable **manufacturer** instead of a smaller trader, the possibility to have a direct claim against a manufacturer will increase the consumer's confidence to have his goods repaired or refunded in case these are not fit during the guaranteed lifespan. This advantage may also play during the two-year period of the legal guarantee, as an additional protection where the legal guarantee only provides the liability of the trader (final seller).

This policy option will only be effective if the lifespan guarantee is **really an issue of competition** on the market of similar consumer products. The voluntary guarantee is a business decision that compares the compliance cost that can be offset by the competitive gain. Due to the reinforced information obligations, the competition on this aspect may be sharpened in some product markets, and the provision of more, and more competitive guarantees may have an effect on consumer trust, whereas traders' and manufacturers' confidence is comforted because their compliance risk is known, calculated and limited. This option is moderately regarded as effective by many stakeholders. Furthermore, stakeholders that favour product regulations, regard this option as an interesting *additional* protection, e.g. where no regulations would exist, or as guarantees for a lifespan beyond the minimum lifespan required by product-specific regulations.

### ***Caveats and disadvantages***

On the **negative** side, there is a risk that a voluntary system that is based on competitive arguments, would result in a **race to the bottom line** in oligarchic markets, if manufacturers (traders if applicable) don't have much to lose and can trade with short guarantees. Furthermore, there is a risk that the commercial guarantee would **confuse** the consumer, for whom the implications of the guarantee, or even the negative statement of absence of guarantee, can be very unclear. Whereas the indication of the guarantee chosen by the guarantor has an advantage of clarity, it is key to avoid a consumer's perception that this pure contractual guarantee period would be the normal lifespan of the product. The statement is merely *contractual* and not necessarily based on technical requirements nor tests. Furthermore, if it is explicitly stated that no commercial guarantee is given for a certain lifespan it is key to avoid that consumers would believe that here is no possibility to claim a remedy for an exceptionally short lifespan as a non-conformity, during the legal liability period of two years.

The legal guarantee is still applicable and may still result in claims if the non-conformity appears within the legal guarantee period of a maximum of two years (but evidently shorter for products with a shorter normal lifespan such as consumables).<sup>91</sup> The legal experts are concerned about the perception and understanding of the consumers. It is clear that consumers are not sufficiently aware of the exact implications of the legal guarantee or the duration thereof, and even more unaware of the exact implications of commercial guarantees.<sup>92</sup> They are confused about the relationship or the differences between legal and commercial guarantees. Boosting consumer awareness and knowledge should always be a condition for any of the policy options that are based on the concept of the commercial guarantee.

However, even legal experts (and national laws!) have diverging opinions about the impact that a commercial guarantee may have on the 'reasonable expectations' of the consumer

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<sup>91</sup> See above,

<sup>92</sup> Confirmed by all legal experts interviewed.

under the **co-existing legal regime** in the two years after delivery.<sup>93</sup> If a breach of the guarantee would also be regarded as a non-conformity, it is not always clear under relevant national law whether a consumer should base his claim on either regime, or whether he can modify his claim. Furthermore, a commercial guarantee with a low warranty can be regarded as a statement that should lower the expectations that a consumer may have (theory of informed consent);<sup>94</sup> however, a commercial guarantee may not reduce the legal rights of the consumer and should provide additional benefits.<sup>95</sup> Whereas a pre-contractual *statement* about the poor *characteristics* of a cheap product may indeed lower the rightful expectations, a low commercial guarantee cannot be considered as having a similar effect, and should be considered as misleading or as an unacceptable exclusion of legal liability. However, this relationship between the guarantee regimes is very complex and cannot be fully explained in this study. It would be advisable to exclude conflicts of this kind if the consumers' and traders' confidence must be boosted. This concern is in line with the general concern about the visibility of the guarantee (see above).

Another disadvantage of this method based on voluntary actions, is that larger companies may find it easier to grant lifespan guarantees involving compliance costs (or risks), rather than smaller companies. An obligation to be transparent about the guarantee may therefore be disadvantageous for smaller companies.

A general caveat must be formulated in view of the voluntary and 'additional' nature of the commercial guarantee, and the **contractual freedom** of the guarantor. Under the current regime of the CSD and the OSD, the guarantor is free to set the **conditions** and exclusions for the execution of such a guarantee. A commercial guarantee may be governed by **territorial exclusions** (obviously not favourable for the consumers' cross-border confidence in trading), notification or registration obligations, strict conditions of use, even **charges** in order to make use of the guarantee. The guarantor may restrict the **transferability** of the guarantee, meaning that second-hand buyers would not be able to benefit. Furthermore, the guarantor may set forth the **remedies** provided by him (e.g. he may require certain procedures for repair or replacement, or may set forth a method to calculate a refund). The hierarchy of remedies provided by the legal guarantee is not applicable. Some of the Amendments propose a solution, e.g. making the legal remedy regime applicable to the specific lifespan guarantee. Evidently, all these conditions may be more balanced due to the competitive aspect. However, fragmentation in this respect and lack of confidence in clauses restricting the rights of the consumer, written in the so-called 'small print' of the unilateral terms and conditions, may not be very effective for the stimulation of consumer confidence.

Insofar as remedies are concerned, it would be important to reflect on situations in which the required guarantor, manufacturer or trader would **not** grant a lifespan guarantee. The typical remedies for non-conforming products offer no solution. **Sanctions** should apply that would really be useful for enforcement – a concern that is clearly formulated by the legal experts.

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<sup>93</sup> See Wiewiorowska, op. cit., pp. 132-139.

<sup>94</sup> According to Art. 4 OSD proposal, the good must have the qualities indicated in any pre-contractual statement that forms an integral part of the contract. Any agreement derogating from the „normal characteristics“ to the detriment of the consumer is valid only if the consumer knows of the specific condition of the goods and has expressly accepted this condition (informed consent, Art. 4, 3 OSD).

<sup>95</sup> As stated in the definition of the commercial guarantee (Art. 2g OSD). As a minimum, the guarantor must warn the consumer that there are legal rules concerning conformity (Art. 15 OSD), but this has a moderate impact on the consumer's perception. It would be a paradox to state that a commercial guarantee would allow the lowering of legal rights based on informed consent.



Inserting this as pre-contractual information obligations in the consumer rights Directive (CRD) could provide a sanctioning mechanism in case of omission.

In addition to these remarks, it must also be clear that confusion may arise from the distinction between commercial guarantees that are paid for as part of the purchase price of the good, and on the other hand commercial guarantees that come with a **specific price** if the consumer wants to accept them. Under the CSD, a guarantee for an additional price was not considered a commercial guarantee. This requirement is not kept in the OSD proposal. Some confusion may arise about the status of commercial guarantees that must be given under Option 2, unless a negative declaration is given. The mandatory lifespan guarantee should obviously not be a commercial guarantee that is only available upon an additional payment. The legal drafting of Option 2 should thus specify that a commercial guarantee *free of charge* must be given, and should stipulate that a call-off of remedies under that guarantee, such as repair, should be without charge as well. In that case, however, one may wonder whether a manufacturer (trader if applicable) may give another additional guarantee, guaranteeing a longer lifespan than their 'free' guarantee. Under the philosophy of the 'voluntary' and 'additional' protection of a contractual guarantee, they should not be refrained from granting better advantages for extra payment. However, this may greatly reduce the effectiveness if the 'free' commercial guarantee, would be set to a very low lifespan, speculating that consumers will pay for more.

If the voluntary commercial guarantee must assume a function beyond the mere 'additional contractual protection aura', and must support a more general matter such as the development of consumer trust and sustainable consumption, then it must be better enforceable, and it would become more important to focus on these aspects as well. Thus, this 'special commercial guarantee' may more and more look and feel as a legal guarantee. This is probably even more important in the framework of the effectiveness test with regard to sustainable consumption (see *infra*). In that case, the existence of two kinds of commercial guarantees would again provide less coherence on the legal aspects.

As already mentioned *supra*, the OSD proposal states in Article 15.4 that the Member States may lay down additional rules on commercial guarantees insofar as those rules do not reduce the protection foreseen in Article 15. This rule may reduce the confidence of traders regarding the validity of their commercial guarantees in a cross-border context.

#### *4.1.4 Sub-option 2a: Focus on the manufacturer*

**Sub-option 2a** takes as hypothesis the liability of the **manufacturer** as guarantor. Currently, under the voluntary system of the commercial guarantee, either the manufacturer, the trader or both can be held liable according to their own choice. Most stakeholders indicate that the manufacturer is the actor that is most qualified to set forth the lifespan of his products. However, since under Option 2 there is no requirement to set forth a 'true' lifespan, and there is no testing required, there is no need to limit the liable actors. Nevertheless, it is known that many products are put on the market with a manufacturer's guarantee. The liability of the manufacturer can be set forth by the text of the law, if the Directive would require a commercial guarantee of the manufacturer. Several Amendments are indeed focused on the obligation of the manufacturer to give the relevant information, and to give the guarantee. This would breach with the current philosophy that the *content* of commercial guarantees should not be regulated (including the indication of the liable person). From the point of view of effectiveness, traders will feel more comfortable if the manufacturers are liable and bear the compliance cost. Manufacturers will in many case be larger than the traders of their goods (although not always), and in general it may be easier for them to absorb these costs.

On the other hand, consumers may feel more comfortable if they have a direct claim against manufacturers, rather than against a trader in a cross-border context, who may often be a smaller company and more difficult to reach or may suffer from an insolvency risk. However, the circumstances will be important, because consumers may feel more comfortable if they have a claim against a trader with whom they have contact and who will take care of repairs.<sup>96</sup>

#### 4.1.5 Sub-option 2b: Joint liability of trader and manufacturer

**Sub-option 2b** is essentially similar to Option 2a, but it provides **joint liability** of trader and manufacturer, under the hypothesis that the commercial guarantee is provided by the manufacturer (and sole liability of the trader if he is the guarantor). If the **trader** would be the **only guarantor**, it would be logical that the trader would be liable, since the *guarantor* is liable under the commercial guarantee. When a guarantee is given by the manufacturer, however, the policy may consider the joint liability of the trader (who is currently liable for the legal guarantee). The trader is often the point of contact for consumers, and she should be regarded as the local point where products can be brought for repairs or replacement. This is especially true in the case of offline sales, at least when products are bought from local traders. The *legal* guarantee emphasises the importance of her role, since the trader is liable for the conformity obligations. Whereas a direct claim against manufacturers is overwhelmingly approved by stakeholders, there is no reason to exclude the consumer from action possibilities vis-à-vis the trader.<sup>97</sup> The trader can make use of her **right of redress** against the manufacturer. The right of redress is neither regulated nor harmonised, but subject to the provisions of national law.<sup>98</sup> However, the right of redress can be more difficult in practice.

When the claim of a consumer is based on a commercial guarantee provided by the trader, or for which the trader assumes responsibility, the existence, modalities and conditions of a right of redress are subject to national law. According to Article 16 OSD proposal, national law *must* provide a right of redress of the trader against persons earlier in the distribution chain, if these are responsible for the non-conformity. Still, in that case, national law will set out the conditions and modalities of such claim. If the commercial guarantee would overlap with the legal guarantee, and a consumer claims a remedy on the basis of the commercial guarantee, but the alleged lack of lifespan would *also* be considered as a *non-conformity* in the meaning of the OSD,<sup>99</sup> it cannot be excluded that the national law would grant more extensive rights of redress of traders against manufacturers or other distributors. This depends on the relevant provisions of national law and may result in more fragmentation and confusion.

Other problems may arise. According to Article 16 OSD, the **trader** has a right of redress against a person acting *in earlier links of the distribution chain* (manufacturers, distributors, importers). Some stakeholders reported that smaller traders are often dependent on the distribution chain of a certain manufacturer and that in practice, they might hesitate to claim redress. A direct claim of the consumer against the manufacturer may prevent difficulties in this respect, but on the other hand, giving traders the possibility to send consumers back and forth to manufacturers should be avoided. Furthermore, the question arises what happens with independent repairers or traders that were not part of the distribution chain of the manufacturer (e.g. the parallel import circuit, or traders of the manufacturer's network in the

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<sup>96</sup> As stated above, there is a risk that consumers may believe that a manufacturer's guarantee would entirely replace the trader's legal liability during the two-year legal guarantee period.

<sup>97</sup> Some member states currently set out that traders are liable under the legal guarantee for the statements of commercial guarantees of manufacturers unless explicitly rejected.

<sup>98</sup> Art. 16 OSD proposal.

<sup>99</sup> Which is possible in our opinion, if the non-conformity appears within two years (see *supra*).

home country of the consumer, when a product has been purchased from a trader abroad). It could be interesting to make certain that traders or repairers who intervene because of a *commercial guarantee*, acting within the distribution chain or externally, might have a claim in redress against the manufacturer. That would also be helpful for the creation of a renewed 'repairer economy' and/or second-hand market that would fit in the principle of a circular economy.

We conclude that Option 2 may provide more transparency on the guaranteed lifespan of products, and may boost the development of realistic lifespan guarantees for certain product groups if the competition forces traders or manufacturers to do so. However, clarification is needed regarding the concrete implementation of this option, and it cannot be excluded that the content of the commercial guarantee must be partially regulated where absolute freedom would not provide sufficient protection to consumers. Overall, and depending on its implementation, this option may have a moderate effect on increased consumer trust through better awareness and transparency, whereas traders (and manufacturers, if applicable) may feel more confident because they can be held liable up to what they have guaranteed and not more than that, although the caveat of stricter national rules regarding commercial guarantees (Art. 15.4 OSD) must be made for this option as well.

#### 4.1.6 *Option 3: Mandatory commercial guarantee based on 'normal' lifespan*

##### **General remarks and requirements concerning this guarantee**

**Option 3** includes an obligation of a manufacturer or trader to inform the consumer of the **normal lifespan** of the product, or the lifespan that **the consumer may reasonably expect**. This option includes an information obligation that should reflect **a reality** and could be regarded as misleading if it is incorrect. The difference with Option 2 is that the information under that option is a choice for the duration of a contractual guarantee, and not about the actual lifespan that can be expected. Information obligations can have a strong effect. Some 92% of consumers would like to see an indication of a lifespan.<sup>100</sup> Mandatory information could, as a variation of the rule, encompass more than just a lifespan, and include the availability of spare parts, the lifespan of certain components and good use instructions or maintenance guides. Such information can be important on markets that offer a competitive choice between products of higher and lower quality, including durability, so that the consumer can make an informed choice. According to some stakeholders, such obligation can already be deduced from the obligation to provide pre-contractual information on the characteristics of offered goods in distance sales, as set forth in more general terms in Art. 6 of the consumer rights Directive.

Some stakeholders, including legal experts, warn that there is already an information overflow for consumers and that consumers cannot or will not assess all the information, or they don't fully grasp the implications of the statements. It would be a clear requirement for its effectiveness, that such lifespan information is **clear, understandable and short**. It is suggested to take a similar approach as the energy label (that may serve as a carrier for the lifespan information, more so than under Option 2<sup>101</sup>). On the other hand, setting forth a 'normal' lifespan may be more complicated, as the 'normal' lifespan that is set forth may be subject to certain presumptions of correct use and maintenance, circumstances such as frequency of use and temperatures, etc. If a consumer cannot assess these modalities before making his purchasing choice, the information may be regarded as false and misleading. It

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<sup>100</sup> BEUC, "Durable goods", op. cit., p. 10.

<sup>101</sup> To avoid inconsistent information on such a label, this would require sufficient testing methods that guarantee the correctness of the information.

should be clear **which kind of assessment** (and evidence) should be asked from a manufacturer before setting a lifespan (e.g. objective information, based on testing methods that are described by European authorities, and that must be kept available for verification). Should more **subjective** criteria be taken into consideration, such as the price of the product, which may reduce or elevate the *reasonable expectations* of consumers in view of the specific circumstances of the transaction? Furthermore, should it be clear that a **minimum, normal or average**<sup>102</sup> lifespan must be indicated?

It should be clear that such an information obligation *must* be accompanied by a guarantee concerning that lifespan. Setting forth a normal lifespan makes no sense if a manufacturer would be allowed to state explicitly that he gives no guarantee in that respect (negative declaration). Such situation would be incomprehensible for consumers and traders alike, because the meaning and value of the statement would seem contradictory. Furthermore, consumers or traders may wonder whether other legal actions, e.g. based on misleading information (as provided in the EU's unfair commercial practices Directive) could still be possible notwithstanding the explicit absence of a guarantee (keeping in mind that the liability period under the legal guarantee is still only two years).

However, such a 'guarantee' would de facto have little in common with the principle of the commercial guarantee, and would look and feel like the legal guarantee. If the instrument of the commercial guarantee would be applied, that would imply an abrupt change of the philosophy of the (regulation of) commercial guarantees, which until present have always been regarded as voluntary extensions beyond legal obligations. The rules regarding commercial guarantees have since 1999 been merely *formal* rules, focusing on the clarity of such guarantee, the responsibility of the guarantor, and the relationship with the legal guarantee, rules that aim to exclude misleading statements. However the rules have never required a **mandatory** commercial guarantee and never ruled the **content** of such commercial guarantee. Many stakeholders warn that such an abrupt change of the fundamental notion of the commercial guarantee is dangerous and incoherent. It would be confusing for consumers and traders, and may result in the disappearance of 'real' (voluntary) commercial guarantees that would provide lifespan guarantees for a longer period than the normal lifespan (as a commercial assurance given by some manufacturers, traders if applicable, for branding purposes). This concern is more fundamental than under Option 2.

On the other hand, as under Option 2, questions should be raised regarding aspects of the commercial guarantee that would not fall under a mandatory rule, such as the conditions of the guarantee, possible remedies, charges, transferability to second-hand purchasers, the granting of better guarantees for an additional price, etc.

### **Advantages**

Like Option 2, the commercial guarantee contains essentially a guarantee of good functioning during a certain lifespan, what may be advantageous, even during the first years after delivery, for products where the continuous good functioning is more at risk than products that only need a more static assessment of their conformity at the time of delivery, such as smart products and other products of a technical or complex nature. Furthermore, it may enlarge the scope of liability to manufacturers. It is evident that the option will be advantageous for durable products with a normal lifespan beyond two years.

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<sup>102</sup> In case of "average" lifespans, manufacturers or traders may argue in a court case that unfortunately some exceptions to the average rule cannot be avoided, without assuming liability

The additional **advantage** of Option 3 when compared to Option 2 is that it requires information about the **real** lifespan of a product, and thus it would provide more valuable information than the voluntary choice of guarantee under Option 2. **If executed correctly**, this information would be more valuable for consumers. However, the vagueness and difficulties in assessment may result in very diverse outcomes instead of a harmonised policy and in that respect it is regarded as ineffective for stimulating trader's or manufacturers' trust as well as consumer's trust.

### ***Caveats and disadvantages***

A possible difficulty is the **assessment** of the lifespan statement, not only by the manufacturer or the trader who must formulate it, but also by enforcement organisations (arbitration, ombudsman, courts), in the framework of market surveillance as well as claims of consumers. If the 'normal' lifespan is not based on binding product-specific regulations or standards (Option 4), but is only referring to a vague notion, how should it be assessed? Should it be based on lists of business organisations, consumer organisations and insurance companies? Stakeholders in general do not favour this approach. How will the notion be implemented by enforcers in the different member states? Would such application result in again **more fragmentation** than harmonisation? And how will reasonable expectations be taken into consideration when a higher or lower price is paid, or when the use conditions may not have been respected (discussions that could even become more difficult in second-hand relationships where the correct or incorrect use of the product by the former owners is probably unclear). In general, stakeholders are not in favour of the approach in the Netherlands, where ADR-judges may decide upon their own insight (but often based on product lifespan lists that are criticised because these are deemed too general or too conservative, etc.).

Similarly, in Finland, the experience points to case-by-case case law where the outcome is very uncertain and diverse, and does not result in clear general standards, but remains an insecure case by case assessment. What would be the impact when a court case based on the insight of one person would create a de facto precedent for other cases? The risks remain high, with an elevated insurance cost. Even within one country the assessments in case law can be very diverse; it is clear that these assessments can be even more diverse throughout the EU member states. Such situation is deemed ineffective in view of the required legal comfort of traders and consumers, all the more in a cross-border context. Thus, even consumer organisations (including the organisation of Finland) and environmental organisations are not convinced about an approach that is too vague and insufficiently based on solid, harmonised lifespan requirements and assessment procedures.

Furthermore, many stakeholders have warned that **the testing** of a 'normal' lifespan without clear testing criteria would be very expensive, as it requires continuous testing over a longer period of time. A consumer in a court case should need support of certain organisations for such testing (and this is available in certain member states). If he must bear the costs, the insecurity of the testing method and evidence requirements and the cost thereof, may limit consumers in searching remedies in court or ADR-proceedings. Enforcement organisations will not have sufficient financial means or resources to test the indicated lifespan of products sufficiently, thus limiting surveillance activities in this field,<sup>103</sup> and consequentially some manufacturers may free-ride with misleading guarantees that will not be checked upon their

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<sup>103</sup> This enforcement cost could be shared between member states if the testing criteria would be clear and unambiguous, based on standards or product-specific regulations. Fragmentation of the implementation and interpretation of the vague principle will result in limited national enforcement actions.

accuracy. Manufacturers that are located outside EU territory may escape (especially when no product markings are introduced similar to the CE-marking). Since issues with such products would occur after more than two years under this option, the harm is done and the companies may already have winded up in the meantime. Stakeholders believe that incorrect manufacturers or traders will in general not change their practices because of this principle based on a commercial guarantee.

It is important to note that under this option, the guarantor may be liable for (1) an incorrect statement regarding the lifespan (too short for a normal product of the kind, or the price paid etc.) or (2) for the failure of a product to comply with the statement, if the statement can be deemed correct. Whereas remedies can be applied to the second situation, the first situation requires a different **sanctioning** mechanism, which may be based on the unfair commercial Practices Directive (misleading information). An adaptation of the consumer rights Directive may require this information as required pre-contractual information and could provide sanctions in case of omission.

Manufacturers of 'cheaper' products may incur risks if the 'normal' lifespan criterion would be set too high, and thus some flexibility on the market may disappear. This may cause higher purchase costs, also for consumers not interested in lifespan guarantees.

Only a minority of stakeholders have expressed their favour for this option. A majority of stakeholders are more in favour of product-specific regulations or the voluntary system (or ideally a combination of both). In their study on the possible implementation of a lifespan guarantee, Tonner and Malcolm did not favour this option and preferred an approach of product regulations, ideally combined with the voluntary commercial guarantee beyond the minimum regulatory requirements and/or the 'no guarantee' statement for further going guarantees than the regulatory minimum.<sup>104</sup> In their opinion, the determination of normal or minimum lifespan must be left for regulations and should be done methodically.

#### *4.1.7 Sub-option 3a: focus on the manufacturer*

**Sub-option 3a** focuses on the hypothesis of *manufacturers'* obligations and liability. The majority of stakeholders believe that the manufacturer is best suited to give mandatory information and a mandatory guarantee, since he is aware of the product design, the components and the manufacturing process. A direct claim of consumers vis-à-vis the manufacturer is deemed justified or even necessary. **Option 3b** focuses on *traders'* liability, solely or jointly with manufacturers. The trader is in many cases insufficiently aware of the factors that are decisive for the lifespan. Some stakeholders believe that he should not be liable for statements stemming from the manufacturer (similar to force majeure). Others believe that the trader, acting as point of contact for the consumer, is liable for the product, including non-conformities and incorrect statements caused by manufacturers (similarly, under the legal guarantee the trader may be liable for manufacturers' negligence). Probably, the best option would be a possibility of joint liability, with right of redress for the trader (although this right may suffer from difficulties as described *supra*).

#### *4.1.8 Option 4: commercial guarantee based on strict standards or product-specific regulation*

**Option 4** requires a commercial guarantee that is **based on strict standards or product-specific regulation**. The philosophy is comparable to Option 3, insofar the policy requires correct information about 'normal' lifespan and requires the product to live up to that lifespan,

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<sup>104</sup> Tonner and Malcolm, op. cit.

which must be guaranteed as a guarantee of good functioning (thus providing a certain continuity of use); however, where possible, the guaranteed lifespan is based on strict regulations on minimum lifespan. The European Commission's OSD proposal did not focus on a solution for durability, but stated that *product-specific regulations* would rather be a solution (recital 23). The same idea was suggested in Tonner and Malcolm's study on the implementation of a lifespan guarantee.<sup>105</sup> **It must be emphasised however that this option is not as such proposed in the Amendments.**

The framework for product-specific regulations that is typically proposed as a tool, is the Ecodesign directive (EDD). An effective use of the EDD would require an extension of the scope thereof, from energy-related products to include (preferably on a transitional basis) all products with significant environmental impacts and potential for environmental improvement. It would require minimum criteria for lifespan requirements under normalised conditions, and a methodology, as well as mandatory information to the consumer, and the needs in view of enforcement and compliance, as well as preferred remedial action. Mandatory information could in addition encompass information about the availability of spare parts, software updates etc.

The standardisation that would follow from such regulatory framework can be used to boost regulatory clarity for manufacturers, traders and consumers. A product must comply with the legal minimum requirements. That would normally be a liability of the **manufacturer** as it involves production design requirements. The 'guarantee' will function in this case as an extra sanction for non-compliance with a regulatory obligation, although the term 'commercial guarantee' may be confusing as the guarantee is not voluntary and the content is mandatory. This remedy has the look and feel of a legal guarantee. The contractual freedom that is typical for commercial guarantees may be problematic, as it is clear that the **conditions** to benefit from the guarantee (charges, registration duties etc.), nor the remedies, nor the transferability to second-hand purchasers should be defined by the manufacturer in a way that may limit effective remedies. Furthermore, a limited geographical scope would be unacceptable.

The 'true' commercial guarantee that is assessed under Option 2 may apply beyond the minimum requirements of the product-specific regulation. Thus the minimum requirements would be safeguarded by a regulatory approach (linked to a 'mandatory' commercial guarantee) whereas beyond that level, the competitive aspect of lifespan may result in additional commercial guarantees as set forth under Option 2. Lifespan requirements exist already for lighting and vacuum cleaners.<sup>106</sup>

A clear **advantage** is that under this system, if it can be implemented within a reasonable timeframe, objective minimum lifespans can be set forth, that are tailored to the specific product categories that matter for this kind of regulation. The manufacturer (trader if applicable) knows the requirements and can assess the compliance costs. His situation is clearer than under Option 3. Furthermore, enforcement will be easier if it is based on a standardised approach, where test criteria are clear. Enforcement organisations can cooperate easier with other European enforcement organisations, reducing the costs. The consumer knows that there are harmonised minimum lifespan requirements and may feel more confident. In order to be effective, the minimum lifespan should be indicated clearly (e.g. on

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<sup>105</sup> Tonner and Malcolm, "How an EU lifespan guarantee model could be implemented across the European Union", 2017. Remarkably, however, this is not explicitly foreseen in the Amendments.

<sup>106</sup> For lighting, the products have to be resistant to a fixed number of switching cycles and be able to function for a fixed number of burning hours. In the case of vacuum cleaners, durability criteria apply to the lifetime of the motor and the hose.

the energy label). Additional voluntary commercial guarantees can be given for extra protection.

A **disadvantage** is that it may take time to develop the criteria for the relevant product groups. As long as product-specific regulations are not (yet) in place, Option 2, the enhanced awareness through a voluntary guarantee or a negative declaration, is often suggested as the back-up approach.

#### 4.1.9 Sub-options 4a and 4b: manufacturer and/or trader – joint liability

**Option 4a** focuses on the **manufacturer's** liability, which would be common since the product design obligations are manufacturer's obligations. In any cases, consumer trust would be reinforced with a possibly to have a direct claim against a manufacturer.

**Option 4b** focuses on the **trader**, alone or **jointly** with the manufacturer. As set forth supra, the trader may be held liable under the legal guarantee for a non-compliant product even if he is not the author of the 'guarantee' nor of the lifespan information. Under **Option 4**, the standards that form the requirements should be known by the traders (but not all SME's will be able to spend the cost of studying these standards). Even if the standards are known, that doesn't imply that traders can examine the conformity of products they receive from manufacturers. Joint liability can be defended. The trader may have a right of redress against the manufacturer. Since the negligence or misleading actions of the manufacturer would constitute *breach of regulations*, and not merely a contractual breach, it might be easier to obtain redress under some national legal systems, and possibly the evidence of the non-conformity can be provided by enforcement organisations.

Where Option 4 can be implemented, it may be regarded as effective for consumer protection and more consumer trust, also in cross-border purchasing situations. Clarity and harmonisation may have a strong effect. Manufacturers and traders will have compliance costs, but at least they will operate in a harmonised level field and they are able to calculate their risks. Easier enforcement together with consumer actions that are based on harmonised standards and not on uncertain or fragmented concepts, may result in effective progress. This option is the preferred choice of the majority of stakeholders.

## 4.2 Specific objective: Enhancing sustainable production and consumption

This specific objective has two operational objectives:

- Design more sustainable products (push the market)
- Consumers purchase more sustainable products (pull the market)

### 4.2.1 Zero Option (baseline)

Under the Option zero, the current rules regarding consumer sales, even harmonised under the OSD, will not have an impact on sustainable consumption or design of durable products, because there is no incentive for manufacturers to take this aspect into consideration from that perspective. The current limitation of the legal guarantee period for two years does not comprise risks in the long run. In the absence of sanctions under consumer law or civil law, the driver for more sustainable production would have to come from product-specific regulations such as the EDD. The Commission's **Action Plan for the Circular Economy** promises a



stronger focus on issues such as reparability, durability, upgradability, recyclability of certain categories of products.<sup>107</sup>

On the consumer side, as mentioned above, there seems a tendency to discard products before they stop working. Although the behaviour of consumers will vary according to different categories of products, there is in general a behaviour problem that may be caused by a relative low replacement cost for goods, whereas the cost of repairs is often found disproportionate and the markets for spare parts or repairers are often not transparent. Even if claims for short lifespan can be stimulated due to the extension of the period where the consumer must not prove the non-conformity in the OSD proposal, the full harmonisation will result in less claims in countries where claims are currently allowed after two years.

#### 4.2.2 *Option 1: Soft law option*

Taxation support for eco-friendly appliances or other behaviour that favours the circular economy could constitute an incentive to support sustainable consumption, and could help to close the relative gap between repair and replacement costs. Information and awareness campaigns will always be necessary in order to change the consumers' behaviour, but are as such deemed insufficiently effective. Labels may have some effect on sustainable consumption; however in the overflow of information, this is not guaranteed.

#### 4.2.3 *Option 2: Commercial guarantee with subjective lifespan*

Option 2 is based on a business *choice* made by the manufacturer or trader, combined with at least an increased awareness on the consumers' side. As explained above, the increased awareness may result in a stronger demand for durable products and respective commercial guarantees, but only where such demand is really important as a matter of *competition*, to such extent that the increased costs would outweigh the competitive advantage. In oligarchic markets, this could lead to short guarantees or absence thereof. Furthermore, certain manufacturers or traders can choose to put cheap products on the market in order to target a large share of consumers for whom the price is the decisive criterion for purchases.

Moreover, even if an increase in lifespan guarantees would be stimulated, the impact on the wanted circular economy would depend on the increase of **repairs** as the main remedy of choice. If a trader or manufacturer may comply with his obligation through cheap replacements of short-lived products, this would not stimulate a repair culture nor the development of a market of repairers, nor stimulate the design of durable products. However, if a manufacturer could be forced to carry out costly repairs, he would have an incentive to avoid such cost. The stimulation of the repair remedy is therefore important (which is not guaranteed under a system where both manufacturers and consumers always have free choice of remedy based on contractual freedom). The commercial guarantee as a legal instrument would need to be 'stretched' beyond the contractual aspect in order to support a matter of environmental policy, and this is often criticised as a confusing or incoherent approach.

However, even this effect depends on the characteristics of the products, since an emphasis on repairs may for certain products obstruct necessary **innovation**. Old-fashioned products should be replaced if their energy consumption, CO<sub>2</sub> emission or other characteristics have a negative environmental effect (and this is sometimes stimulated in member states). Furthermore, the replacement of products may foster a second hand market. Ideally, the

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<sup>107</sup> See <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52015DC0614>

remedy of repair should be stimulated up to the point where, for relevant product groups, it would **obstruct environmental-positive innovation**.

It would thus be important to **'channel' the best remedy types according to the specific product groups**, meaning that the voluntary aspect of commercial guarantees should become stricter as far as remedies are concerned. This aspect seems easier to achieve under a regime of product-specific regulations, or at least in combination with such a system, that may force the manufacturer to design durable products, and on the other hand could set forth the appropriate remedies as well as requirements that may favour repairs where necessary (e.g. through the availability of spare parts, software updates). As explained earlier, the contractual conditions of a commercial guarantee may limit their effectiveness (including possible geographical restrictions that may annihilate remedies in a cross-border context, unless these are deemed made in bad faith). It would be difficult and incoherent to change the nature of the guarantee by regulating its content in large part, thus awareness campaigns should be used to create awareness about the important aspects of such guarantees or a sectoral approach to develop fair practices.

All in all, this option is deemed to have a moderate effect on sustainable consumption (consumers' side) and similarly on sustainable production on the supply side.

Whereas **Sub-option 2a** focuses on the liability of the manufacturer and **Sub-option 2b** on joint liability of manufacturer and trader, we refer to the role of the manufacturer as the designer of the product and the creator of the branding policy that is important for commercial guarantees. In that respect the urge to develop sustainable products will all the more arise if manufacturers risk their own liability, and the cost cannot be pushed to the traders of the network. This may especially be true if costly repairs are risked. Option 2b offers more possibilities to consumers where they may have claims in joint liability.

#### 4.2.4 Option 3: Commercial guarantee for 'normal' lifespan

Option 3 requires the indication of a 'normal' lifespan which must be guaranteed. In the framework of sustainable production and consumption, there is an advantage in that a 'normal' lifespan must be indicated, and thus the consumer can really take requirements of durability into consideration, whereas Option 2 is merely based on choice. However, the vague rule leaves much insecurity, fragmented implementation and enforcement issues (*supra*), and is based on an instrument that is deemed not suitable for the regulatory aspect that is expected of it. Consumer claims will only be important for the individual consumers that dare to file claims based on vague requirements, but they will not result in clear, harmonised standards. Furthermore, difficult and costly surveillance does not warrant a sufficient level of compliance, nor a coherent minimum level playing field. In general, Option 3 is deemed ineffective as an instrument to boost sustainable consumption as well as sustainable production, and until present no level of more sustainable consumption nor production has been proven in the Member States where claims for lifespan can be raised after the two-year period of the legal guarantee.<sup>108</sup> Regarding effectiveness, there is not really a difference whether the manufacturer or trader would be liable, except that sustainable production will be more felt by manufacturers if they risk their own liability and effective compliance costs.

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<sup>108</sup> Confirmed by local experts.

#### *4.2.5 Option 4: Commercial guarantee based on product-specific standards or regulations*

Option 4 has been described above as standardisation in combination with a guarantee. Most stakeholders, including business associations but also consumer and environmental associations, have no doubt that product-specific regulation will be the most effective policy option for sustainable production,<sup>109</sup> at least if it can be implemented in due time for the relevant product groups. The requirements for production can be tailored according to the needs of the product groups, they are clear and provide a minimum for consumer protection. Beyond the minimum level, commercial guarantees can be applied as an additional protection, if there is a competitive urge to do so. It would be normal to hold the manufacturer liable for breach of the rules, however there are arguments to hold the trader liable as well, whereby he can use the right of redress.

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<sup>109</sup> As well as the Commission in recital 23 of the OSD.

## 5. Efficiency: Relevant costs and benefits

The focus of the section 5 is on efficiency, which is defined as follows: efficiency relates to the overall impact of the proposed options on social welfare. It implies an evaluation of both the expected costs and the expected benefits of each option.

It is very important to identify the categories of costs and benefits that such options are likely to generate. This, in turn, makes it easier to evaluate the possible distributional impacts of each option, i.e. the impact broken down per category of stakeholder.<sup>110</sup> We base our analysis on the taxonomy of costs and benefits provided in Renda et al. (2014),<sup>111</sup> now fully embedded in the toolkit attached to the new better regulation guidelines of the European Commission.<sup>112</sup>

The detailed benefits and costs assessed below in each group have been identified during the consultation and/or the desk research process. The purpose is to assess how and to which extent each policy option can generate such costs and benefits. Obviously, the list of costs and benefits is not exhaustive.

### 5.1 Possible benefits

#### 5.1.1 *Healthier competition.*

So far, commercial guarantees have been primarily a component of companies' business models. Businesses have typically followed two strategies when they provide a commercial guarantee. An extra service of guarantee can be offered rather as a label, in order to show that the lifespan of the product lasts longer than the legal guarantee period. This type of strategy is even more profitable for products with actual intrinsic qualities that are above market's average. On the other hand, specific financial incentives can also be behind the supply of commercial guarantees as an extra service. For instance, as emphasised by the consumer and environment associations interviewed during the consultation, to some extent some commercial strategies have been using the product itself as a 'loss leader' (low price that results in loss or little profit on the product itself) to stimulate the purchase of profitable commercial guarantees. The assumption is that competition on the intrinsic qualities of products rather than on attached financial services is healthier and more beneficial for the economy in general. The purpose is to assess how and to which extent each option can contribute to reinforce this healthy competition.

Within the **soft law approach (Option 1)**, none of the initiatives directly targets the practice of commercial guarantees primarily for financial incentives. However, indirectly, different initiatives such as the promotion of the use of labels or the awareness campaigns to incite consumers to consider guarantees in their purchase could reinforce the framework for the competition based on products. Therefore, the overall impact on the health of competition should be null or slightly positive/negative.

As regards the **option subjective duration for lifespan (Option 2)**, manufacturers and traders alike can provide commercial guarantees for lifespan, but the mindset of this option is

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<sup>110</sup> This approach has also been developed in another impact assessment for the European Parliamentary Research Service on copyright, p. 300 ([http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS\\_STU\(2015\)558762\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf)).

<sup>111</sup> See Renda et al. (2014), "Assessing the costs and benefits of Regulation", CEPS-Economisti Associati Study, for the European Commission ([http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/131210\\_cba\\_study\\_sg\\_final.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf)).

<sup>112</sup> See the website of the European Commission on the guidelines for Better Regulation ([http://ec.europa.eu/smart-regulation/guidelines/tool\\_51\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/tool_51_en.htm)).

that they cannot ask for an extra fee anymore. In a way, this would mean that competition on attached financial services would disappear.

Therefore, this could indirectly reinforce the competition on the intrinsic qualities of the product. But, no specific legal regime within this option would contribute to directly shape competition on products, as providers are free to provide guarantees for lifespan in subjective terms. At best, a common practice would be that providers which choose to offer these guarantees for lifespan are the ones that produce the most robust products, and consumers fully understand this trend. But the realisation of this assumption remains uncertain given the flexibility offered to providers in the determination of the duration of lifespan. If consumers perfectly understood the terms of the contracts they set with distributors, the quality of competition would be high, as consumers would be able to compare products, lifespan and related rights in an objective manner. But, this assumption is highly hypothetical.

Within the **option normal duration for lifespan (Option 3)**, in line with the option subjective duration for lifespan, the commercial guarantees based primarily on financial incentives will disappear. Furthermore, should mandatory guarantees for lifespan be generalised in that option, lifespan and by extension the quality of the product should automatically become an even stronger argument of competition. However, owing to their ambiguities, the notions of 'reasonable' or 'normal' lifespan could result in misunderstanding of both consumers and suppliers, hereby altering the competition in an undesirable manner.

Finally, the **option binding technical standards for the duration of lifespan (Option 4)** should markedly reinforce the benefits in terms of competition by product, provided that the chosen standards are of high quality (standards that are highly reliable, applicable, sufficiently flexible, etc.). Nevertheless, it is likely that a limited number of sectors could be covered by **Option 4**. Therefore, in the meantime, the existing sub-optimal patterns of practices would be maintained in other sectors.

#### *5.1.2 Benefits to the consumer*

Consumers could benefit from a stronger policy framework for lifespan and commercial guarantees. There is currently no evidence on the level of additional costs triggered by mandatory commercial guarantees for lifespan and to which extent these costs will be reflected in the final price. Whereas manufacturer and retail associations tend to agree that such costs could be significant, consumer and environment associations had the opposite view.

If some conditions are met, it is possible that the cumulative impact will be eventually beneficial for all or certain groups of consumers, depending on their risk profile and purchasing habits. Also, some options could be more beneficial for consumers who purchased a defective product.

#### **Consumers with high-risk aversion versus consumers with low-risk aversion**

Within the **Options 2, 3 and 4**, the service of extended guarantees to be purchased, which can be expensive and heavily used by specific business models when the period for legal guarantee is over, will not be available anymore. All consumers purchasing the same product will have a guarantee for the lifespan of the product, and no extra funds would have to be disbursed. The price of the product should admittedly be raised by providers to counterbalance the loss of fees captured via guarantee extension. However, for consumers who were purchasing guarantee extensions, the total cost would be below pre-option levels, because the corresponding financial losses for providers will be passed on to the product price for all consumers, including the ones who were not acquiring such guarantees. For other

consumers, the total cost would be higher but they would benefit from longer commercial guarantees.

Within this model, the impact will depend on the risk profile and purchasing habits of each consumer. Consumers with higher risk-aversion (who were purchasing extended guarantees or would have liked to purchase one) should benefit from it, while the ones with lower risk aversion (who were not interested in purchasing extended guarantees) could perceive the increase of prices as a loss of welfare. The winners should be consumers with higher risk-aversion who might have purchased a commercial guarantee if it was cheaper. According to some studies (Chafea, 2015), up to 45% of EU consumers can have this profile.<sup>113</sup>

Nevertheless, the intensity of these effects should differ across the options. Within the **Option 2**, the aggregate impact for the whole economy is uncertain, as it will significantly depend on how companies adjust their business models and to which extent they will provide information on lifespan and commercial guarantees for that lifespan. Should the **options 3 and 4** result in mandatory guarantees for lifespan, the benefits identified for the **Option 2** will be generalised.

Finally, regarding the **soft law approach**, specific initiatives of this option could contribute to raise the share of risk-averse consumers, especially via the awareness campaigns aimed at inciting consumers to consider guarantees in their purchase. But, given the non-legislative dimension of such an initiative, each national government is free to promote it or not. So, most likely, the effect on consumer benefit in that sense is uncertain or rather limited.

#### ***Consumers who purchased a defective product versus consumers who purchased a good product***

The original purpose of a guarantee related to the purchase and consumption of a product is somehow similar to an insurance service. Products with defect result in costs of repair, replacement, etc. or legal fees in case suppliers and consumers do not agree on the nature of the failure. If this failure occurs within the guarantee period and if the nature of the failure allows the consumer to be entitled to remedies, the costs are shared with other consumers. If the consumer of the failed product is using his rights related to a commercial guarantee he purchased, then most likely the costs are almost exclusively shared with other consumers who purchased the same commercial guarantee, according to the principles of insurance. Typically, within the systems of **Options 2, 3, and 4**, the existence of free commercial guarantees for lifespan implies that the costs should be shared between all consumers through an increase of the price of the product. Against that backdrop, the consumer with a failed product who was purchasing a commercial guarantee before the implementation of one of these options is the big winner with these three options.

The joint liability of traders and manufacturers (**Options 2b, 3b and 4b**) should bring further benefits to consumers than under a regime where only manufacturers are liable. As traders are fully liable, consumers could directly notify them their claims. Given that traders are the main contact point of consumers, this greatly facilitates the claims process. As analysed in the legislative options, the seller has then the possibility to have an action in redress against the manufacturer, should domestic laws allow it. On the other hand, should manufacturers be solely liable (**Options 2a, 2b and 2c**), it is likely that in many cases consumers would have to

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<sup>113</sup> See on p. 92 of the study published by the Consumers, Health, Agriculture and Food Executive Agency on Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU, December 2015 ([http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/docs/legalguaranteesfinal\\_report\\_en.pdf](http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/legalguaranteesfinal_report_en.pdf)).

notify their claims to manufacturers. The claim process should be much more complex, especially for smaller manufacturers who might not have any interface to manage these claims. As a result, many consumers might decide not to notify claims, particularly for cross-border cases.

### 5.1.3 *Benefits in specific fields*

The objective of this session is to assess if the options will be more beneficial for some stages of the production and distribution chain, and for specific sectors of products. Provided that the new rules would encourage firms to invest further in the design of sustainable products, specific sectors of the production chain such as research and development could be boosted. This should be particularly true for the **Option 4** where many manufacturers would have to innovate to comply. The extension of guarantees under **Options 3 and 4** should greatly benefit consumers in sectors where the demand for long lifespan is high. This should be a priori the case for expensive goods that are less shaped by fashion/latest taste/trends: home appliances, cars, etc. Also, as analysed in the section 4 on options and the section 5 on effectiveness, mandatory commercial guarantees for lifespan should greatly benefit 'smart products'.

### 5.1.4 *Development of pan-European sustainable products*

This is a more specific, EU-related benefit that can be considered a stand-alone benefit for a policy oriented at contributing to the achievement of the Single Market. If the EU were to legislate on the matter, the information obligation for manufacturers or traders to inform about a product's lifespan and to establish a commercial lifespan guarantee could provide the opportunity to develop a level playing field for competition on the European market, as well as a fair system to allow consumers to make comparisons also across national borders.

The **soft law approach** would be very weak regarding this benefit, given that none of the initiatives are constraining and that each government is free to promote them or not. Further mandatory information disclosure on practices in terms on guarantee and lifespan, as it is specified under **Option 2** should reinforce comparability of products. This is also the case for **Option 3**, but the high legal uncertainty (see section 1.1.5) resulting from this option might more than counterbalance the positive effect of further information and generalised guarantees, which might be particularly critical on a cross-border basis for both suppliers and consumers. As the primary goal of the **Option 4 binding technical standards for the duration of lifespan** is to edict binding technical standards at the European level (for instance via an extension of the EDD), this option has by far the largest potential to contribute to the emergence of pan-European sustainable products.<sup>114</sup> This view is shared by several of the environmental associations consulted. Furthermore, a legislation such as the EDD is also providing an obligation to disclose relevant information to the consumers, in order to facilitate cross-border comparison.

The options that focus on joint liability of sellers and manufacturers (**options 2b, 3b and 4b**) should be key for the emergence of pan-European sustainable products. As analysed above in the section 1.1.2, in a domestic context, consumers should be reluctant to purchase a good if they understand that the claim can be notified only to the manufacturers. This should be

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<sup>114</sup> For example, in Annex 1, Part 2 of the EDD, several requirements related to the supply on information should help consumers compare sustainable products across countries, in particular (b): information for consumers on the significant environmental characteristics and performance of a product, accompanying the product when it is placed on the market to allow consumers to compare these aspects of the products.

especially true for small manufacturers, as a significant share of them have no interface to deal directly with the consumers. This barrier is even more constraining in a cross-border context.

#### 5.1.5 *Increased legal certainty*

A system with high legal certainty permits those subject to the law to regulate their conduct with certainty and to protect those subject to the law from arbitrary use of state power. The subjective dimension emphasised in the **Option 2** should provide a relatively high level of legal certainty, given that the lifespan and related conditions of usage, etc. are defined solely by the supplier. In case of claims or complains, the sole reference for legal assessment remains the contract between the consumer and the supplier. For **Option 4**, the legal certainty should be even reinforced, as for all products covered, the legal reference is the detailed standards that in theory apply to all manufacturers when they are defining their lifespan. Conversely, legal experts interviewed in the consultation tend to believe that the **Option 3**, as it has been designed (mostly on the basis of Amendments 198, 385, 386 and 635), should offer the lowest level of legal certainty of all options. Indeed, if any dispute should arise, the legal authority should in principle have much more freedom than in other options on how to decide.

## 5.2 Possible costs

### 5.2.1 *Direct costs*

#### ***Direct costs for manufacturers***

Certain policy options might be more costly than available alternatives in terms of resulting charges, substantive compliance costs (need to review the process of determination of lifespan, etc.), or administrative burdens (introduction of new reporting obligations for market monitoring). Such costs are typically incurred by industry players. As revealed in the Flash Eurobarometer 413 (2015),<sup>115</sup> a significant share of companies that sell their products online to other EU countries already consider the cost of guarantees and returns as a major problem. The related figures show that, no matters their size, sector or age, all types of companies can encounter significant difficulties when facing costs of guarantees and returns. These findings were confirmed by all retail and manufacturer associations approached within the consultation.

The **soft law approach** should result in the lowest level of direct costs for manufacturers. As none of the initiatives is constraining, the adoption by firms of any of these initiatives should be most likely based on a cost/benefit assessment. As such, if a firm adopts an initiative, the direct costs should be limited compared with benefits. **Option 2** will result in few additional legislative constraints. Internal models of suppliers will not need to be adjusted to determine lifespan. The only business models that might be significantly affected are the ones who were relying intensively on the practice of charging for commercial guarantees. Therefore, the direct costs for all models would be mostly limited to the ones resulting from the additional information disclosure. On the other hand, direct costs should be high with the **Option 3** in a context of generalisation of commercial lifespan guarantee, and very high for **Option 4**, mainly as a result of the implementation of the technical norms. No marked differences can be identified between the options “manufacturers are liable” and “traders and manufacturers are jointly liable”.

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<sup>115</sup> The results of Eurobarometer 413 can be found at [http://data.europa.eu/euodp/en/data/dataset/S2058\\_413\\_ENG/resource/60d2cd71-2326-4a1b-9701-8aceb8fd7e77](http://data.europa.eu/euodp/en/data/dataset/S2058_413_ENG/resource/60d2cd71-2326-4a1b-9701-8aceb8fd7e77).



**Direct costs for consumers**

One of the purposes of the different options assessed is to contribute to alleviate information asymmetries that are detrimental to consumers in respect to the lifespan of the product. In other words, the objective is to ensure that consumers have the right information on lifespan of the products and related guarantees.

All the consumer and business associations highlighted that the new information available on lifespan, commercial guarantees and related rights should be relatively complex, hereby requiring time to be understood and assimilated by consumers. Many of the initiatives covered by the **soft law approach** such as the ones related to labels, education of consumers/traders, awareness campaign or publication of information on usage could contribute to accelerate the learning process for acquiring good knowledge of mechanisms related to lifespan and guarantees. But, this would depend much on how far these initiatives are promoted at domestic level.

The added mandatory information under the **Option 2** should contribute to clarify somewhat the practice of the suppliers in terms of commercial lifespan guarantee. It is likely that consumers might have more difficulties to understand the information disclosed within **Option 3**, especially if the 'normality' is not properly defined in the sector. Whereas the original intention of **Option 3** was to reduce significantly information asymmetries detrimental to consumers, it is likely that such a system might lead to more misunderstanding by both the producer and the consumer than in **Option 2**. **Option 4** should be the most qualified to decrease information asymmetries, especially if adequate information is provided on the usage as is the case in the EDD. Some technological trends such as the emergence of big data and Internet of things could also somehow help consumers better use their products with digital content (electronic devices could provide personalised information to each consumer in order to improve their usage).

**5.2.2 Enforcement costs**

This category can include costs from enhanced litigation, administering and applying sanctions, and monitoring compliance. Such costs typically affect public authorities, but they can also affect private players. The latter can face costs of this type both in the form of opportunity cost of the time spent engaging litigation, and as a result of the existence of private regulation such as codes of conduct, which place enforcement activities directly in the responsibility of private players.

Enforcement costs for the **soft law approach** are almost null, given that it concerns only non-legislative initiatives. The only exception might be the use of taxation tools to enhance the development of sustainable products and proper guarantee systems (to check if the tax declaration is correct, given that a significant amount of information might be needed).

**Surveillance costs**

As regards legislative options, a distinction can be made between enforcement costs related to surveillance and the ones related to the notification of claims. Overall, surveillance can concern two core aspects: the assessment that the lifespan is correct and the assessment of all other issues. The latter includes elements such as the publication of mandatory information, etc. It should be proportionate to the number of legal requirements. These types of enforcement costs should be thus higher for **Option 4** than for **Options 2 and 3**. The former concerns the testing of the durability of products and aims at assessing if the information disclosed is correct. As shown by some publications, the performance of durability tests for

the whole product can be very expensive in time and money (Joint Research Centre, 2017).<sup>116</sup> This argument was highly supported by all retail and manufacturer associations. It is likely that the needed resources to perform such tests will be higher for **Option 3**, as the benchmark is not well defined within that option.

#### ***Claims costs: Assessing the impact of usage***

Assessing if a specific usage is the core reason behind the failure of a product can be very costly and challenging, and can require the conduct of expensive tests. One possibility is that the failure is directly related to a misconception during the production process and that the type of usage of the consumer had little impact. On the other hand, what could be firstly analysed as a defect during the production, as claimed by the consumer, could be eventually assessed as the result of an inadequate usage of that consumer.

The difficulty to assess the role of usage is due to the multidimensional characteristics of usage. For example, for what concerns home appliances, usage can differ significantly across consumers: use frequency (often based on the type of households: single or family with several children), maintenance (e.g. how often the filters of a washing machine are changed), proper installation, location of the appliance (the room can be damp, too cold, too hot, badly ventilated), etc. The impact of the general patterns of use can be also very significant for products such as smartphones (some consumers use it 30 times, whereas some others might use it 150 times).

Within the **Option 1**, the initiative aimed at promoting the disclosure of information on the detailed conditions of usage and maintenance could somewhat help mitigate the differentiation of usage across consumers. But, if not compulsory, its adoption would remain uncertain. **Option 2** gives entire freedom to providers to determine the lifespan and the related conditions of usage. Tests and assessment should be therefore based on what is written in the contract between the consumer and the trader.

Within the **Option 3**, in case of recourse against the manufacturer, the ambiguity of the notion of lifespan could complicate markedly the conduct of adequate tests, hereby likely raising enforcement costs. Conversely, within the **Option 4**, legal authorities can use consistent standards to assess if usage played a role or not. For example, in case the **Option 4** would be based on the technical standards of the EDD, some elements of this EDD aim at directly shaping the usage of consumers (in relation to installation, use and maintenance), to minimise the impact of usage on environment and to ensure optimal sustainability of the product.<sup>117</sup>

#### ***5.2.3 Indirect costs: Compliance costs***

Indirect compliance costs occur when costs generated by compliance with legal rules are passed on downstream in the form of higher prices. These elements were already partly analysed above in the section on healthy competition. Business associations all agreed that compliance costs involved within the Option 1 should be limited as suppliers are not

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<sup>116</sup> For instance, in the JRC Technical report on Ecodesign and Energy Label for Household Dishwashers (2017, p. 341), the requirement on performing durability tests for the whole product (e.g. endurance tests, accelerated tests under extreme conditions), where manufacturers declare the durability values, is costly in terms of money (minimum 50,000/test) and time (9-12 months) for both dishwashers and washing machines. The results of non-compliance would only be available one year after the product is on the market, making its removal difficult. The mechanism would work more on the brand reputation, if several cases of non-compliance were found.

<sup>117</sup> See Annex 1, Part 2, (b) of the EDD: Information for consumers on how to install, use and maintain the product in order to minimise its impact on the environment and to ensure optimal life expectancy, as well as on how to return the product at end-of-life, and, where appropriate, information on the period of availability of spare parts and the possibilities of upgrading products.

compelled to adopt initiatives. Should providers do it, they would have assessed well in advance related costs and benefits. As regards **Option 2**, the more suppliers of a sector were providing commercial guarantees for which there were charges, the more prices of the final product would increase. The only other possible cost to be pass-through could be related to the new information disclosure, but this should be very limited.

Indirect costs should be significantly higher for the **Options 3 and 4**, especially if commercial guarantees for lifespan are mandatory for all covered sectors. The level of increase in prices will depend on:

- the amount of the costs related to the review of internal processes for determination of lifespan (likely much higher for **Option 4** given the clear standards enacted) and
- the amount of the costs related to new claims (the number of claims will automatically rise once guarantees are extended: the related costs could concern both costs resulting from the use of remedies and/or legal costs in case of disagreement between the consumer and the supplier on the nature of the failure). It is likely that **Options 2b, 3b and 4b**, where manufacturers and traders are jointly liable, will result in further claims and therefore higher indirect compliance costs.

#### *5.2.4 Indirect costs: Substitution effects and technological avoidance measures*

These costs refer to the case in which consumers rely on a second-best, socially optimal course of action. A significant number of retail associations interviewed emphasised that if prices increase significantly as a result of the new legislation, consumers could be more prone to purchase goods from outside of the EU, in particular products with lower price and quality. Such products are less likely to be compliant to the new rules or other existing ones related for example to safety, and it could be more challenging for authorities to enforce them. *Ceteris paribus*, the risk that consumers purchase more cheap products imported from outside the EU would mainly depend on how much the price of product would increase as a result of the new legislation. This was analysed above in the section on “indirect costs”: compliance costs. Therefore, the risk would be limited for **Options 1 and 2**, high for **Option 3** and very high for **Option 4**.

Also, regarding the rights of consumers, these consumers might not be encouraged to notify their claim simply because they fear that no quick solution would be provided such as a replacement product. These indirect costs should be much higher for **Options 2a, 3a and 4a** given the additional difficulty to notify the claim.

#### *5.2.5 Indirect costs: Reduced efficiency, competition or innovation*

These effects occur anytime a specific policy option falls short of achieving a satisfactory level of efficiency.

#### ***The question of remedies***

Another indirect cost is related to the repair agenda. Provided that the good is not consuming too many resources because of its age, all organisations interviewed agreed that the repair of the product can be analysed as the option with the lowest negative impact on environment. Nevertheless, all associations also pointed that the ‘cost gap’ recorded between repair and replacement has kept on decreasing in the last decade, owing to continuous contraction in repair jobs, low availability of spare parts, increasingly ‘impatient’ consumers and marketing strategies. If the final amendments lead to more replacements in some sectors because the related repair industry cannot cope with possibly increasing demand from consumers or

simply because the vast majority of consumers systematically opt for replacement, then the cumulative impact on the environment might even prove to be negative.

In sectors where replacement has been so far favoured by a significant share of consumers and suppliers during the legal guarantee period (for example with products that can be easily carried back to the shop: small electronics, small home appliances, etc.) a longer guarantee could have therefore mostly counterproductive effects. Conversely, in sectors with a demand for repair which is structurally high (for instance in sector where it might be difficult to carry the product to the distributor: home appliances such as washing machines, etc.), a longer guarantee could reinforce the number of repairs.

Therefore, options that focus on the generalisation of the extension of guarantee should have marked effects if repair (positive effect) or replacement (negative effect) are almost systematically preferred. The cumulative effect at the economy level is uncertain and a sector-by-sector approach should be more adequate in that context. No matters which option is chosen, the absence of focus on remedies remains one of the main limitations of the amendments.

***Existing competition issues between manufacturers, traders or repairers might worsen***

Should **Options 2, 3 or 4** be chosen, two types of competition imbalances between manufacturers, traders or repairers could worsen significantly:

- a monopoly situation: there is only one manufacturer or very few of them for a large number of small distributors, or there is only one repairer or very few of them for a large number of small distributors or repairers.
- a monopsony situation: there is only one manufacturer or distributor or very few of them for a large number of small repairers, or there is only one distributor or very few of them for a large number of small manufacturers.

**Options 3 and 4** could distort further these different situations of unbalanced competition, should lifespan guarantee be generalised. An example of the second type of distorted competition occurs in the car repair industry (as argued by the corresponding association at EU level), where one or very few manufacturers are generally using the services of a multitude of authorised repairers. In case of defect during the legal guarantee period, consumers typically ask authorised repairers to repair the defective vehicle because no or low fees are involved.<sup>118</sup> Often, owing to the monopsony situation, contractual agreements between manufacturers and authorised repairers are unfavourable to the latter. A systematic extension of guarantee could therefore result in unfavourable terms much beyond the legal guarantee period. On the other hand, independent repairers focus almost mostly on cars which already passed the legal guarantee period. A lifespan guarantee that result in lifespan contracts with authorised repairers could therefore significantly affect the activity of these independent repairers. Given the small size of repairers, it is likely that a noticeable number would disappear against that backdrop.

For the case of monopsony where manufacturers are disproportionally bigger than distributors, the **Options 2a, 3a and 4a** could protect somehow the small distributors, albeit to the detriment of consumers. Should the distributor be much bigger than manufacturers,

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<sup>118</sup> A detailed analysis on the car repairer markets and on the preferences of the consumers can be found in "The European Automotive Aftermarket Landscape", Boston Consulting Group (2012), notably on p. 7 (accessible via <https://www.bcg.com/documents/file111373.pdf>) and "The Natural Link between Sales and Service – An investigation for the Competition Directorate-General of the European Commission (2000), notably on p. 40 (accessible via [http://ec.europa.eu/competition/sectors/motor\\_vehicles/documents/sales\\_and\\_service.pdf](http://ec.europa.eu/competition/sectors/motor_vehicles/documents/sales_and_service.pdf)).

**Options 2b, 3b and 4b** should not be sufficient to protect manufacturers, given that large distributors are likely to obtain disproportionate advantages through the use of redress mechanisms. As such, in case a legislative option is adopted, the scope of sectors to be covered by the new law should be thoroughly assessed before implementation.

## 6. Impact of the amendments on the coherence of the legislative framework on consumer protection

A **coherent** regulatory framework is consistent with the objectives of the EU, and it avoids unnecessary complexity and unequal variations for similar issues in the regulations. A feeling of legal uncertainty and (apparent) contradictions, fragmentation, and possibly loss of certain benefits, are indications of incoherent legislation. Variations in rules, exceptions, and a certain complexity are not per se inconsistent, if such trade-offs are justified by certain benefits of the rules. This assessment must be done under the coherence check.

The coherence assessment can be regarded as an assessment of the internal coherence of the Amendments within the framework of the existing rules of the CSD and the OSD, and on the other hand an assessment of the external coherence with the other legal instruments of the *acquis communautaire* in consumer protection.

### 6.1 Internal coherence

The legal framework should avoid diverging rules for **offline and online sales** channels. It is presumed that the OSD shall be extended to the CSD in order to avoid a different framework governing similar issues.

**Confusion between the legal guarantee regime, the commercial guarantee regime and a 'special' or mandatory commercial lifespan guarantee** should be limited as far as possible. The concepts of legal and commercial guarantees, and their interrelationship, are already under the current legislation difficult to grasp. This confusion will only increase if special commercial guarantees occur with mandatory elements. The deviations of the freedom to contract, until now essential for commercial guarantees, are necessary if a commercial guarantee must fulfil a more regulatory function, and this should be done carefully. Furthermore, the complex *co-existence* of these regimes during the first two years after delivery, should be made as clear as possible. The impact of commercial guarantees on the legal guarantee can be an impact of raising or lowering consumers' expectations regarding the required conformity of a product. The consequences must be made clear and unambiguous. It should also be clear whether or not even more beneficial commercial guarantees can be given for extra payment, beyond and above the required lifespan guarantee that should be for free.

The current **freedom of contract** regarding commercial guarantees implies that guarantors are able to propose **remedies** that are less efficient from an environmental point of view, or that they can prohibit the **transfer** of the commercial guarantee to second-hand buyers, or that they may require **registration** or other conditions. If such limiting terms and conditions can subsist, the commercial lifespan guarantee would lose much of its effectiveness and such inconsistent framework would result in empty protection. It would not be good practice to require mandatory statements from traders or manufacturers that can at the same time easily become meaningless in practice through their own terms.

If the trader would be targeted as liable person, a sufficient right of redress against the manufacturer should avoid **the trader being 'sandwiched'** between a consumer who files a claim against him and a manufacturer who would be able to dismiss the right of redress of the trader, even if he would be responsible for the lack of lifespan or the incorrect duration mentioned on the guarantee.

If a new rule would require the manufacturer or trader to provide mandatory information on the 'normal' or 'expectable' lifespan, he should not have an option to explicitly refuse a guarantee for such lifespan. It would be seen as very inconsistent, and even contrary to other consumer protection laws (possibly the UTCD and UCPD), to provide certain information on the characteristics of a product and to be able to exclude the liability for it through a negative guarantee.

## 6.2 External coherence

The amendments are consistent with the *acquis communautaire* in the field of consumer protection.

One remark is, however, that the **consumer rights Directive**<sup>119</sup> contains pre-contractual information obligations in its Articles 5 and 6, regarding the characteristics of sold products. Lifespan is not explicitly mentioned as mandatory information (nor the obligation to state that no lifespan is guaranteed). If such obligation is included in the CRD, the lack of information may be sanctioned more effectively than under the OSD.

**Product-specific regulations or standards** must be **aligned** with contractual liability. If product-specific regulations require certain minimum lifespan obligations, a commercial guarantee should as a minimum respect such obligations.

Certain **remedies** may have a positive effect on **sustainable** consumption (e.g. repair), but when applied too rigidly, the effect may become negative (e.g. important **innovation** may be hampered and older products may pollute the environment more, in a way that new techniques could avoid). The aspect of remedies must be applied carefully, taking into consideration product-specific issues and requirements. The effects must be consistent with existing policies in these fields.

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<sup>119</sup> **Directive on consumer rights** (2011/83/EU), not to be confused with the consumer sales Directive (CSD).

## 7. Subsidiarity and proportionality

### 7.1 Subsidiarity

When applied in the context of the European Union, the principle of subsidiarity serves to regulate the exercise of the Union's non-exclusive powers. It rules out Union intervention when an issue can be dealt with effectively by Member States at central, regional or local level and means that the Union is justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level.

Under Article 5(3) Treaty on the European Union there are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity: (a) the area concerned does not fall within the Union's exclusive competence (i.e. **nonexclusive competence**); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. **necessity**); (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. **added value**).<sup>120</sup>

The area concerned encompasses rules of consumer protection as well as elements of the law of contracts, under many Member States regarded as civil law or common law.

The proposed amendments aim to provide a protection for consumers with regards to the expected lifespan of products, which would not be provided under the OSD or DCD, nor the CSD (whether or not they are merged with the OSD) without the Amendments. Due to a harmonisation of a maximum legal guarantee period of two years, consumers would not be able to claim a lack of lifespan if the issue would become apparent after those two years. The aim of the amendments is to boost consumer's confidence and thus stimulate cross-border purchasing and the further development of the digital market. Furthermore, through guaranteeing a protection for the durability of products, and at least an awareness in this field, the amendments aim to promote the development of sustainable consumption, as well as sustainable production.

Through harmonised rules requiring the introduction of a commercial lifespan guarantee and information obligations, it will create a single set of rules ensuring the same high level of consumer protection across the European Union and allowing traders to sell to consumers in all Member States based on the same contractual terms. The proposal would significantly reduce traders' compliance costs while granting consumers a high level of protection. Therefore, **action at EU level would be more effective than action at national level**. Only an action at the EU level can achieve legal certainty in the framework of cross-border selling, and can avoid fragmentation of national laws. At least the traders will all know that they have an obligation to provide a commercial guarantee regarding lifespan, or they have to inform the consumers that no such guarantee is given. At least the consumers will in the entire Union be offered such a guarantee or as a minimum the negative declaration that may raise their awareness, enabling them to contract with informed consent.

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<sup>120</sup> These analyses can be found in the following document of the European Parliament on the principle of subsidiarity ([http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.2.2.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf)).



## 7.2 Proportionality

The proposed Amendments comply with the principle of proportionality as set out in Article 5 of the Treaty on European Union because the proposals will not go beyond what is necessary for the achievement of the objectives.

The proposed Amendments will not harmonise nor limit *all aspects* concerning commercial guarantees; on the contrary, the modalities can still be regulated by national law as set forth in Article 15(4) OSD (there is currently no similar provision in the DCD). Freedom of contract remains in general safeguarded. Only in relation to protection regarding the expected *lifespan* of products, do the amendments introduce a mandatory commercial guarantee, the modalities of which is not regulated (although we suggest that modalities such as transfer of the guarantee to second-hand buyers, remedies, conditions of the guarantee may be more regulated in a harmonised manner). The content of such commercial guarantee may be regarded as of a more regulated nature if the trader or manufacturer must provide a 'normal' lifespan (Option 3) or has to respect product-specific regulations (Option 4). If the lifespan of products is regulated, the commercial guarantee referring to such regulation will only confirm an obligation that would exist already. Such provision will thus comply with the principle of proportionality.

The aim of Options 2 and 3 are somewhat different. Option 2 aims at a market offering a higher level of consumer protection through increased competition on the basis of expectations of durability by consumers, and it aims at creating more awareness on the consumer's side. Whereas the guarantor may set the guarantee period freely taking into consideration the competition on the market, the rule leaves much freedom and is not too interfering. Furthermore, the option to *not* grant a guarantee, with the sole obligation to inform the consumer of this fact, leaves even more freedom to choose a business model and freedom to contract on the basis of informed consent. This rule is not to be considered as invasive.

Option 3 aims at an information obligation regarding the 'normal' lifespan of a product and the trader or manufacturer must grant a guarantee in that respect. The principle of contractual freedom is reduced but not entirely eradicated. The trader or manufacturer would in our opinion still be allowed to grant a more extensive commercial guarantee, for an additional charge. He would be bound by an obligation to provide a certain minimum protection, whereas under the current rules of the OSD, he can still provide conditions and modalities of the guarantee. But this rule should not be considered as too invasive.

## 8. Concluding remarks

This study explores the question of whether specific amendments that aim at introducing a commercial lifespan guarantee for durable products should be implemented: Amendments 384, 385, 386, 387 and 388 of the European Parliament Committee on Internal Market and Consumer Protection (IMCO) on the online sales directive (OSD); Amendments 198 and 199 of the European Parliament Committee on Legal Affairs (JURI) on the OSD; and Amendment 635 of IMCO on the digital content directive (DCD). The implicit policy question is to assess whether a fully harmonised two-year period of the legal guarantee for non-conformity is adapted to the market evolution of durable goods, as well as to the policy objectives that the amendments are trying to achieve: a dynamic single market for durable goods and a robust sustainable economy.

To do so, specific policy options have been defined. First, two non-legislative options have been analysed: 1) the zero option in which both the OSD and the DCD are implemented without integrating any of the amendments; and 2) the 'soft law' approach (Option 1) which includes Option zero and specific non-legislative initiatives aimed at raising awareness among consumers and inducing suppliers to provide commercial guarantees for a product's lifespan.

Then, three distinct legislative options, each of them integrating some of the amendments and building on them, have been determined. They all consider the introduction of a mandatory or optional commercial lifespan guarantee. The core criterion to define these options is based on how lifespan will be determined, regulated and enforced. For each of these legislative options, two sub-options have been defined: one in which the manufacturer is solely liable (Options 2a, 3a and 4a) and another one where both the manufacturer and the final trader are liable (to build on Amendment 387), as shown in Options 2b, 3b and 4b.

Within Option 2 ('Subjective duration of lifespan'), the guarantor is free to provide a commercial lifespan guarantee. If he opts for such a guarantee, he is free to set forth the duration of the guaranteed lifespan at his own discretion (Amendments 198 and 384). In case he decides not to provide a lifespan guarantee, this information has to be explicitly disclosed (Amendments 384, 387, 388 and 198).

Within Option 3 ('Normal duration of lifespan'), all manufacturers or final traders in the markets covered by the new rules have to provide a commercial lifespan guarantee (there is no option to explicitly refuse a guarantee). The lifespan has to be the actual normal lifespan as a product belonging to a particular category of products, or the lifespan that can be reasonably expected (Amendments 198, 385, 386 and 635).

Within Option 4 ('Binding technical standards for the duration of lifespan'), all manufacturers or final traders in the markets covered have to provide a commercial lifespan guarantee (there is no option to explicitly refuse a guarantee). The determination of the lifespan has to be based, at a minimum, on binding product-specific standards. These standards could be defined, for instance, in a regulation such as the EDD.

Each non-legislative option has pros and cons. Whereas the implementation of the OSD and the DCD, on the assumption of a fully harmonised legal guarantee of two years, should contribute to reducing legal fragmentation across the EU, thereby reinforcing the single market for durable goods, in the long run the increasing complexity of some durable products (in particular technical goods with digital content) should require a guarantee for continuity and not a static non-conformity assessment at delivery. Non-legislative initiatives covered by Option 1 should definitely contribute to raising awareness among consumers on the need to

ask for robust commercial guarantees. Nevertheless, all initiatives covered by this option are not constraining, resulting in high uncertainty regarding their adoption by domestic governments and companies alike.

As regards the three legislative options, the use of commercial guarantees for good functioning should ensure a more continuous support than with a regime of conformity at the time of delivery. Among the main weaknesses of these options, their final impact will greatly depend on the modality set by guarantors (e.g. registration, transfer to second-hand buyers, remedies...), and questions remain on the ultimate effectiveness of the sanctions system.

More specifically, Option 2 should result in high legal certainty regarding duration, given that the legal reference will remain in the contract between the consumer and the provider. Further mandatory information disclosure on practices in terms of guarantee and lifespan should reinforce the comparability of products within and across countries. Given the few additional legislative constraints, enforcement costs should be limited and the only business models that might have to face significant compliance costs are the ones that relied extensively on commercial guarantees. Overall, increases in prices should be moderate at worst, and consumers should possess better awareness of practices in terms of commercial guarantees.

Nevertheless, Option 2 should have a rather limited impact on the improvement of healthy competition (defined as competition on the intrinsic qualities of products rather than on attached financial services, such as the practice of charging for commercial guarantees): the practice of commercial guarantees for which there are charges should admittedly not persist under this option, but no specific legal regime would contribute to directly shaping competition on products. Additionally, the positive impact on consumers with high risk aversion and consumers who bought a defective product should be modest, and should mainly depend on how many companies eventually provide commercial guarantees under the new framework.

Conversely, provided that the supply of commercial guarantees for lifespan is mandatory, consumers with high risk aversion and consumers who bought a defective product should greatly benefit from Option 3. Under this option, healthy competition should be reinforced further than under Option 2, even though the notions of 'reasonable' or 'normal' lifespan could sometimes result in misunderstanding on the part of both consumers and suppliers, thereby altering the competition in an undesirable manner. In addition, fraud is possible and questions remain for imported goods.

The ambiguities related to the definition of lifespan under this option should result in the highest level of legal uncertainty regarding exact duration. If any dispute should arise, the legal authority should in principle have much more freedom than in other options on how to decide. Given the higher level of constraining rules and the difficulty of assessing the exact duration, costs related to enforcement (for both surveillance costs and claims costs, notably to assess the impact of usage) and direct compliance costs should be the highest of all legislative options. Finally, in sectors with persistent competition issues between manufacturers, traders and repairers (in the form of monopoly or monopsony), the generalisation of the commercial lifespan guarantee could even further distort this already unbalanced competition.

Options 3 and 4 should provide broadly similar levels of benefits to consumers with high risk aversion. Given that the determination of lifespan within Option 4 in principle results in less ambiguities than within Option 3, the positive impact on healthy competition should be even

stronger within the former. Provided that the binding technical standards are defined at the European level, for instance through an extension of the Ecodesign Directive (EDD), consumers could easily compare lifespan across countries. Therefore, Option 4 has by far the largest potential to contribute to the emergence of sustainable pan-European products. The objective of strengthening the single market for durable goods would therefore be best achieved under this option. Also, as the technical standards would be the legal reference in case of dispute, legal certainty would be the highest of all options. Last but not least, implementation of Option 4 has the largest potential to encourage firms to invest further in the design of sustainable products and in the activities of research and development.

However, implementation of Option 4 also poses significant challenges. First, given the complexity of the processes, the definition and implementation of technical standards will take a significant amount of time, especially if a large number of sectors are covered by the new rules. Its costs of compliance will likely be the highest of all options, thereby likely resulting in the highest increase in the prices of final products. Enforcement should be significant, although benchmarking should be easier than with Option 3. Finally, in line with Option 3, existing distortions in competition within the supply chain should worsen with Option 4.

Overall, the two preferred options are Options 2 and 4. The former is certainly less ambitious than the latter and will result in fewer benefits overall, but it will also involve lower costs and, contrary to Option 4, could be implemented within a relatively short period of time. Overall, to achieve the specific objectives of enhancing sustainable consumption and cross-border exchanges of durable products, Option 4 should definitely be the preferred option. Within Option 3, the ambivalence related to the notions of 'reasonable' or 'normal' lifespan would result overall in more costs than benefits.

As regards sub-options, given that the manufacturer is responsible for the design of the product, liability placed solely on the manufacturer, as shown in Options 2a and 4a, should *a priori* be the preferred option. Within this framework, direct claims can also avoid traders being sandwiched between consumers and manufacturers. Nevertheless, a significant share of manufacturers (in particular SMEs) do not have interfaces to interact directly with consumers and would face significant difficulties in organising such a process, especially on a cross-border basis. As the trader remains the main contact point for consumers, a joint liability framework (Options 2b and 4b) would also be an interesting approach, provided that adequate mechanisms are put in place between the trader and the manufacturer.

Whatever option is selected, specific principles should be respected in order to strengthen the coherence of the regulatory framework. First, as a core assumption used in this study, rules for online distribution channels should be similar to those applied to offline channels. It is also essential to avoid confusion between legal regimes, commercial guarantees and special or mandatory commercial guarantees. Thirdly, restrictions in the guarantees that would deny protection (e.g. registration duty, prohibition to transfer, limited remedies) should be banned. Frameworks that contain information duties about minimum or normal lifespan and that allow refusal of guarantee should be avoided. Last but not least, product-specific regulations must be aligned with contractual liability to the greatest extent possible.

## Annex 1. Number of interviews by segment and country

Geographical coverage	DE	FI	FR	IE	IT	NL	PL	EU	Total
<b>Consumer associations</b>	Stiftung Warentest	Finnish Competition and Consumer Authority	Que Choisir	ECC Ireland	ECC Italy	ECC Netherlands		BEUC	7
<b>Manufacturer associations</b>	Bitkom - Germany's digital association BDI – Federation of German Industry ZVEI - Germany's Electrical Industry	EK - Confederation of Finnish Industries	Groupe SEB		Confindustria	Dutch Confederations for SMEs (MKB-Nederland) and Industry (VNO-NCW)		CECED - The European Committee of Domestic Equipment Manufacturers UEAPME - European Association of Craft, Small and Medium-sized Enterprises DIGITALEUROPE	10

<b>Retailer/repairer associations</b>	Handelsverband Deutschland (HDE) - The German Retail Federation					Detailhandel Nederland		Eurocommerce Ecommerce Europe CECRA - European Council for Motor Trades and Repairers European eCommerce and Omni-Channel Trade Association	6
<b>Environment associations</b>			Les amis de la Terre Association HOP -Halte à l'Obsolescence Programmée	School of Law - NUI Galway				EEB – The European Environmental Bureau	4
<b>Legal experts</b>	University of Munich	Law Firm Borenus		Sutherland School of Law, -University College Dublin	Bocconi University	Amsterdam University	Jagiellonian University		6
<b>Total</b>	<b>6</b>	<b>3</b>	<b>4</b>	<b>3</b>	<b>3</b>	<b>4</b>	<b>1</b>	<b>9</b>	<b>33</b>

## Annex 2. Summary table of assessment ('impact matrix') for effectiveness

	Baseline	Option 1	Option 2		Option 3		Option 4	
	Zero option	Soft law	2.a Manuf	2.b Joint	3.a Manuf	3.b Joint	4.a Manuf	4.b Joint
<b>Effectiveness</b>								
<b>Specific objectives</b>								
- Enhancing cross-border exchanges of products	...	..	...	..	..	.	....	...
- Enhancing sustainable consumption	.	..	...	...	...	...	....	....
<b>Operational objectives</b>								
- Removing barriers for cross-border demand of products	..	..	...	..	...	..	....	...
- Removing barriers for cross-border supply of products	...	..	...	...	.	.	....	....
- Manufacturers design more sustainable products	.	..	...	..	..	.	....	...
- Consumers purchase more sustainable products	.	..	..	...	..	...	...	....

Legend: • (lowest likely impact) to .... (highest likely impact).

'Manuf' stands for only the manufacturer is liable.

'Joint' stands for the manufacturer and the trader are jointly liable.

### Annex 3. Summary table of assessment ('impact matrix') for efficiency

	Baseline	Option 1	Option 2		Option 3		Option 4	
	Zero option	Soft law	2.a Manuf.	2.b Joint	3.a Manuf.	3.b Joint	4.a Manuf.	4.b Joint
<b>Efficiency</b>								
<b>Benefits</b>								
- Healthier competition		.	..	..	...	...	....	....
- Benefits to consumers								
Consumers with high or low risk aversion		..	..	..	....	....	....	....
Consumer who purchased or not a defective product		.	..	....	...	....	....	....
- Benefits in specific fields/activities		.	.	.	...	...	....	....
- Development of pan-European products		.	..	....	.	...	....	....
- Legal certainty		..	....	....	.	.	....	....
<b>Costs</b>								
- Direct costs								
Producers		.	..	..	...	...	....	....
Consumers		.	..	..	....	....	...	...
- Enforcement costs								
Surveillance costs		.	..	..	....	....	...	...
Claims costs: assessing the impact of usage		.	...	...	....	....	...	...



	Baseline	Option 1	Option 2		Option 3		Option 4	
	Zero option	Soft law	2.a Manuf.	2.b Joint	3.a Manuf.	3.b Joint	4.a Manuf.	4.b Joint
- Indirect costs: compliance costs		•	••	•••	•••	••••	••••	•••••
- Indirect costs: substitution effects/technological avoidance		•	•••	••	•••	•••	•••••	••••
- Indirect costs: reduced efficiency, competition, innovation								
Question of remedies		•	•	•	••	••	••	••
Existing competition issues between manufacturers, distributors and repairers might worsen		•	•	•••	•••	•••••	•••	•••••

Legend: • (lowest likely impact) to ••••• (highest likely impact).

'Manuf' stands for only the manufacturer is liable.

'Joint' stands for the manufacturer and the trader are jointly liable.

## Annex 4. Analysis of the amendments: Information and guarantee on lifespan

### AMENDMENTS ASSESSED in this Study

Amendments 384, 385, 386, 387 and 388 (Article 15a (new)) (to be read in conjunction with amendments 150, 151, 153 and 192 (recitals) which have a bearing on the introduction of a commercial lifespan guarantee) on the Commission's 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 (COM (2015) 635 final, 2015/0288 (COD), IMCO Rapporteur P. Arimont)

#### Amendment 150

##### *Text proposed by the Commission*

(23) Ensuring longer durability of **consumer** goods is important for achieving more sustainable consumption patterns and a circular economy. **Similarly, keeping non-compliant products out of the Union market by strengthening market surveillance and providing the right incentives to economic operators is essential to increase trust in the single market. For these purposes, product specific Union legislation is the most appropriate approach to introduce durability and other product related requirements in relation to specific types or groups of products, using for this purpose adapted criteria. This Directive should therefore be complementary to the objectives followed in this Union sector specific legislation. In so far as specific durability information is indicated in any pre-contractual statement which forms part of the sales contract, the consumer should be able to rely on them as a part of the criteria for conformity.**

##### *Amendment*

(23) Ensuring longer durability of goods is important for achieving more sustainable consumption patterns and a circular economy. **Therefore sellers should inform consumers of the minimum expected lifespan of a product, and clearly indicate if they guarantee that lifespan. Consumers should be entitled to a remedy for the lack of conformity with the contract of the goods where the lack of conformity becomes apparent within the lifespan of the goods consumers can reasonably expect. Furthermore, sellers should inform the consumer about the availability of spare parts which are essential to the use of the product.**

**Amendment 151***Text proposed by the Commission*

(23) Ensuring longer durability of consumer goods is important for achieving more sustainable consumption patterns and a circular economy. Similarly, keeping non-compliant products out of the Union market by strengthening market surveillance and providing the right incentives to economic operators is essential to increase trust in the single market. For **these** purposes, product specific Union legislation is the most appropriate approach to introduce durability and other product related requirements in relation to specific types or groups of products, using for this purpose adapted criteria. This Directive should therefore be complementary to the objectives followed in **this** Union **sector specific** legislation. **In so far as specific** durability information **is** indicated in any pre-contractual statement which forms part of the sales contract, **the consumer** should be **able to rely on them as a part of the criteria for conformity**.

*Amendment*

(23) Ensuring longer durability of consumer goods is important for achieving more sustainable consumption patterns and a circular economy. Similarly, keeping non-compliant products out of the Union market by strengthening market surveillance and providing the right incentives to economic operators is essential to increase trust in the single market. For **those** purposes, product specific Union legislation, **such as Council Directive 85/374/EEC<sup>1a</sup>**, is the most appropriate approach to introduce durability and other product related requirements in relation to specific types or groups of products, using for this purpose adapted criteria. This Directive should therefore be complementary to the objectives followed in Union **product liability** legislation. Specific durability information **should be** indicated in any pre-contractual statement which forms part of the sales contract, **which** should be **part of the criteria for conformity**. **Furthermore, sellers should inform consumers about the availability of spare parts which are necessary for the use of the product.**

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**<sup>1a</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29).**

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### Amendment 153

*Text proposed by the Commission*

*Amendment*

***(23 a) Similarly, keeping non-compliant goods out of the Union market by strengthening market surveillance and providing the right incentives to sellers is essential to increase trust in the single market. For those purposes, product-specific Union legislation should be used to introduce durability and other product-related requirements in relation to specific types or groups of goods, using for that purpose adapted criteria. This Directive should therefore be complementary to the objectives followed in this Union sector-specific legislation. In so far as specific durability information is indicated in any pre-contractual statement which forms part of the sales contract, the consumer should be able to rely on them as a part of the criteria for conformity.***

### Amendment 192

*Text proposed by the Commission*

*Amendment*

***(33 a) The producer of a technical product should be obliged to inform the consumer about the minimum life span to be expected of the technical product. This life span indication should reflect the expectations of reasonable and typical consumers, particularly because many of these products entail mass produced software packages and services. The obligation of producers to offer a commercial guarantee, independent from the legal prescription period, should take account of the new situation that sellers of technical products are regularly unable to rectify any defects by themselves.***

## Amendment 384

### Article 15 a (new)

*Text proposed by the Commission*

*Amendment*

#### **Article 15 a**

#### **Commercial guarantee for lifespan**

***The producer of an energy-related product as defined in point 1 of Article 2 of Directive 2009/125/EC of the European Parliament and of the Council<sup>1a</sup> shall:***

***(a) indicate the minimum lifespan within which he guarantees to the consumer the fitness of the product and provide a clear statement of the legal rights of the consumer; or***

***(b) clearly indicate that he does not offer a commercial guarantee for the lifespan of the product.***

***This information shall be made available to the consumer before the consumer takes an informed transactional decision.***

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***1a Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (OJ L 285, 31.10.2009, p.10).***

## Amendment 384

Who: producer
What: energy-related products
Information duty? Conditional: if he does not explicitly refuse the commercial guarantee – what: the duration that he guarantees (chosen freely) + legal rights of the consumer (must guarantee unless explicitly refused)
Sanctions: not specifically foreseen

**Amendment 385***Text proposed by the Commission**Amendment***Article 15 a****Commercial guarantees for lifespan**

**1. The producer of technical or other durable goods shall indicate to the seller and the consumer the lifespan of the goods. The indicated timeframe shall reflect the reasonable expectations of the consumer and shall not be shorter than two years unless justified by the particular nature of the goods concerned.**

**2. Where goods do not conform to their lifespan as specified in accordance with paragraph 1, this shall be construed as a breach enforceable by the consumer directly against the producer as a contractual guarantee, which may give rise to remedies for non-conformity.**

## Amendment 385

Who: producer
What: technical or other durable goods
Information duty? Yes, always. – what: the lifespan (to the seller and the consumer), which must reflect the reasonable expectations and normally not shorter than two years (must guarantee)
No possibility to refuse the guarantee
Sanctions: breach directly against the producer, remedies for non-conformity

**Amendment 386***Text proposed by the Commission**Amendment***Article 15 a****Commercial guarantees for lifespan**

**1. The producer of a technical product shall guarantee to the consumer the fitness of the product for its foreseeable minimum lifespan**

***and shall indicate the duration of that lifespan. The indicated timeframe shall not be shorter than the legal prescription period applying in the Member State where the consumer has his habitual residence and shall reflect the expectations of a reasonable and typical consumer.***

***2. Where the producer does not fulfil his obligations in accordance with paragraph 1, the obligations owed by him to the consumer shall be the same as those owed by the supplier.***

#### Amendment 386

Who: producer
What: technical goods
Information duty? Yes, always. – what: the foreseeable minimum lifespan, normally not shorter than the legal prescription term in home state of consumer (will be harmonised), and shall reflect reasonable expectations (must guarantee)
No possibility to refuse the guarantee
Sanctions: breach directly against the producer, remedies for non-conformity ('same obligations as the supplier')

#### Amendment 387

##### Article 15 a (new)

*Text proposed by the Commission*

*Amendment*

##### **Article 15 a**

##### **Commercial guarantees for lifespan**

***1. The seller of a technical product shall inform the consumer of the foreseeable minimum lifespan of the product.***

***The seller shall also:***

***(a) guarantee to the consumer that the product is fit for its intended purpose for its foreseeable minimum lifespan and shall***

*indicate the duration of that lifespan; or*

*(b) clearly indicate that he does not guarantee the fitness of the product during its lifespan.*

*This information shall be made available to the consumer before or at the time when the consumer concludes the contract. The seller shall inform the consumer whether the guaranteed lifespan is shorter or longer than the limitation period specified in Article 14. Article 15 shall continue to apply.*

#### Amendment 387

Who: seller
What: technical goods
Information duty? Yes, always. – what: the foreseeable minimum lifespan (and explicitly state whether longer or shorter than two years), BUT not mandatory to guarantee IF explicitly refused
Even if information must be given: Possibility to explicitly refuse the guarantee
Sanctions: as provided in proposed directive (breach) (remark: I believe that in case of incorrect information, claims can be based on misleading practices even if guarantee is refused)

#### Amendment 388

##### Article 15 a (new)

*Text proposed by the Commission*

*Amendment*

##### **Article 15a**

##### **Commercial guarantee of minimum duration**

##### **1. Manufacturers of products that consume energy for their operation must**

*(a) guarantee to consumers the serviceability of the product for its minimum expected life and indicate the duration thereof, or*

*(b) indicate clearly that they do not guarantee the serviceability of the product for its minimum expected life.*



**2. In the commercial guarantee, the manufacturer shall inform the consumer if the minimum life of the product is less or greater than that specified under the legal guarantee.**

**3. A manufacturer who fails to comply with the obligations set out in paragraphs 1 and 2 shall have the same obligations as the seller vis-a-vis the consumer.**

Amendment 388

Who: manufacturer
What: products that consume energy
Information duty? Conditional, IF they guarantee the serviceability for the minimum expected life and indicate the duration thereof + have to state that it is more or less than the legal guarantee
Possibility to explicitly refuse the guarantee
Sanctions: breach against manufacturer ('same obligations as the seller')

Amendments 198 and 199 (Article 15a (new)) on the Commission's 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 (COM (2015) 635 final, 2015/0288 (COD), JURI Draftsperson H. Hautala)

## **Amendment 198**

### **Article 15 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 15 a**

##### **Commercial guarantees for lifespan**

**1. The producer of an energy-related product as defined in Article 2(1) of Directive 2009/125/EC of the European Parliament and of the Council<sup>1a</sup> shall:**

**(a) guarantee to the consumer the fitness of the product for such foreseeable minimum lifespan, as is normal in goods of the same type, and shall indicate the duration of this lifespan, or**

**(b) clearly indicate that he does not guarantee the fitness of the product during its lifespan.**

**This information shall be made available to the consumer as a contractual guarantee at the time where he enters into the contract.**

**2. If the producer does not fulfil his obligations according to paragraph 1, the consumer shall be entitled to have the goods brought into conformity with the contract by the producer in accordance with Article 11.**

**<sup>1a</sup> Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (OJ L 285, 31.10.2009, p. 10).**

## Amendment 198

Who: producer
What: energy related product
Information duty? Conditional, IF they guarantee lifespan: then shall indicate the duration of lifespan as is normal for goods of the same type
Possibility to explicitly refuse the guarantee
Sanctions: breach against producer, direct claim to have goods brought into conformity

## Amendment 199

*Text proposed by the Commission*

*Amendment*

**Article 15a**

**Information on the lifespan of certain goods**

**1. Producers of energy-related products as defined in Article 2(1) of Directive 2009/125/EC shall inform their customers of the minimum lifespan of their products if used for the purposes intended.**

**2. Before concluding the contract of sale, sellers shall inform consumers of the lifespan referred to in paragraph 1 and clearly indicate whether they intend to offer consumers a commercial guarantee for that lifespan.**

**3. Paragraphs 1 and 2 shall not apply where the lifespan referred to in paragraph 1 is shorter than the minimum time limit provided for in Article 14.**

## Amendment 199

Who: producer
What: energy related product
Information duty? Yes, always. – what: minimum lifespan of their products if used for the purposes intended (not clear whether this must reflect the 'normal' lifespan or free choice; I believe it should reflect normal lifespan because of the following rule:  But: shall not apply where the lifespan is shorter than the time limit of two years (thus it would not make sense to let the producer choose the duration)

But, even if information is mandatory: Possibility to explicitly refuse the guarantee (they should otherwise indicate that they give the guarantee)
But: shall not apply where the lifespan is shorter than the time limit of two years
Sanctions: not explicitly foreseen, could be breach and in my opinion claims based on misleading practices even if guarantee is refused but incorrect lifespan is indicated

Amendment 635 (Article 8b (new) which has a bearing on the introduction of a commercial lifespan guarantee) on the Commission's Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (COM (2015) 634 final, 2015/0287 (COD), IMCO/JURI Co-rapporteurs: E. Gebhardt/A. Voss)

### Amendment 635

*Text proposed by the Commission*

*Amendment*

#### **Article 8 b**

#### **Commercial guarantees for lifespan**

**1. The producer of a technical good in which digital content or a digital service is embedded shall guarantee to the consumer the fitness of the product for its foreseeable minimum life span and indicate how long this life span is. The indicated timeframe shall not be shorter than the legal prescription period of the Member State where the consumer has his habitual residence and shall reflect the expectations of a reasonable and typical consumer.**

**2. When the producer does not fulfil his obligations according to paragraph 1, he shall have the same obligations to the consumer as the supplier.**

### Amendment 635

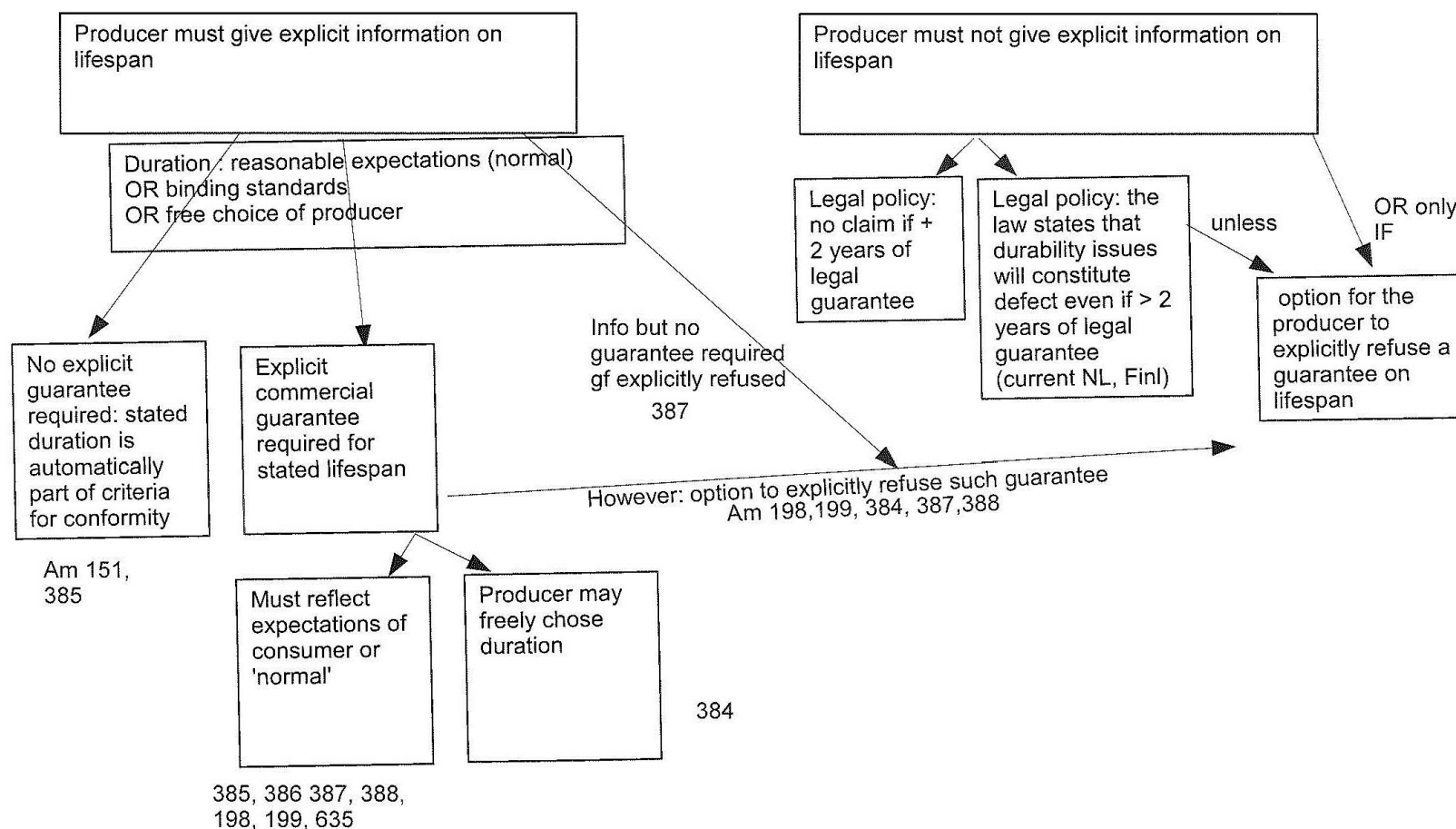
Who: producer
What: a technical good in which digital content or a digital service is embedded
Information duty? Yes, always. – what: fitness for foreseeable minimum lifespan of their products and indicate this lifespan (which shall not be shorter than the legal prescription

period of the law of the consumer's home state (will be harmonised), and shall reflect reasonable expectations)
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No possibility to refuse the guarantee
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Sanctions: breach ('same obligations as the supplier')
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## Annex 5. Analysis of the amendments: Producer must give information on lifespan vs producer must not give information on lifespan



## Annex 6. Template of the Questionnaire

### Interviews with business associations

#### Introduction

This interview is carried out in the context of an impact assessment of proposed substantial amendments from the European Parliament (IMCO and JURI Committees)<sup>121</sup> introducing a commercial lifespan guarantee. As shown in the Accreditation Letter of the European Parliament (see the email), the impact assessment has been commissioned to the Centre for European Policy Studies (CEPS), together with Time.lex, and concerns the following substantial amendments which have a bearing on the introduction of a commercial lifespan guarantee:

-Amendments **384, 385, 386, 387** and **388**<sup>122</sup> (Article 15a (new)) (to be read in conjunction with amendments 150, 151, 153 and 192 (recitals)) to the draft report of the Committee on (IMCO) on the Commission's 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 (2015, IMCO Rapporteur P. Arimont), and

-Amendments **198** and **199**<sup>123</sup> (Article 15a (new)) to the draft opinion of the Committee on (JURI) on the Commission's 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 (2015, JURI Draftperson H. Hautala), and

-Amendment **635**<sup>124</sup> (Article 8b (new)) to the draft joint report of the Committee on (IMCO) and the Committee on (JURI) on the Commission's Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (2015, IMCO/JURI Co-rapporteurs E. Gebhardt and A. Voss).

Against this background, collecting information from business associations is a key step in completing the impact assessment. The information provided during this interview will remain strictly confidential and will not be disclosed to any third party. Results will be published so as not to be attributable to any specific respondent.

We would recommend setting a call or a meeting in order to complete the questionnaire. We can set the interview at your earliest convenience, after you have had some time to gather the relevant information. If more convenient, you may share with us a pre-filled questionnaire before the interview. In this respect, answers to questions as well as any additional comment can be added to this file. You may skip questions that are not relevant to your organisation; if this is the case, please flag such questions as not relevant.

If you wish to receive information regarding this impact assessment, please contact the Project Manager (Sylvain Bouyon, [sylvain.bouyon@ceps.eu](mailto:sylvain.bouyon@ceps.eu), +32 2 229 39 87). We are also happy to

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<sup>121</sup> (IMCO) stands for the Internal Market and Consumer Protection, while (JURI) stands for Legal Affairs.

<sup>122</sup> These amendments can be found here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+COMPARL+PE-597.627+01+DOC+PDF+V0//EN&language=EN>.

<sup>123</sup> These amendments can be found here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+COMPARL+PE-597.434+01+DOC+PDF+V0//EN&language=EN>.

<sup>124</sup> This amendment can be found here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+COMPARL+PE-599.502+02+DOC+PDF+V0//EN&language=EN>.

provide guidance and clarification regarding the questionnaire. For that request, please contact Antonella Zarra ([antonella.zarra@ceps.eu](mailto:antonella.zarra@ceps.eu), [+32.2.229.39.71](tel:+3222293971)).

### ***Structure of the questionnaire***

The questionnaire includes the following parts:

Part 1. General information	94
Part 2. Impact of current rules on the level of sustainable consumption	95
Part 3. Impact of current rules on the development of a single market	97
Part 4. Introduction of a commercial guarantee for lifespan	98
Part 5. Specific options for the introduction of a commercial guarantee for lifespan	101

For your convenience, some questions (highlighted in yellow) might have been pre-filled based on data retrieved via desk research. Therefore, we would be very grateful if you could validate or revise such answers.

#### **Part 1. General information**

Date and time of interview	
Location of interview	
Name of interviewee	
Position of interviewee	
Organisation	
Contact details of interviewee	
Interviewer	
Country	



**Part 2. Impact of current rules on the level of sustainable consumption**

For each of the below questions, provide your best estimate from 1 to 5 based on the following scale: (1) not at all; (2) to a limited extent; (3) to some extent; (4) to a high extent; or (5) to the fullest extent. Select DK/NO if you don't know or you have no opinion. For each of the below question, please justify your answers.

Q1. Does your country achieve satisfactory levels of sustainable consumption for:

A. Technical goods	1	2	3	4	5	DK/NO
B. Energy-related goods	1	2	3	4	5	DK/NO
C. Products with digital content	1	2	3	4	5	DK/NO
D. All products	1	2	3	4	5	DK/NO
Comments:						

Q2. Overall, do the current national rules contribute positively to sustainable consumption for these types of goods:

A. Technical goods	1	2	3	4	5	DK/NO
B. Energy-related goods	1	2	3	4	5	DK/NO
C. Products with digital content	1	2	3	4	5	DK/NO
D. All products	1	2	3	4	5	DK/NO
Comments:						

Q3. Do the current national rules related to commercial guarantee and legal guarantee have a positive impact on the sustainable consumption of goods in general?

*"Commercial guarantee" is defined as the rights of the consumer against the manufacturer, whereas "legal guarantee" provides for rights of the consumer directed against the seller in case of non-conformity of the good.*

A. Commercial guarantee	1	2	3	4	5	DK/NO
B. Legal guarantee	1	2	3	4	5	DK/NO
Comments:						

Q4. May the below limitations in the national regulatory framework (if they do exist) hinder claims based on short lifespan?

A. Limitation period for claims	1	2	3	4	5	DK/NO
B. Period for reversal of burden of proof	1	2	3	4	5	DK/NO
C. Period for notification of claims	1	2	3	4	5	DK/NO
D. Other limitations (please specify)	1	2	3	4	5	DK/NO
Comments:						

Q5. Are problems related to short lifespan currently in case law considered as issues of non-conformity or defect of a product (*justify*)?

- ☐ Yes (*justify here*)
- ☐ No (*justify here*)

Q6. Do traders generally provide commercial guarantees in that respect?

- ☐ Yes
- ☐ No

Q7. As regards environmental performance, to which extent the introduction of a commercial guarantee for lifespan could positively contribute to:

A. Improve the eco-design of products	1	2	3	4	5	DK/NO
B. Improve the durability of the product	1	2	3	4	5	DK/NO
C. Reduce the impact on input resources	1	2	3	4	5	DK/NO
D. Reduce the quantity of waste	1	2	3	4	5	DK/NO
E. Improve the air quality	1	2	3	4	5	DK/NO
F. Improve water and sanitation	1	2	3	4	5	DK/NO
Comments:						

Q8. General comments on the question of regulatory framework and sustainable consumption

**Part 3. Impact of current rules on the development of a single market**

For each of the below questions, Provide your best estimate from 1 to 5 based on the following scale: (1) not at all; (2) to a limited extent; (3) to some extent; (4) to a high extent; or (5) to the fullest extent. Select DK/NO if you don't know or you have no opinion. For each of the below question, please justify your answers.

Q9. Overall, do domestic consumers regularly purchase the below type of products from non-resident suppliers (principally in the EU):

A. Technical goods	1	2	3	4	5	DK/NO
B. Energy goods	1	2	3	4	5	DK/NO
C. Products with digital content	1	2	3	4	5	DK/NO
Comments:						

Q10. If (3), (4) or (5), is there a significant difference between online and offline purchases for the below type of products:

G. Technical goods	1	2	3	4	5	DK/NO
H. Energy goods	1	2	3	4	5	DK/NO
I. Products with digital content	1	2	3	4	5	DK/NO
Comments:						

Q11. Are the below elements significant barriers for selling products abroad:

A. Additional cost of compliance due to different consumer protection rules	1	2	3	4	5	DK/NO
B. Risks related to the differentiation in national consumer protection laws	1	2	3	4	5	DK/NO
Comments:						

#### Part 4. Introduction of a commercial guarantee for lifespan

For each of the below questions, Provide your best estimate from 1 to 5 based on the following scale: (1) not at all; (2) to a limited extent; (3) to some extent; (4) to a high extent; or (5) to the fullest extent. Select DK/NO if you don't know or you have no opinion. For each of the below question, please justify your answers.

Q12. Suppose that the legal guarantee remains set at two years (full harmonisation or not), that there is an introduction of an **information obligation** regarding the expected lifespan of a product, combined with a mandatory choice of a trader or a producer to provide (a) a **commercial guarantee** regarding the lifespan of the product, or (b) an **explicit statement that no** such commercial guarantee is provided.

A. Overall will the introduction of such a statement with commercial guarantee for lifespan contribute significantly to <b>sustainable consumption</b> ?	1	2	3	4	5	DK/NO
B. Will such rules effectively force a trader or a producer to provide a realistic commercial guarantee?	1	2	3	4	5	DK/NO
Comments:						

Q13. Overall, will the introduction of a commercial guarantee for lifespan result in:

A. Less fragmentation in EU consumer laws	1	2	3	4	5	DK/NO
B. Less complexity in EU consumer laws	1	2	3	4	5	DK/NO
C. More coherence in EU consumer laws	1	2	3	4	5	DK/NO
Comments:						

Q14. Is full harmonisation of such rules necessary (*justify*)?

- ☐ Yes (*justify here*)
- ☐ No (*justify here*)

Q15. Will the introduction of a commercial guarantee for lifespan affect the compliance costs of:

A. Large companies	1	2	3	4	5	DK/NO
B. SMEs	1	2	3	4	5	DK/NO
C. Sellers	1	2	3	4	5	DK/NO
D. Producers	1	2	3	4	5	DK/NO
Comments:						

Q16. Will the introduction of a commercial guarantee for lifespan have an impact on the price of:

A. Technical goods	1	2	3	4	5	DK/NO
B. Energy-related goods	1	2	3	4	5	DK/NO
C. Products with digital content	1	2	3	4	5	DK/NO
Comments:						

Q17. Assess to which extent the below assertions are true:

A. The introduction of a commercial guarantee for lifespan will contribute to a more <b>healthy competition</b> , by further protecting 'honest' and 'transparent' sellers and producers, hereby enhancing the quality of products and contracts	1	2	3	4	5	DK/NO
B. The introduction of a commercial guarantee for lifespan will be less impactful for products that are heavily shaped by the 'latest taste' (smartphones, etc.)	1	2	3	4	5	DK/NO
C. The introduction of a commercial guarantee for lifespan will positively impact vulnerable consumers	1	2	3	4	5	DK/NO
Comments:						

Q18. General comments on the impact of the introduction of a lifespan

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**Part 5. Specific options for the introduction of a commercial guarantee for lifespan**

Q19. Is it effective to give a trader or producer an option to either provide a commercial guarantee, or explicitly state that no such guarantee is provided?

- ☐ Yes
- ☐ No

Q20. If a commercial guarantee for lifespan is introduced, what is the most adequate approach to determine this lifespan? In this respect, please rank the following approaches from the most adequate to the least adequate. [Please feel free to indicate another approach you believe could be adopted]

Factors	Rank
A. The producer is free to choose the duration of his guarantee (and the duration can be a competitive marketing argument)	
B. No specific standards: the 'reasonable expectations' of average consumers for such a product will be the guideline in case of claims	
C. Standardised system for product categories (e.g. product-specific regulations based on the Ecodesign Directive)	
D. Based on a list made by the business sector or administration (as it is the case in Finland and the Netherlands)	
E. Other (please specify _____)	
Comments	

Q21. If a commercial guarantee for lifespan is introduced, what is the most adequate approach to determine the sanction when a product is purchased and used for e.g. 2-3 years? In this respect, please rank the following approaches from the most adequate to the least adequate. [Please feel free to indicate another approach you believe could be adopted]

Factors	Rank
A. Replacement of such product	
B. Repair or enhancement of such product	
C. Partial refund of the sale price (which method?), with or without termination of the contract	
D. Some combination of the above options	
E. Other (please specify _____)	
Comments	

Q22. Should the possibility to introduce a commercial guarantee for lifespan be a matter for *(justify)*:

- A. Traders
- ☐ Yes *(justify here)*

- No *(justify here)*

B. Importers

- Yes *(justify here)*
- No *(justify here)*

C. Producers

- Yes *(justify here)*
- No *(justify here)*

D. Sellers to consumers

- Yes *(justify here)*
- No *(justify here)*

Q23. Should direct claims against producers be available *(justify)*?

- Yes *(justify here)*
- No *(justify here)*

Q24. Should issues concerning lifespan be considered as force majeure for other traders but the producers?

- Yes
- No

Q25. If a commercial guarantee for lifespan is introduced, should the legal framework provide for exceptions or conditions (such as the normal use of product)?

- Yes
- No

Q.26 If Yes, give examples of exceptions or conditions *(justify)*.

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Q27. If a commercial guarantee for lifespan is introduced, should the guarantee remain valid for second-hand purchasers *(justify)*?

- Yes *(justify here)*
- No *(justify here)*

Q28. If a commercial guarantee for lifespan is introduced, should the reversal of the burden of proof and/or notification period extend to the entire lifespan of the product?



- ☐ Yes
- ☐ No

Q29. If an information obligation annex on commercial guarantee for lifespan is introduced, would it be feasible to limit this obligation to:

A. 'Energy-consuming' products

- ☐ Yes
- ☐ No

B. 'Technical' products

- ☐ Yes
- ☐ No

C. 'Durable' products

- ☐ Yes
- ☐ No

Q30. If an information obligation annex on commercial guarantee for lifespan is introduced as stated above, and full harmonisation would apply to the legal framework of the legal and commercial guarantee (including a 2-year limitation period and reversal of burden of proof for two years) would the currently existing rights of consumers in your country be positively or negatively impacted (*justify*)?

- ☐ Yes (*justify here*)
- ☐ No (*justify here*)

Q31. Is the introduction of the information obligation annex on commercial guarantee for lifespan in directives on the sale of (online) consumer products and digital content justified in light of the principles of subsidiarity and proportionality (*justify*)?

- ☐ Yes (*justify here*)
- ☐ No (*justify here*)

Q32. General comments on the answers to this questionnaire

## Annex 7. Glossary

**Commercial guarantee:** A commercial guarantee represents the rights of the consumer against specific stakeholders (typically the manufacturer), who can offer the consumer an additional commercial guarantee (warranty) that can either be included in the price of the product or at an extra cost. This warranty does not replace the legal guarantee, which is always a minimum of two years. The Commercial Guarantee must be legally binding and must provide consumers with certain information.

**Durable Good:** A durable good is one which may be used repeatedly or continuously over a period of more than a year, assuming a normal or average rate of physical usage.

**Energy-related good:** As defined in point 1 of Article 2 of Directive 2009/125/EC,<sup>125</sup> an energy-related good is any good that has an impact on energy consumption during use which is placed on the market and/or put into service, and includes parts intended to be incorporated into energy-related products covered by the Ecodesign Directive which are placed on the market and/or put into service as individual parts for end-users and of which the environmental performance can be assessed independently.

**Hierarchy of remedies:** According to the Consumer Sales and Guarantees Directive,<sup>126</sup> if a good is non-conforming a consumer is first required to request repair or replacement, and only as a second step can he ask for termination of the contract or price reduction. Some Member States have followed this approach while other Member States have gone beyond this minimum requirement offering the consumer from the beginning a free choice between repair, replacement or termination. Some Member States provide a free choice of remedies however that choice is limited by the seller's right to cure or by other conditions which lead to an effect similar to the hierarchy of remedies. Another group of Member States have taken over the hierarchy of remedies but also provide for another remedy, namely a right to reject non-conforming goods within a short deadline.

**Legal guarantee period:** The trader can be held liable for a period of no less than two years for defects which were present at the time of delivery. While 23 Member States have made use of this two-year period, in one Member State<sup>127</sup> the period is three years and in two Member States<sup>128</sup> it is unlimited. In two other Member States,<sup>129</sup> there is no specific legal guarantee period, but the consumer rights are limited by the prescription period (time limits in national legislations within which rights can be invoked in court).

**Legal guarantee:** According to EU law,<sup>130</sup> the legal guarantee provides for rights of the consumer directed against the seller in case of non-conformity of the good. The consumer has a minimum of two years as a protection against faulty goods, or goods that don't look or work as advertised. The legal guarantee is binding on the trader. It is valid for a certain period (minimum two years) and covers products bought in the EU. The legal guarantee period starts

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<sup>125</sup> Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products

<sup>126</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

<sup>127</sup> Sweden

<sup>128</sup> Finland and the Netherlands

<sup>129</sup> Ireland and the United Kingdom

<sup>130</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

from the day the consumer took possession of the product. The legal guarantee covers any defects presumed to have existed at the time of delivery and which become apparent within a minimum period of two years.

**Notification duty by the consumer:** Member States are authorised to stipulate that in order to benefit from their rights, consumers must inform the seller of the defect within a specific period from its discovery. In case of non-notification consumers lose their right to remedies.

**Products with digital content:** As defined in point 1 of Article 2 of the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content,<sup>131</sup> 'Digital content' means: i) data which are produced and supplied in digital form, for example video, audio applications, digital games and any other software; ii) a service allowing the creation, processing or storage of data in digital form, where such data are provided by the consumer and iii) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service.

**Reversal of the burden of proof:** A consumer can only ask for a remedy if the good was non-conforming when delivered. The burden of proof is reversed during the first six months, obliging the trader during this period to prove that no such defect existed at the time of delivery. While 25 Member States have laid down a shift of burden of proof for six months, three Member States have extended this period.<sup>132</sup>

**Smart product:** Products embedded with sensors, processors, software and connectivity that allow data to be exchanged between the product and its environment, manufacturer, operator/user, and other product and systems. The data collected from these products can be then analysed to enable operational efficiencies, inform decision-making and continuously improve the performance of the product.

**Technical goods:** Any device or machine that is designed for a particular use or function. The goods defined as 'technical' ones in these amendments are all durable goods and include notably cars, home appliances, mobile phones, computers, televisions, etc. Noteworthy, many durable goods are not considered as technical products: bricks, jewellery, books, etc.

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<sup>131</sup> Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final - 2015/0287 (COD)

<sup>132</sup> Poland to one year, France and Portugal to two years. European Commission, 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 (COM (2015) 635 final, 2015/0288).

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This study was requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) as part of the Parliament's general commitment to improving the quality of EU legislation, and in particular in undertaking to carry out impact assessments of its own substantial amendments when it considers it appropriate and necessary for the legislative process.

The aim of this study is to conduct an ex-ante impact assessment of proposed substantial amendments from the IMCO and JURI Committees which would introduce a commercial lifespan guarantee. The impacts of these amendments have been analysed through the development of specific policy options. Two non-legislative options, implying that none of the amendments are implemented, are first assessed: an Option zero and a soft law approach (Option 1). Three distinct legislative options are also defined, by integrating specific aspects of the amendments: Option 2 (Subjective duration of lifespan), Option 3 (Normal duration of lifespan) and Option 4 (Binding technical standards for the determination of the lifespan). For each legislative option, two sub-options are developed by considering liability solely on the manufacturer (2a, 3a and 4a), or joint liability with the trader (2b, 3b and 4b).

The key findings of the impact assessment reveal that the preferred options are Options 2 and 4. The former is certainly less ambitious than the latter and would result in less benefit overall, but it would also involve less cost and, contrary to Option 4, could be implemented within a relatively short period of time.

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