

Position Paper

Commercial Guarantee For Lifespan

Response to proposed substantial amendments from the European Parliament introducing a commercial guarantee for lifespan

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Bitkom represents more than 2,500 companies in the digital sector, including 1,700 direct members. With more than 700,000 employees, our members generate a domestic turnover of 140 billion Euros a year, exporting high-tech goods and services worth another 50 billion Euros. Comprising 1,000 small and medium-sized businesses as well as 400 start-ups and nearly all global players, Bitkom' members offer a wide range of software technologies, IT-services, and telecommunications or internet services. They produce hardware and consumer electronics or operate in the sectors of digital media and the network industry. 78 percent of the companies' head-quarters are located in Germany with an additional amount of 9 percent in other countries of the EU and 9 percent in the USA as well as 4 percent in other regions. Bitkom supports an innovative economic policy by focusing the modernization of the education sector and a future-oriented network policy.

Background

This position paper is written in the context of the following proposed substantial amendments from the European Parliament (IMCO and JURI Committees) introducing a commercial guarantee for lifespan:

- Amendments 384, 385, 386, 387 and 388¹ (Article 15a (new)) 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

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¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-597.627&format=PDF&language=EN&secondRef=01>

- Amendments 198 and 199² (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 635³ (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, Bitkom would like to provide some critical comments on commercial guarantees for lifespan.

Summary

The proposals of a commercial guarantee for lifespan need to strike a balance between having a positive impact on consumer rights and sustainable consumption and being reasonable for the industry. For these purposes, legislation should be guided by the following principles:

- Commercial guarantees for lifespan are voluntary commitments. Mandatory guarantees for lifespan are not reasonable.
- The existing legal distinction between commercial guarantees and legal guarantees must be kept upright. The boundaries may not be softened. To apply the provisions on legal guarantee by analogy would create a mandatory commercial guarantee and determine its validity by the time limits of the legal guarantee (not less than 2 years).

Commercial guarantees for lifespan must be kept voluntary

Bitkom strongly recommends keeping commercial guarantees in general, and commercial guarantees in particular for lifespan, voluntary.

Bitkom agrees with the observation of the German Federal Government that the reasons why consumers purchase new electric and electronic devices are manifold, so that any measures to support longer usage would need to address these different motivations. Case by case considerations would therefore be necessary to analyse reasons and to define requirements which are technically feasible, ecologically as well as economically sound, and which can be supervised by market authorities. However, despite ongoing attempts, no adequate testing methods - for either manufacturers or market authorities - for all these criteria could be established yet, due to the complexity of the different interacting factors, including practical usage. The German Federal Government is therefore also right in

² <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-600.964&format=PDF&language=EN&secondRef=01>

³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-599.502%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>

differentiating between a technically possible durability and factual use, which may negatively impact the technically possible durability.⁴

With regard to electrical and electronic products, commercial guarantees for lifespan are common and an important selling point. Producers and/or sellers of electrical and electronic products often guarantee the function of the whole product or of important components for a certain lifespan. This is a relevant aspect to create a competition advantage for high-quality products, that would no longer exist if commercial guarantees became mandatory. This commercial guarantee is often given if the producer offers an after-sales-service as well. The after-sales-service is another competitive selling point. Consequently, measures such as a mandatory guarantee for lifespan may take away important elements for competition.

Mandatory commercial guarantees would also create a competitive disadvantage in international trade. The price difference between the same product sold in the EU and overseas would increase no matter if the guarantee would be an obligation of the dealer or the producer.

This arbitrage opportunity would have the effect to encourage overseas trading companies to import grey market products without de jure or de facto being bound to the guarantee applicable only in the EU, because consumers may not be able to approach the overseas trader. Or the trading company may have been set up only for a single large transaction (similar as we see e.g. for the purposes of missing trader VAT fraud). This would hurt European consumers and resellers.

Competition aspects aside, the approach of introducing a common commercial guarantee for all technical products, products within the scope of the Ecodesign-Directive or all energy-consuming-products does not work as one-size-fits all-approach in practice. With regard to lifespan, the products under the proposed scope(s) of the different articles are not comparable at all. Any specific minimum lifespan may be too short for one product group but too long for another.

It is even problematic to set minimum requirements for a certain product or a certain product category. The lifespan of any product ultimately depends on how the consumer uses the product. Any expected lifespan could only be calculated and measured against a standard based on 'normal' usage. The basis of such a 'normal' usage must be intended use and reasonable care, which are difficult categories to define. Practical usage scenarios of products differ widely, from every day use to occasional use, from private use to professional use, use within different environments (dry, humid, warm, cold), or transporting a product versus fixed location. These usage scenarios are determined by the consumer, and completely out of the control of the manufacturer. These different scenarios, however, have a major impact on the lifespan of any product – whether high-end or low-end, and across all product groups. Imposing a mandatory commercial guarantee cannot predict the practical use of any product, which puts an unfair burden on manufacturers, namely to provide a guarantee for factors they cannot influence.

⁴ Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 18/12687 –, S. 2-3 (in German)

Without any such categories, however, consumers have to pay the price for a higher standard across the board, which they may not want. Producers, on the other hand, could hardly be protected against claims of consumers who have not used the product in line with the intended use or without reasonable care. Otherwise, the guarantee would cover moral hazards during the use of the product and would result in unfair cross-subsidisation between the different consumer groups.

Furthermore, providing a diverse product range within the same product group meets consumer demands, as not all consumers are willing or able to purchase high-quality goods at a high price. Producing to meet a specific lifespan – independent from the practical usage scenarios – would directly lead to an increase of prices across the board. As a consequence, consumers with less financial means could be excluded because only high-price products are available on the market (e.g. no inexpensive coffee makers). Then again, others may pay a higher price, even if they do not wish a high-quality product with a longer lifespan (e.g. products intended not for every-day use).

Introducing a mandatory common commercial guarantee for a wide range of products may even have negative environmental impacts. The commercial guarantee for the minimum lifespan may be seen as a kind of ‘carefree package’ by consumers if commercial guarantees become a standard (‘moral hazard’). If producers are accountable by law for minimum guarantees, consumers could have a reduced incentive to apply due care in using the product.

Moreover, our members report that electronic products are mostly redeemed by end-customers during the first three months (60 to 70%), then the curve steeply falls and regains just at the very end of the guarantee period. The overall redemption rate is about 2%. This shows that most defects occur at the very beginning of use and are linked with imminent technical issues, not long-term sustainability issues. In contrary, the longer the guarantee the higher is the incentive for consumers to redeem a product at the end of a guaranteed lifespan even if the product could still be used. This particularly applies if a lifespan guarantee is accompanied by burden of proof which makes it impossible or highly expensive for producers or dealers to show that a defect was caused by the consumer. In the end, a long guarantee could even hurt sustainability, because consumers may try to redeem still usable for a new ones at the end of the period. Without such opportunity offered by a long guarantee in conjunction with the burden of proof some malfunctions or defects of older devices would be tolerated by the consumer if he had to buy a new product otherwise (e.g. the loudspeaker of a notebook sounds tinny, a LED display shows a line of pixel mistakes or sometimes shows false colors, a smartphone does not detect a memory card any more etc).

Strengthening consumer rights is not the same as increasing sustainable consumption. This fact can be illustrated with the unintended side-effects of the consumers’ right of withdrawal for distant contracts. A recent Bitkom study shows that every second consumer has ordered products online in the past with the strong intention to return and not to keep them (e.g. to try on clothes in different sizes).⁵ This behaviour causes unnecessary shipments with negative effects on the environment. On these grounds, Bitkom doubts that a mandatory commercial guarantee will result in valid incentives for sustainable consumption.

⁵ <https://www.bitkom.org/Presse/Presseinformation/Jeder-zehnte-Online-Kauf-wird-zurueckgeschickt.html> (in German).

In summary, mandatory commercial guarantees are not technically feasible and not ecologically as well as economically sound. Therefore, commercial guarantees for lifespan must remain voluntary commitments.

Distinction to legal guarantees must be kept

Bitkom strongly recommends keeping the existing legal distinction between commercial guarantees and legal guarantees upright. Their boundaries must not be softened.

The two concepts of guarantees in an overview:

	Legal Guarantee	Commercial Guarantee
Who is responsible?	Trader of the sales contract	Producer or trader (the guarantor)
Is there a legal obligation?	Yes, the legal guarantee is compulsory.	No, the commercial guarantee is voluntarily. It is an addition to the legal obligation relating to the legal guarantee.
What is the content of the guarantee?	The seller must deliver goods to the consumer, which are in conformity with the contract of sale.	Depends on the specific guarantee statement. The guarantor can define the content and the terms of conditions.
What is the decisive moment to assess the conformity?	<p>The good has to be in conformity at the time it was delivered.</p> <p>However, any lack of conformity which becomes apparent within six months of delivery of the good is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity or unless proved otherwise.⁶</p>	<p>The good has to be in conformity over the duration of the guarantee.</p>
What are the consumer rights?	If the good the consumer bought turns out to be faulty or does not look or work as advertised, the seller must repair or replace it free of charge or give you a price reduction or a full refund.	If the good does not meet the specifications or any other requirements related to conformity set out in the guarantee statement, the guarantor must reimburse the price paid or replace, repair the good.
What is the duration of the guarantee?	Minimum 2 Years for new goods (up to 6 Years in some Member States)	Depends on the specific guarantee statement

⁶ The discussion about the extension of the reversal of the burden of proof is to take into consideration in regards to the improvement of lifespan.

The concept of the legal guarantee is strongly linked to the contract of sales between the trader and the consumer. It only addresses the conformity at the time the good was delivered. If the product does not comply with the given description or if it cannot be used for normal purposes or the specific purposes requested by the consumer at the time of delivery, the seller commits a breach of his contractual duties. The legal guarantee (for new goods) is valid for at least 2 years (in some Member States up to 6 years). But this does not mean that the legal guarantee does include conformity of 2 years or longer after the time of delivery.

— The conformity after the delivery is not covered by the legal guarantee. Hence, the legal guarantee is not covering the lifespan of the product. Faults as a result of wear and tear are not part of the legal liability of the seller (unless he has given a commercial guarantee). This system of liability, in turn, is often misunderstood due to the effect of the relaxation of the burden of proof in favor of the consumer.⁷ De facto, the relaxation of the burden of proof leads in many cases to a liability for minimum lifespan of six months. This might appear reasonable considering the intention and purpose of the relaxation of the burden of proof, which is according to the judgment of the European Court the “well-nigh impossible for consumers’ to prove that that lack of conformity existed at the time of delivery, whereas it is generally far easier for the professional to demonstrate that the lack of conformity was not present at the time of delivery and that it resulted, for example, from improper handling by the consumer (see the explanatory memorandum to the proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM(95) 520 final, p. 13)”.⁸ But this idea cannot be extended to commercial guarantee for lifespan, especially when taking the proposals of extending the relaxation of the burden of proof into consideration. The producer has no information on the practical use of the product, so he is unable to prove that the defect is not a result of wear and tear. Therefore, Bitkom rejects proposals such as amendment 385⁹ and 386¹⁰.

⁷ Article 5(3) of Directive 1999/44 provides for a derogation from that principle if the lack of conformity has become apparent within six months of delivery of the goods.

⁸ ECJ, judgment in *Froukje Faber v Autobedrijf Hazet Ochten B*, C497/13, paragraph- 54.

⁹ Amendment 385 (IMCO): ‘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.’

¹⁰ Amendment 386 (IMCO): ‘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.’