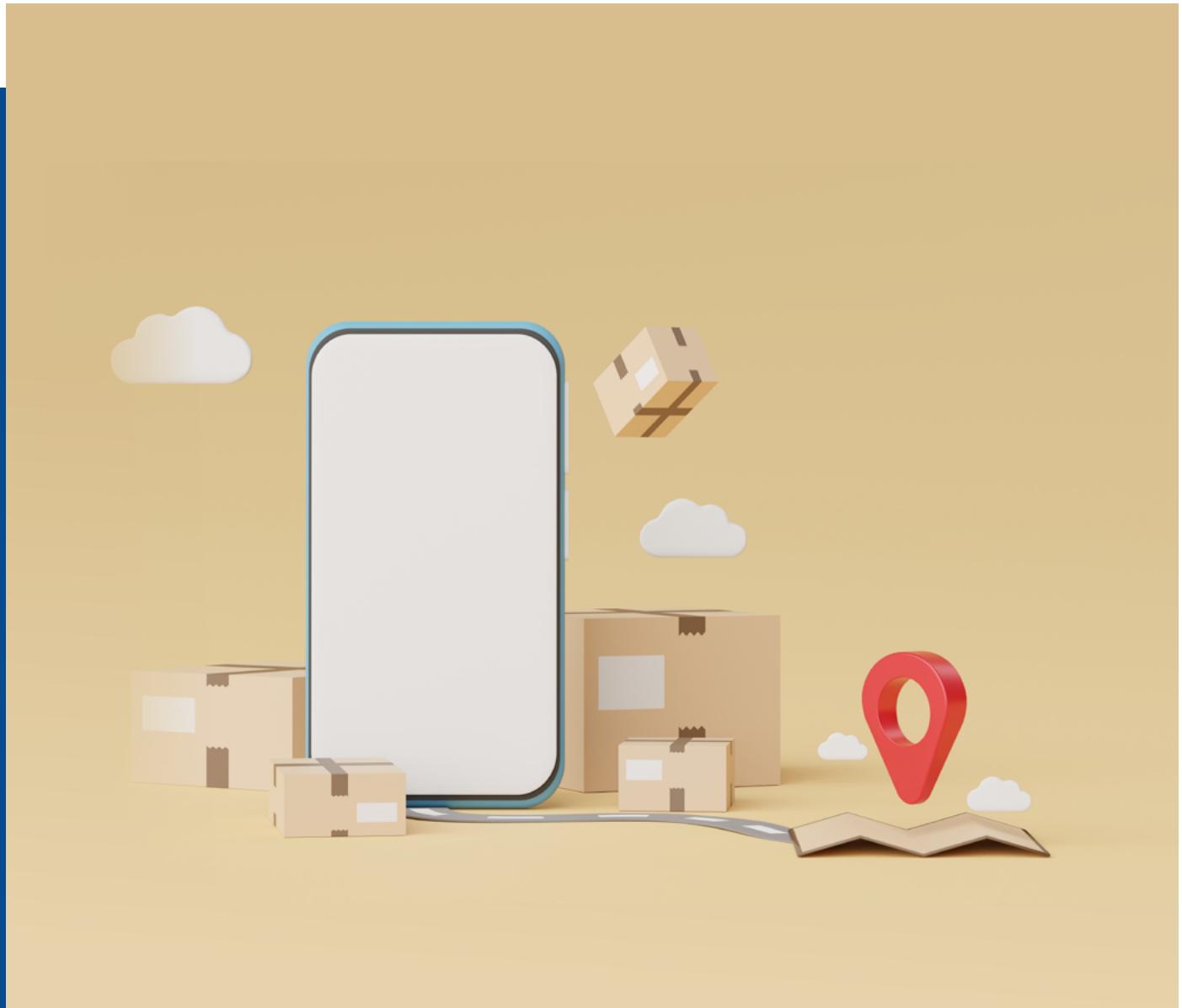




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Parcel delivery issues met by ECC-Net in the e-commerce sector

Position paper



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Parcel delivery issues met by ECC-Net in the e-commerce sector¹

EU legislation has the clear goal to protect consumers purchasing at distance. Nevertheless, as already identified by (51) in Consumer Rights Directive², the delivery and return of items still bear a lot of risks and generate an important number of complaints, caused by traders, even the big and well referenced ones, not respecting current consumer legislation.

With regard to penalties, failure by a professional to comply with their delivery obligations entitles the consumer to rescission of the contract or its performance, as well as payment of damages.

The following document by ECC-Net outlines the primary areas of complaints related to the delivery process and the return of items. It serves as a reminder of the existing applicable laws that require robust enforcement and proposes minor legislative changes or interpretations that could significantly enhance consumer protection.

1. This note does not include parcel delivery services purchased by consumers but focusses on complaints received by consumers having encountered an issue with an order delivery from an e-commerce seller.

2. DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.



Delivery to the consumer

According to recital (55) of the Consumer Rights Directive "Where the goods are dispatched by the trader to the consumer, disputes may arise, in the event of loss or damage, as to the moment at which the transfer –of risk takes place. Therefore this Directive should provide that the consumer be protected against any risk of loss of or damage to the goods occurring before he has acquired the physical possession of the goods. The consumer should be protected during a transport arranged or carried out by the trader, **even where the consumer has chosen a particular delivery method from a range of options offered by the trader**. However, that provision should not apply to contracts where it is up to the consumer to take delivery of the goods himself or to ask a carrier to take delivery. Regarding **the moment of the transfer of the risk, a consumer should be considered to have acquired the physical possession of the goods when he has received them.**"

According to article 20 of the Consumer Rights Directive "In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer **when he or a third party indicated by the consumer and other than the carrier** has acquired the physical possession of the goods. However, the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier."

It should be reminded that the obligation to deliver is an obligation of result, it is up to the seller, the debtor of this obligation, to establish that he has performed it, or that the non-performance was due to force majeure or the buyer's fault.

Also, the third party must be specifically designated, even though some enforcement authorities might see this differently: The German enforcement authority Bundesnetzagentur states in this regard: «Parcels must be delivered personally or handed to a substitute person in the same household or in the neighbourhood, unless otherwise instructed by the sender or recipient. Many postal companies deposit items that could not be delivered in branches or packing stations³.»

1. Non-delivery of an order to the consumer's address

In order for the risk of transport to pass on to the consumer, they need to take physical possession of the parcel. The fact that the consumer's customer account or the tracking of the transport company indicates a parcel as being delivered, doesn't prove anything. In case of a dispute, the seller will have to provide clear evidence, that the parcel has been entrusted to the consumer.

It might be reminded that during the pandemic, deliveries needed to take place without physical contact between the delivery teams and the consumers. Many technical solutions have been fund back then to replace the written signature, that still can be used.

Often delivery companies leave parcels in hallways, with doormen etc. For the risk to pass on to the consumer, this third party needs to be authorised by the consumer to receive the package. In case of a dispute, unless this authorisation can be shown, the risk did not transfer to the consumer.

3. <https://www.bundesnetzagentur.de/DE/Vportal/Post/Universaldienst/start.html>1. Non-delivery of an order to the consumer's address

2. Delivery without signature if this was foreseen in the contract

If the delivery options provided by the seller indicate delivery against a signature or a one time password and the parcel was just left in the letterbox, the seller did not fulfil their delivery obligations.

The transmission of a code to a delivery person cannot be understood as the designation by the consumer of a third party who would take physical possession of the goods in his place. In this case, the seller remains liable for any loss or damage to the goods, since the carrier had been proposed by him.

3. Non-delivery or disappearance of an order from a letter box

Often letter boxes are considered as being in the possession sphere of the consumer. Also General Terms and Conditions of several transport companies consider that delivering to letter boxes is enough. What happens if parcels are stolen from the boxes, for example via Postal Master keys as this has happened many times during the pandemic? Did consumers already get physical possession of the item?

In legal terms, possession involves more than just having something in one's vicinity; it includes an element of control and intention. For possession to be recognized legally, the individual must have the ability to control the item and the intent to do so. The logical question here is whether the consumer has control over the package when it is left at the doorstep.

If a package is placed in a consumer's mailbox but is stolen before the consumer retrieves it, the consumer has not exercised control over the item, and therefore, has not taken possession of it. On the other hand, the seller's obligation to deliver the item is considered fulfilled if they can prove that a third party, such as a thief, prevented the consumer from receiving it.

What does this mean for the consumer: The consumer will have to inform the seller of the incident and the seller will have to file a police report. The seller doesn't have to deliver the item anymore to the consumer. The consumer, in turn, is not obliged to pay the purchase price or, if the purchase price has already been paid, is entitled to a refund. This has been confirmed by ECCs France, Germany and Belgium for example.

It should however be made very clear: if the seller indicates in his Terms and Conditions that the item is handed over by hand to the consumer, even if the transport company states otherwise in their terms, the parcel needs to be handed over to the consumer.

4. Non-delivery or disappearance of an order at a pick-up station

Usually pick-up stations are proposed by sellers, in form of a list the consumer can choose from. In the opinion of ECC-Net there are therefore considered as part of the delivery process and the risk transfers to the consumer only once he takes physical possession of the item at the pick-up point. If the item disappears before that, the seller should bear the risk.

The situation is different if usually the seller doesn't provide for pick-up options and the consumer requests expressly for one. It could then be considered that the seller fulfils the obligation by delivering the parcel to a third party mandated by the consumer. If the parcel disappears, the consumer will have to take recourse against the pick-up station.

5. Wrong product delivered or damaged parcel content

"Regular delivery of goods ordered via e-commerce, mail order etc. often takes place without immediate inspection by the consumer of the goods delivered. Under the Directive, the risk passes to the consumer on taking physical possession of the goods regardless of whether they have been inspected for defects. However, there is a requirement for fault-free delivery under the Sales of Goods Directive (EU) 2019/771. Article 11 of that directive sets out the rules on burden of proof with respect to any lack of conformity."⁴

This issue is prevalent in Latvia, where consumers often report that while the shipment package itself appears undamaged, the goods inside are damaged upon opening. When consumers contact the trader with a complaint, their claims for replacement or refund are frequently denied. Traders often argue that the consumer

4. [EUR-Lex - 52021XC1229\(04\) - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2021.1229_04)

accepted the shipment from the courier without objections, implying acceptance of the goods' condition. Consequently, if the consumer does not raise any immediate concerns upon delivery, traders are typically unwilling to resolve the dispute later.

6. Request of the seller to file a police report

The seller bears the risk of transport until due delivery. Therefore, any incident outside the sphere of possession of the consumer has to be assumed by the seller. The consumer's duty is to inform the transport company/seller about the incident, so the seller doesn't lose his recourse against the transport company.

National laws provide different deadlines for this declaration. In France for example a consumer has 3 days according to the commercial code, but if the transport company cannot prove to have given the consumer adequate time during the delivery to effectively inspect the goods' condition, the deadline is 10 days according to the consumer code.

However, regularly traders impose the burden of proof of the non or damaged delivery on the consumer by requesting copies of ID, declarations of non-receipt and even police reports. Traders are usually smart enough not to indicate these procedures in their terms and conditions.

The Annexe of Directive 93/13/EEC on unfair terms in consumer contracts⁵ however clearly states that terms which have the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract may be regarded as unfair.

5. [L_1993095EN.01002901.xml \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993D0130&from=DE)



Return by the consumer

In the event of withdrawal, unless the trader has offered to collect the goods himself, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive the goods.

According to the guidance on the interpretation and application of Directive 2011/83/EU "Article 13(1) requires the trader to carry out the reimbursement without undue delay and by no later than 14 days from the day the consumer informs the trader of the decision to withdraw from the contract.

For sales contracts, under Article 13(3), the trader can only withhold the reimbursement beyond this deadline until he has either received the goods or at least evidence has been supplied by the consumer that the goods have been sent back."

Nevertheless, in practice, traders very regularly condition the refund by having actually received the return and their warehouse having inspected the items.

7. Cooling off: the consumer never accepted the parcel

In the guidance on the interpretation and application of Directive 2011/83/EU, it is mentioned that it should not be possible to withdraw from the contract by simply returning the goods without any explicit statement to this effect. Refusing delivery or not picking the goods up at the post office would not as such count as valid expressions of withdrawal.

Nevertheless, the return parcel, if never accepted, will travel under the responsibility of the trader.

The same guidelines foresee "Where the consumer has never taken physical possession of the goods, e.g. by refusing to take delivery, either without any explicit statement or with a statement to the trader about withdrawal from the contract, the trader would continue bearing the risk of loss or damage since no transfer of risk to the consumer will have taken place according to Article 20."

8. Cooling off: Return with a shipping label from the seller

The Directive does not regulate who bears the risk for accidental damage or loss during the return of the goods when the consumer withdraws from the contract. Therefore, this matter is also subject to national laws. In several Member states, such as Austria and Finland⁶, the goods travel at the risk of the seller.

The concept of '**evidence of having sent back the goods**' is important for the application of Article 13(3). In principle, this 'evidence' should be understood as a written statement from an established transport or postal service provider specifying the sender and the recipient."

If the consumer accepts the trader's offer to collect the goods, or the trader has offered to collect them at his expense, the trader should not be able to invoke the right to withhold the refund under Article 13(3)."

6. The Finnish Consumer Ombudsman has deemed that the risk of loss of or damage to the goods passes to the seller as soon as the consumer hands over the package to the carrier for return, provided that the seller has agreed to cover the return costs and thus has chosen the carrier.

9. Cooling off: Return with a delivery company mandated by the consumer

As mentioned, the seller cannot delay the refund until they receive the return, only until the moment the consumer proves to have sent the parcel.

According to the guidance on the interpretation of Directive 2011/83/EU, « In principle, when returning the goods, the consumer should take reasonable care, for example, by choosing an established transport or postal service provider, to ensure that the goods reach the trader and are not damaged in transit.”

If the consumer takes in charge the return of the parcel, they become the contractual partner of the transporter. If the seller upon return realises a loss or damage, they will have to inform the consumer and the transport company, just like they request consumers to do so. If they don't, they become liable for the consumer losing their claim against the transport company and cannot ask the consumer for a refund.

10. Cooling off: voluminous items

In the case of off-premises contracts where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader shall at his own expense collect the goods if, by their nature, those goods cannot normally be returned by post.

This exception should be extended to distance selling. ECCs receive many cases for example of mattress sales, where they cannot return those as they will need a logistics partner to do so but usually they do not accept single items from private consumers or only at horrendous prices.

11. Return of several items ordered separately in one parcel

Some traders indicate to consumers that for sustainability reasons, they should/could return items delivered separately in one single parcel. However, statements of consumers show that in this case often only one item is refunded. This seems due to the fact that the consumer has to request every single item to be returned, usually

a return reference is issued for every single one, but only one will be indicated on the return label. So, when the parcel arrives at the warehouse, only the one reference is scanned, and one return procedure finalised.

12. Legal guarantee

Under Directive 1999/44/EC, in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge. The terms « free of charge » in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour, and materials.

Under Directive 2019/771/EU, where the lack of conformity is to be remedied by repair or replacement of the goods, the consumer shall make the goods available to the seller. The seller shall take back the replaced goods at the seller's expense.

Nevertheless, many sellers ask consumers to bear the costs of return, which they promise later to refund. This is explicitly permitted for example by the French law⁷, if the return can intervene by post: "If the goods can be returned by post without causing the consumer any major inconvenience or incurring costs disproportionate to their value, the consumer shall send the goods to the seller by post. In this case, article L. 241-6 applies. In any event, the consumer may not be required to ensure or pay for the transport of the goods other than by post."

"A trader who has charged the consumer the cost of shipping the goods in order to bring them into conformity must reimburse these costs within fourteen days of the day on which the consumer is informed that the goods have been taken over under the legal warranty. The amount due is automatically increased by 10% if reimbursement is made within fourteen days after this deadline, by 20% up to thirty days and by 50% thereafter."⁸

If the consumer mandates a transport company, this has of course consequences on the risk of transport.

7. [Article D217-1](#) French consumer code

8. Article L241-6 French consumer code

Return with a shipping label from the seller

The seller is liable for the transport and any damage or loss will have to be seen with the transport company. The consumer retains the right to the application of the legal guarantee. Some national legislations foresee deadlines for the seller to provide the remedy. Once the deadline expired, consumers may be entitled to a refund, in a specific timeframe. Sellers therefore cannot suspend the refund until the investigation with the transport company is over.

13. Return by mistake of a wrong item by the consumer

It happens, that consumers pack a wrong item, for various reasons. While sellers often invoke a fraud of the consumer, some cases contain honest mistakes. Whatever the reason, the seller will receive in the warehouse the property of the consumer.

Usually, they inform the consumer that they will not return the item, which can be considered an unjustified enrichment. Other sellers systematically indicate they destroy the item received; this is a damage to property. In both cases, they are liable to the consumer.



Conclusion and possible legislative amendments

To better protect consumers from the issues explained above, the following legislative clarifications should take place:

- Require delivery companies to obtain verifiable proof of delivery, such as a signature or photographic evidence of the package being handed to the recipient or placed in a secure location identified by the consumer. Even though this already exists as a company practice, it needs to be applied and communicated to the consumer. Sellers need to provide the consumer with such proofs.
- Mandate the provision of secure delivery options, such as lockboxes, parcel lockers, or delivery to designated collection points, to prevent packages from being left unattended on doorsteps. Application among the whole EU territory of such practices as it also the sustainable option.
- Standardize return procedures.
- Consumer Rights Awareness: Implement requirements for sellers and delivery companies to inform consumers of their rights regarding delivery and returns. This includes providing clear instructions on what to do if a package is lost, damaged, or left in an insecure location.

- Strengthen enforcement mechanisms to ensure compliance with delivery standards. This could involve regular audits of delivery companies, penalties for non-compliance, and establishing a dedicated body to handle cross-border delivery disputes.
- Require delivery companies to use advanced tracking systems that provide real-time updates to consumers about the status and location of their parcels. This can help consumers anticipate delivery and ensure someone is available to receive the package.
- Mandate insurance coverage for high-value items during transit. This ensures that consumers are compensated adequately in case of loss or damage under cooling off procedure.
- Provide additional protections and support for vulnerable consumers, such as the elderly or those with disabilities, to ensure they can safely and easily receive their parcels.

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