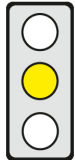


KEY ISSUES

Objective of the Directive: Full harmonisation of important legislation on consumer contracts relating to digital content, aims to remove legal uncertainty about the cross-border sale of digital content and thereby encourage this type of business.

Affected parties: Consumers, businesses, intermediaries



Pro: (1) The Directive is a step towards full harmonisation of consumer protection law with regard to digital content which is necessary for the completion of the internal market.

Contra: (1) In important areas, the Directive fails to bring about full harmonisation and also imposes the same rules on very diverse digital content.

(2) The Directive gives rise to problems of demarcation with regard to sales of goods and further fragments consumer protection law on the basis of content and/or sales channel.

CONTENT

Title

Proposal COM(2015) 634 of 9 December 2015 for a **Directive on certain aspects concerning contracts for the supply of digital content**

Brief Summary

► Context and objectives

- The Commission wants to remove barriers to the digital single market. By fully harmonising important consumer contract rules and ensuring a high level of consumer protection, it wants to facilitate and encourage the online sale of goods and the supply of digital content EU-wide (Recitals 1-7).
- The Commission proposes two new Directives:
 - on certain aspects concerning contracts for distance sales of goods [COM(2015) 635, see cepPolicyBrief] and
 - on certain aspects concerning contracts for the supply of digital content (this cepPolicyBrief).

► Scope and definitions

- The Directive applies to any contract relating to the supply of "digital content" between a business ("supplier") and a consumer where the latter pays for this with money or "actively" provides data to the supplier – e.g. name, email address, photos - (Art. 3 (1), Recital 14).
- "Digital content" means (Art. 2 (1) (a) - (c))
 - data which is produced and supplied in digital form, e.g. video and audio content, apps, applications, data bases, digital games and other software;
 - services allowing the creation, processing or storage of the consumer's own data in digital form, e.g. cloud-hosting, web-hosting and other storage services;
 - services allowing consumers to share or otherwise "interact" with data in digital form provided by other users of the service, e.g. social networks.
- "Supply" means making available or providing access (Art. 2 (10)).
- The Directive also applies where digital content (Recitals 11 and 12)
 - is embedded in goods as long as the content does not simply have a subordinate function, or
 - is supplied on a durable medium (CD, DVD) which serves only as a carrier.
- The Directive does not apply to (Art. 3 (5))
 - services performed with a predominant element of "human intervention", e.g. consultancy services,
 - electronic communication services as defined in Directive 2002/21/EC, such as telephony,
 - healthcare, gambling and financial services.
- In the event of a conflict with other EU legal acts, the latter take precedence (Art. 3 (7)).

► Full harmonisation

- In most of the areas governed by the Directive, it provides for full harmonisation. Thus diverging - including more stringent - national provisions are prohibited (Art. 4).
- Insofar as "aspects" are not regulated, the Directive does not affect national general contract laws (Art. 3 (9)).
- It is left up to the EU member states to decide whether they regulate contracts relating to digital content as sales, services, rental or sui generis contracts (p. 6).

- The Member States can provide supplementary rules on "conditions for the exercise of rights" - e.g. the right to damages - and the consequences of termination of the contract (Recital 10).
- In addition, the Directive excludes "specific issues of liability" in the case of digital content related to the Internet of Things, e.g. liability for "machine-to-machine" contracts (Recital 17).

► **Conformity of the digital content with the contract**

- The supplier is responsible for ensuring that the digital content
 - primarily corresponds to the contractually agreed features - e.g. functionality, duration, interoperability, security, updates, instructions, customer service (Art. 6 (1), (4)) or - in the absence of a contractual provision - is fit for purposes for which it is normally used (Art. 6 (2))
 - corresponds to the latest available version at the time of conclusion of the contract, unless otherwise agreed,
 - is fit for the consumer's required purpose which has been accepted by the supplier, and
 - conforms to the descriptions contained in terms and conditions, work specifications or pre-contractual information where these form an integral part of the contract.
- Digital content is in breach of contract where it (Art. 7, 8)
 - has been "incorrectly" integrated by the supplier, or by the consumer due to faulty instructions,
 - is encumbered by third-party rights - e.g. intellectual property rights - i.e. there is a defect in title.

► **Liability, time for determining conformity with the contract and reversal of the burden of proof**

- The supplier is liable to the consumer
 - for failure to supply the digital content (Art. 10 (a)); unless otherwise agreed, supply must take place immediately after the conclusion of the contract (Art. 5 (2));
 - where digital content is supplied on one occasion, for any "lack of conformity" which exists at the time the digital content is supplied (Art. 10 (b));
 - where digital content is to be supplied "over a period of time" (i.e. a continuing obligation), for any "lack of conformity" which occurs during the duration of that period (Art. 10 (c)).
- Under EU law, the supplier's liability is not time-limited. The EU-states may, however, make claims subject to "national prescription rules" in order to provide "legal certainty" (Recital 43).
- The supplier must, in principle, - due to its better knowledge (Recital 32) - prove that digital content conforms to the contract (Art. 9).

► **Consumer's claims under guarantee ("remedies") for failure to supply**

In the event of failure to supply the digital content, the consumer can terminate the contract immediately (Art. 11).

► **Consumer's claims under guarantee ("remedies") for lack of conformity**

- In the case of a "lack of conformity with the contract" (defects) the consumer can firstly require subsequent performance ("Stage 1") or - if that fails or is prohibited - a price reduction or "termination of the contract" ("Stage 2") (Art. 12, 13).
- There is no obligation to give notification of defects within a specific period after the defect becomes apparent. The Member States cannot impose such a duty to give notification of defects (Recital 9).

"Stage 1": "Bringing the digital content into conformity with the contract" (subsequent performance)

- Bringing the digital content into conformity with the contract must take place "free of charge", within a "reasonable" time and "without significant inconvenience" to the consumer (Art. 12 (1), sentence 1, (2)).
- Subsequent performance is prohibited where it is impossible, unlawful or "disproportionate" - i.e. imposes "unreasonable costs" on the supplier - (Art. 12 (1)).

"Stage 2": Price reduction or "termination" (rescission or notice to terminate)

- The consumer is entitled to a price reduction or to terminate the contract by notice given by any means (Art. 13 (1)) if subsequent performance is impossible, does not take place within a "reasonable" time or would involve "considerable inconvenience" to the consumer. (Art. 12 (3))
- Termination of the contract is only possible where the defect impairs "main performance features" of the digital content. This is deemed to be the case and the supplier must prove the reverse. (Art. 12 (5))
- In the case of termination of the contract (Art. 13 (2)),
 - the supplier must reimburse the price paid, cease, in principle, to use the data provided by the consumer and enable the latter to retrieve its data free of charge;
 - the consumer must cease to use the content, return durable media and delete any copies.
- The consumer need not pay for any use made of the digital content prior to termination (Art. 13 (4)).

► **Damages**

The supplier is liable for all damage to the consumer's digital environment "caused" by failure to supply the digital content or "lack of conformity" with the contract. Exercising the right to damages is regulated under national law. (Art. 14 (1), (2))

► **No exclusion period for claims under warranty**

The Directive does not stipulate a period within which "lack of conformity" with the contract must become apparent. Grounds: Digital content is not subject to wear and tear (Recital 43).

► Termination of long term contracts and changes to digital content

- The consumer is entitled to terminate contracts, with a duration exceeding 12 months, any time and by any means, after the expiration of the first 12-month period (Art. 16).
- The supplier can only alter “main performance features” of the digital content where the contract permits him to do so and the consumer is notified and allowed to terminate the contract and is able to retrieve his data (Art. 15).

Main Changes to the Status Quo

- Claims under guarantee for digital content are regulated at EU level for the first time.
- The definition of "digital content" is extended beyond that of the Consumer Rights Directive (2011/83/EU).
- The active provision of data by the consumer is recognised for the first time as counter-performance.
- This Directive now applies, instead of the Consumer Goods Directive (1999/44/EC), to durable media such as DVDs and goods carrying embedded digital content as their main function.
- In the event of failure to supply digital content, the consumer can terminate the contract without further conditions.
- Until now, suppliers have only been liable for defects for a limited period, e.g. for 2 years in the case of consumer goods. Liability for defects in digital content will be for an unlimited period under EU law; national limitation periods remain lawful however.
- Until now, the supplier's burden of proving that no defect was present when risk passed, has been limited in time, e.g. to 6 months in the case of consumer goods. In future, the supplier will have to prove conformity with the contract, in respect of digital content, for an unlimited period.
- Suppliers are likely to be liable irrespective of fault for damage to the consumer's digital environment.
- New: the consumer's right to terminate long term contracts after one year and the protection of the consumer against unilateral alterations to the digital content.

Statement on Subsidiarity by the Commission

The EU Commission sees "legal gaps" in EU consumer law relating to digital content. Only EU action can close these gaps and at the same time prevent the threat of legal fragmentation (p. 3, 5, 6, Recital 54).

Policy Context

In its Communication on a Strategy for the Digital Single Market [COM(2015) 192; see [cepPolicyBrief](#)] the Commission criticised the lack of EU rules regarding digital content acquired online. With the Regulation [COM(2015) 627; see [cepPolicyBrief](#)], it wants to ensure the cross-border portability of online content.

Legislative Procedure

9 December 2015	Adoption by the Commission
10 June 2016	Debated by the Council

Options for Influencing the Political Process

Directorates General:	DG Internal Market (leading)
Committees of the European Parliament:	Internal Market and Legal Affairs (both leading); Rapporteur: Axel Voss, Evelyne Gebhardt
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Legal Affairs (leading); i.a. Economic Affairs; Digital Agenda; EU
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The Directive is a step towards full harmonisation of consumer protection law with regard to digital content, which is necessary for the completion of the internal market. It restricts itself however to broad areas of guarantee law and to rights to terminate long term contracts as well as protection in the case of alterations. Since it fails to harmonise other important areas of contract law, such as limitation periods - and thus e.g. fails to provide any legal certainty about the length of the period in which claims under guarantee may be brought in - it is doubtful whether it will encourage cross-border trade with digital content to the desired extent.

The fact that the reversal of the burden of proof and the guarantee are not subject to a time limit means that suppliers de facto remain liable until the end of the national limitation period, even for defects in digital

content which arise later, because they will often be unable to provide the necessary counter-proof of "conformity with the contract". This encourages consumers to treat digital content carelessly, e.g. by neglecting to carry out virus protection and updates, and **will give rise to higher prices**. In addition, suppliers are likely to be liable irrespective of fault for damage to the consumer's digital environment because there is no explicit fault requirement. Suppliers should be liable for DVDs in the same way as for goods, because, contrary to the Commission's view, they are also subject to wear and tear.

The mandatory requirement to permit termination after one year is a severe encroachment on the supplier's freedom of contract protected under the EU Charter of Fundamental Rights, and on his interest in planning certainty. Although it facilitates changes in supplier, suppliers will price in the risk of premature termination of the contract.

Legal Assessment

Legislative Competency

The Directive is correctly based on the power to approximate laws in the internal market (Art. 114 (1) TFEU).

Subsidiarity

Unproblematic. Convergence of consumer contract law can only take place at EU level.

Proportionality with respect to Member States

The Directive encroaches on the national law of obligations and, due to full harmonisation, restricts the Member States' scope for shaping their own legislation. Its positive impact on the cross-border sale of digital content is likely to be limited because the Directive leaves out **important areas of contract law**, such as impossibility and limitation periods, **which work in conjunction with guarantee law**. It is precisely these areas, however, that **should also be fully harmonised in order to create the desired legal clarity for consumers and cost savings for businesses**. One positive feature to mention is the fact that the Directive allows Member States to regulate contracts on digital content separately or to integrate them into their contractual topography.

There is a question mark over the approach which establishes a special "digital content" category and **makes all contracts relating to digital content subject to the same rules**, even though the content of performance may differ significantly, i.e. irrespective of whether the content is provided on one occasion or over a period of time, is offered as goods or services, is provided individually or as "standard". **It would be more sensible to differentiate the rules** for different digital contents according to the content of the main performance obligation. In addition to the parallel Directive for online sales of goods and the Consumer Goods Directive for offline sales of goods, **this Directive also creates a third legal regime with divergent guarantee rules for digital content**, relating inter alia to liability, burden of proof and rescission. **The fragmentation of national law is thus replaced by a fragmentation based on sales channel or content of performance. It would be more transparent and effective to create a uniform consumer contract law and only provide for divergences where either the content of performance (digital content) or the sales method (online) requires it.** E.g. a consumer will find it hard to understand why his rights regarding a defective DVD player are different to those regarding a defect in the DVD which he bought at the same time.

Clarification is required as to the extent of the restrictive effect of the Directive and in particular the flexibility clause regulating the "exercise of the right to claim damages", i.e. **whether the Member States can provide for supplementary compensation rights for the consumer** and/or base liability on fault.

Compatibility with EU Law in other respects

The broad definition of "digital content" is appropriate in view of the speed of technological development, but it **results in problems of overlapping with other EU legislation** e.g. the planned Directive for online sales of goods. Clarification is required, inter alia, about when digital content embedded in a product only has a subsidiary function, when a data medium serves not just as a carrier - in both of these cases the Directive does not apply - or which rights consumers have in the case of digital content related to the "Internet of Things" because hardware and software are becoming more and more intertwined which makes definition more difficult. Overlaps with the General Data Protection Regulation should be avoided.

Conclusion

The Directive is a step towards full harmonisation of consumer protection law with regard to digital content, which is necessary for the completion of the internal market. It is, however, restricted to broad areas of guarantee law. Full harmonisation is also necessary in other areas of contract law, such as limitation periods, if cross-border trade in digital content is really to be encouraged. There is a question mark over the approach which makes all contracts relating to digital content subject to the same rules. Differentiated rules would be more appropriate. At the same time, the Directive creates a third legal regime with its own guarantee rules for digital content. The fragmentation of national law is thus replaced by a fragmentation based on sales channel or content of performance. It would be more effective to create a uniform consumer contract law which only provides for divergences where necessary. The broad definition of "digital content" gives rise to overlaps with other EU legislation. Clarification is required as to whether the EU member States can provide for supplementary compensation rights for the consumer. The increased risks to suppliers, such as the fact that the reversal of the burden of proof and guarantee period are not time limited, will give rise to higher prices.