

STAKEHOLDERS FEEDBACK NOTE

I) THE DIGITAL CONTRACTS PROPOSALS

The Commission adopted in December two important proposals: the proposal on certain aspects concerning contracts for the supply of digital content¹ and proposal on certain aspects concerning contracts for the online and other distance sales of goods². – These proposals are among the first deliverables adopted under the Digital Single Market Strategy. The main objective of these proposals is to contribute to faster growth of the Digital Single Market by eliminating contract law related barriers that hinder online cross-border trade. The Digital Contract proposals provide a set of targeted fully harmonised contract law rules. The main rules are:

For digital content:

- **Supplier's liability for defects:** If the digital content is defective, the consumer can ask for a remedy. There will be no time limit to the supplier's liability for such defects, because -unlike goods digital content is not subject to wear and tear.
- **Reversal of burden of proof:** If the digital content is defective, it will not be up to the consumer to prove that the defect existed at the time of supply, but rather for the supplier to prove that this is not the case.
- **Right to end long term contract:** Consumers will have the right to terminate long-term contracts, and contracts to which the supplier makes major changes.
- **Scope:** The proposed rules apply equally when consumer obtained digital content for money or in exchange for consumer's data.

For goods:

- **2 years guarantee period:** If a good is defective, the consumer can ask for a remedy during 2 years.
- **Right to remedies:** Similar to the existing Sales and Guarantees Directive³, where the goods are defective, consumers will have the right to have them repaired or replaced. Where this goods cannot be repaired or replaced consumer will have a price reduction or to terminate the contract.
- **Reversal of the burden of proof for two years:** In the EU, it is already the case that for a certain period of time a consumer asking for a remedy for a defective product does not have to prove that the defect existed at the time of delivery; it is up to the seller to prove the opposite. Currently, the time period during which the seller has this burden of proof varies by Member State; now it will be extended to two years throughout the EU.

¹ COM(2015) 634 final

² COM(2015) 635 final

³ 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

- **No notification duty:** Consumers will not lose their rights if they do not inform the seller of a defect within a certain period of time, as is currently the case in some Member States.
- **Minor defects:** If the seller is unable or fails to repair or replace a defective product, consumers will have the right to terminate the contract and be reimbursed also in cases of minor defects.
- **Second-hand goods:** For second-hand goods purchased online, consumers will now have the possibility to exercise their rights within a two-year period, as is the case with new goods, instead of the one-year period that currently applies in some Member States.

II) THE FEEDBACK MECHANISM

In the context of the Better Regulation Package of May 2015, stakeholders have the possibility to provide feedback on legislative proposals within 8 weeks after their adoption by the Commission. This feedback, published in the Commission website⁴, is meant to feed into the legislative debate and as such is presented by the Commission to the European Parliament and the Council.

This document offers a brief overview of the feedback received on Commission's proposal on certain aspects concerning contracts for the supply of digital content and Commission's proposal on certain aspects concerning contracts for the online and other distance sales of goods.

Stakeholders were involved at various stages in the development of these proposals. The consultation strategy was based on a mix of public and targeted consultations including a public consultation⁵, specific consultations targeting main stakeholders⁶, and Member States⁷.

After the adoption of the proposals (in particular between January and March 2016), numerous meeting took place with the main stakeholders organisations representing a wide range of interests in order to get stakeholders feedback.

Stakeholders also used the opportunity provided by the new feedback mechanism to express their comments on the proposals. The number of feedback received through the feedback mechanism is relatively modest (16 contributions). Comments sent through the feedback mechanism were in general similar to those expressed in earlier stakeholder consultations but to some extent more concrete. New elements were raised on digital content provided against

⁴ http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm

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⁶ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3295&NewSearch=1&NewSearch=1>,

http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/eccg/index_en.htm

⁷ A number of bilateral meetings were held with Member States which have started preparatory work for legislation on digital content. Bilateral technical meetings have also been held with other Member States.

data and in particular regarding the relation with the recently adopted General Data Protection Regulation (GDPR)⁸.

III) SUMMARY OF VIEWS EXPRESSED IN THE CONTEXT OF THE FEEDBACK MECHANISM

16 contributions were received by the Commission, 7 were received within the deadline (7 March 2016), 3 before the 31st of March and 6 between 31st of March and 20th of May. The vast majority of respondents are organisations representing businesses. On the consumer side, one European umbrella organisation sent its feedback. In addition, comments were received from four stakeholders representing legal professions organisations and others.

Considering that the feedback mechanism is a relatively new tool and some stakeholders are not yet aware of it, a flexible and open approach was adopted for this feedback note. Contributions sent outside the official channel and directly to the competent Commission services were analysed as part of this mechanism. Contributions sent within the deadline but also contributions sent within a reasonable period after the deadline (until 31st of March) were included in the analyses. Contributions sent after the 31st of March were exceptionally analysed but separately. The contributions will be published on DG JUST website⁹. Two stakeholders who sent contributions outside the official channel did not give agreement to be part of the feedback mechanism and their contributions will not be published.

A) Summary of the contributions received before 31 March.

Digital content

Business: Three business organisations commented on the digital content proposal. While one of them welcomes the proposal as a good basis for working towards the development of contract rules for the supply of digital content, another one does not see the need for an harmonisation of the rules at EU level. All of them raised concerns on specific points. The definition of digital content should be narrower. Digital services and purchases of digital content should not be treated the same way.. The definition of digital content should be the same as in the Consumer Rights Directive (CRD)¹⁰ to avoid legal uncertainty. Counter-performances other than money should not be covered to avoid duplication with the General Data Protection Regulation (GDPR). One stakeholder specified that if the proposal duplicates rights that consumers already have under data protection law, the same terminology should be used. Others argue that as far as personal data are concerned the consequences of terminating the contract are already regulated by the GDPR. One stakeholder underlined that when instructions and customer assistance are not provided by the supplier (especially in case of counter-performances other than money) and no standards or codes of good practice exists, it

⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

⁹ http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm

¹⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights

will be difficult for service providers to specify what reasonable technical support can be expected. One stakeholder raises concerns on the unlimited legal guarantee period and unlimited reversal of the burden of proof.

Legal professions and others: Two stakeholders commented on the digital content proposal. One asked to include gambling in the scope of the proposal. The other one welcomed the proposal, supported the full harmonisation approach and the fact that it is a Directive and not a Regulation. However, it regrets that the proposal does not apply also to B2B contracts, especially for SMEs, and that different rules will apply to online sales, supply of digital content and face-to-face sales. Special mandatory rules on standards terms should be added. This stakeholder suggests that consumers should substantiate their claims and address the issue of portability of digital content to a third party.

Online sales of goods

Business: Three business organisations commented on the online sales of goods proposal. Two of them questioned the full harmonisation approach as the benefits of having a uniform set of rules would be outbalanced by the additional costs of an excessive consumer protection level. The third stakeholder stated that existing rules (in particular the CRD) should be reformed before enacting a new directive. One stakeholder would prefer to apply the country-of-origin principle and to review the Rome I Regulation¹¹. All of them contested the split of online and offline trade and advocated for a six month reversal of the burden of proof. Two stakeholders argue against the right of termination for minor defects. One stakeholder argued the deletion of the provision on damages. He criticises that some Member States have longer prescription periods than the legal guarantee period. This may prevent full harmonisation. A stakeholder does not support the extension of the legal guarantee to two years for second-hand goods.

Legal professions: Two representatives of the legal professions commented on the online sales of goods proposal. One of them supported the objective of the proposal and the full harmonisation approach. The other one finds the proposal too consumer-friendly. Both of them suggested extending the proposal to B2B contracts. One suggested that in B2B contracts these rules should be non-mandatory. They both raise concerns on the legal fragmentation between the online and offline rules. One stakeholder argued for a six months reversal of the burden of proof. One stakeholder supported the hierarchy. Both stakeholders specified that the right of termination should not be available to consumers in case of minor defect. One of them considers that the remedies are not balanced and too favourable to consumers (e.g. consumer right not to pay for the use of the good before return).

b) Summary of contributions received between 31 March and 20 May.

Digital content

¹¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Business: Five business organisations sent comments on the digital content proposal. These stakeholders generally welcome the proposal and a full targeted harmonisation limited to B2C contracts. However, they believe that the scope of the proposal should be simplified and clarified. They are concerned about the relationship with other EU legislations in particular the CRD and the GDPR. The approach chosen for embedded digital content was also questioned and some of them consider that digital content against data should not be included in the scope at this stage. The majority of them do not agree with the right to terminate the contract immediately in case of failure to supply and consider problematic the rules on long term contracts. One stakeholder explicitly supported the hierarchy of remedies. All of them expressed concerns on the consequences of termination which are not in line with the GDPR. Two stakeholders claimed that liability for damages should require the fault of the supplier. One would like to see the rules on damages deleted. All stakeholders are against the unlimited reversal of the burden of proof and the legal guarantee period. A majority asked for coherence between the rules on digital content and on goods. A stakeholder asked for a notification obligation for consumers.

Consumers: One consumer umbrella organisation sent comments on the digital content proposal. This organisation welcomes the proposal on digital content. It stresses the need not to undermine existing consumer protection and have rules that future proof. This organisation acknowledges that full harmonisation is appropriate. It welcomes the inclusion of digital content against data in the scope of the proposal and would favour including digital content against data automatically collected. The relationship with Internet of Things should be clarified as well as the one with the GDPR. Consumer's legitimate expectations should be part of the conformity criteria. This stakeholder is concerned that the indefinite legal guarantee period could be contractually limited by the supplier. It supports a 2 year reversal of the burden of proof and the right to terminate long-term contracts, but calls for six months instead of 12 months. It overall supports the provisions on damages but stresses that the directive should clarify that national laws stay untouched for other type of damages. Finally, this organisation claims that a section on unfair contract terms should be incorporated, including a specific list of unfair clauses. It also suggests introducing a joint liability between the supplier and the producer to address potential loopholes in the liability chain.

Online sales of goods

Business: Three business organisations sent comments on the online sales of good. These organisations welcomed the full targeted harmonisation and the focus on B2C contracts. They expressed concerns about the divergent rules for online and offline sales and call to wait for the REFIT exercise results. They are against a two year reversal of burden of proof and the right to terminate the contract for minor defects but welcomed the hierarchy of remedies. They welcome the two year legal guarantee period but call to reconsider the extension of the legal guarantee period to two years for second-hand goods.