EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content {COM(2015) 634 final} and the Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods {COM(2015) 635 final}.

These two proposals constitute a substantial element of the Commission's Digital Single Market Strategy (DSM) which is among President Juncker's priorities. They form part of a broader package of ambitious measures designed to unleash the full potential of the DSM.

In fact, the main objective of these proposals is to contribute to the faster growth of the DSM by eliminating contract law related barriers that hinder online and other distance cross-border purchases. For digital content, where currently hardly any specific contract law rules exist at EU level, businesses face legal uncertainty and consumers suffer economic detriment in case a product is defective. Moreover, Member States are starting to introduce their own digital content-specific laws.

Therefore, the proposal aims to avoid a fragmented legal framework with a patchwork of mandatory contract rules across the EU. This would be costly for businesses who wish to offer digital content in more than one EU country and detrimental for consumers who would not have clarity on their rights and not trust their engagement in e-commerce. For goods, where currently there are many differences between national laws, a uniform set of rules would bring legal certainty and create a favourable environment for exporting businesses and consumers.

Modernising and simplifying the regulatory framework for digital content and online and other distance sales of goods will have beneficial effects for businesses and consumers alike. It will encourage more traders to sell online especially across the border and lower their costs, while at the same time it will result in more products and better offers for consumers, thereby increasing their trust in the DSM.

The Commission takes seriously the concerns expressed by the Bundesrat as regards the proposal on contracts for the online and other distance sales of goods. It takes note of the concerns that a further harmonisation in parallel to the existing Consumer Sales Directive

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would lead to a fragmentation of the applicable regime. It also takes note of the concerns regarding the principle of full harmonisation in this proposal.

On the proposal on contracts for the supply of digital content, the Commission is pleased to see that the Bundesrat sees a need for an EU-wide appropriate level of consumer protection in the supply of digital content. It also takes note of the comments on the consistency of this proposal with other EU consumer, intellectual property or data protection legislation, the possibility for suppliers to avoid liability for non-conformity, the inclusion within the scope of the proposal of digital content provided in exchange for data, the unlimited guarantee period and reversal of the burden of proof and the rules on liability for damages.

As stressed in the Communication accompanying the proposals, it is clearly the Commission's objective to ensure a coherent legal framework throughout the EU for both online/distance and face-to-face sales of goods. The consultation and the impact assessment undertaken for the proposal have already identified many issues that are relevant for all sales of goods. Furthermore, the Commission has started a "Fitness Check" of EU consumer and marketing law which covers six directives including the Consumer Sales and Guarantees Directive. The Commission has made efforts to ensure that the first preliminary results of the analysis on the alignment of the rules for distance and face-to-face contracts become available as soon as possible.

The Commission is convinced that a full, targeted, harmonisation of the key consumer contractual rights in the areas covered by the proposals is the appropriate solution for achieving the objective of the DSM Strategy- that businesses can sell throughout the EU on the basis of one single set of rules and thereby create lower costs for business and a larger choice at more competitive prices for consumers. Minimum harmonisation, if national rules go beyond it to a different extent and on different points, still leads to legal fragmentation, which represents an obstacle to cross border e-commerce.

The Commission is pleased to provide replies to the other, more technical questions in the attached Annex and hopes that these clarifications address the issues raised by the Bundesrat.

The Commission looks forward to continuing the political dialogue in the future.

Yours faithfully,

Frans Timmermans
First Vice-President

Věra Jourová
Member of the Commission

ANNEX

The Commission has carefully considered the issues regarding the two Proposals raised by the Bundesrat and is pleased to provide the following clarifications.

On the Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods

- On the extension of the reversal of the burden of proof

A recent study[1] suggests that a longer period for the shift of the burden of proof to the seller does not make a significant difference in practice, as many sellers often apply it de facto throughout the entire 2-year legal guarantee period.

Moreover, having the same length for both the legal guarantee period and the reversal of the burden of proof period will simplify the entire system and thus allow an easier and more effective application of the EU rules on the legal guarantee.

Finally, such an approach is in line with the Commission's goal to promote a Circular Economy and the durability of products: a longer period for the burden of proof is an incentive to produce higher quality and more durable products.

On the Proposal for a Directive on contracts for the supply of digital content

- On the consistency of this proposal with other EU consumer, intellectual property or data protection legislation

The proposal complements the Consumer Rights Directive, which already fully harmonised pre-contractual information duties and the right of withdrawal in distance contracts. These provisions remain untouched. The coherence with copyright law is also maintained, in particular through the introduction of the priority given to subjective conformity criteria in the conformity test. Moreover, the Commission has taken due care that the rules of the proposal on certain contracts for the supply of digital content are entirely in line with the forthcoming General Data Protection Regulation (GDPR). To avoid any misunderstanding, Article 3(8) of the proposal clarifies in an unequivocal manner that the Directive is without prejudice to the rules on data protection.

The proposal on contracts for the supply of digital content includes digital content provided against data because the Commission's goal is to provide technologically-neutral and future-proof rules reflecting the realities of the digital market. Digital content provided against the data constitutes a significant share of the market which cannot be disregarded and the consumers engaged in this type of transactions also merit protection. Moreover, borderlines between different categories of digital content are becoming more and more blurred. For instance in the so-called freemium models the consumer starts by paying with data and later on with money. The Commission wants to create a level playing field between the different business models in this area.

[1] The consumer market study on the functioning of legal and commercial guarantees for consumers in the EU published on 10 December 2015 and available at the following link: http://wcmcom-ec-europa-eu-wip.wcm3vue.cec.eu.int:8080/consumers/consumer_evidence/market_studies/index_en.htm.

- On the rule on conformity of the digital content in Article 6, paragraph 2

Two basic approaches exist for determining of the conformity: a subjective approach which is based on contractual conformity criteria and an objective approach which is based on statutory conformity criteria.

According to Article 6, paragraph 1, the benchmark for conformity of digital content is, in principle, what the contract stipulates. Such a solution has been chosen for two main reasons. First, the aim is to avoid conflicts with intellectual property rights. Indeed, in almost all cases the supplier, contracting with a consumer, will not be the author, but a licence holder. It is likely that the author imposes restrictions on the licence holder, for instance not to use the digital content for a certain purpose. If statutory objective criteria determined the conformity of a product, the supplier would possibly be obliged to provide certain functions that he is not allowed to provide, due to restrictions by the author. Second, the approach chosen encourages also innovation by making so called beta-versions, possible. Beta-versions are usually products, for instance software developed by small start-ups, which are likely to have defects but the possible defects are not known. By launching these products, developers explicitly rely on users' reactions to identify problems with the content. This way the products can be improved. If one applied immediately objective criteria to these innovative products, they would be made impossible.

However, it can happen that the contract either does not, or not sufficiently, stipulate the parameters of the content specified in Article 6, paragraph 1 against which the conformity of the digital content will be assessed. There are contracts which, in practice, only contain a rather vague or incomplete wording. In such cases, Article 6, paragraph 2 provides applicable statutory, objective criteria. These criteria primarily derive from the Consumer Sales and Guarantees Directive 1999/44/EC. In this way it is ensured that the consumer is sufficiently protected.

- On the unlimited guarantee period or the reversal of the burden of proof

The Commission believes that the reversal should neither be limited in time, nor should there be a legal guarantee period for digital content. The introduction of these periods for goods was based on assumption that problems appearing after certain time do not have their origin in a lack of conformity at the time of delivery but are rather due to the use of the goods.

However, unlike goods, digital content is not subject to wear and tear. In other words, usage and time do not affect digital content's quality or functionality: a defect will not appear after a certain period of usage if it was not already there at the time of supply.

Moreover a legal guarantee period does not fit with the nature of a number of digital content categories, which are supplied in a continuous manner over a period of time. One would expect that the digital content delivers the promised quality during the entire duration of the contract. For example, when one has a subscription to watch movies on the Internet, one expects to have a good quality during the entire duration of the contract. It is thus hardly possible to determine a specific point in time that would trigger the beginning of a guarantee period.

While the Commission has not included deadlines in the proposals, this does not mean that businesses would be subject to indefinite possible complaints. As rightly pointed out by the Bundesrat, consumer rights would be limited by national prescription periods.

- On the rule on right to damages in Article 14

When preparing the Impact Assessment accompanying the proposal, the Commission found that, in practice, many contracts exclude completely the right to damages, restrict it to direct damages only or cap damages. Furthermore, there is a trend for suppliers to offer only so-called "service credits", namely discounts on future purchases, as compensation for damages. The objective of Article 14 is to prevent the further use of those practices by providing a minimum regulation on the right to damages, while leaving all the details of the regulation of damages to Member States.

Therefore the proposal fully harmonises only the main principles regarding damages caused to the software and hardware of the consumer. Other economic damages like consequential loss and non-economic damages are left to national laws. This solution strengthens consumer protection without upsetting national legal traditions on damages. It responds to calls from consumer stakeholders.