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Bundesrat

22 April 2016

Decision
of the *Bundesrat* (Upper House of the German Parliament)

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the provision of digital content

COM(2015) 634 final; Council document 15251/15

The *Bundesrat* decided to submit the following comments, at its 944th session held on 22 April 2016, according to Sections 3 and 5 EUZBLG (Act on Cooperation between the Federal Government and *Länder* (federal states) on European Union Matters):

Re the submission in general

1. The *Bundesrat* shares the Commission's view that the further development of the digital single market requires a reliable legal framework, guaranteeing a high level of consumer protection. It therefore welcomes the Commission's efforts to promote the digital single market and guarantee a stable legal framework for contracts on the provision of digital content. The harmonisation of regulations constitutes in this respect an appropriate instrument to ensure greater legal certainty similarly to the benefit of contractors and consumers.

2. The *Bundesrat* assesses it as positive that the Commission, with its proposal, has moved away from the optional sales law pursued in the Common European Sales Law and instead is moving to the harmonisation of selected rules.

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3. Constantly advancing digitalisation has opened up new perspectives for trade and services and resulted in the establishment of new business models in relation to the provision of digital content. The Commission agrees that a reliable legal framework must exist for these contractual relationships and any loopholes in the applicable law must therefore be closed. At the same time however, the *Bundesrat* points out that current factual and legal issues arising in the provision of digital content do not depend in principle on whether the parties are consumers or contractors. Developing generally applicable regulations in which the consumer's need for protection can be taken into account, where necessary, through specific, supplementary regulations, therefore seems preferable. Merely focussing on consumer contracts on the other hand is less effective.

4. However, the *Bundesrat* doubts that full harmonisation of consumer contract law in the submitted form would result in simpler rules. It notes that the desired legal harmonisation would only be achieved on the EU level through fragmentation of national law as a result of the introduction of three different regimes for consumers' defect warranty rights, depending on the distribution channel — online or offline — and the product — digital content or another product. In this context consideration has to be given to the fact that functioning markets within the Member States are just as important for the functioning of the single market as for the functioning of cross-border markets.

5. In addition, the *Bundesrat* points to the fact that a contract is not characterised by the product that it relates to, but by what is to happen to the product and the mutual performance obligations to which the contractual parties are subject. In this respect it addresses fundamental concerns that the Proposed Directive, in terms of the legal system, does not relate to the obligations characteristic of the different types of contract, but to the fact that a contract involves the provision of digital content. As a result not only contracts on the permanent and temporary supply of standardised digital content are subject to the same regulations from the outset, but such regulations are also intended to apply to contracts on individually created digital content and on services

related to digital content. Uniform regulations are established for different types of contract — purchase agreements, lease agreements, service contracts, contracts to produce a work and other contracts — with quite different main obligations on the provider which are not geared to the differing structure obligations. It may serve the interests of the parties for the consumer, pursuant to Article 11, to have a right to immediate termination of the contract if the provider fails to supply an agreed unique stream for entertainment purposes at the agreed time. However, a right to immediate termination of the contract seems unbalanced if the subject of the agreement is a longer, ongoing subscription for cloud-based services, involving the provision of application software and IT resources.

6. The Bundesrat also sees some fundamental problems with regard to transposing the Proposed Directive into national law. The second volume of the German Civil Code (law on contractual obligations) is structured by type of contract and does not essentially differ in approach based on the subject matter to which the contractual relationship relates. Implementation of the Proposed Directive by creating a paragraph related to the provision of digital content would not therefore fit into the BGB (German Civil Code) system at all. In case of implementation by amending the existing types of contract, special regulations would have to be established on diverse rules for numerous types of contractual obligations (at least purchase, lease, service contracts and contracts to produce a work). This would result in fragmentation of the law into small parts within the respective types of contract, depending on content (analogue or digital). Intervention in regulations under the German law of obligations would be considerable.

7. The Bundesrat addresses concerns that, as a result of the full harmonisation approach, special regulations on digital content have to be included in national law even if the (national) regulations that apply regardless of the product covered by the contract hold appropriate and balanced solutions in store for contracts concerning the provision of digital content. The applicable sales law can for example be applied to contracts for pecuniary interest on the definitive supply of digital content. In this respect it does not seem necessary or appropriate to replace existing regulations with new regulations. The Proposed Directive harbours the risk of legal fragmentation the disadvantages of which — especially in respect of national circumstances — outweigh the advantages.

8. The point made in the Proposed Directive in favour of the approach that contracts on the provision of digital content are assigned to different types of contract from

Member State to Member State, and even in a national context, depending on the subject matter of the contract, does not constitute a special characteristic of contracts on digital content. The boundaries between different types of contract are also fluid in other areas. This does not provide sufficient reason to break with the system of types of contract arranged by mutual obligations in favour of a system which is based on the product forming the subject matter of the contract. In fact it appears sufficient to create selective special regulations which can be integrated in the traditional system of types of contract based on the law of the Member States. This would also be in line with the goal of the Proposed Directive not to adopt any provision on the question of which type of contract is relevant to contracts on digital content.

9. The Bundesrat sees a clear shift of contractual obligations and risks in the Proposed Directive to the detriment of providers, in particular providers of digital content. The fear therefore exists that cross-border trade — in particular with digital content — would not be encouraged, but might even be obstructed.

10. The Proposed Directive, as well as the proposal for a Directive submitted in parallel on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635 final; Council Document 15252/15, has a limited material and personal scope of application. Both proposals are therefore suited to bringing about (further) fragmentation of contractual regulations in view of the regulations on stationary trading and b2b transactions. In any case fundamental concerns exist about whether this partial approach is compatible with the objective of the Proposed Directives of making the applicable law more transparent from the perspective of the contractual parties.

11. The Bundesrat points out that the scope of application of the Proposed Directive on digital content is not clearly differentiated from the scope of the Proposed Directive on certain aspects concerning contracts for the online and other distance sales of goods. Difficulties in differentiation are likely to arise in the first instance for goods in which digital content is embedded in such a way that its functions are subordinate to the main functions of the goods and it operates as an integral part of the goods (for example household appliances or toys) and which should not be subject to this Proposed Directive, or in case of cloud services (such as cloud printing). Even the differentiations made in the actual Proposed Directives between online purchasing of physical goods, digital services and offline purchases are often unclear. In addition, online and offline trading are inching ever closer to one another in practice and combined systems are emerging whose the legal classification would hardly be possible under the Commission's proposals.

12. The Bundesrat points out that establishing a different regulatory regime for the provision of digital content, online trading in goods and stationary trading will set difficult tasks on the contractor side, primarily for small and medium-sized enterprises (SMEs). This is true in particular of SMEs which operate at least mainly in stationary trading and are already exposed to the distinction between consumer contracts and other contractual relationships. On the other hand, large companies already conducting cross-border trade could benefit from the (partial) harmonisation of legal principles and eliminate smaller competitors from the market.

13. The increase in the complexity of the law of Member States associated with different regulatory regimes is also suited to obstructing consumers in gaining an overview of their rights. The goal pursued inter alia by the Proposed Directive of ensuring that the uncertainty felt by consumers — due to the complexity of legislation — is reduced cannot then be achieved.

Re the Proposed Directive in particular

14. The Bundesrat suggests making it clear in the recitals that schools belong to the group of providers whose services are ‘performed with a predominant element of human intervention [...] where the digital format is used mainly as a carrier’ (compare Article 3(5)(a) of the Proposed Directive).

The Proposed Directive should be applicable to contracts on the provision of digital content concluded between schoolchildren on the one hand and third parties as providers on the other hand even if such provision is related to attending school. This is only a matter of making it clear that the relationship of schoolchildren to the school is not covered.

Such clarification is required because in the proposed version the possibility of the funding bodies of schools, as providers, falling under the scope of application of the Proposed Directive cannot be ruled out. The resultant legal consequences could represent significant burdens on the Länder and local authority school funding bodies, as legal entities for public-sector schools, and on private funding bodies for independent schools.

15. The definition of the term ‘digital content’ is — based on the statement of grounds in the Proposed Directive deliberately — interpreted broadly. According to the wording of Article 2(1)(b) ([...] allowing the creation, processing or storage [...]) however, any causal link between the service to be assessed and later data processing by the consumer is sufficient, including, for example, leasing or repair of hardware. It follows from recital 11 that the Directive should not apply to digital content which is embedded in goods in such a way that it is an integral part of the goods and its functions are subordinate to the main functions of the goods. However the question remains open of how services are to be handled which do not involve the supply of a product with digital content already integrated in it. The Bundesrat therefore suggests clarifying the material scope of the definition of the term.

16. The Bundesrat points out that the unclear definition of the provider in Article 2(3), in conjunction with the liability regulations contained in Articles 10 and 14, results in great uncertainties for platform operators in particular. The scope of application is unclear once a platform is introduced between trader and consumer (for example streaming platforms on which individual content providers operate their own shops and provide their content directly). It therefore requests clarification of whether the obligations under the defect warranty right affect the content provider or streaming platform operator, or both.

17. The Bundesrat welcomes the fact that Article 3(1) extends the scope of application to contracts in which the consumer does not make any monetary payment, but actively provides counter-performance in the form of personal or any other data. Especially with regard to social networks, including contracts in which the consumer provides counter-performance in the form of data instead of a monetary payment is also considered reasonable.

However, the *Bundesrat* suggests fundamental issues regarding 'data as counter-performance' should first be cleared up in principle before the concept is introduced, in its current design, into a directive on consumer-protection contract law the consequences of which have not yet been conclusively clarified.

18. Moreover, the Bundesrat holds the opinion that the scope of application of the planned directive should be reviewed in individual points and amended as required.

19. Concerns arise about the detailed differentiation — susceptible to abuse — in Article 3(4) regarding contracts to which the scope of application in terms of the nature and context of the data made available by the consumer and the processing thereof, does not extend. A balanced legal regime , to which a link can be made, is available in the form of the data protection regulations on the differentiation of data, the collection, processing or use of which for commercial purposes requires approval, from data which can be collected and used without approval. Assuming a counter-performance in the form of data seems in principle worth considering whenever the collection or use thereof requires the consumer's approval. The consumer's counter-performance is then implemented in the form of his approval. The Bundesrat requests a review of whether and to what extent references to regulations under data protection law are preferable for defining whether or not data

represent a contractual counter-performance. In case of references to data protection provisions, it should be made clear however that the civil law regulations in Member States for the protection of minors will not be not replaced by the regulations to which reference is made. Furthermore, regardless of the provision in Article 3(8) — where appropriate in the recitals — it should be made clear that a prohibition of linkage under data protection law is not affected by the regulations on data as counter-performance.

20. Moreover, protection of consumers is insufficient if only the 'active' provision of data should be deemed price equivalent, given that for example data recording and profiling using cookies are not necessarily regarded as 'active provision of information'. This limitation on the scope of application disregards the spirit and purpose of Article 3(1) to include such circumstances in which the consumer pays with his data.

21. According to Article 3(2) the Proposed Directive should also apply to contracts on the provision of digital products which are developed according to the consumer's specifications. There are doubts about whether there is a need for harmonisation for such an extension of the scope of application. Contracts of this type involving a consumer are not likely to constitute standardised bulk transactions, which have considerable relevance in cross-border legal relations from a quantitative point of view.

22. The Bundesrat welcomes the fact that the Commission intends to avoid the law becoming fragmented according to the various distribution channels used to provide digital content. Where the scope of application of the Directive is also to be extended to physical data carriers for this purpose which are 'used exclusively as carrier of digital content', the Bundesrat points to the fact that the regulation under Article 3(3) may result in significant problems related to differentiation. This is especially true of the question of when a data carrier is 'used exclusively as carrier of digital data'. By way of example, this problem can be seen in the purchase of a music CD. Its function is not necessarily limited to carrying music data, but may also consist of having a physical object which is used as required and may become the object of a 'CD collection'. This is all the more true when a separate value is assigned in part to the 'additional benefits' (for example CD cover or booklet).

It therefore seems preferable to exempt the acquisition of data carriers with digital content from the scope of application of the Proposed Directive and to leave it within the scope of application of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Purchase of Consumer Goods Directive). In addition it is conceptually unclear as to which data carriers are used exclusively as carrier of digital content.

23. Moreover, the Bundesrat points out that the extension of the scope of application of the Directive in Article 3(3) to include 'durable media', envisaged in order to avoid fragmentation, again produces a fragmentation of applicable law elsewhere. If the consumer acquires a 'blank' instead of a data carrier already furnished with digital content, the applicable law (for example to defects on data carriers) will not depend on this Proposed Directive, but where appropriate — regardless of the distribution channel — on the regime of the simultaneously Proposed Directive COM(2015) 635 final; Council Document 15252/15 or on the rules applicable to stationary trading. The same applies to data carriers which serve other purposes apart from carrying digital content. In goods trading, for example in respect of games software, there is often a standard version and a limited special edition with an elaborately designed envelope and special add-ons. Fragmentation of applicable law is also a threat here.

24. In view of Article 3(6) of the Proposed Directive, it should be ensured that — in case of contracts concerning digital and non-digital content — the right to terminate the contract can be uniformly exercised for the whole contract if the consumer has no interest in the continued existence of the remaining service.

25. The Bundesrat recommends setting — as for physical goods — a warranty period of two years in the Directive for digital content where the underlying contracts are purchase agreements, and restricting the reversal of the burden of proof to the detriment of the provider to six months, as has been the case to date for physical goods. Contrary to the opinion expressed in the Proposed Directive, digital content is also subject to wear and tear. On the one hand this is true quite specifically of CDs and DVDs — also covered by digital content for example — which are worn out through use. Furthermore, digital content often becomes obsolete due to the rapid technological progress in this area. For these reasons, the comments in recital 43 should be scrutinised. Article 6 should therefore make it clear that a warranty period can be stipulated. In conjunction with the burden of proof under Article 9, this would otherwise result in companies having virtually indefinite liability and the reversal of

burden of proof also being for an indefinite term. Indefinite liability risks to companies are thereby produced.

26. The Bundesrat suggests examining whether Article 6(1)(b) has its own regulatory content, given that in the cases described therein the ‘purpose for which the consumer requires’ the digital content in any case usually becomes the subject of contractual agreement through the provider’s approval.

27. It holds the view that the usual suitability and function of the offered contents, according to prevailing opinion, should also fundamentally be considered as a benchmark for the contractual conformity of the service. The subordination of the objective suitability benchmark, envisaged in Article 6(2) of the proposed directive, to contractual provisions and information harbours the risk that restrictions on functionality and compatibility are regulated in technical specifications the interpretation of which by the consumer however cannot regularly be expected. The 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 also stipulates that the usual suitability and function of goods is in principle decisive for the assessment of contractual conformity.

28. In order to ensure a high level of data protection, the Bundesrat also considers it necessary that data protection requirements are specifically included in the catalogue of criteria for the contractual conformity of service performance and any infringements, for example unnoticed data recording and transmissions through spyware, result in corresponding claims under contract law by the affected consumer.

29. The comma must be replaced by the word ‘or’ at the end of Article 6(2)(c) subsection (ii).

30. Unless the contractual parties have agreed otherwise, digital content must conform under Article 6(4) to the most recent version available at the time of contract conclusion. According to recital 29, this relates to the consideration that digital content is frequently improved by updating in particular. However, the regulation includes cases in which the latest available version offers a lower range of services. Moreover, this regulation may result in disputes because of the contractual conformity of digital content, although the provided digital content fulfils the

contractual purpose adequately or even better. The Bundesrat therefore suggests deleting Article 6(4), especially as the mutual interests of the contractual parties are sufficiently protected by the other regulations on contractual conformity.

31. The Bundesrat points to the fact that Article 7, in conjunction with Article 9, is problematic for providers, given that under Article 9 the burden of proof for contractual conformity is on the provider, unless the consumer's digital environment is incompatible with digital content. This regulation appears to be not very practicable: the digital environment of the consumer is outside the provider's sphere of influence, and a company would only have the opportunity to investigate the reason for the disputed problem in respect of digital content and prove that the product was free of defects upon risk transfer by means of access to the consumer's digital environment. On the consumer side, the accessibility of his digital environment may involve a significant intervention into his privacy; the regulation may therefore also be detrimental to consumers.

32. Article 8 should be adjusted linguistically, given that — based on the current wording — the provided digital content must be 'free of any right' of third parties. However it is sufficient for content to be 'free of any conflicting right', i.e. rights of third parties which may prevent the consumer's contractual use of digital content (see also recital 31).

33. The Bundesrat regards the proposed general reversal in the burden of proof at the provider's expense as inconclusive. The Bundesrat argues for the stipulation of a uniform burden of proof regulation in respect of the contractual conformity of the subject of the contract for the provision of digital content, online trading in goods and stationary trading. In particular in case of contractual relationships under sales law, the issue of the burden of proof for contractual conformity represents a key point, for which, even under considerations of transparency and legal certainty, differentiation by various distribution channels is to be avoided. Contrary to the specification in recital 32, any cutting-edge expertise of the provider for digital content cannot justify any special burden of proof regulation in respect of digital content. These considerations apply equally to contractors and vendors of other physical goods or works (for example cars, hardware, buildings). Nor can any special regulation rely on the assumption in recital 43 that digital content is 'due to its nature [...] not subject to wear and tear'. Regardless of whether this assumption is tenable, digital data may be exposed to external influences which are decisively

relevant to the question of the contractual conformity of digital content (at the time of provision). By way of example, computer viruses or damage to the data carrier should be mentioned.

34. Pursuant to Article 10(c), the provider should be liable to the consumer for any lack of conformity which occurs during a period where the contract provides that the digital content should be provided over that period. The Bundesrat points to the fact that the regulation, based on its wording, is also applicable to cases in which the subject of the contract is the unique but the permanent making available of digital content without any further monitoring or updating obligation, i.e. has a purchase-type character (for example when acquiring an e-book). In such cases however — unlike in the framework of contractual relationships for an indefinite period with a service character — liability for any lack of conformity occurring after initial provision does not serve their interests. In addition it would be contrary to a fundamental principle of (sales) law, pursuant to which the provider is only responsible for the absence of defects on the object of purchase at the time of risk transfer to the buyer.

35. The Bundesrat argues that the consumer, contrary to Article 11, is entitled to 'terminate' the contract in case of the provider's failure to provide digital content only if and when he has previously set a deadline for remedy by the provider and does not have an exceptional interest in immediate termination. An immediate right of termination will lead to unreasonable discrimination against the provider particularly if it is not to blame for the late provision and the consumer's interest in the service continues undiminished. Otherwise, both the Consumer Rights Directive (Directive 2011/83/EU) and the simultaneously submitted Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods stipulate a provider's right to 'second delivery' for their scope of application. There are no evident reasons justifying or even demanding different treatment of consumer contracts covered by the Directive or Proposed Directive.

36. The Bundesrat has significant concerns about the fact that uniform regulations are to be introduced for remedies in case of a breach of contract, regardless of the relevant contract type, for contracts on the provision of digital content under Article 12. In view of the broad scope of application of the Proposed Directive, as set out in Article 3, this does not only apply to purchase agreements — contrary to the Proposed Directive on certain aspects concerning contracts for the online and other

distance sales of goods. Contracts on the provision of digital content, by virtue of their highly diverse appearance, may be assigned to a wide variety of contract types. Depending on the subject of the contract, it may be a purchase agreement, lease agreement, service contract, contract to produce a work or other type of contract. One characteristic of the different types of contract is that — unless general contractual provisions are applicable — different regulations apply thereto in respect of warranty and termination of contract. Contrary to Article 12, these regulations give consideration to the main obligations that characterise the contract. Against this background, concerns also arise about the fact that Article 16 sets out standard conditions under which the consumer has a right to termination of indefinite contracts or contracts concluded for a term of more than twelve months.

37. The Bundesrat requests a review of whether at least in respect of contracts concerning the provision of digital content with a purchase-type character an option should in principle be granted in respect of the type of remedy (defect remedy or replacement), as stipulated for the scope of application of the Consumer Goods Purchase Directive and the simultaneously submitted Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods. A special rule on digital content seems unjustifiable.

38. According to the Proposed Directive, regulations of the Member States continue to apply with regard to the classification of a contract in a certain contract category. Until now Member States have been free — in the event of failure to remedy the defect — to stipulate that the consumer is entitled to take care of the remedy himself. Under German law, this is set out particularly for contracts to produce a work in Section 634 subsection 2, in conjunction with Section 637 BGB (German Civil Code), and in case of lease agreements in Section 536a BGB. In contrast, the Proposed Directive merely stipulates a right to reduce the price or terminate the contract, under Article 12. The Bundesrat regards it as being in the interest of the parties for the consumer to retain further rights, in particular the right to self-remedy.

39. Moreover, the Bundesrat suggests inserting the words ‘In particular’ (in the context of the regulation on remedy in case of lack of conformity with the contract) with regard to points to be considered in establishing whether the costs of producing the

contractual state would be disproportionate, into Article 12(1), sentence 3, before the words ‘the following shall be taken into account’. Article 12(1) only designates two considerations (the value digital content would have if it were in conformity with the contract, and the significance of the lack of conformity with the contract for attaining the purpose). The corresponding regulation in German sales law (Section 439(3) BGB) is designed as an ‘in particular’ regulation and thereby leaves room for consideration of additional circumstances in the specific individual case. Such a configuration is also reasonable with regard to digital content.

40. According to Article 13(1), the consumer may exercise his right to terminate the contract by way of ‘notice given by any means’. In view of the legal consequences this seems too general and not very understandable. The Bundesrat therefore suggests that termination of the contract should be issued in writing.

41. Moreover, the Bundesrat suggests a linguistic review of Article 13(2)(b). The text is difficult to understand. It seems preferable to consistently map the differentiation made in recitals 37 and 38 in the structure of the Article and in the text of the Directive. The same applies accordingly to Article 15(2)(b) and Article 16(4)(a).

42. Clarification is requested on how providers are to fulfil the provisions under Article 13(2)(c) in practice. The term “user-generated content” is not clearly defined. Nor is it clearly set out what the term ‘technical means’ which the provider has to make available to the consumer for recovery of his data should be understood to mean. There would be unjustifiable effort involved in the implementation here if the provider had to equip the consumer in the first place with the technical environment and connection to enable him to receive the data. Therefore, it should also be stipulated that the consumer has to cooperate accordingly in the recovery of data. Moreover, the return of data should usually be carried out in the same way as the original transmission, unless a more cost-effective, equivalent method exists.

43. The regulation in Article 13(4) appears unbalanced, according to which the consumer is not liable, upon termination of the contract, for payment for the use of contractual digital content in the period prior to the termination of the contract. The consumer would in many cases have benefitted from a commercial value by being able to use the digital content prior to the termination of the contract. The opportunity should be created, in accordance with recital 15 of the Consumer Goods

Purchase Directive, for Member States to set out an obligation on compensation for use.

44. The Bundesrat holds the opinion that all necessary technical resources should be provided to consumers in order to delete digital content or make it illegible in any other way following termination of the contract under Article 13. In addition, Article 13 should be supplemented in such a way that the provider may only block access to consumers when it has fulfilled its obligations under this provision and granted the consumer a reasonable deadline to recover his content and data.

45. The Bundesrat requests clarification or an examination of whether the provider should pay any compensation for use upon contract termination (and restitution under Article 13) in cases where the consumer's counter-performance consists of making data available to the provider and allowing it to use such data. This issue has not yet been addressed in the proposal, although a claim by the consumer for compensation for the value which the past opportunity to use his data represented is appropriate if — as in the cases specified under Article 13 — the consumer was able to terminate the contract on grounds of the provider's non-contractual performance. Otherwise, the provider would be enriched by this opportunity to use the data, despite its failure to comply with the contract.

46. The Bundesrat has concerns about a conclusive regulation on compensation if the consumer's claims, as stipulated in Article 14, are to be limited to commercial damage to the digital environment, given that compensation claims for breaches of the personality right, among others, would also thereby be excluded. It also argues that Article 14 should not affect any further claims for culpable violation of contractual obligations according to the law of the Member States.

47. In view of the full harmonisation pursued by the Proposed Directive, it therefore requests clarification that a right to compensation for damage to the consumer outside his digital environment should not be excluded by Article 14 and the Member States should not be prevented from limiting the compensation liability of the provider to culpable conduct. Otherwise, a contradiction would be produced with German warranty law which, in the view of the Bundesrat, leads to an unreasonable distribution of risk or loss between the contractual parties.

48. The Bundesrat holds the view that in Article 15(1)(b), instead of transfer on a durable medium only the written form should be stipulated with regard to the required consumer notification. Especially in view of the frequent and often indispensable changes to some forms of digital content such as software, media disruption would otherwise occur, which would represent a serious constraint on growth and development for the digital economy. Consumers would also find it difficult to understand the need for the flood of letters and CDs which such a regulation would cause to be sent, where applicable.

49. The Bundesrat regards as problematic the fact that, according to Article 16, the consumer should have the right to terminate contracts concluded for an indefinite period or for a term of more than twelve months at any time after the expiration of the first twelve months. A maximum term of twelve months specified by the legislator seems unnecessary, given that competition ensures an appropriate range of different terms — for example in the telecommunications sector it is already common for contracts to be offered even without a minimum term, although the law allows a maximum term of 24 months. As far as consumers are concerned, the regulation could prove disadvantageous in the long term, given that companies are likely to price in the risk of early termination of the contract.

50. In the view of the Bundesrat, the Proposed Directive only gives insufficient consideration to the problem that digital content may be changed by the provider's updates and may be vitiated by new defects as a result. It argues in favour of granting consumers the claims under Articles 12 et seq. also for updates within a certain period of time, and, if necessary, of referring in Article 10 with regard to conformity with the contract not only to the time when the digital content is initially supplied, but also to the time of any potential later updates.

51. The Proposed Directive, in the opinion of the Bundesrat, should contain a minimum specification on the validity and statute of limitation on the consumer's claims in case of non-contractual performance, in order, on the one hand, to avoid distortions of competition between Member States and, on the other hand, to ensure a high level of consumer protection. Based on the Consumer Goods Purchase Directive, the statute of limitation should be at least two years.

52. The Bundesrat sees the need to use appropriate measures to compensate for the general burden on the consumer, as set out in the Proposed Directive, through the

risk of data loss in downloading and transferring digital content. The restriction of provider responsibility to the mere supply of digital content, which follows from Article 10, in conjunction with Article 2(10), constitutes a rejection of the principle set out in Article 20 of the Consumer Rights Directive that the vendor generally assumes transport risk. Consideration must be given to the fact that in case of digital content, in contrast to physical objects without additional production and materials expenditure, a new copy of data can be made available. Solely encumbering the consumer with the transfer risk therefore seems commercially unreasonable and, moreover, unsuited to boosting the confidence of consumers in cross-border offers. One solution could be to grant the consumer a fixed-term claim for subsequent delivery, where appropriate limited to a registered device, and to allow him to download again if the transfer of the digital content is incomplete or damage occurs during the transfer.

53. The Bundesrat sees a need to protect consumers' expectations of the usability and availability of digital content by imposing on providers a general requirement to allow consumers to use the digital content on several, (if necessary) registered devices, taking into account any mandatory copyright protection requirements. A review should be conducted to set out minimum requirements in the Directive for the provider's performance obligation.

54. Moreover, within the framework of minimum requirements for the provider's performance obligation, the Bundesrat suggests stipulating that digital content acquired by virtue of a purchase agreement can in principle be transferred to third parties if an assurance can be given that the digital content is no longer available to or usable by the original buyer. The buyer has an appreciable commercial interest in transferring individual digital content or, for example in the event of death, the whole portfolio of digital goods.

Direct transmission to the Commission

55. The *Bundesrat* will transmit these comments directly to the Commission.