EUROPEAN COMMISSION

Brussels, 8.9.2016
C (2016) 5656 final

Mr Stanislaw TILLICH
President of the Bundesrat
Leipziger Straße 3 - 4
D – 10117 BERLIN

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}.

Together with the proposal on online and other distance sales of goods[1]*, this proposal constitutes a substantial element of the European Commission's Digital Single Market Strategy (DSM) which is among President Juncker's priorities. The two proposals main objective is to contribute to the faster growth of the DSM by eliminating contract law related barriers that hinder online cross-border trade.*

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 on digital content 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.

Modernising and simplifying the regulatory framework for digital content will have beneficial effects for both businesses and consumers. It will encourage more traders to sell across the border and lower their costs, while at the same time it will make available more products and better offers for consumers, increasing their trust in the DSM.

---

1 COM(2015)635 final.

The Commission is pleased to see that the Bundesrat supports the Commission's aim to achieve a digital single market by harmonising the relevant rules and to overcome legal uncertainty in cross-border supply of digital content. The Commission is also pleased to note the general support of the Bundesrat in favour of including in the scope of application of the proposal contracts for digital content supplied against data.

The Commission takes seriously the concerns and doubts expressed by the Bundesrat regarding (i) the restriction to business-to-consumer (B2C) contracts; (ii) the possible fragmentation between different legal regimes and (iii) the burden which the proposal might place on businesses, and in particular Small and medium-sized enterprises (SMEs).

Concerning the restriction to B2C contracts, it is the area where different national mandatory consumer contract law rules have been identified as obstacles to cross-border e-commerce. Stakeholders highlighted the significance of freedom of contract as an overarching principle in business to business contracts. However, the need to also protect SMEs against unbalanced contracts in the field of digital content has been recognised in the Digital Single Market Strategy and will be analysed in the context of other actions announced in the Strategy. Finally, the proposal, of course, does not prevent Member States from applying in their national laws the rules of this Directive to business to business contracts.

Regarding Bundesrat's concerns regarding the fragmentation of contract law and a possible inconsistency between online and other distance sales of goods and face-to-face sales, the Commission would like to refer to the response to the Bundesrat regarding the Proposal concerning contracts for the online and other distance sales of goods {COM(2015) 635 final}. Regarding the opportunity to create a separate set of rules for digital content, the Commission believes that, while the rules on digital content should be as far as possible based on the rules on the sales of goods, the specific nature of digital content often requires tailor-made rules. The Commission also wishes to highlight that, in order to avoid fragmentation, the proposal applies to digital content independently of whether it is sold at a distance or in face-to-face situations.

On the risk of imposing additional burdens on companies, and in particular SMEs, the Commission believes that the proposal strikes an appropriate balance between significantly increased opportunities for businesses through full harmonisation and a high level of consumer protection at EU level. In particular, the Commission does not believe that having a specific set of rules for digital content will specifically increase the burden on SMEs. As has been pointed out by the Bundesrat, SMEs are already faced with different sets of rules for B2B and B2C contracts. On the contrary, the Commission believes that the initiative will overall particularly be beneficial to SMEs as their main problem is often to find new markets. The consultations with SMEs and organisations representing SMEs confirmed the benefit of uniform rules.

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*

Andrus Ansip — *Vice-President*

ANNEX

The Commission has carefully considered the issues raised by the Bundesrat and is pleased to provide the following clarifications on the main points.

- On possible transposition problems into German law

The Commission recognises that the proposal contains rules relating to digital content as the object of the transaction whereas the general approach of the current German law of contracts is to codify rules relating to the type of the contract concerned. However, the Commission does not believe that this approach would lead to inconsistencies with the general systematic approach of the Member States' national laws. As suggested by the Bundesrat, the proposal only harmonises specific key contractual rights and obligations, which in the end is the decisive element for consumers and businesses, but does not determine whether such contracts are to be considered for example as sales, services, rental or a sui generis contract. This decision is left to Member States, which are free to include those specific rights and obligations within the rules for sales, services or rental contracts or within a new sui generis type of contract. Thereby, with this Commission proposal, the Member States' can leave their basic systematic approach untouched.

- On the limits of the scope of application in relation to embedded software and tangible mediums as carriers of digital content

The Commission recognises the blurring character of the border line between regular goods and digital content especially in the context of goods with embedded software and considering that a variety of distribution channels (online, face-to-face, mixed channels) is used to supply (embedded) digital content. However, in order to ensure legal certainty and clarity it is necessary to distinguish between regular goods and digital content. Assuming the perspective of an average consumer, the proposal accomplishes this distinction using the main functionality as the key criterion. Consequently, where digital content is embedded in goods in such a way that its functions are subordinate to the main functionalities of the goods, both elements are covered by the Directive on the sales of goods. The idea being that the good is more important and more valuable and therefore the rules for the good should be applicable and not those on the digital content. However, if the tangible medium serves merely as a carrier of the content, the tangible medium has a clearly subordinate function in relation to the digital content. Therefore, the proposal will apply.

- On the definition of supplier in relation to platforms

The definition of digital content could include platforms, but only to the extent that the platform itself provides the digital content. Where the platform is used by other suppliers to supply digital content, these suppliers are responsible for the delivery of that digital content (and not the platform).

- On the applicability of the proposal only to actively provided data as a counter performance

The Directive only applies to contracts where the supplier requests and the consumer consciously, that is to say actively, provides data. The Commission chose this approach because it wanted to have a pragmatic distinction from the point of view of the average consumer and did not want to regulate all questions relating to the use of the internet. Actively provided data includes for instance the name and e-mail address or photos, provided directly to the supplier by the consumer for example through individual registration or on the basis of a contract which allows access to the consumer's photos. Conversely, the Directive should not apply when the supplier collects information, including personal data, such as the IP address, or other automatically generated information without the consumer actively supplying it.

- On the inclusion of digital content on a tangible medium in the scope of the proposal

The Commission understands the concern expressed by the Bundesrat that CDs or DVDs may not always be "exclusively" used as a carrier of the digital content. However, the Commission believes that in the vast majority of cases, the tangible medium is used exclusively as a carrier of digital content. This is supported by the consideration that usually the economic value of the tangible medium is negligible and the true added value is in the digital content.

Furthermore, the Commission recognises that the proposal would not apply to contracts for the sale of blank durable media or the packaging of a specific durable medium. Unlike in case of a sale of digital content supplied on a tangible medium, the blank tangible medium sold represents the entire economic value of the transaction.

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

The Commission believes that neither the reversal of the burden of proof should be limited in time, nor should there be a legal guarantee period for digital content. The introduction of these periods for contracts on the sale of goods was based on the assumption that problems appearing after a 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. The Commission agrees that, indeed, the tangible medium on which digital content is supplied is subject to wear and tear. This is considered to be one of the necessary drawbacks of providing for a single rule and avoiding further fragmentation depending on the supply medium. However, the Commission believes that for other digital content not supplied on a tangible medium, computer viruses or other defective software damaging the digital content are to be considered as external factors and not as "wear and tear" of the digital content itself.

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.

While the Commission has not foreseen deadlines in the proposals, this does not mean that businesses would be subject to indefinite possible complaints. Consumer rights would be limited by national prescription periods.

- On the criteria for determining conformity of the digital content

Two basic approaches exist for the determination 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(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 imposed by the author. Second, the approach chosen also encourages 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. In 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 does not or not sufficiently stipulate the parameters of the content specified in Article 6(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. Only for those cases, Article 6(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.

For these reasons, the Commission believes that for purposes of legal certainty, it is appropriate to have a hierarchy between the subjective and objective criteria, the objective criteria being subsidiary to and only applying in the absence of an agreement by the parties meeting the subjective criteria.

- On the supply of the most recent version of the digital content

Article 6(4) regulates at least partially the problem of new versions of digital content. What is owed by the supplier is the most recent version of the digital content which was available at the time of the conclusion of the contract. For versions which are brought to the market after

the conclusion of the contract, Article 6(1) steps in, which means that it depends on the respective contract whether an update is owed or not.

The Commission understands that there can indeed be cases in which an older version of the digital content may better satisfy the consumers' needs. However the Commission does not think that Article 6(4) forces the parties to supply the most recent version of the digital content in each and every case, since the parties can always agree on the supply of an older version in line with the exception contained in Article 6(4). Insofar as this might not be clear from the wording of the proposal, adaptation of the wording during the legislative process may be considered.

- On the burden of proof

Already the Sales of Goods Directive of 1999 foresees a shift of the burden of proof. At the time, the legislator considered that it is difficult for the consumer to prove for technical goods that the defect was there at the time of delivery. This reasoning applies even more to digital content. Due to its complex technical nature, an average consumer simply does not have the knowledge to understand whether a problem with a digital content was present at the time of delivery. Therefore the burden to prove that there was non-conformity at the time of delivery should be reversed. However, the consumer still needs to show that there is a problem with the digital content in the first place.

It is possible though that the problem lies within the remit of the consumer. For example, the digital content may not fit with the hardware of the consumer or the internet connection is too slow. In that case, it would be unfair to make the supplier responsible. This is why the consumer shall cooperate with the supplier to determine whether the problem stems from the consumer sphere or not (for example by accepting that the computer sends automatic crash reports to the supplier or by providing details on the consumer's internet connection), bearing in mind that this obligation to cooperate should limited to the "least intrusive" means for the consumer that are available to the supplier. The Commission believes that this constitutes a balanced solution, taking due account of the consumers' right to privacy.

Furthermore, for the reasons already mentioned, there is no need for a time limit for the reversal of the burden of proof with regard to digital content. However, the Commission agrees with the Bundesrat that if a time limit for the burden of proof were to be introduced in the legislative process, it should be the same for online and face-to-face sales contracts as well as contracts for the supply of digital content.

- On the rights of third parties that constitute non-conformity

Article 8 only refers to those rights of third parties that affect the buyer's ability to use the digital content in accordance with the contract. Insofar as this restriction might not be clear from the wording of the proposal, adaptation of the wording during the legislative process may be considered.

- On the lack of conformity in contracts where the digital content shall be supplied over a period of time

Article 10(c) states that where a contract provides that the digital content shall be supplied over a period of time, the supplier shall be liable for any lack of conformity which occurs during the duration of that period. The Commission shares the view of the Bundesrat that this provision does not apply to the one-off download a movie or music file (so-called "sales like contracts" as opposed to so-called "services-like contracts"). Insofar as this restriction might not be clear from the wording of the Proposal, adaptation of the wording or an amendment of recital 34 during the legislative process may be considered.

- On the right to immediate termination of the contract in cases of lack of supply of the digital content

As recital 35 shows, the failure to supply the digital content is a serious contractual breach and thus it is justified that the consumer is entitled to immediately terminate the contract. In the consultations with stakeholders numerous companies within the IT-industry stated that they do not insist on a second chance to supply the digital content, instead an entirely new delivery is often easier to administrate. However, an adaptation of the wording during the legislative process may be considered.

- On the lack of distinction between repair and replacement

In case of the supply of digital content, it is not possible to clearly distinguish between repair and replacement of the digital content. Therefore the proposal deliberately uses the term of "bringing into conformity" which is used in the Consumer Sales Directive as the general term for repair and replacement. In the end, the supplier is subject to the same obligation, but is entitled to determine how best to achieve it.

- On the lack of the consumer's right to be reimbursed for repairing the digital content himself

The proposal leaves it up to Member States to integrate contracts about digital content in their national contract law, including into their typology of contracts. Because of the full harmonisation by the proposal it is possible that certain rights present in contracts about other products, such as the right of the consumer to be reimbursed for repairing the digital content himself, might not be applicable to contracts about the supply of digital content. However, the Commission is confident that the increase of consumers' rights in other areas will more than make up for such a loss. Additionally, the practical relevance of a right of the consumer to repair the content himself is doubtful. If the digital content is, for instance, a cloud service or other web-based service, the consumer does not have sufficient access in order to repair the content himself.

- On the lack of a form requirement for the consumer's termination notice

The proposal does not include formal requirements for the termination notice. Instead, the consumer can exercise this right by a notice given by "any means". Possible form requirements would have the disadvantage for consumers that a termination of contract might be invalid due to the non-compliance with such requirements. However, because the consumer bears the burden of proof in regards to having given the termination notice, consumers have an interest to choose a form which subsequently enables them to prove the termination of contract.

- On the exclusion of payment for the use of the digital content prior to contract-termination

According to Article 13(4) the supplier is not entitled to retain a part of the price paid as compensation for the consumer's use of the digital content. The provision is in line with the Quelle judgement[2] of the ECJ relating to Article 3 of the Consumer Sales Directive and implements the judgment for digital content. It promotes the effective exercise of consumer rights which should not be compromised by other legal consequences which could discourage the consumer from exercising his rights.

- On additional rules on damages in national laws

Article 14 provides a minimum regulation on the right to damages, while leaving all the details of the regulation of damages to Member States. The proposal fully harmonises only the main principles regarding damages caused to 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.

Insofar as this restriction of the scope of application of the proposal might not be clear from the wording of the Proposal, the Commission recognises a need for clarification.

- On the right to terminate long term contracts

Digital content is often offered to consumers on a subscription-like basis, binding the consumer to long term contracts. The majority of respondents to the public consultation believe users should have the right to terminate such long term contracts, upon prior notification to the trader. Recent data from a Europe wide study on misleading free trial and subscription traps[3] shows that one mayor difficulty in online services (e.g. cloud storage and video music streaming) is to terminate the subscription. In particular, 17 % of EU online consumers indicated "Unsubscribing for a service is not easy" as one of their top 5 greatest concerns.

The right to terminate long term contracts prevents lock-in situations for the consumer and allows switching between providers, thereby contributing to higher competitive pressure on

---

[2] See C-404/06, points 33, 34, and 39-42.

[3] Recent data: Preliminary results from a study to inform future enforcement work of the Consumer Protection Cooperation Regulation; based on a EU wide sample of 23,393 people (to be published before the summer 2016).

prices and innovation and to a healthy market with lower entry barriers. This is especially important for SMEs and new entrants to the market.