



EUROPEAN COMMISSION

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Dear Chairs,

The Commission would like to thank the Camera dei Deputati for its Opinion on the Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods {COM(2015) 635 final}, and 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 Communication – Digital contracts for Europe – Unleashing the potential of e-commerce {COM(2015) 633 final}.

The main objective of these two proposals is to eliminate contract law related barriers that hinder online cross-border trade. By so doing, they will contribute to the Commission's Digital Single Market Strategy which is designed to unlock the potential of a truly integrated European digital single market (DSM) which will benefit businesses and consumers alike.

For digital content, businesses face legal uncertainty because of either none or different national rules in case a product is defective. Contracts for supplying digital content are categorised differently from one Member State to another: as sales contracts, services contracts or rental contracts. As a consequence, businesses face different liabilities when they export to consumers in different Member States. A patchwork of mandatory contract rules across the EU would be costly for businesses who wish to offer digital content in more than one EU Member State.

As regards online and other distance sales of goods, there are currently 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 online and other distance cross-border purchases will have beneficial effects for both businesses and consumers. It will encourage more traders to sell online especially across the border and lower their costs, while at the same time it will make available more products and better offers for consumers, thereby increasing their trust in the DSM.

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The Commission is pleased to see that the Camera dei Deputati supports the aim of achieving a digital single market by harmonising the relevant rules, overcoming legal uncertainty and opening up the market for consumers by increasing competition on a European level.

The Commission notes the concerns expressed by the Camera dei Deputati and would like to provide the following general comments.

The approach chosen, full targeted harmonisation, will not lower the level of consumer protection for digital content at national level. As only a few Member States have enacted specific legislation on the supply of digital content, a common set of rules would fill a legal vacuum providing legal certainty while at the same time preventing fragmentation. On the substance, the lack of a legal guarantee period and the unlimited reversal of the burden of proof foreseen in the proposal would set a very high level of consumer protection. Moreover, for the first time the consumer would benefit from remedies for defective products also in case of counter-performance other than money.

With regards to the relation between the digital content proposal and the General Data Protection Regulation (GDPR) it has to be underlined that while the GDPR has as one of its main goals the protection of a fundamental right, the present proposal aims at ensuring the balance between a contractual performance and its counter-performance. However, full consistency of the proposal with the General Data Protection Regulation must be ensured. Therefore, to avoid any misunderstanding and in addition to providing rules that are fully in line with the Regulation, the proposal clarifies in a unequivocal manner that the Directive is without prejudice to the rules on data protection, including those concerning the protection of minors.

The Commission would like to address the Camera dei Deputati's other remarks in a more detailed way in the Annex attached.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Camera dei Deputati and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Carlos Moedas
Member of the Commission*

ANNEX

The Commission has carefully considered the other issues raised by the Camera dei Deputati 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:

Point a) A recent study¹ 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 two-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.

Point b) The objective of this provision is to ensure that when a good is subject to any third-party rights, including based on intellectual property (IP), the seller must have the right to sell the goods so that it can be used in accordance with the contract. If, however, the use of the goods in accordance with the contract would be prevented or made more difficult by third party rights, those rights will continue to exist, but the consumer should have remedies for the lack of conformity of the goods.

In addition, as announced in the DSM Strategy, the Commission is working to create a modern, more European copyright framework. In this context, the Commission adopted on 9 December 2015 a proposal on cross-border portability and an action plan. The action plan explains that in the long term an effective and uniform application of copyright legislation is needed. The Commission will work closely with Member States on this. While it is now too early to consider a full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, this should remain an objective for the future.

Point c) The introduction of a notification duty in all Member States would not encourage consumers' trust in the DSM. A notification duty would, in fact, lower consumer protection as consumers risk losing well-substantiated claims for remedies in case of a delay or an omission of the notification. In particular, in those Member States where there is currently no notification duty, consumers' confidence would significantly decrease. In any case, the lack of a notification duty would not be excessively burdensome for the businesses compared to the current situation. In fact, data shows that consumers in general are rather active anyway and react in very short time, usually within one week.

Point d) The choice of a reasonable period within which the seller must repair or replace the goods represents a balanced approach. A fixed period might be, depending on the good, either too short or too long. If the fixed period is too short in order to repair the goods, the consumer would be pushed to terminate the contract, even when that is unnecessary. In

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.

practice this period is likely to become the default period for all goods. In the case that the fixed period is longer than the period necessary for the remedy, the consumer would in practice probably have to wait for an unnecessary long period before having his good repaired or replaced.

Point e) According to the consumer survey identifying the main cross-border obstacles to the Digital Single Market, language was ranked as the least important parameter for respondents to consider when buying cross-border. Only 7% of respondents mentioned the language of a foreign website to be a decisive factor when buying/ordering from a specific source. In any case, within the Connecting Europe Facility (CEF) programme, the Commission is promoting the deployment of language technologies for the purpose of creating multilingual public online services.

Point f) On 25 May 2016 the Commission adopted a proposal for a Regulation on cross-border parcel delivery services, as part of a package of measures to allow consumers and companies to buy and sell products and services online more easily and confidently across the EU. The aim of the proposal is to increase price transparency and regulatory oversight of cross-border parcel delivery services so that individual consumers and small e-retailers can benefit from more affordable deliveries and convenient return options, even to and from peripheral regions.

Point g) As concerns the suggestion to introduce measures to prevent traders from concealing prices from search engines and from price comparisons, there is already legislation in place that covers this issue. The Unfair Commercial Practices Directive (UCPD) requires any online business that qualifies as a trader and engages in Business to Consumer (B2C) commercial practices to provide all information that the consumer needs to take an informed transactional decision. Under the UCPD, the total price or the manner in which it is calculated must be clearly indicated. In addition, according to the Consumer Rights Directive (CRD), traders must prominently display the price to consumers. Moreover, as set out in the Price Indication Directive, traders have to indicate the selling price. Concerning the suggestion of harmonised presentation of pre-contractual information, in the Fitness Check and in the evaluation of the CRD, the Commission is also looking at whether the presentation of pre-contractual information to consumers should be simplified by applying a uniform model, for example using icons.

On the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content:

Point a) The Commission would like to provide the following additional clarification on the relationship with the GDPR. The reference to "counter-performance other than money in the form of personal data or any other data" does not undermine the level of protection provided by the GDPR. The suggested reference to digital content provided "free of charge" would not be sufficiently clear as it would not indicate that the counter-performance consists of data, either personal or other data. For instance, the time spent to have to see advertising before you have access to digital content is not covered by the Directive, while it would be covered in the formulation "free of charge".

Point b) The proposal does not contain comprehensive rules on damages, including non-economic damage, for various reasons. First of all, Member States' national legislations already have provisions governing the consumer's right to damages and they do not constitute internal market barriers. Secondly, the majority of the respondents to the public consultation were opposed to the harmonisation of damages. In our discussion with Member States before the adoption of the proposal for a Directive, there was no support from Member States to regulate this at EU level either. As a consequence, Member States remain free to regulate on other forms of damages and to lay down the detailed conditions for the exercise of the right to damages.