EUROCHAMBRES

Position Paper

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REACTION to the European Commission's proposal on the distance sales of digital content (COM(2015)634 final)

Executive Summary

EUROCHAMBRES took note of the European Commission's proposals on the distance sales of tangible goods and digital content published on 9 December. This position paper is a reaction to the proposal on digital content (COM(2015)634 final).

The necessity for a specific law on the distance sales of digital content is questionable from different perspectives. For companies, the differences in the contract laws of Member States is certainly not the only reason why they refrain from offering products abroad. The issue is rather that companies when going cross-borders are not allowed to apply the laws of their country of establishment and that ROME 1 Regulation provides for a an exemption to the country of origin principle for contracts between suppliers and consumers.

In EUROCHAMBRES' view the provisions in the ROME I regulation need to be revised. This would only necessitate a small change in legislation and therefore contribute to the pledge of the European Commission not to indulge in overregulation and to put in practice the principle of not regulating more but better.

The statement that this law would diminish costs through the harmonisation of certain aspects of contract law is not entirely convincing. Even with harmonisation being applied to the aspects covered by the proposal, companies will still have to abide by a patchwork of different mandatory consumer protection laws within the EU.

Full harmonisation can ensure the adoption of harmonised provisions at European level and spur the removal of contract law barriers. While this approach has its merits, the benefits should be balanced for businesses and consumers. In this instance, EUROCHAMBRES considers that consumers' interest have been disproportionally been taken into account at the expense of business' interest. EUROCHAMBRES is however pleased to see that Member States will keep their prerogatives on how to categorise their contract sales laws. They should remain free to define them as services, lease or sales contracts.

Finally, prior to the launch of the proposal a more thorough analysis should have been carried out of the already applicable rules in the field of online contract sales law for digital content. Indeed, most issues encountered by companies are to be identified in the areas of copyright law, IPR, data protection and privacy law. Therefore, the creation of a consistent framework with the upcoming data protection rules is highly advisable in order to avoid the emergence of different policy regimes existing one next to another.

EUROCHAMBRES priorities:

- **Full harmonisation should not necessarily lead to disproportionate advantages to the detriment of suppliers.**
- **The inclusion of contracts for digital content products that are offered against a counter-performance other than money in the form of personal data or any other data should be reconsidered or at the least remain limited.**
- **The party claiming non-conformity should bear the burden of proof. In that respect the approach in the Sales of Consumer Goods Directive is more balanced and fair for both consumers and businesses.**
- **Even though digital content products differ from tangible goods, some principles applying to the latter should be transposed to the former category, which means that the time limit for the burden of proof foreseen in article 5 § 3 DIR 1999/44/EC and the time limit for the occurrence of the lack of conformity provided in article 5 §1 should apply.**
- **The proposed rules regarding the termination of the contract are too much in favour of the consumers (eg in case of no-delivery and no payments due when a single functionality is not in conformity).**

Scope of the proposal

EUROCHAMBRES is pleased to see that the European Commission took note of the businesses' request to restrict the scope to B2C contracts as B2B contracts should be governed by freedom of contract.

EUROCHAMBRES regrets the inclusion of contracts for digital content products that are offered against a counter-performance other than money in the form of personal data or any other data. The need for the inclusion of such services is not established and is rendering the scope of the Directive too wide.

Objective criteria if explicit benchmarks are lacking in the contract? (Recital 24 and article 6)

EUROCHAMBRES agrees with the European Commission's assessment that the conformity of the digital content product provided by the supplier should be monitored through the promises made in the contract between supplier and consumer only.

In the event that benchmarks are lacking or not made explicit enough, the evaluation (contrary to article 6 § 2) should not be carried out by objective criteria. The conformity should be assessed against subjective criteria as it would be a very complex monitoring process and require a very thorough analysis to assess what would be *"fit for the purpose for which digital content of the same description would normally be used".* This would require the constant updating of objective criteria lists due to the rapid development of the sector. It would be a near impossible task due to the fast pace of technological advances to objectively assess what would be objective. The consumer should take responsibility for the fact that he agrees to a contract which does not set explicit benchmarks.

EUROCHAMBRES does acknowledge that *"Unless otherwise agreed, digital content shall be supplied in conformity with the most recent version of the digital content which was available at the time of the conclusion of the contract."* (article 6 § 4 and recital 29) Suppliers delivering digital content have no interest themselves in selling outdated products and are prone to deliver their latest products in order to keep their competitivity in a very dynamic business environment.

The proposed reversal of the burden of proof

EUROCHAMBERS' members consider that it should be the contractual party that is claiming non-conformity with the contract that should bear the burden of proof. The provision on the burden of proof is handled differently than in the Sale of Consumer Goods Directive[1]. According to article 5 §3 of this Directive the burden of proof with respect to the conformity rests on the party that is claiming non-conformity. But if this non-conformity becomes apparent within six months of delivery this party will not have to prove that this non-conformity already existed at the time of delivery. In such a case the benefits of the presumption that the non-conformity already existed at that time apply.

In contrast to the wording of theSales of Consumer Goods Directive, article 9 § 1 implies that the burden of proof is shifted to the supplier. The supplier would have to prove that the digital content is in conformity with the contract and that this was the case at the time of the supply. Therefore the approach proposed by the Commission in fact gives the impression and is to be interpreted as a legal presumption that providers of digital content in the EU are always *a priori* delivering defective products. This is of course not in accordance with the reality. Such a presumption would not be a positive signal especially for innovative start-ups in the digital sector.

The introduction of an unlimited time to the reversal of the burden of proof is equally out of bounds for suppliers of digital content. Due to the fast and unexpected evolutions in the digital sector, companies should only prove the conformity with the contract throughout a limited, predetermined and manageable period of time. EUROCHAMBRES considers that the concept on the burden of proof and the 6-months'

[1] 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

time-limit for the presumption as defined in the Directive on the Sale of Consumer Goods (DIR 1999/44/EC, article 5 §3) to be adequate for digital content as well.

Even if digital content products might not be subject to the same wear-and-tear as tangible products (although CDs eventually will wear out), they can become outdated at a far higher pace than the latter. As a consequence, the know-how about these products of the supplier who sold them to the consumer might also diminish very quickly. Organising the liability for these old products can become a complicated and costly affair for companies. Just as tangible goods, digital content products can become obsolete at different paces.

In addition, the Commission disregards the fact that whether digital content can be used as expected depends to a large degree on the digital environment of the user. This environment is certainly not static. On the contrary, a consumer's digital environment will often change (e.g. installation of other software, infection by computer viruses etc) often immediately after the supply of digital content when the digital content and the environment of the user were compatible. Many aspects of change of the user's digital environment after the supply of the respective digital content can have (negative) effects on the functionality of the digital content. The modification of the digital environment is typically the rule and not the exception, and even rises the more time elapses since the supply of the digital content. Considering all the mentioned aspects an unlimited reversal of the burden of prove would be absolutely in contradiction with the aim of well-balanced solutions.

Therefore the same rules as for tangible goods foreseen in article 5 § 3 DIR 1999/44/EC with regard to the time limit for the burden of proof and in article 5 §1 with regards to the time limit for the occurrence of the lack of conformity should apply. By omitting to introduce tangible limits, the proposal is likely to create legal uncertainty and might even deter SMEs to offer their services across borders.

EUROCHAMBRES contests that companies, and SMEs in particular, would have per definition more resources and/or know-how than the consumers to identify as per why digital content does not work as it should. The costs to properly investigate why a digital content product does not run as could reasonably be expected can also lead to unreasonable costs.

Article 9 § 2 stipulates that burden of proof would be passed on to the consumer if the supplier can show that the digital content can't be used as could be expected because of an incompatibility with the consumer's digital environment (and provided that the technical requirement were specified in the contract). In effect, the supplier would still need to invest considerable efforts (both in man hours and resources) to prove the incompatibility of the consumer's digital environment. As currently established in the draft Directive, in the case that a consumer complains about the digital content provided, the supplier would need to proactively ask for the consumer's incident reports, internet connection or even ask for virtual access to his digital environment. This should not be expected from small companies. Alternatively, the consumer should prove himself that his environment is in fact compatible and that the problem is to be identified somewhere else. In the case that the technical requirements are duly specified in the contract, it should not be upon the supplier to invest resources to evaluate the compatibility of the consumer's environment.

It might be equally burdensome and complex for a supplier to show that that a customer incorrectly followed the installation instructions and point out at which stage the consumer made an error when installing the digital content product (art 7 and art 30). In the large majority of cases, the cost to prove an incorrect installation are not proportionate with the sale value of the product itself.

Liability of suppliers (art 10) and remedies for non-delivery

Following article 11 consumers should have the possibility to terminate the contract immediately in the event that the provider failed to deliver in time. Under article 5 § 2 the provider is, unless otherwise agreed, obliged to deliver right away after the conclusion of the contract. EUROCHAMBRES is skeptical about the proposed *modus operandi.* Alternatively, the more realistic approach described in article 18 § 2 of the Consumer

Right Directive[2] could be adopted. It stipulates that the consumer is obliged to call upon the trader to make the delivery within an additional period of time appropriate to the circumstances. It is inadequate that in case of digital content the supplier is not granted an adequate extension for the delivery . This differentiation is not justified and furthermore not in accordance with to the principle of objectivity under art 20 of the European Charter of Fundamental Rights.

Remedies for lack of conformity

EUROCHAMBRES agrees with the approach in article 12 which consist of introducing a hierarchy of remedies where a chance is given to the supplier to bring the digital content in conformity in accordance with the requirements of the contract. In practice however in most cases the costs to bring the digital content in conformity will be disproportionate with its value it would have if brought in conformity.

Consumers, under the circumstances enumerated in the aforementioned article, should be able to ask for a price reduction if the product cannot be brought in conformity. The proposal also provides that the consumer should be entitled to a termination of the contract or a price reduction if the remedy would cause *significant inconvenience to the consumer.* The consumer in this case would need to properly prove that this is the case, otherwise it might be too easy for a consumer to use this as an excuse in the case that he changed his mind and decided that he does not want the product any more (art 12 § 3c)

Article 12 § 5 provides that *"The burden of proof that the lack of conformity with the contract does not impair functionality, interoperability and other main performance features of the digital content shall be on the supplier."* In reality it is very difficult for especially smaller tech companies to manage to live up to these expectations and to deliver such services. In this case it would be much easier for the consumer to show the impairment of functionality, interoperability and other main performances than for the supplier.

Termination of a contract

Article 13 and article 16 of the draft Directive provide that consumers can exercise their right to terminate a contract by notice to the supplier given by *any means.* EUROCHAMBRES believes that the number of ways how a notice can be given by a consumer should be limited and specified. Ideally, the way a notice should be given should be retraceable in order to avoid potential disagreements.

We consider it not appropriate that according to article 13 §2e the consumer should only be obliged to return digital content on a durable medium "upon the request" of the supplier. The consumer should return the durable medium on his own initiative.

In the case of long term contracts, the supplier and the consumer should be able to include in the contract that even after the expiration of the first 12 months of the contract, the contract will be automatically renewed for the same length of time as the lapsed contract.

In the case the long term contract does not mention automatic renewal, consumers should be given the possibility to terminate it after the first 12 months upon notification to the supplier.

Compensation for use

EUROCHAMBERS proposes to change article 13 § 4, because it is not appropriate that consumers shall not be liable to pay for the use of digital content before the termination of the contract. Especially if the consumer was able to use a programme for a longer time due to the fact that the lack of conformity has only affected a single function of the programme, which the consumer had not used so far or did not need. The situation is as such comparable to continuous obligations, for which following article 13 § 6 an obligation to pay is foreseen.

[2] DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights

Approach to damages

Article 14 stipulates a (strict!) liability for any economic damage to the consumer's digital environment caused by a lack of conformity. Member States shall lay down detailed rules for the "exercise" of the right to damages. According to recital 44 the liability should be *"regulated"* at Union level on the one hand while on the other hand it should be for Member States to lay down the detailed *"conditions"* for the right to damages. Beside the fact that EUROCHAMBRES considers strict liability absolutely inadequate, article 14 together with recital 44 will lead to high legal uncertainty as it is not clear what is regulated at Union level and what is left to the Member States' competence. This is not compatible with the notion of better regulation.

The consumers' right to damages in the case of a lack of conformity should be an area completely left to the Member States' competence, and this should be clearly stated in article 14.

Irrespective of the before-mentioned concern we would like to point out that there is an inconsistency between article 2 § 5 and article 14. Whereas article 2 defines damages as a *"sum of money to which consumers may be entitled as compensation for economic damage to their digital environment"* , article 14 also defines damages as on obligation for suppliers to "*put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract."* Not only is it nearly impossible to determine what that position might be, moreover article 14 is not aligned with the definition of damages in article 2.

Modification of digital content (Article 15)

Traders should be able to modify digital content products if the contract stipulates that the trader has the right to unilaterally modify the product. This right should be upheld as long as these modifications are justified. Most commonly, digital content providers modify their products in order to remove redundant functionalities or ameliorate certain features with a view to continuously improve user experience. The draft directive foresees that if the modifications *"adversely affect"* the use of the digital content, the consumer should have the right to terminate the contract and should be notified on a durable medium of the modification.

EUROCHAMBRES considers that the wording *"adversely affects"* could be subject to a highly subjective interpretation of the consumer. Suppliers should be given the possibility to notify the modification through other means than on a *"durable medium"* as the latter could incur significant costs. If the modification made by the supplier is of urgent nature and for instance pertains to the security of the product, no notification should be done if the contract stipulates that this sort of modification might occur during the time that the consumer is using the product.

Termination of long term contracts

Article 16 provides the possibility to terminate long term contracts after the expiration of 12 months. This would make contracts with a longer duration but at a more favourable price impossible. This approach would restrict the freedom of choice between different offers to the detriment of consumers. Additionally, the possibility for consumers to terminate the contract *by any means* is overly tipping the balance in favour of the consumer.

Law Enforcement

EUROCHAMBERS proposes to delete article 18 due to the fact that the sanctions are inappropriate for a Directive, which regulates individual contractual claims in the event of non-conformity with the contract. It is for well-considered reasons that the Consumer Sales Directive (1999/44/EG) doesn´t include such a provision. In addition to the liability towards the consumer concerned article 18 would lead to administrative

penalties and class actions against suppliers in cases where they deliver digital content not in conformity with the contract.

The proposed Directive anyway contains under article 20 § 3 a supplement to the Injunction Directive (2009/22). This Directive regulates the possibility for injunctions for the protection of “collective” consumer interests. An additional possibility for collective actions should be rejected.

Implementation

EUROCHAMBERS proposes that for Member States additionally to the transposition deadline a reasonable period (1 year) should be provided, after which the provisions become applicable. Only so it is at least likely that the companies will have a sufficient vacatio legis in order to adapt to the new requirements.

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