



DIGITAL TRANSFORMATION IN THE EU:

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

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Idea behind the DSM

Digital Single Market can only be fully developed especially if:

- *there is substantial additional investment in digital skills and infrastructure, from the EU level, Member States and the private sector.*
- *there is a clear and stable legal environment to stimulate innovation*

Why do we need this instrument?

- 1. Contributing to faster growth and*
- 2. Ensuring high consumer protection*

FACTS:

39% businesses selling online but not cross-border (main obstacle different national contract laws)

18% of consumers using internet are purchasing online from another MS in contrast to 55% consumers doing so domestically



Background:

Alternative, in the part that refers to "digital content", to the CESL (Common European Sales Law)

The Consumer Rights Directive has fully harmonized certain rules for online sales of goods and supply of digital content (mainly pre-contractual information requirements and the right of withdrawal).

*However, there are no specific EU rules to protect consumers **against non-conforming digital content***



FULL HARMONISATION

- *not an optional regime*
- *Member States will not be able to maintain or introduce more protective rules*
- *high consumer protection*

Scope of the Directive

Digital content or digital service

Excluded: digital content or service for which the consumer does not have to pay a price and does not have to provide personal data to the supplier

Debate: embedded digital content

"Embedded digital content"

Example: smart cars, smart refrigerators

*Proposal: Directive **should not apply** to 'digital content, which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods'*

Remedies for the failure to supply

Proposal:

- immediate termination of the contract

Possible compromise:

- a second chance given to the supplier in case of his failure to supply the digital content or digital service, subject to certain safeguards for the consumer where this second chance would not apply.

Lack of conformity with the contract

Material defects = lack of conformity

*Example: **incorrect integration** - digital content does not interact with other software or hardware*

Legal defects = lack of conformity

Example: third party rights, in particular copyright

Remedies for lack of conformity:

First step: consumer entitled to have the digital content brought to conformity (eg. updates)

No fixed deadlines, but REASONABLE deadline

Second step: price reduced or contract terminated

Caveat: DC provided over a period of time against a counter-performance

Right to terminate the contract and damages

- *notice by **any** means*
- *reimbursement (no later than 14 days)*
- *supplier shall take all the measures to refrain from the use of consumers "data" and provide the consumer with technical means to retrieve all data*
- *Damages: "digital environment" (detailed rules by MS)*

Burden of proof

- *supplier considered as better placed, hence he needs to prove that the digital content was in conformity with the contract*
- *however: if the supplier demonstrates that the digital environment is not in conformity with the contract, the burden of proof is reversed.*



When disputes arise...

Applicable Law - Rome I Regulation (Art. 6)

Choice of Law made by consumer and trader

where no choice of law was made by the parties, in certain situations the consumer benefits from the application of the law of the country where he/she has his habitual residence



Jurisdiction - Brussels I Regulation

Consumers may bring proceedings either in the courts of the Member State of trader or in the courts of the place where they are domiciled (Article 18)

*Proceedings **against** a consumer may be brought only in the courts of the Member State in which the consumer is domiciled (Article 19)*

Conditions for special protection in terms of applicable law and jurisdiction:

Trader must:

- *be pursuing his commercial activities in the country where the consumer has his **habitual residence**, or*
- *by any means, **direct such activities** to that country or several countries including that country*

State of play:

Co-legislators turn!

Council – general approach (MT presidency)

Parliament – reports from the relevant committees

Adoption under ET presidency?

*IT IS NOT THE STRONGEST OF THE SPECIES
THAT SURVIVES, NOR THE MOST INTELLIGENT
THAT SURVIVES. IT IS THE ONE THAT IS THE
MOST **ADAPTABLE TO CHANGE...***

C. Darwin