Contracts for the supply of digital content

2015/0287(COD) - 09/12/2015 - Legislative proposal

PURPOSE: to contribute to faster growth of the digital single market, by eliminating the key barriers related to contract law hindering cross-border trade in the digital environment.

PROPOSED ACT: Directive of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with Council.

BACKGROUND: the growth potential of e-commerce has not yet been fully exploited. Differences in national consumer contract law rules and a lack of clear contract law rules are among the key obstacles that hinder the development of the supply of digital content.

Only 18% of consumers who used the Internet for private purposes in 2014 purchased online from another EU country while 55% did so domestically. Consumers suffer detriment due to lack of clear contractual rights for faulty digital content. Different national contract law rules have created one-off costs for retailers selling to consumers of approximately EUR 4 billion. These costs mostly affect micro and small- and medium-sized enterprises (SMEs).

The Digital Single Market Strategy adopted by the Commission on 6 May 2015 announced a legislative initiative on harmonised rules for the supply of digital content and online sales of goods.

This initiative is composed of (i) a proposal on certain aspects concerning contracts for the supply of digital content, and (ii) a proposal on certain aspects concerning contracts for the online and other distance sales of goods.

By eliminating the key barriers related to contract law hindering cross-border trade, the rules put forward in the proposals will reduce the uncertainty faced by businesses and consumers that is due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law between Member States.

Drawing on the experience acquired during the negotiations for a Regulation on a Common European Sales Law, they no longer follow the approach of an optional regime and a comprehensive set of rules. Instead, the proposals contain a targeted and focused set of fully harmonised rules.

IMPACT ASSESSMENT: the impact assessment examined 5 policy alternatives, and concluded that fully harmonised rules for digital content and goods would best meet the policy objectives. This option will reduce contract law-related costs for traders and facilitate cross-border e-commerce. Businesses will be able to rely largely on their own law when selling cross-border, as the main rules, which are relevant for cross-border trade, will be the same in all Member States.

CONTENT: the proposed directive aims to fully harmonise a set of key rules concerning contracts for the supply of digital content. It includes rules on: (i) conformity of the digital content, (ii) remedies available to consumers in cases of lack of conformity of digital content with the contract, as well as (iii) certain aspects concerning the right to terminate a long term contract and the modification of the digital content.

Definitions: some definitions stem from the current acquis, such as the definition of a consumer, while others reflect the specificity of digital content. The definition of digital content is deliberately broad and encompasses all types of digital content, including downloaded or web streamed movies, cloud storage, social media or visual modelling files for 3D printing, in order to be future-proof and to avoid distortions of competition and to create a level playing field.

Scope: the proposal covers only business-to-consumer transactions, and the supply of all types of digital content. It also covers digital content supplied not only for a monetary payment but also in exchange for (personal and other) data provided by consumers, except where the data have been collected for the sole purpose of meeting legal requirements.

Excluded from the scope of the proposal are services performed with a significant element of human intervention or contracts governing specific sectorial services such as healthcare, gambling or financial services. In case of conflict between the Directive and another EU act, the other EU act takes precedence.

Full harmonisation: the proposal precludes Member States from adopting or maintaining laws remaining below or going beyond the requirements of the Directive.

Supply of digital content: the digital content must be supplied to the consumer or to a third party which operates a physical or virtual facility allowing processing of, access to or transmission of digital content to the final consumer and with which the consumer is in a contractual relation. As a default rule, the digital content should be supplied instantly unless the parties agree otherwise.

Conformity of digital content with contract: the digital content must primarily conform to what was promised in the contract. In the absence of such explicit benchmarks, the conformity of the digital content must be assessed according to an objective criterion, i.e. it must be fit for the purpose for which digital content of the same description would normally be used.

The proposal also stipulates that:

- when the digital content is supplied over a period of time, it must be in conformity with the contract throughout the duration of the contract;
- the version of digital content supplied to the consumer must also be the most recent version available at the time of the conclusion of contract;
- a lack of conformity of the digital content resulting from an incorrect integration into the consumer's hardware and software should be equal to a lack of conformity of the digital content itself if the reasons for the incorrect integration are in the sphere of the supplier;

- the digital content must be cleared from any third-party rights, including those based on intellectual property.

Burden of proof: the burden of proof for the absence of lack of conformity is imposed on the supplier, unless the consumer's digital environment is not compatible with the digital content. This reversal of the burden of proof is not limited in time.

Liability of the supplier: the proposal sets out the cases of liability of the supplier towards the consumer, namely where the digital content is not in conformity with the contract or the supplier failed to supply the digital content altogether. Given that digital content may be supplied over a period of time, the supplier should also be liable for any lack of conformity that occurs during that period.

Termination, damages, and right of redress: the proposal:

- gives the right to the consumer to terminate the contract immediately when the supplier failed to supply the digital content altogether. The supplier shall reimburse the price or, if the counter-performance consisted of data, refrain from using these data and any other information which the consumer has provided in exchange for the digital content;
- lists the remedies available to the consumer in case of any failure to supply or lack of conformity of the digital content: (i) in a first step, the consumer shall be entitled to have the digital content brought to conformity within a reasonable time, without significant inconvenience and without incurring any costs; (ii) in a second step, the consumer shall be entitled to have the price reduced or the contract terminated if the lack of conformity relates to main performance features;
- establishes a right to damages restricted to cases where damage has been done to the digital content and hardware of the consumer. However, Member States should lay down the detailed conditions for the exercise of the right to damages;
- lists the conditions under which the supplier can modify the contract for the supply of digital content as regards main performance features;
- establishes the conditions under which the consumer has a right to terminate contracts concluded for an indeterminate duration or for duration exceeding 12 months and thereby is able to switch provider;
- provides the supplier with a right to redress in case of an act or omission by a person in earlier links of the chain of transactions that triggered the supplier's liability for lack of conformity or a failure to supply towards the consumer.

Lastly, the proposal requires Member States to ensure that adequate and effective means exist to ensure compliance with this Directive.