



INSIGHT

EARLY NOTES ON THE 9 DECEMBER 2015 EUROPEAN
COMMISSION'S PROPOSALS ON CERTAIN ASPECTS
CONCERNING CONTRACTS FOR THE ONLINE
AND OTHER DISTANCE SALES OF GOODS;
AND ON CERTAIN ASPECTS CONCERNING CONTRACTS
FOR THE SUPPLY OF DIGITAL CONTENT

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ABSTRACT: In the context of a determined commitment with the EU consumer protection law, on last 9 December 2015, the Commission has issued a proposal on certain aspects concerning contracts for the online and other distance sales of goods and a proposal on certain aspects concerning contracts for the supply of digital content. Both instruments are aimed at removing obstacles to consumers and businesses with regard to the exercise of fundamental freedoms, which result from differences between national mandatory contract law rules. The proposals intend to fully harmonise key contract law sectors such as conformity, remedies for lack of conformity and conditions or modalities of the exercise of the rights deriving from the Directives. The proposal on the supply of digital content is additionally meant to fill the current legal gap in the European Union consumer law *acquis*, as far as such specific content is concerned.

KEYWORDS: consumer protection EU law – Digital Single Market – online sales – supply of digital content – full harmonisation – remedies.

I. INTRODUCTION AND COMMON FEATURES

The aim of this *Insight* is to comment, on a brief and synthetic basis, the main features of two new proposals of the European Commission in the field of European Union (EU) consumer protection law. These proposals confirm and extend the compromise of the European Union with the consumer as a qualified subject of the Single Market. Such an initiative must thus be greeted and deserves a favourable reception.

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On 6 May 2015 the Commission addressed the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Communication adopting the so-called *Digital Single Market Strategy*.¹ In this context, a few months later, on 9 December 2015, the Commission launched two draft documents containing a targeted, fully harmonised set of rules: (i) a proposal on certain aspects concerning contracts for the online and other distance sales of goods; and (ii) a proposal on certain aspects concerning contracts for the supply of digital content.²

The objective of both proposals is to eliminate legal fragmentation in the area of consumer contract law. This fragmentation results in high costs for businesses (especially small and medium-sized enterprises) and low consumer trust when buying online from another country. The Directives contribute to create a true Digital Single Market to the benefit of consumers and businesses – by harmonising, under a *full harmonisation* criterion, contract rules for the supply of digital content and the online sales of goods.

The legal basis of the two proposals is Art. 114 of the Treaty on the Functioning of the European Union (TFUE), on approximation of laws. Both Directives should be adopted in accordance with the provisions of the TFUE regarding the ordinary legislative procedure (Arts 289, para. 1, and 294 TFUE). The proposals will impact positively on a number of rights protected under the EU Charter of Fundamental Rights, particularly Art. 38, on consumer protection, Art. 16, on freedom to conduct a business, and Art. 47 on the right to claim an effective remedy. The proposals are based on the mandatory nature of consumer contract rules.

The proposals are compatible with the fundamental existing EU rules on applicable law and jurisdiction in the Digital Market, namely, Regulation (EU) 1215/2012³ and Regulation (EC) 593/2008 (Rome I).⁴ On the other hand, both texts respect and supplement the *acquis* on EU consumer protection law: Directive 2011/83/EU,⁵ which has already

¹ Communication COM (2015) 192 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*.

² Proposal COM (2015) 634 final for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, and Proposal COM (2015) 635 for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods final. Both proposals are linked to the Communication COM (2015) 633 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee entitled *Digital contracts for Europe – Unleashing the potential of e-commerce* and also published on 9 December 2015.

³ Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴ Regulation (EC) 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I).

⁵ Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Directive 93/13/EEC of the Council and Directive 1999/44/EC of the European Parliament and of the

fully harmonised certain rules for the online and other distance sales of goods (mainly pre-contractual information requirements and the right of withdrawal); and Directive 2000/31/EC,⁶ which, among others, partially establishes harmonised rules on electronic contracts.

II. PECULIAR ASPECTS OF THE PROPOSAL ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE ONLINE AND OTHER DISTANCE SALES OF GOODS

The special features of the proposal on certain aspects concerning contracts for the online and other distance sales of goods, with their origin in Directive 1999/44/EC,⁷ are the following:

a) It is aimed at removing obstacles to the exercise of fundamental freedoms which result from differences between national mandatory contract law rules following the Member States implementation of the minimum harmonisation criteria of Directive 1999/44/EC;

b) Where referring to the same concepts, the provisions of the proposed Directive should be interpreted in a manner consistent with the rules of the Directives 1999/44/EC and 2011/83/EU as interpreted by the case law of the Court of Justice of the European Union;

c) The notion of “goods” only covers “tangible movable item[s]”;

d) The proposal will not harmonise all aspects concerning contracts for the online and other distance sales of goods. It will rather focus on targeted, key mandatory consumer EU contractual rights which are essential in cross-border online transactions, namely, on (i) conformity; on (ii) remedies; and on (iii) the modalities for the exercise of these remedies:

(i) On conformity, it will be assessed not only with regard to the contract terms but also under a combination of subjective and objective criteria being some of the latter provided by the text of the proposal itself. The passing of risk – when the consumer takes control of the goods – will be considered the time for the conditions for lack of conformity to be completed. The burden of proof for the absence of lack of conformity is shifted to the seller for a period of two years;

(ii) As for remedies to lack of conformity – to be exercised within a two years time limit – in a first step the consumer should be entitled to have the goods repaired or re-

Council and repealing Directive 85/577/EEC of the Council and Directive 97/7/EC of the European Parliament and of the Council.

⁶ Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁷ Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees.

placed; in a second step, when repair or replacement is not available, the consumer could claim a price reduction or termination of contract. The right to withhold performance is also recognised until the goods are brought in conformity. It is worth being noted that the seller is provided a right to redress in case of an act or omission by a person in earlier links of the chain of transactions triggering seller's liability for lack of conformity; and

(iii) The modalities for and the consequences of exercising the right to terminate the contract are also dealt with by the proposal, and the restitution as a consequence of the termination is especially regulated in that no later than 14 days the seller should reimburse the price paid at its own expenses and the buyer should return the defective goods at the seller's expense;

e) The proposal contains transparency requirements regarding commercial guarantees issued by the seller. These guarantees are binding for the seller pursuant to conditions reflected in advertisements, pre-contractual information and guarantee statements.

III. PECULIAR ASPECTS OF THE PROPOSAL ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

The essential points of the proposal on certain aspects concerning contracts for the supply of digital content, on the other hand, could be enunciated as follows:

a) It aims at filling the current legal gap in the European Union consumer law *acquis* in so far as consumers are currently likely to suffer detriment due to lack of clear contractual rights for faulty digital content covering a wide range of products, such as music, movies, games, cloud storage services, apps or sport events broadcasts. Modification and termination of long term contracts are regulated by the proposal, as problematic and currently only covered by the general provision on the unfairness control in Directive 93/13/EEC;⁸

b) Without prejudice to the rules on data protection, the Directive covers the supply of all types of digital content which are object of a business-to-consumer transaction, although services performed with a significant element of human intervention or contracts governing specific sectorial services such as healthcare, gambling or financial services are excluded. Modalities and time of supply of digital content is clarified;

c) The Directive lays down certain requirements concerning contracts for the supply of digital content to consumers, particularly – under a scheme paralleled to the former proposal on online and other distance sales of goods –, (i) rules on conformity of digital content with the contract; (ii) remedies in the case of lack of conformity; and (iii) the

⁸ Directive 93/13/EEC of the Council on unfair terms in consumer contracts.

modalities for the exercise of those remedies as well as on modification and termination of such contracts:

(i) A mixture of contractual and statutory conformity criteria is contained. 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 correct integration are in the sphere of the supplier. Digital content must be cleared from any third-party rights. The burden of proof for the absence of lack of conformity lies on the supplier and it is not limited in time;

(ii) As remedies, in the first step, the consumer shall be entitled to have the digital content brought to conformity with a reasonable time; in a second step, the consumer shall be entitled to price reduction or contract termination. A right to damages is established with regard to cases where damage has been done to the digital content and hardware of the consumer. The supplier can claim a right to redress for act or omission by a person in earlier links of the chain of transactions; and

(iii) Conditions under which the supplier can modify the contract for the supply of digital content are envisaged as well as conditions under which the consumer has a right to terminate contracts for an indeterminate duration or for duration exceeding 12 months and thereby is able to switch provider.

IV. CONCLUSION

In conclusion, the 9 December 2015 Commission's proposals on certain aspects concerning contracts for the online and other distance sales of goods and on certain aspects concerning contracts for the supply of digital content must be welcome. The proposals further encourage cross-border e-commerce with the aim of bringing about a high level of consumer protection in those fields towards the completion of a true Digital Single Market to the benefit of consumers and businesses. The following steps of the ordinary legislative procedure will offer the opportunity to improve both texts and to better clarify the scope of application of the directives, the criteria on assessment of lack of conformity and the extent of its consequences and remedies.

