Position Paper

UEAPME[1]'s reply to Public consultation on contract rules for online purchases of digital content and tangible goods.

Introduction

UEAPME warmly welcomes the European Commission's initiative to launch a public consultation to collect stakeholders' view on the possible ways to remove contract law obstacles related to the online purchases of digital content and tangible goods. UEAPME acknowledges that this consultation is launched in the framework of the Digital Single Market Strategy and tackles the first initiative announced by the Commission in the strategy.

As a general remark, UEAPME points out that e-commerce is becoming more and more important for both consumers and traders. The opportunities the internet and online shops offer are growing. Therefore there is a need for a working legal framework within the European single market.

Concerning tangible goods and services, the existing rules are proofed by practice and only small modifications are needed. UEAPME would like to underline that the current European legislation regarding consumer protection is extremely complicated and not easy to understand, both for consumers and traders. Especially the information obligations are complex and burdensome and not always relevant.

The Consumer Rights Directive (CRD) has already fully harmonised the most essential provisions regarding e-commerce. In other areas (e.g. legal guarantees, unfair contract terms) a uniform European minimum standard is guaranteed by minimum harmonisation directives. Therefore, UEAPME underlines that before creating new provisions, the application and the impact of the CRD should be evaluated and the shortcomings of the Directive should be eliminated.

It is important that new legislation does not lead to fragmentation of the law of obligation systems. This development cannot be considered desirable and it would not increase legal security. Sectoral harmonisation could bring a more profound disadvantage because of the fragmentation in regulation.

In contrast to that, there are still no sufficient rules concerning digital products. At national level, as well as at European level, there are no appropriate rules to cover digital content such as online-streams or downloads. Therefore it is necessary to introduce legal security concerning those goods in the cross-border context, as well as in national business relations.

In this Position, UEAPME will try to address all the questions posed by the EC within the Consultation.

[1]UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

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PART 1 - Digital Content

Section 1 - Problems

UEAPME agrees that digital content products are growing rapidly, as for example the app sector. Digitalisation in general has already changed traditional business practices and SMEs are adapting and introducing more and more digital solutions. The impact of digitalisation extends horizontally to nearly all spheres and activities. Therefore all new legislation needs to be future proofed, appropriate and simple for SMEs.

UEAPME agrees that there is the need to introduce clear and simple rules concerning digital content products before the majority of Member States starts adopting specific legislation which might differentiate from one another. Indeed, this could further increase the differences between national rules that businesses would have to consider when providing digital content products throughout the EU.

However, UEAPME wants to point out that regulation regarding digital content products should be in principle the same that applies to other consumer's products as well. As a general rule, consumer rules should be similar and not differentiating according to which kind of product has been sold.

It is possible to do the example of the sale of a software program. As would be the case for the purchase of a tangible good, the consumer should be informed of all relevant aspects of this purchase. This means that the consumers has to be informed about the price, the content of the sale and any other information necessary for the consumer taking into account the generally foreseeable use of the product (such as compatibility). Should the software program show a defect, the same rules on guarantees and remedies that apply on tangible goods could apply.

To be effective, a new set of rule needs to entail all the possible aspects of the contractual relationship. Otherwise a trader would still have to take into account the different legislations on the aspects that are not covered by the new instrument.

Given the absence of legislation on digital content in all the Member States, a new harmonised European legislation on this topic could increase the protection of users (both consumers and small businesses) when buying digital content products.

Concerning the quality of digital content products, UEAPME underlines that it might be problematic to regulate this area introducing new rules. Instead of very detailed rules concerning the quality of digital content products, freedom of contract between the parties should be the principal approach towards the question on how to define the quality. Mandatory rules concerning the quality of digital content products should contain mainly general clauses where the quality of products would be defined in an open-ended way.

Concerning the possibility of having diverging specific national legislations on digital content products, UEAPME believes that every diverging set of rules, affects business activities in a negative manner. This has been proofed over the last few years with the introduction of new legislation, both on domestic and EU level. Whenever new sets of rules come into force, online sales are being made more difficult. Therefore, a new initiative on digital content products needs to be comprehensive and cover any possible aspect without leaving legal uncertainty. Otherwise, traders need to have the possibility to choose the applicable law, which in practice would mean that they are able to choose their domestic law. In absence of proper harmonisation, if traders do not have this choice, it will become practically impossible for them to adapt to all different legislation.

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Section 2 – Need for an initiative on contract rules for digital content products at EU level

As already underlined, UEAPME agrees that on digital content products there is a need to act at EU level. However, any new legislation needs to be clear and simple for all parties without adding new burdens on SMEs. As stressed before, a new set of rules would only provide a solution to the current problems if it covers all possible aspects of the contractual relationship. If not, it would only be a new set of rules, additional to the existing ones, and both traders and consumers would still have to inform themselves on the applicable legislation on the aspects not covered by the new instrument.

Section 3 – Scope of an initiative

In the specific case of digital content, the problems for B2B and B2C contracts are similar. Therefore, UEAPME[2] believes that a proposal on the selling and downloading of digital content should also cover B2B. In fact, SMEs are often the weak part in such contracts and risk to have sensitive data for their business withheld by big multinationals. With a new possible initiative covering only B2C, consumers would be protected with the possibility to terminate the contract and eventually (depending on the direction of the proposal) also retrieve all user generated content and data while SMEs would be left without protection. Without jeopardising the freedom of relations in B2B dynamics, SMEs and their businesses need to be protected from big competitors.

In addition, in B2B transactions digitalisation may sometimes also facilitate misleading and unfair practices. Therefore, regulation should make it possible to effectively intervene when irregularities are occurring. In order to create a reliable digital market, it should be ensured that misleading marketing is addressed also between the B2B contractual relationships. Interference of the misleading marketing practices in an effective way can be seen as an extremely important act when building a reliable and trustworthy digital market inside the EU. Without trust, digitalisation and the completion of the digital market will happen at a slower rate.

Concerning the digital content products to cover with a new initiative, UEAPME strongly believes that all types of digital content should be covered. The more exceptions are made, the more confusing the regulation becomes, and the harder it will be for retailers to follow. Therefore any definition of 'digital content' should be as broad as possible.

Indeed, digital content product is a very wide and obscure concept/term by itself. Therefore, it might be difficult to try to define the concept "digital content product" very precisely or exclusionary. If certain digital content products, for example social media applications, are omitted from the initiative, this may lead to the outcome that for example the new regulation may cover online games, but not applications which combine online games and social media applications. This outcome can be seen quite contrived and ambiguous and it cannot be considered reasonable from the legal certainty prospective. In addition, when planning new initiatives it should also be kept in mind, that the progress of digital technology is so fast that narrow and elaborated regulation could turn out obsolete in regard to technology already when it comes into effect.

Given the fact that nothing is given for free, UEAPME believes that digital content which is provided for "free" or for another counter performance than money (ex. personal data) should also be covered by the proposal. However, rules have to be simple and clear.

Section 4 – Content of an initiative

If the quality of the products will be covered, a mid-way approach should be used. The purchase of digital content is still a purchase, and therefore a contractual matter and should be treated in that way. However, if the supplier does not deliver what was promised there should be a legal reference. It is also important to note that sometimes problems of

[2] With the exception of WKO, The Austrian Federal Economic Chamber.

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conformity are not caused by the product itself but the devices that a consumer uses. The trader cannot be aware of all the kind of devices used by consumers; therefore he/she cannot always be responsible of the non-conformity of digital content. In this respect, it is therefore important to have content and product information, but the trader cannot be expected to provide extensive information on interoperability.

Furthermore, in case users complain about defective products, they have to provide evidence that the digital content products are defective. The person claiming non-conformity should also have to prove it, therefore the burden of proof need to be on the customer's side.

In the interest of fair and balanced solutions we strongly oppose ideas of a free choice of remedies on the side of consumers but strongly favour a hierarchy of remedies in principle as provided in Art 3 of the Consumer Sales Directive. In order to make the instrument attractive to traders we would propose a slight adaption of this regime for the trader's choice between repair and replacement. It is very important that the trader first has a right to remedy. Any trader should be given a possibility to satisfy his/her consumer by fixing the problem in a way he/she consider the most appropriate. In first instance, the trader should be given the possibility to repair the defect, if possible, and in second place to replace the defect product. Only if none of these two options are possible, an appropriate reduction in the price should be rewarded. If for example, the retailer would be able to fix the non-conformity of the product in a simple way, such as with an update that should be the solution to follow.

UEAPME[3] believes that remedies should be provided also for digital content products provided for counter-performance other than money. The remedies provided in article 3 of the Consumer Sales Directive are easily applicable to this specific type of sales.

The current regime of remedies and prescription should not be changed. Time period for asking the remedies should not be indefinite, neither in a case of digital content product nor in case of physical products. As a general rule, reasonable time after the buyer has discovered or ought to have discovered the defect should be sufficient. However, what comes to the length of reasonable time, in a case of digital content product, it is also notable that life cycle of those products is usually significantly shorter comparing physical products. What comes to the question of specific time limit which would apply exclusively to the digital content product, those kind of sector-specific regulations cannot be seen a desirable solution. It could increase legal uncertainty and cannot be considered reasonable neither the consumers' nor trader's perspective.

UEAPME believes that the right to damages should be left out of the scope. It is also often the case that the retailer is just a reseller of the digital content product, manufactured by third parties.

Concerning the question of termination of long term contracts, specific rules are usually not necessary. It is one of the fundamental principles of contract law that parties are entitled to terminate open-ended contracts. It is also necessary a clear definition of what it is meant by long term contracts. In any case, termination should be expressed in advance and by notice. It seems appropriate that users could be provided by means to retrieve their data and traders may not further use them. However, this will also depend on the General Data Protection Regulation (GDPR). We are already concerned that SMEs will not be prepared for new regulation and obligations imposed by the GDPR. Rules concerning data protection and privacy will already be regulated in a very detailed way.

In terms of digital content product, the user's right to recover the content after the termination of the contract depends on the product. This question is linked with the issue concerning the application of the new regulations and the definition of the product. If this right will be foreseen, it should be free of charge, possible in a reasonable time and without any significant inconvenience.

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Concerning the actions that a trader could be entitled to take in order to prevent the further use of the digital content, freedom of contract and terms and conditions could be one approach. In general, traders should be entitled to update and improve the features of digital content products. Otherwise, product development and possibilities to improve the products would be unnecessarily difficult.

PART 2 – Online sale of Tangible goods

Section 1 – Problems

As pointed out before, UEAPME would like to underline that the current EU regulation regarding the consumer protection is extremely complicated and not easy to understand, both for consumers and traders. Especially the information obligations are complex and burdensome and not always relevant. In addition, EU based consumer protection regulation can be considered quite detailed when it comes to e-commerce. For example, the provisions of the Consumer Rights Directive (2011/83/EU) on consumer information in distance selling are in some instances unnecessarily extensive, which can hinder the trade of simple goods or digital content. Moreover, consumer protection legislation in the EU has already been mainly harmonised. Therefore, new legislative initiatives concerning this area of law should be considered very carefully and any new obligations for traders or regulations should only be created in response to a real need. UEAPME stresses again that before drafting new provisions especially the application and the impact of the CRD on e-commerce should be carefully evaluated.

Harmonisation is emerging as a possible approach in cross-border purchases. Despite UEAPME's concerns on the effects for traders of full harmonisation in contract law for the online sale of tangible goods, this is only true when harmonisation covers all possible aspects of the contractual relationship. If not, initiatives on harmonisation only provide for a new set of rules, which has proved over the last years to provide less transparency in applicable law.

UEAPME would like to underline that small companies do not have the means to pay for legal advice on contract law in the different member States in which they want to sell. Therefore high costs and complicated rules would discourage traders from engaging in cross-border online sale.

As stated already, instead of creating a new legal instrument with new provisions regarding legal guarantees and unfair contract terms, small modification of the existing legislation could be sufficient. The completion of the country-of-origin principle for the trader could be a solution. The current ROME I Regulation in fact, does not allow the choice for the law of the trader but this change would significantly ease cross border trade.

UEAPME suggests that an adaptation of ROME I Regulation, giving traders the chance to sell on the basis of their country-of-origin, could be an easy solution to boost cross border e-commerce. In case this proposal is not followed and a new instrument will be proposed, we would like to comment the Commission's proposals as follows.

Section 2 – Need for an initiative on contract rules for online sales of tangible goods at EU level

We do acknowledge the problems that may arise from differences in national legislation, but we do not consider the creation of a new set of rules to be the solution, unless it would entail all aspects of the contractual relationship.

There may be a risk that the initiatives may lead into the fragmentation of contract law and law of obligations systems between the national systems and EU based special regulation concerning the online sale. This development cannot be considered desirable and it would not increase legal security.

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Section 3 – Content of the initiative

In relation to online sale of tangible goods, UEAPME believes that a new initiative should cover B2C only.

We are conscious of the possible legal risks and obstacles related to cross-border e-commerce. However, concerning the areas of contract law mentioned in the consultation which might create problems related to national divergences, as we have many times presented above, the consumer protection regulation in the EU has already been harmonised by the directives.

Furthermore, criteria defined in the current Consumer Sales and Guarantees Directive concerning the quality of goods is adequate and, at this time, any additional or different criteria won't be necessary. Concerning the burden of proof for defective products, the customer should be obliged to notify the defect within a reasonable period of time. If the buyer does not notify the trader, he/she should lose all the remedies unless there is a justified reason to do so.

The Consumer Goods Directive provides that - unless proved otherwise – a lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The current solution has worked in practice. Furthermore the solution reached in the Directive on the sale of consumer goods is based on the period for which one could convincingly accept the reversal of the burden of proof. The decisive consideration for the drafters of that Directive was that the likelihood that the merchandise had been delivered free of defects increases the longer the merchandise is with the consumer. UEAPME strongly believes that half a year is the longest plausible time period for the legal presumption that the defect had already existed in the moment of the delivery of the merchandise. Rules in the field of consumer law should be balanced, protecting the legitimate interests of both consumers and business alike. A longer presumption period would not meet these demands.

As said for digital content products, we oppose the idea of a free choice of remedies on the side of consumers and we advocate for a hierarchy of remedies in principle as provided in Art 3 of the Consumer Sales Directive.

As already stated, the current regime of remedies and prescription period should not be changed. As a general rule, buyer should be entitled to ask for the remedies within a reasonable period of time after the buyer has discovered or ought to have discovered the product was defective. However, this time period should not be indefinite, neither in a case of tangible product nor in case of an intangible product. Prescription period should be maximum two years from the time of delivery. A shorter prescription period is necessary for second hand goods. Both the prescription period and the guarantee period should be limited to one year maximum.

As for the digital content, UEAPME believes that the right to damages should be left out of the scope. Strict liability for traders would result in a kind of "contractual product liability" and is absolutely inadequate. It should be noted that a defect within the meaning of the product liability Directive would always be considered a lack of conformity with the contract as well. If the trader (seller) was strictly liable for consequential damages caused by lack of conformity he would bear the product liability risk. Such an approach would cause a diametric contradiction to the legal system established by the – fully harmonised - Directive on product liability which "channels/allocates" strict liability for damages caused by defective goods basically to the producer and only in certain specifically defined cases to importers and suppliers.

A notification-obligation would be adequate. This period has to be as short as possible. The longer this period is, the harder it will be to identify the link between non-conformity and the defect. In other words, if the period to notify the trader is too long, the defect could also have been caused by misuse or general wear and tear. Therefore, the consumer should notify the trader within immediately after detecting the defect, or after the time at which he could be expected to have discovered the defect. If he does not notify the trader within this timeframe, he should lose his right to ask for remedies.

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The decision to grant a commercial guarantee is a voluntarily business decision and should remain under the discretion of the trader. Behind the reason to give a guarantee is usually an idea that the guarantee could help to gain a competitive edge over the competitors. Due to the fact that commercial guarantees are purely voluntary commitments, compulsory rules concerning the content or form of the guarantees are not needed. Consumers' guarantees are already regulated in great detail. Instead of mandatory rules, the European Commission could support best practices or other soft law instruments related to the commercial guarantees. Those practices and procedures could eventually foster trust between the consumers and traders.

Concerning unfair contract terms, the list provided in the Unfair Contact Terms Regulation sets sufficient standards.

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