Position Paper

UEAPME[1]'s Position on the Commission's proposed Directive on certain aspects concerning contracts for the supply of digital content (COM (2015) 634).

General remarks

UEAPME agrees that digital content products and services 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.
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.
However, there is still sufficient time to carefully analyse the impact on businesses and on all parties in general in order to ensure the best solution when dealing with digital content online.

In addition, 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.

We also believe it is important to clarify the interaction of the current proposal with the General Data Protection Regulation (GDPR) to ensure a coherent legal framework. The impact of compliance with both the GDPR and the current proposal can be quite heavy for SMEs.

At the moment, the proposal is quite complex and partly ambiguous. Therefore we are concerned about the risk to create uncertainty about rights, obligations and applicable rules. A bigger effort to simply the proposal and make it easy and understandable for all parties is necessary.

Specific Comments

- **Article 3, Scope of application**

[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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We are concerned about a possible confusion on the scope of application. Indeed, the proposal will apply not only to digital content supplied online but also to the one supplied through a durable medium. However in case of non-conformity due to problems of the sole durable carrier, there might be confusion on which Directive is applying (digital content or tangible goods). Furthermore, the Consumer Rights Directive (CRD) would continue to apply to those goods in case of a failure to deliver.
In addition to this, according to Art.2/1 the current proposal would apply to services whose main purpose is providing, allowing the creation, processing or storage of digital content but not to those services performed by the supplier where the digital content is used mainly as carrier.

All the above mentioned issues are just examples of the complexity of the scope of application. Therefore, we think it is absolutely necessary to clarify definitions and clearly define the scope in a simple and more understandable way.

Moreover, due to technological complexity of some digital services, it might be difficult to define in practice when the collection of personal data is carried for performance of a contract or for meeting legal requirements and when instead personal data is collected for purely commercial purposes.

Given the fact that nothing is given for free, UEAPME is in principle favourable of covering digital content which is provided for "free" or for another counter performance than money. However, there is a need for better clarification on which data and/or "counter performance" would be covered, given that the GDPR already covers personal data, as well as how the lack of conformity will be treated.

- **Article 9, Burden of Proof**

Article 9 imposes on the seller the burden of prove of conformity of the digital content at the time (and period) of supply for an **unlimited period of time**. The rules of evidence for goods (Article 5/3 Consumer Goods Directive, but also Article 8/3 proposal of the directive for online sales of tangible goods), for the benefit of the consumer, state that in the event of occurrence of a lack of conformity (defect) within a specified period of time (currently 6 months), there is a presumption that this defect existed at the time of delivery.

The absence of a time limit for the burden of proof is justified by the Commission inter alia, by the principle that the digital content is not a "wear" subject. This may perhaps be partly true, but this approach ignores the following: whether the digital content "works" depends essentially on the digital environment of the consumer. This is definitely not static, but might change shortly after the delivery of the digital content because of installations of other programs, automatic or conscious (could also be daily) updates of other programs, contamination with viruses etc. These changes of the consumer´s digital environment might lead to the consequence of incompatibility with the digital content.

The digital environment of the consumer will continue to change over time. This means the more time passes, the more changes will happen in comparison with the digital environment at the time the digital content was supplied. For example, if an installed program works fine at the time digital content was supplied, but then after several months problems occur, it's more likely that a change in the digital environment caused the problem. So even if the program itself is unchanged and not subject to wear and tear, there is a constant technical and digital progressive change of the digital environment.

If one-person-businesses or SMEs in general had to prove for an indefinite time (e.g. after 23 months), that the digital content was handed over in conformity with the contract at the time of supply, they would have to make use of tremendous resources in order to examine the user's environment that has for certain changed comprehensively from the time of supply. One-person-businesses or SMEs in general don't have or simply cannot have such resources (think here also of distributors, which often do not have the required expertise and need to pay other people for that).

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In order to ensure legal certainty and a balanced solution, a **time limit for the burden of proof** is essential. Therefore, a **period of maximum 6 months** would be a plausible solution for digital content, as well as online sale of goods (see UEAPME position on online sale of tangible goods). Furthermore, **coherence with the content of the rules of evidence and the presumption applicable for goods is necessary** to make clear, that in case of occurrence of lack of conformity within this period of time, the presumption that it already existed at the time of supply is in favour of the consumer. Expiring this 6 months' time period, the consumer will have to bear the burden.

The proposed rule is inter alia also justified by arguing that the provider can more easily assess whether this - alleged – nonconformity has its origin in the digital environment of the consumer or not (recital 32). This is not true in many cases, because the seller can be only an intermediary (dealer), who does not have the necessary technical expertise.

The aspect that the supplier does not know the digital environment of the consumer should be compensated with the idea that the consumer must cooperate with the seller. This approach seems generally reasonable, but does not change the fact that it creates considerable expenses and effort for the supplier and that the extent of the required cooperation of consumers is unclear.

If the result of the examination is that the "non-functioning" is caused by the digital environment of the consumer, the supplier will also be obligated to describe the "defects" or inadequacies of the consumer´s digital environment in a rather precise way. Such an examination is certainly a considerable effort and cost burden for suppliers. As a result, the supplier would provide a free service for the customer in such cases, which goes beyond what was owed by the contract.

Commission Proposal	Proposal of UEAPME
Art 9/1- The burden of proof with respect to the conformity with the contract at the time indicated in Article 10 shall be on the supplier.	**Art 9/1-** ~~The burden of proof with respect to the conformity with the contract at the time indicated in Article 10 shall be on the supplier.~~ Any lack of conformity with the contract which becomes apparent within **six months** from the time when the digital content or digital facility was supplied, is presumed to have existed at the time of supply.

- **Article 11, Remedy for the failure to supply**

According to Article 5/2, the provider - unless otherwise agreed - is obliged to deliver the digital content immediately after the conclusion of the contract. We would like to refer to article 18/2 of the Consumer Right Directive, which already contains provisions for delayed delivery of goods. 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 the case of providing digital content, the supplier is not granted an adequate extension for the delivery. Cases of server failure as a reason for delayed delivery can also occur. This differentiation is not justified and furthermore not in accordance with the principle of objectivity under art 20 of the European Charter of Fundamental Rights.

Commission Proposal	Proposal of UEAPME
Art 11- Where the supplier has failed to supply the digital content in accordance with Article 5 the consumer shall be entitled to terminate the contract immediately under Article 13.	**Art 11-** Where the supplier has failed to supply the digital content in accordance with Article 5 the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract immediately under Article 13.

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- **Article 13, Termination**

In our opinion, the possibility for the consumer to terminate the contract by notice to the supplier given by any means is inadequate. Notification should always be made in a written form.

Moreover it is not appropriate, as outlined in Art. 13/2, that the consumer should only be obliged to return digital content supplied on a durable medium "upon the request" of the supplier. The consumer should return the durable medium by law.

We also advocate for a proportionate payment for use made of the digital content prior to the termination of contract. Indeed, if the consumer was able to use a program for a longer period of 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, he should be liable to pay for the use prior to the termination. The situation is as such comparable to continuous obligations, for which the following paragraph 13/6 foresees an obligation to pay for the use.

Commission Proposal	Proposal of UEAPME
Art 13/1 - The consumer shall exercise the right to terminate the contract by notice to the supplier given by any means. **Art 13/2/e(i)** - upon the request of the supplier, return, at the supplier's expense, the durable medium to the supplier without undue delay, and in any event not later than 14 days from the receipt of the supplier's request; **Art 13/4** - The consumer shall not be liable to pay for any use made of the digital content in the period prior to the termination of the contract.	**Art 13/1 -** The consumer shall exercise the right to terminate the contract by notice to the supplier in a written statement. **Art 13/2/e(i)** - ~~upon the request of the supplier~~ unless differently agreed with the supplier, the consumer shall return, at the supplier's expense, the durable medium to the supplier without undue delay, and in any event not later than 14 days from termination of the contract ~~the receipt of the supplier's request~~; **Art 13/4** – Whether the consumer was able to use most of the digitial content, the consumer shall ~~not~~ be liable to pay a proportionate amount for any use made of the digital content in the period prior to the termination of the contract. If the non-conformity concerns essential functions of the digital content, the consumer shall not be liable to pay for any use made of the digital content in the period prior to the termination of the contract.

- **Art 14, Right to Damages**

Article 14 provides a strict liability of the supplier in the event of economic damages to the digital environment of the consumer by non-conformity of the digital content. Member States shall lay down detailed rules for the "exercise" of the right to damages. Beside the fact that we consider strict liability as inadequate, article 14 in conjunction 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. The consumers' right to damages in the case of a lack of conformity should be an area completely left to the Member States' competence, therefore UEAPME suggests the deletion of the entire article.

Commission Proposal	Proposal of UEAPME
Art 14 - The supplier shall be liable to the consumer	~~**Art 14 -** The supplier shall be liable to the consumer~~

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for any economic damage to the digital environment of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. Damages shall 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. 2. The Member States shall lay down detailed rules for the exercise of the right to damages.	~~for any economic damage to the digital environment of the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. Damages shall 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.~~ 2. ~~The Member States shall lay down detailed rules for the exercise of the right to damages.~~

- **Art 16, Right to terminate long term contracts**

Art 16 provides a right for consumers to terminate contracts with indeterminate duration or with a duration exceeding 12 months any time after the expiration of 12 months. This would make contracts with a longer duration, but at a more favourable price, impossible and would therefore lead to reduced consumer choice.

Commission Proposal	Proposal of UEAPME
Art 16 – Right to terminate long term contracts [..]	- To delete entire article.

Additional Comments

- A two-year warranty period, as provided in Art 5 of the Consumer Sales Directive should also apply for digital content. Recital 43 states that Member States remain free to rely on national prescription periods. This goes against the full harmonisation exercise and will not bring legal certainty. This clarification would in any event need to be made in the operative part of the directive.

- In addition to the transposition deadline for Member States (**Art 21**), a reasonable period (1 year) should be provided, after which the provisions become applicable. This seems a sufficient *vacatio legis* for companies in order to adapt to the new requirements.

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