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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

Digital contracts for Europe - Unleashing the potential of e-commerce

1. CONTEXT

The European e-commerce market has grown rapidly in recent years within the overall retail sector. It is a main driver for overall EU growth. However, it still has a significant untapped potential. Instead of taking full advantage of the opportunities of e-commerce, businesses and consumers are too often constrained to their own domestic markets.

Key figures

E-commerce as a main driver for growth: The value of retail e-commerce in the EU grew by 13.4% in 2014 compared with 2013 and reached a total of €370 billion.[1] Enterprises' turnover from retail e-commerce as a share of total retail turnover has risen by 85% from 2009 to 2014[2], showing that retail trade is growing much faster online than offline.

Growth potential of e-commerce still untapped: The share of e-commerce in the total retail sector remains significantly lower in Europe than in the USA: In 2014, the share of e-commerce in total retail was 7.2% in the EU compared to 11.6% in the USA.[3] In the same year, only 12% of EU retailers sold online to consumers in other EU countries, while three times as many (37%)[4] did so domestically. Only 15% of consumers purchased online from another EU country, while roughly three times as many (44%) did so domestically.[5]

Against this background, the European Commission adopted the Digital Single Market Strategy[6] setting the creation of a Digital Single Market as one of its key priorities to generate additional growth in Europe. The Digital Single Market Strategy tackles all major obstacles to the development of cross-border e-commerce in the EU. Dealing with those obstacles together and improving the situation for businesses and consumers will bring the expected boost to the Digital Single Market and the overall EU economy.

The gap between demand and supply can be narrowed. EU businesses will be able to increase their competitiveness by selling more easily to more than just their national or a couple of neighbouring national markets. Increased supply will also strengthen competition. This will bring consumers a wider choice of products at more competitive prices. Giving consumers uniform rights with a high level of consumer protection will increase their confidence to buy abroad.

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1 European B2C E-commerce Report 2015. Ecommerce Europe. Excluding Bulgaria, Cyprus, Croatia, Lithuania, Luxembourg, Malta, Slovenia and Slovakia for which data are not available. http://www.ecommerce-europe.eu/ p.29 - All figures contained in this Communication are also available in the Commission Staff Working Document containing the Impact Assessment accompanying the Proposals for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, SWD (2015) 275.

2 Eurostat, E-commerce by enterprises: summary of EU aggregates (NACE Rev. 2 activity)

3 http://www.retailresearch.org/onlineretailing.php

4 Flash Eurobarometer 396 (2014) "Retailers' attitudes towards cross-border trade and consumer protection" (2015), p.27

5 Eurostat survey on ICT usage in households and by individuals (2014), isoc_ec_ibuy

6 Commission Communication 'A Digital Single Market Strategy for Europe' COM (2015) 192 final, available at: http://ec.europa.eu/priorities/digital-single-market/

2. A FIRST AND IMPORTANT STEP TOWARDS UNLEASHING THE POTENTIAL OF E-COMMERCE

One of the three main objectives of the Digital Single Market Strategy is to ensure *"better access for consumers and businesses to online goods and services across Europe*". The Strategy identified differences in contract law between Member States among the barriers to cross-border e-commerce.

To deliver the right conditions to enable cross-border e-commerce to flourish, consequently, the Digital Single Market Strategy announced legislative proposals for simple and effective cross-border contract rules for consumers and businesses by harmonising contract rules for the supply of digital content and the online sales of goods.

As announced by the Commission in its 2015 Work Programme, the Commission is adopting today (i) a proposal for a Directive on certain aspects concerning contracts for the supply of digital content, and (ii) a proposal for a Directive on certain aspects concerning contracts for the online[7] and other distance sales of goods.[8]Together with the Proposal for a Regulation on cross-border portability of online content services, these proposals are the first new legislative initiatives adopted under the Digital Single Market Strategy.

Concretely, the two Directives will fully harmonise in a targeted way the key mandatory rights and obligations of the parties to a contract for the supply of digital content and the online sales of goods.[9] They will contribute to faster growth of the Digital Single Market by:

- **Reducing costs resulting from differences in contract law:** The key consumer contract law rules which currently differ amongst Member States create obstacles for cross-border trade of digital content and goods. The current proposals will make sure that these rules will be the same in all Member States. EU-wide rules will prevent emerging legal fragmentation in the area of digital content[10] and remove it as regards goods[11]. Furthermore, businesses will no longer have to adapt their contracts to different rules when selling cross-border and thereby avoid additional costs.

- **Creating legal certainty for businesses:** Unlike today where they face a complex legal framework, businesses will be able to supply digital content or sell goods online

7 For the purpose of this Communication, any reference to "online sales" shall be understood as "online and other distance sales". Conversely, any reference to "offline sales" shall be understood as "face-to-face sales".

8 The key aspects of both the supply of digital content and online sales of goods are based on the Consumer Sales of Goods Directive and are therefore as coherent as possible. However, the Commission decided to adopt two legislative instruments, given that the specificity of digital content requires several rules to be regulated differently than the ones for goods. Moreover the fast technological and commercial development of digital content will require a review of the application of this Directive. Therefore, the implementation and application of the digital content provisions and their review will be facilitated by their incorporation in a single legal instrument, namely the Directive on the supply of digital content.

9 For example, conformity with the contract, hierarchy of remedies and their exercise, consumer's right to terminate the contract.

10 Individual Member States have recently enacted (UK, NL) or started to work (IE) on specific mandatory rules on contracts for the supply of digital content. These emerging national legislations differ both in terms of scope and substance.

11 There are only minimum harmonisation rules on the notion of conformity with the contract and on remedies for non-conforming goods (under the Consumer Sales and Guarantees Directive). Since these are minimum standards, Member States have the possibility to go further and add requirements in favour of consumers. Many Member States have used this possibility on different points and to a different extent.

to consumers throughout the EU based on the same set of consumer contract law rules provided by the proposed Directives. This will increase legal certainty and create a business friendly legal environment, which will be especially beneficial for SMEs.

- **Helping consumers to gain from online cross-border shopping in the EU:** Uncertainty about their key contractual rights is a major reason for consumers' lack of confidence to shop online cross-border. Consumers will have a fully harmonised clear set of rights throughout the EU and will therefore be more confident in accessing digital content or buying goods cross-border. The overall level of consumer protection in the EU will also rise significantly. For the online sale of goods, this applies in particular, in cases of defects, to the extension of the period for the reversal of the burden of proof to two years, aligning it with the two year legal guarantee period. Except in two Member States where the level will remain the same, this will increase consumer protection for all European consumers. It will empower consumers to buy online cross-border and also make it easier for them to exercise their rights.[12]

- **Reducing the detriment suffered by consumers with respect to defective digital content:** Unlike today, where there are no EU-wide specific contractual rules on the supply of digital content, consumers will have clear and digital-specific rights when facing problems with digital content. This will enable them to seek remedies and thus reduce the detriment they currently suffer when they acquire faulty digital content. Given the pace of this technologically and commercially fast moving market, the EU rules are technologically neutral and future-proof; they will therefore create a level playing field for all relevant types of digital content.

- **Overall, balancing the interests between consumers and businesses:** By picking up market trends and balancing well the different interests, the two Directives will provide a good deal for both consumers and businesses, creating the conditions for overall economic gains.

Improving everyday life…

The Directives will concretely improve the everyday life of both businesses and consumers in Europe. Today, businesses have to spend time and money to find out about foreign consumer contract laws when selling cross-border and to adapt contracts accordingly. For example, the time during which a trader can be liable for defects of a PC varies today from two years to the entire lifespan of the PC, depending on the Member State. Tomorrow, the national laws on such contractual remedies will all be the same within the EU: time and money saved can be used to develop new products or to sell at a more competitive price.

12 This extended reversal of the burden of proof could also contribute to higher quality and more durable products, in line with the European Commission's Circular Economy Package adopted on the 2nd of December 2015.

Consumers will be able to shop online and access digital content in other EU countries as easily and confidently as they do in their own country. Consumers proactively buying goods from a trader in another Member State will tomorrow be protected to the same extent as under their national law. Moreover, today a consumer who cannot watch online the movie paid for because of poor video quality often may only receive as compensation a mere discount to watch future movies, with possibly the same poor quality. Tomorrow, the consumer will have the rights to have the problem fixed, to have the price reduced or to terminate the contract and be fully reimbursed.

... and bringing macro-economic benefits

If the barriers related to contract law were lifted, around 122,000 more businesses would sell online across borders. Cross-border EU trade could increase by around €1 billion. Increased online retail competition will lead to retail prices going down in all Member States, averaging -0.25% at EU level, which will directly increase household consumption in the EU by about €18 billion. On top of that, wider choice of products and services will translate into higher consumer welfare. Between 7.8 and 13 million additional consumers would start buying online cross-border. The average amount spent annually by each cross-border buyer would also increase by €40. Overall real EU GDP is expected to gain about €4 billion per year.[13]

These proposals address only contract law terms in a business to consumer interaction. It is recognised that SMEs, as weaker parties with less bargaining power, also face contract law related difficulties especially when using digital content. However, taking into account in particular the positions expressed by stakeholders and Member States, the Commission has decided to look into this issue in the context of other initiatives announced in the Digital Single Market Strategy.

In order to reap the full benefits offered by the Digital Single Market, this package with both proposals is needed to unleash the full potential of e-commerce. The Commission needs to act simultaneously on both goods and digital content. These Directives will be complemented by the other measures foreseen in the Digital Single Market Strategy such as those related to VAT-related burdens, developing high-quality cross-border parcel delivery services or a modern copyright framework. Further consumer related initiatives such as the ones announced in the Digital Single Market Strategy on abolishing geo-blocking and the review of the Consumer Protection Co-operation Regulation[14], as well as the entry into operation of the Online Dispute Resolution platform[15], will further enhance cross-border commerce and

13 "The macro-economic impact of e-commerce in the EU Digital Single Market", Cardona M., N. Duch-Brown, J. Francois, B. Martens, F. Yang (2015), Digital Economy Working Paper, IPTS-JRC

14 Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

15 Regulation (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

remedy other important problems for business and consumers, such as the need for effective cross-border redress and enforcement.

3. LEARNING FROM PAST EXPERIENCE - A FOCUSED, TARGETED APPROACH

Learning from past experience and having listened to stakeholders, the Commission proposals offer an ambitious but realistic way forward to remove contract law related barriers and thus help to unleash the e-commerce potential in the EU.

These proposals entail the most appropriate level of intervention.

Firstly, the proposals address real-life problems as identified by stakeholders and Member States. The Commission has sought the collection of a wide and balanced range of views on this issue. By conducting extensive consultations, both public and targeted, the Commission ensured a wide participation throughout the preparation process of the proposals and therefore offered numerous opportunities to all relevant parties (businesses, consumers, national authorities, lawyers and academics) to express their opinions.

Secondly, the proposals specifically take into account the lessons learnt from previous efforts to approximate contract laws. As a result, the Commission focusses on a targeted full harmonisation of mandatory consumer rights which remedy concrete key obstacles to cross-border trade and address the urgency of acting on the online sphere as also recognised by the European Parliament.[16] Moreover, Directives, instead of Regulations, are more appropriate as they leave Member States the freedom to adapt the implementation to their national law. This problem-focused, targeted approach was an important result of the stakeholder consultations.

Finally, on substance, the proposals offer a new dynamic as they strike an appropriate balance between a high level of consumer protection at EU level and significantly increased opportunities for businesses through full harmonisation. The approach chosen maintains substantive solutions that have proven their value in practice (e.g. duration of the legal guarantee period, hierarchy of remedies) while at the same time putting forward, where necessary, new solutions supported by recent data and trends in the Member States (e.g. extension of the duration of the reversal of the burden of proof).[17] The proposals will bring an increased level and effectiveness of consumer protection[18] as well as legal certainty and less

16 In its legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635– C7-0329/2011 – 2011/0284(COD)) the European Parliament decided to restrict the scope of CESL to online and other distance sales as well as to extend the rules on digital content which is provided against another counter-performance than money.

17 "Consumer market study on the functioning of Legal and Commercial Guarantees for consumers in the EU" (2015): Indeed, within the entire 2-year legal guarantee period only a minority of businesses insist on consumers proving the trader's liability, and there is very limited change in traders' behaviour before or after 6 months on this point. Two EU Member States (FR, PT) have already adopted national legislation providing for a 2 year period for the reversal of the burden of proof.

18 For example, for digital content, the legal guarantee period will be unlimited and consumers will not have to prove the source of a defect for an unlimited period of time. Consumers will be able to terminate long term contracts and contracts for which the supplier makes major modifications. When purchasing goods online, all EU consumers will be able to request a remedy for a defective product without having to prove that the defect existed at the time of delivery during two years. EU consumers will not lose their rights if they do not notify the seller of the defect within a certain period of time.

cost for businesses.[19] Overall, this will translate into increasing consumer confidence and spurring business activity across the EU.

4. ACTING BEFORE IT IS TOO LATE

We need to act now on the digital dimension…

The pace of commercial and technological change due to digitalisation is very fast, not only in the EU, but worldwide. The EU needs to act now to ensure that business standards and consumer rights will be set according to common EU rules respecting a high-level of consumer protection and providing for a modern business friendly environment. It is of utmost necessity to create the framework allowing the benefits of digitalisation to materialise, so that EU businesses can become more competitive and consumers can have trust in high-level EU consumer protection standards. By acting now, the EU will set the policy trend and the standards according to which this important part of digitalisation will happen.

For businesses, simplification of the legal framework is a key prerequisite for their competitiveness and active participation in digital markets throughout the Union. For consumers, trust and protection is particularly important in the online environment in order to mitigate the distance-related risks (no in-person contact with the seller, no "touch and feel" of the product) inherent in these transactions. Without immediate action, changes may come too late and opportunities could be lost. To quickly strengthen the competitiveness of EU businesses and boost EU growth, the Commission is dealing as a priority with the digital dimension of retail, namely the supply of digital content and the online purchase of goods. Both aspects of the digital dimension are fundamental. The barriers to the supply of digital content clearly need to be addressed because the supply of digital content has a particularly strong growth potential.[20] Any delay regarding digital content entails the risk of emerging legal fragmentation, causing obstacles to both consumers and suppliers participating in cross-border transactions. As to goods, they still represent by far the biggest share of the online market: of the €231 billion estimated total size of the Digital Single Market, some €212 billion stem from retail in goods. The full Digital Single Market potential would not be unleashed if only one of the two aspects was addressed.

An important trend of the different stakeholder consultations was that any rules on digital content should be as far as possible based on the rules on the sales of goods, deviations being justified only to take account of the specific features of digital content. This shows also the importance of discussing both sets of rules as far as possible concomitantly during the inter-institutional process.

19 Costs incurred by businesses to adapt their contract to the law of another Member State are estimated at around €9000. See for more details Annex 5 to Commission Staff Working Document containing the Impact Assessment accompanying the Proposals, SWD (2015) 275.

20 Alongside increased internet penetration and usage (80% or 317 million Europeans used the internet in 2014), a growing number of smartphones, e-readers and tablets are fuelling demand for digital content. Taking into account that, according to Flash Eurobarometer 411 "Cross-border access to digital content" (2015)", the vast majority of EU internet users aged 15-24 currently access some type of digital content online (87 % access music online, 80% watch audio-visual content online and 58% download or play games online), this increase can be reasonably expected to become apparent in the near future.

These are all key reasons why the proposals on digital content and the online sales of goods are being put forward together and now.

… and will ensure consistency between online and offline rules

Given the increasing importance of the omni-channel distribution model (i.e. selling at the same time online and offline), the Commission will take all necessary steps to align the rules for online and offline sales of goods. It will ensure that consumers and businesses will be able to rely on a coherent legal framework which is simple to apply everywhere in Europe.

As part of its 'Regulatory Fitness and Performance Programme' (REFIT), the Commission will examine the existing EU consumer legislation. This fitness check will be much broader than the current proposals and cover a number of consumer Directives[21] including the Consumer Sales and Guarantees Directive (the rules of which will, in respect of online sales, be replaced by the proposal on goods).

The wide-ranging consultation undertaken for the proposed pieces of legislation has identified many issues that are relevant for both online and off-line sales of goods. In this way, a large part of the analysis work concerning the issues to be carried out under the REFIT exercise for the Consumer Sales and Guarantees Directive has already been undertaken when developing the proposed rules for online sales of goods.

This analysis will be complemented by data from the fitness check analysis on the application of the Consumer Sales and Guarantees Directive to sales of goods, which are expected in 2016. This data and therefore the outcome of the REFIT exercise on this point are not yet available. If the outcome of the REFIT exercise will confirm the preliminary results of the ongoing analysis - which seems to be pointing towards the need for a Commission initiative on offline sales of goods – these conclusions could feed into the progress made by the co-legislators on the proposal for online sales of goods, for instance by expanding its scope. Though action to tackle the key obstacles that hamper online cross-border commerce is urgent and unavoidable, it is the Commission's objective to ensure a legal framework of coherent rules applied throughout the EU for both online and offline sales.

5. TURNING INTENTION INTO REALITY

The digital contract proposals are "*ambitious political steps towards a connected Digital Single Market notably … by modernising and simplifying consumer rules for online and digital purchases*", as announced by the guidelines of President Juncker.[22] They are among the

21 Directive 93/13/EEC on unfair terms in consumer contracts; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market; Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers; Directive 2006/114/EC concerning misleading and comparative advertising; Directive 2009/22/EC on injunctions for the protection of consumers' interests.

22 http://ec.europa.eu/priorities/docs/pg_en.pdf

first deliverables of the Digital Single Market Strategy, transforming these guidelines into concrete policy. They are the first steps towards creating economic growth through a business-friendly environment and strong consumer confidence in a genuine Digital Single Market. It is now up to the co-legislators to turn this intention into a reality for European consumers and businesses. The Commission will continue to work closely with the European Parliament and the Council to make this happen.