BEUC The European Consumer Organisation

The Consumer Voice in Europe

Permanent Representation to the EU

B – Brussels

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Ref.: Proposal for a Directive on certain aspects concerning contracts for the supply of digital content: BEUC's recommendations for Council's general approach - JHA Council meeting on 8th June 2017

Dear Ambassador,

I am writing on behalf of BEUC, the European Consumer Organisation, in view of the upcoming adoption of the Council's general approach on the European Commission's proposal for a Directive on contracts for the supply of digital content (COM (2015) 634 final).

Because few Member States have modern sales law rules, consumers are not sufficiently protected when accessing and purchasing digital content products or subscribing to digital services. The European Commission's proposal offers an opportunity to develop a solid European consumer protection framework for digital content products and services and close the existing legislative gap in EU consumer law.

We would like to provide you with our most important concerns on elements of the proposed directive:

1. Recognition of the value of data as a counter-performance (Article 3.1)

More and more traders provide products, or carry out their services, to gather data. The value of personal data in current business models is undisputed. BEUC therefore supports the inclusion of digital content which is provided against 'personal data or any other data' as a counter-performance.

The scope of application should not be limited to digital content or digital services only in exchange of "personal data", therefore excluding "any other data". The essence of sales law and legal guarantees is to restore contractual equivalence. Consumers need to be protected if they did not receive what was promised in the contract, even though they kept their side of the bargain and provided (any) data as a counter-performance.

It is a business reality that providers ask for non-personal data in exchange of their services. It is a common business model to collect different types of data. It is not justified to exclude such contracts from the scope of application. This would deprive consumers of their rights in case of a lack of conformity. In practice, it will also often

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be difficult to establish whether data are personal or non-personal. The lack of clarity will be at the expense of consumers.

Consequently,

- BEUC considers it necessary to follow the Commission's approach and **include all data** that has been given in exchange of the product or service.

- We do not recommend making a distinction between personal data and other data: the directive should apply to digital products and services accessed in exchange of '***any counter-performance, including data'***. This approach would be in line with EU contract law doctrines and avoid risks of conflicts with the General Data Protection Regulation.

2. Embedded software – Scope of application (Article 3.3)

BEUC agrees that it is necessary to clarify what rules would apply to products composed by both tangible and digital elements.

Consumers should not be confronted with uncertainty as to what rules apply when there is a defect or when there are difficult burden-of-proof situations if the goods are faulty because of a potential software failure. Therefore, as a principle, the consumer should always benefit from the rules that are more favourable to him or her – may this be the tangible goods regime or the digital content one.

3. Inclusion of online communication services (OTTs) (Article 3.5(b))

It is crucial that number-independent interpersonal communications services[1] such as WhatsApp, Google Hangout or Skype fall within the scope of the proposed Digital Content Directive. This directive is the right instrument to protect consumers with adequate contractual measures for this type of service:[2] This is also the approach that the rapporteur of the Internal Market and Consumer Protection Committee (Ms. Dita Charanzová – CZ, ALDE) has proposed in her draft opinion on the proposal for a European Electronic Communications Code:[3]

By including these services in the scope of the digital content directive, consumers will have specific conformity rights, which are inexistent today. If consumers come across problems with an online communication service, they should be able to rely on remedies provided by consumer law. These remedies must include the possibility to terminate the contract and, where appropriate, get a reimbursement when consumers access the service in exchange of a payment. Other remedies such as price reduction should also be available to consumers.

4. Conformity of the digital content with the contract (Article 6)

BEUC insists on the need to include the consumer's legitimate expectations among the criteria for the definition of 'conformity'. It is very important that the conformity test is based not only on the information provided by the trader but that it also takes into account what the consumer could have expected from the digital content. This is crucial to avoid any circumvention of liability because of lack of conformity. Consumers should only be deemed to have expressly accepted the specific condition of the digital content if this is unequivocally clear from a separate statement of acceptance.

[1] As defined by the proposed European Electronic Communications Code in Article 2(7), otherwise also known as online communication services or over-the-top – OTT services.
[2] It is important to note that the proposed European Electronic Communications Code excludes number-independent interpersonal communications services from practically all of its consumer protection measures, and importantly provisions on contract termination, switching and transparency.
[3] Par. 3: "(…) *She* [the rapporteur] *therefore considers it more appropriate to ensure that number-independent interpersonal communication services* [e.g. WhatsApp and Skype] *are addressed within the scope of the digital content directive, currently under negotiation* (…)"

5. Remedies (Article 12)

BEUC considers that it should be up to the consumer to freely choose the remedy for the lack of conformity. They should choose between having the digital content or service brought into conformity, to have an appropriate price reduction or to terminate the contract.

In any case, it should be easier for consumers to terminate the contract when the digital content turns out to be defective, for example, where the same or another defect appears (again).

Particularly for digital content products, consumers need to be able to get their money back or retrieve their data if they cannot access the digital service or if the digital content malfunctions. It does not make sense to ask consumers to request the service provider to remedy the defect when the product cannot be used at all.

BEUC also asks the Council to guarantee that in case of termination, consumers can recover the full amount paid for the digital content. In case of ongoing contracts, consumers should also be entitled to recover the price paid in advance for any remaining period of the contract and the amount corresponding to the period during which the digital service was not in conformity.

6. Effects of termination of the contract (Article 13)

BEUC strongly supports the consumers' ability to recover all data and user-generated content upon the termination of the contract. In our view, the supplier should always have the obligation to return the data to the consumer in a usable format, unless the request is technically impossible.

7. Time limits

BEUC considers that there is no specific need to include a legal guarantee period in this directive because – unlike tangible goods – digital content is not subject to wear and tear. Member States should refrain from maintaining or introducing such a period. National prescription periods in relation to claims will apply in any case. The EU legislators should therefore only make sure that such prescription periods are never shorter than the limitation period for tangible goods.

8. Reversal of the burden of proof (Article 9)

BEUC strongly supports that the reversal of the burden of proof should always be on the service provider. It would be extremely difficult for a consumer to prove that the defect existed at the time of the supply of the digital content. Therefore, if the law introduced a time limit for the reversal of the burden of proof shorter than the limitation period, that would mean that in practice consumers would be protected only for the duration of the burden of proof period.

Additionally, if the consumer had to prove the existence of the defect, they would not only have to conduct a very expensive technical test but also bear the risk of potential intellectual property right infringement in case of a bypass of technical protection measures necessary to identify the defect.

9. Unilateral change of terms and conditions (Article 15)

As a matter of principle, the change of terms and conditions must be an exception in business dealings with consumers. The proposed rule should not be used as a door to legitimise the unilateral modification of contract rules at the consumer's expense.

Therefore, BEUC asks that termination rights should be granted not only when the impact of the contract modification is not linked only to "adverse effects" or negative impact but in any event of changes. This is particularly relevant where the functionality, interoperability, accessibility, continuity and security of the digital content or the consumer's digital environment are affected. Further to this, the termination must be free of any charge or additional cost. The provision should be without prejudice to protective rules set out in EU consumer law or national law that go beyond the standard of this directive.

Thank you very much for taking these recommendations into account in the ongoing debate.

Please do not hesitate to contact us should you require any further information.

Yours sincerely,

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Director General

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