FEDIL

Position

POSITION OF FEDIL – CONTRACT RULES FOR THE SUPPLY OF DIGITAL CONTENT & ONLINE SALES

SUMMARY / CONTENT

This position paper constitutes Fedil-ICT members' contribution to the "Proposal for a Directive of the European Parliament and of the council on certain aspects concerning contracts for the supply of digital content and for the online and other distance sales of goods" published on 9th December 2015.

GENERAL COMMENTS

Fedil-ICT welcomes the objective of both proposals to target full harmonisation on certain aspects of contract rules in business-to-customer transactions. The creation of a level playing field would have positive effects on cross-border trade.

However we recommend a more market oriented approach, to align the directive with existing standards and legislations and to rely on industry-wide practices to define the means in order to reach full harmonisation on contracts for distance sales of goods and for the supply of digital content.

SPECIFIC COMMENTS

1. CONTRACTS FOR THE ONLINE AND OTHER DISTANCE SALES OF GOODS

REQUIREMENTS FOR CONFORMITY OF THE GOODS

Fedil-ICT believes that further clarification is needed when assessing in Article 5 (c) that goods acquired online „shall possess qualities and performance capabilities {...} taking into account any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions" in order to conform with the contract. The obligation for the supplier to consider public statements could allow third parties to determine the scope of the legal requirements for goods to conform to the contracts. The practicality of this is unclear.

RELEVANT TIME FOR ESTABLISHING CONFORMITY OF THE GOODS WITH THE CONTRACT

Article 8 (3) assesses the extension of the period in which the burden of proof for a lack of conformity of goods is unjustifiably shifted to the seller from currently 6 months to 2 years. This would likely increase the risk of abuse by customers who may return goods after 2 years in order to acquire newer models. Taking into account that the vast majority of Member states legislation foresee a 6 month-period, Fedil-ICT recommends that the time for a non-conformity presumption of the good acquired online should be reduced to six months.

COMMERCIAL GUARANTEES

Fedil-ICT believes that the obligation for content providers to provide minimum information rights to the consumers on a durable medium seems excessive and would become extremely burdensome in case this obligation would apply to any commercial guarantee given by a third party.

2. CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

SCOPE OF THE DEFINITION OF DIGITAL CONTENT

The proposal for a directive on certain aspects concerning contracts for the supply of digital content extends the scope of the definition of digital content compared to the current consumer rights directive (2011/83/EC, Article 2, (11)), which restricts digital content to "data which are produced and supplied in digital form". In fact, Article 2, (1) of the proposal assesses that digital content also encompasses services "allowing the creation, processing or storage of data in digital form", as well as services "allowing sharing of and any other interaction with content provided by other users". As these services are not covered by the CRD, remedies would be unclear. In case this extension of the definition was included to the directive, Fedil-ICT recommends to include remedies to a lack of conformity for these services.

PERSONAL DATA AS COUNTER-PERFORMANCE FOR THE SUPPLY OF DIGITAL CONTENT

Article 3 (1) of the proposal stipulates that the directive applies to any contract where digital content is supplied to the consumer in exchange for a monetary compensation, for personal data or any other data. In this context, Fedil-ICT believes that the scope should include a distinction between free-to-view and pay-to-view services. In fact, the proposal assumes that significant data collection and processing is taking place for any supply of digital content. However, free-to-view services currently only collect basic data about their users in order to offer a more personalised experience. Forcing right-holders to collect additional data about their users of free-to-view services in order to recuperate sufficient data could be a deterrent for users and could harm the economic viability of free-to-view services. More generally, the extended scope could possibly cover many online services like email, social networks, digital news and others alike.

The UK Consumer Rights Act recognised the need for a distinction after similar discussions in the UK and made the relevant national digital consumer rights regime applicable only to transactions made in exchange for money.

Therefore Fedil-ICT recommends to exclude contracts for the supply of digital content against a non-monetary counter-performance from the scope of this proposal.

REQUIREMENTS FOR CONFORMITY OF DIGITAL CONTENT

By stipulating in Article 6 (2) (c) that in order to conform with the contract, the digital content shall "take into account any public statement made by or on behalf of the supplier or other persons in earlier links of the chains of transactions" it could be interpreted that third parties could determine the scope of the contractual obligation to provide digital content in conformity through public statements. The practicality of this is unclear.

LIABILITY AND REMEDIES

The liability of the supplier to the consumer for any failure and any lack of conformity (Article 10) which exists at the time the digital content is supplied does not include any clarification regarding the source of fault or of incompatibility of the supplied content. The quality of service of digital content can be influenced by multiple variables like broadband speed, usage restrictions and device compatibility which makes it difficult to assess

whether the fault was

with the content, the device or the delivery mechanism, especially considering that these elements are more than likely provided by different companies. Fedil-ICT also wants to raise awareness that it is not always straightforward to assess the source of the fault especially with open platforms.

Therefore, Fedil-ICT believes that the proposal does not properly reflect these concerns and that this setup may be open to abuse.

Furthermore, Fedil-ICT believes that shifting the liability for non-conformity of the digital content with the contract strictly to the supplier will put content providers in an even more complicated position when the content has actually been consumed. In fact, it is an industry-wide practice that service providers will typically pay to the relevant right holder a fee for each time content is downloaded, i.e. right holders charge content providers on a pay-per-view basis for each time a digital asset is downloaded. This process would be extremely complicated from a copyright perspective because the service provider would need to recover any payments already made to producers or underlying right holders.

RIGHTS UPON TERMINATION

Article 13 (2) (b) assesses the consumer's termination rights of contracts for the supply of digital content where consumers give a "counter-performance other than money" such as personal data in return for access to free-to-view content. In case a supplier disables the further use of the digital content, he still has to enable the customer to retrieve the consumer generated content. The view of the Commission of what constitutes user generated content is very broad: e.g. digital images, video and audio files, blogs, discussion forums, text-based collaboration formats, posts, chats, tweets, logs, podcasting, content created on mobile devices or in the context of virtual environments, ratings or collections of links. Based on the wording of the law, that could mean that marketplaces could no longer use a product review in case the customer terminates the contract due to a lack of conformity of the product. The technical feasibility of this provision is also unclear.

RIGHT TO TERMINATE LONG TERM-CONTRACTS

If a contract for the supply of digital content has a duration exceeding twelve months, the consumer can terminate at any time with two weeks' notice after expiration of the first twelve months. This goes against the current industry practice of terminating contracts for the end of the month. Termination within 2 weeks would also create complications as suppliers would only need to refund the portion of the fee the customer has not used as Art. 16 (3) ties the amount to be refunded to the period of time the service was used.

RISK OF ABUSE

The inclusion of a short-term right to reject for digital content might increase the potential for fraud, increasing the risk of abuse by some consumers who claim the digital content is faulty but then retain a copy. This issue needs further clarification.