

Opinion of the European Economic and Social Committee on the ‘Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content’

(COM(2015) 634 final — 2015/0287 (COD))

and the

‘Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods’

(COM(2015) 635 final — 2015/0288 (COD))

(2016/C 264/07)

Rapporteur: Mr Jorge PEGADO LIZ

On 18 and 21 January 2016 respectively, the Council and the European Parliament decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the:

Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content

(COM(2015) 634 final — 2015/0287 (COD))

and the

Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods

(COM(2015) 635 final — 2015/0288 (COD)).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 13 April 2016.

At its 516th plenary session, held on 27 and 28 April 2016 (meeting of 27 April), the European Economic and Social Committee adopted the following opinion by 146 votes to 61, with 44 abstentions.

1. Conclusions and recommendations

1.1 The EESC agrees that a number of the matters raised in the Communication from the Commission (COM(2015) 633 final) now need to be regulated; these are set out in the proposal for a directive on certain aspects concerning contracts for the supply of digital content.

1.2 The EESC does, however, consider that other factors, which it identifies in this opinion, are far more important than contractual rights in contracts for the online sale of tangible goods. They have a greater impact and should be a higher priority with regard to the Commission’s objectives of creating a single digital market, and represent a greater obstacle to the development of cross-border trade.

1.3 Moreover, with regard to the aspects addressed, the EESC disagrees with the legal basis cited by the Commission, and proposes Article 169 TFEU instead.

1.4 It therefore follows that, in principle, the measures adopted should be based on minimum harmonisation, in line with paragraph 2(a) and paragraph 4 of that Article, which has been generally accepted by the European legislator.

1.5 The EESC only considers it appropriate to regulate these matters by means of two directives rather than a single instrument because of the urgency and timeliness of regulating the online sales of digital content.

1.6 It also believes that insufficient reasons are given for taking the option of targeted full harmonisation instead of others, such as model contracts certified by an EU mark or minimum harmonisation in line with Article 169 TFEU.

1.7 Regarding those aspects that are now to be regulated separately under the proposal on contracts for the online sale of tangible goods, it would be more appropriate to regulate them together during the review of Directive 1999/44/EC as part of the REFIT exercise on consumer law since they represent one of its chapters.

1.8 Furthermore, the Commission's proposal concerning the online sale of tangible goods establishes two systems, creating an unacceptable difference in the treatment of online and offline sales of goods.

1.9 In the event that the Commission's plans should be confirmed in their current form, the EESC sets out a series of improvements to the provisions of the proposals with a view to safeguarding consumers' rights against any erosion, ensuring in practice a high level of protection, as required by the TFEU.

1.10 This applies in particular to the rules on sales of digital content, which the EESC considers to be the priority and for which, for pragmatic reasons, it accepts the Commission's suggestion of targeted full harmonisation.

1.11 Nevertheless, this is where gaps in provision and regulatory shortcomings are to be found. They are incompatible with maximum harmonisation, creating insoluble problems for transposition and implementation in the Member States, for which solutions are sought through a raft of proposals on specific aspects.

2. Introduction: one communication — two proposals for directives

2.1 With this Communication, the Commission is taking the first step towards implementing the Digital Single Market strategy for Europe⁽¹⁾ and is carrying out one of the most important measures in its 2015 Work Programme⁽²⁾ by proposing these two legal instruments, with the objective of ensuring 'better access for consumers and businesses to online goods and services across Europe':

- a) a proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content; and
- b) a proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods.

2.2 Being aware that the key aspects of these two proposals are, from a systematic point of view, closely linked to the consumer goods sales directive⁽³⁾, the Commission made it clear that they are 'as coherent as possible'. However, it explained that its decision to 'adopt two legislative instruments' was due to the fact that 'the specificity of digital content requires several rules to be regulated differently than the ones for goods' and that 'the fast technological and commercial development of digital content will require a review of the application of this Directive', and in order to justify its 'incorporation in a single legal instrument, namely the Directive on the supply of digital content'.

2.3 With these two proposals, the Commission is looking to achieve five objectives:

- a) Reducing costs resulting from differences in contract law;
- b) Creating legal certainty for businesses;
- c) Helping consumers to gain from online cross-border shopping in the EU;
- d) Reducing the detriment suffered by consumers with respect to defective digital content;

⁽¹⁾ EESC opinion: OJ C 71, 24.2.2016, p. 65.

⁽²⁾ COM(2014) 910 final.

⁽³⁾ OJ L 171, 7.7.1999, p. 12.

e) Overall, balancing the interests between consumers and businesses and improving everyday life.

2.4 The Commission believes that the most appropriate method in both cases is 'targeted' harmonisation. It will be full harmonisation for contract rules covering the supply of digital content and the online sales of goods, and for key mandatory rights and obligations of the parties to a contract for the supply of digital content and the online sales of goods. This represents almost all of the Directive's provisions, with the exception of the 'rules on formation, validity or effect of contracts, including the consequences of the termination of a contract' and (Article 1(4) of the Proposal for a Directive on Distance Selling) certain aspects of its enforcement.

2.5 With regard to the scope of application, the Commission expressly limited this to contract law terms in a business to consumer interaction, because as mentioned in the Impact Assessment (IA, p. 23) there is no evidence to suggest that the differences in contract law hinder EU businesses from buying online from other Member States. In this connection, the Commission recognises 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.

2.6 With regard to the selected legal instrument, the Commission justifies its use of a directive instead of a regulation as in its view directives are more appropriate in that they leave Member States free to decide how to transpose them into national law. According to the Commission, this option, combined with targeted full harmonisation of mandatory consumer rights, will provide an appropriate balance between a high level of consumer protection at EU level and significantly increased opportunities for businesses.

2.7 The economic rationale which the Commission gives for the directives in hand is based on certain assumptions, of which the following stand out:

- a) the European e-commerce market still has significant untapped potential;
- b) the creation of a Digital Single Market will generate additional growth in Europe;
- c) EU businesses will be able to increase their competitiveness by selling more easily to a market that is much larger than their national markets;
- d) giving consumers uniform rights with a high level of consumer protection will increase their confidence to buy abroad;
- e) 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 EUR 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 EUR 18 billion;
- f) on top of that, a wider choice of products and services will translate into higher consumer welfare. Between 7,8 and 13 million additional consumers would start buying online across borders. Overall, real EU GDP would be expected to gain about EUR 4 billion per year.

2.8 However, in order to secure these supposed outcomes, the two directives proposed here are not enough; they are part of a larger package of measures, of which the Commission is specifically highlighting:

- a) The proposal for a Regulation on cross-border portability of online content services;

- b) Developing high-quality cross-border parcel delivery services;
- c) Abolishing geo-blocking;
- d) The entry into operation of the Online Dispute Resolution platform ⁽⁴⁾.

2.9 Finally, the Commission explains the need to ‘act now’ before it is too late, since any delay regarding digital content entails a risk of national laws emerging, leading to fragmentation of the EU market and causing obstacles to both consumers and suppliers participating in cross-border transactions.

3. General comments

3.1 The economic and psychological rationale demonstrating the link between the proposed legislative measures and the increase in e-commerce and its repercussions on European growth are supposedly set out in the study appended to the IA. However, a detailed analysis thereof does not demonstrate with any certainty that the data on which it is based and the conclusions it draws are absolutely reliable, or that other factors might not affect them or other options not produce better results.

3.1.1 Even if some of the basic statistical data is correct — namely that 62 % (page 10) of European traders, equating to more than 122 000 businesses, and more than 13,5 % (page 13) of consumers, representing 8 to 13 million additional consumers, raising the total number to 70 million, would start buying online across borders if the alleged obstacles and additional costs resulting directly from the current legal system in force were to be removed — this does not allow us to determine with certainty an increase in the volume of trade warranting an associated estimated 0,03 % increase in European GDP, equivalent to around EUR 4 billion, as its necessary and exclusive consequence. In contrast, it is certain that every business will have to bear costs of EUR 7 000 on average to adjust their contracts to the new arrangements.

3.1.2 Furthermore, the same study does not properly quantify the fact that other additional factors — such as the language question or tax arrangements, quality, cost and availability of high speed internet services, the risk of fraud, legal costs, secure methods of payment, certification of identity and the good repute of sellers, lack of trust in judicial and extrajudicial conflict settlement procedures — will not continue to have a decisive influence on decisions to carry out cross-border online transactions, perhaps more than the current legal system (described in pages 7 and onwards, and 18 and onwards of the impact assessment).

3.1.2.1 Delays in transposition and difficulties in the application and the inefficiency of certain ADR systems set up under Directive 2013/11/EU ⁽⁵⁾ are particularly relevant in this respect, and are consequently mentioned in all the studies that the Commission has requested. This is often related to the lack of financial means in some Member States and, even more, to the apparent ineffectiveness of the ODR system set up under Regulation (EU) No 524/2013 ⁽⁶⁾, which came into force on 15 February 2016, and which has proven crucial to the functioning of a Digital Single Market.

3.1.3 Moreover, the relative importance of the elasticity of supply and demand cannot be detected clearly in the calculation of market saturation in terms of perfect competition which, in any case, being purely theoretical, is essential for the credibility of the model, not to mention factors external to macroeconomic policy which are key in determining consumers’ purchasing decisions, such as the consequences of austerity policies, by comparison with growth policies based on consumption and Keynesian-type investment.

⁽⁴⁾ OJ L 165, 18.6.2013, p. 1.

⁽⁵⁾ OJ L 165, 18.6.2013.

⁽⁶⁾ See footnote 5.

3.1.4 Lastly, the Commission's assessment puts the emphasis on the proposed model, and has not taken due account of the economic consequences of the other four models which could have been chosen (page 23 and onwards of the impact assessment), which would likewise help remove these same obstacles, in such a way as to enable comparative analysis. This applies in particular to option 5 — an optional European model contract combining an EU trust mark (page 25), despite being a simple and cheap option entailing little red tape (pages 38 and onwards); in other words, it would best correspond to the principles of the 'Better Regulation' package⁽⁷⁾ and REFIT⁽⁸⁾. This option received support during preparatory consultations.

3.2 The grounds for opting for maximum harmonisation directives have likewise not been adequately explained. The EESC has generally stated that, when it comes to harmonising matters essentially related to the functioning of the single market, it prefers the use of regulations, which can be as detailed as necessary. However, it has also indicated that, in areas that have a particular impact on consumers' rights, its preference is for minimum harmonisation directives such as that flowing from the principle set out in TFEU Article 169(4).

3.2.1 On the contrary, the EESC has repeatedly spoken out against the Commission's over-riding tendency in recent years to adopt maximum harmonisation directives offering a low level of protection, barely responding to professionals' interests⁽⁹⁾.

3.2.2 In the present case, there is a whole series of questions which the directives do not address but which it is essential to harmonise, such as the age at which minors can conclude digital contracts (which, in the latest version of the Data Protection Directive is set between 13 and 16), the definition of categories of specific unfair terms for online contracts for which there is no provision in Directive 93/13/EEC⁽¹⁰⁾, the recent practice of 'pay now' buttons on the pages of certain social networks that do not connect to the website of a responsible platform and the inclusion, to be recommended, of a standard clause on co-regulation.

3.3 Suitable grounds have not been given either for the option of using two directives instead of just one, in that it unnecessarily duplicates legal provisions, meaning more effort has to go into transposing the directives so that they are consistent with each Member States' domestic provisions and obliging them to go further in interpretation of the directives. This would be completely understandable if the text of the directive on online sales of tangible goods was taken as a basis and the specific features of the sale of intangible goods were included in the exceptions to the basic arrangements, given that it is certain that the distinction between tangible goods and digital content is imperceptible, particularly when they are interlinked.

3.4 According to the Commission, the instrument selected was based on: 189 responses from all categories of stakeholders from across the EU; consultation of a group composed of 22 organisations representing a wide range of interests that met seven times; seminars with Member States; and meetings with national enforcement authorities at the Consumer Protection Cooperation committee meeting and with the national authorities responsible for consumer policy at the Consumer Policy Network meeting (May 2015), which subsequently challenged the validity of the sample on account of its small size⁽¹¹⁾.

3.4.1 However, according to the known and published results⁽¹²⁾ there is not a clear majority in favour of the option chosen: consumer organisations are clearly opposed to any form of the application of the seller's law, although the majority of business organisations and some academics support this option. For their part, the majority of Member States have cast doubt on the need for new legislation on distance purchases (which already includes online sales) and, in particular, on the appropriateness of the two directives, as it is difficult to extract precise and clearly defined guidelines. From an objective analysis of the responses to the consultations, at first glance it would appear that option 5 attracts a general consensus on the part of both professionals and consumers, depending of course on the content of the model contract rules to be agreed upon by the industry and on the degree of usage and acceptance of the trust mark by EU businesses, mainly because it is the one that entails the fewest costs for professionals.

⁽⁷⁾ EESC opinion: OJ C 13, 15.1.2016, p. 192.

⁽⁸⁾ EESC opinion: OJ C 230, 14.7.2015, p. 66.

⁽⁹⁾ See EESC opinions: OJ C 108, 30.4.2004, p. 81, OJ C 317, 23.12.2009, p. 54 and OJ C 181, 21.6.2012, p. 75.

⁽¹⁰⁾ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, as subsequently amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.

⁽¹¹⁾ EESC opinion: OJ C 383, 17.11.2015, p. 57.

⁽¹²⁾ <http://ec.europa.eu/justice/newsroom/contract/opinion/>

3.5 Lastly, it is important to note that the EESC has had the opportunity to issue its views extensively on the subject of consumers' rights in digital matters in various opinions, and has defined a fundamental approach, according to which the same rights recognised in the 'physical' offline world (face-to-face contracts) should be consistent with the online environment, without prejudice to particular specific features or suitable forms of digital (intangible) content transactions, but always in the direction of strengthening, rather than diminishing or undermining such rights. The Commission's proposal concerning the online sale of tangible goods establishes two systems, creating an unacceptable difference in the treatment of online and offline sales of goods.

4. Specific comments

4.1 Notwithstanding the previous comments, the EESC fully agrees with the need for and timeliness of the steps to regulate some of the matters dealt with in the proposed directives in hand, especially with regard to the online sale of digital content. With regard to the online sale of tangible goods, the EESC recommends duly adopting these measures as part of the REFIT process. In the observations set out in this opinion regarding the text of the proposals, due to an obvious lack of space, reference is made only to points where there is disagreement.

4.2 Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015) 635 final — 2015/0288 (COD))

4.2.1 As regards the legal basis, in keeping with previous EESC opinions, consumer representatives — like most EESC members — consider that TFEU Article 169(2) would be a more appropriate basis, insofar as it is basically the definition and protection of consumers' rights that is at stake here, and not just completion of the single market. Certain EESC members, namely business representatives focused on completing the single market, agree with the Commission.

4.2.2 The directive option having been chosen, the EESC considers that it should be based on minimum harmonisation, along the lines of the current sales and guarantees directive (1999/44/CE), in that the option chosen here leads to greater 'fragmentation', less legal certainty and two classes of protection, it being certain that the 'improvements' introduced here would also have to apply to sales in the 'physical world'.

4.2.3 Owing to the complexity of consumer legislation, the proposal interacts with a series of other legislative instruments which it complements⁽¹³⁾ — but requires an unnecessary and difficult task of interpretation, contrary to the sensible rules in the 'Better regulation' package, and creates added transposition difficulties in ensuring compatibility with existing national standards which have transposed or supplemented those Community standards, which vary from one Member State to another.

4.2.4 For this reason, the EESC would prefer for the rules contained in this proposed directive to be taken on board in the review of Directive 1999/44/EC as part of the REFIT Programme.

4.2.5 The following proposals are made for concrete amendments to a number of the provisions:

4.2.5.1 Article 1 — Subject matter and scope

Procurement of certain online and distance services, such as leasing, should not be excluded from the subject matter and scope.

4.2.5.2 Article 2 — Definitions

1. The concept of commercial guarantee should also cover other forms of compensation, otherwise they will not be deemed to be covered by the rules in Article 15.

⁽¹³⁾ Directive 2011/83/EU, OJ L 304, 22.11.2011, p. 64; Directive 2009/125/EC, OJ L 285, 31.10.2009, p. 10; Directive 2010/30/EU, OJ L 153, 18.6.2010, p. 1.

2. The concept of a tangible movable good has not been positively defined, which gives rise to different interpretations by Member States.
3. Also not excluded are other types of products with their own legislation, such as pharmaceuticals and medical appliances, which are excluded from the application of other consumer protection rules.
4. It is not established if online platforms might be considered as 'sellers'.
5. Neither is there a definition of the concept of producer for the purpose of their being directly liable to consumers under the terms of Article 16.

4.2.5.3 **Article 3 — Level of harmonisation**

The level of harmonisation should be minimum, with all the necessary consequences for the regime.

4.2.5.4 **Articles 4 and 5 Conformity with the contract**

1. The durability criterion should be incorporated ⁽¹⁴⁾, influencing the period of validity of the guarantee.
2. Definition of the conformity requirements should be worded in the negative, so as to expressly exempt consumers from having to prove that the good does not conform to requirements: the onus here should be on the seller.
3. The wording of exceptions to the article establishes a generic exclusion of seller liability which cannot be enforceable against consumers without prejudice to the right of recourse (applicable to the case of VW).

4.2.5.5 **Article 7 — Third party rights**

Add at the end: '... except where expressly agreed between parties and set out in detail in the terms of the contract'.

4.2.5.6 **Article 8 — Relevant time for establishing conformity with the contract and reversal of the burden of proof**

1. Add at the end of paragraph 2: 'except in situations where the particular complexity of the installation requires more time, agreed with the seller'.
2. The rights attributed in the proposal to sellers should be passed on to any bona fide possessor.

4.2.5.7 **Article 9 — Consumer's remedies for the lack of conformity with the contract**

1. The provision excludes as an initial option the possibility of the good being returned immediately and payment reimbursed, which would go against consumer rights in various Member States, with significant variations (Greece, Portugal, Ireland, United Kingdom, Denmark and Lithuania).
2. The notion of 'reasonable time' is a subjective one, and provides leeway for differing transpositions on this key subject, which is incompatible with maximum harmonisation. For example, in countries such as Bulgaria, France, Portugal and Luxembourg, the time period is 30 days; in Hungary, Romania, Greece and Estonia it is 15 days. The provision should establish a period corresponding to the maximum applying in some EU countries - 15 days.
3. The term 'impossible' in paragraph 3(a) should be replaced with 'technologically impossible'.

⁽¹⁴⁾ See EESC opinion: OJ C 67, 6.3.2014, p. 23.

4. Likewise, the notion of 'significant inconvenience' is also subjective and should be removed or replaced with the wording found in Austrian law: 'the least inconvenience possible' and accompanied by the possibility of a similar temporary replacement being made immediately available to the consumer until the repair is completed.
5. The Commission proposal has not taken into consideration the existing requirement in various national legislations (France, Malta, Greece, Romania, Portugal and Slovenia) obliging manufacturers to maintain an adequate stock or ensure the timely delivery to sellers of spare parts for the expected lifetime of the product, a matter linked to built-in obsolescence and the guarantee period for the replaced part.
6. The Commission should establish the obligation of the seller to provide a temporary replacement.

4.2.5.8 **Article 10 — Replacement of goods**

1. The Commission has not provided for suspension of the legal guarantee during the repair or replacement period, which happens in most Member States' national legislation. The same goes for periods of mediation, arbitration and legal recourse.
2. Where there is a replacement, the replaced good should benefit from a new and identical guarantee period as of the moment it is delivered.

4.2.5.9 **Article 11 — Consumer's choice between repair and replacement**

1. The term 'significant' should be removed, for the reasons set out above.
2. In the event of 'recurrent' defects, consumers should automatically have the possibility of terminating the contract.

4.2.5.10 **Article 13 — The consumer's right to terminate the contract**

1. The obligation on the consumer to pay for the use, deterioration or loss of a good in the event of the contract being terminated is highly questionable.
2. Moreover, the Court of Justice has already indicated that in the event of the right to replacement being exercised, consumers may not be required to pay compensation for using the defective product (Quelle case ⁽¹⁵⁾).
3. It is not clear what amount is to be reimbursed when the purchase has been made for an overall price for various goods without distinction.

4.2.5.11 **Article 14 — Time limits**

The period should take into account the existing guarantee periods in some Member States (Finland, Netherlands, Sweden and the United Kingdom) which take into account the durability and built-in obsolescence of products.

4.2.5.12 **Article 15 — Commercial guarantees**

1. Add a new indent (d) in paragraph 1: other guarantees offered by the seller on behalf of third parties which aim at providing a guarantee (equipment insurance, brand guarantees, etc.).
2. Information should also be included on the possibility of passing on commercial guarantees to third parties.

4.2.5.13 **Article 16 — Right of redress**

1. The lack of harmonisation on this aspect constitutes an important source of diverging application of the directive, with harmful consequences for trade.
2. The rule should be to provide for direct joint and several liability on the part of the manufacturer with regard to the consumer in cases where the latter opts for repair or replacement of the good.

⁽¹⁵⁾ Case C-404/06 — Judgment of the CJEU of 17 April 2008 (First Chamber), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1461850459727&uri=CELEX:62006CC0404>

3. Provision should also be made with respect to sellers seeking redress against producers, entitling the seller to the full amount of the costs incurred.
4. As in the previous points, provision should be made for joint and several liability on the part of online platforms where consumers have acquired goods.

4.2.5.14 **Article 17 — Enforcement**

Non-harmonisation of supervision in enforcing the directive is one of the main obstacles to effective consumer protection and fair competition.

4.3 **Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (COM(2015) 634 final — 2015/0287 (COD))**

4.3.1 As the Commission itself states, the reasons for the proposal, the collection of expertise and the impact assessments concern both proposals since the two are envisaged as a package with common objectives. For this reason issues of a general character common to both proposals will not be repeated, and the EESC will limit itself to comments relating to specific aspects. It is nevertheless important to point out here that, in general, this proposal warrants the EESC's agreement in principle, particularly as regards:

- a) Special protection for consumers in online purchasing of intangible goods, commensurate with the increased complexity of products, lack of transparency in negotiation, greater threats to data security, privacy and protection, particular forms of unfair practices and unfair terms, hidden costs, prices that vary depending on location and the less substantial nature of the means employed (internet, mobile phones, social networks, etc.).
- b) The urgent need to establish clear rules in an area where it appears only one Member State (United Kingdom) possesses specific regulations on this type of contract.
- c) The appropriateness of pursuing maximum harmonisation, at a high level of protection for consumers, limited to B2C contracts, which, moreover, would be better achieved through a regulation.
- d) The need to define the legal nature of this type of contract in a uniform fashion.
- e) The need for overall approximation to a whole raft of other measures outlined in the Digital Single Market strategy, comprising in particular the initiatives related to the cross-border portability of content, role of platforms, the Free Flow of Data, European Cloud, the VAT-related burden, as well as actions ensuring portability and the interoperability of content, and taking account of the entry into operation of the Online Dispute Resolution platform⁽¹⁶⁾ and the review of Regulation (EC) No 2006/2004 of 27 October 2004 on consumer protection cooperation between national authorities responsible for the enforcement of consumer protection laws.
- f) Special attention to the protection of individuals with regard to the processing of personal data, governed by Directive 1995/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽¹⁷⁾ and Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector⁽¹⁸⁾. These provisions are fully applicable to supplies of digital content, insofar as this entails the processing of personal data.
- g) The review of the regulatory package on electronic communications services.
- h) The need to pay particular attention to cloud computing contracts.

⁽¹⁶⁾ OJ L 165, 18.6.2013, p. 1.

⁽¹⁷⁾ OJ L 281, 23.11.1995, p. 31.

⁽¹⁸⁾ OJ L 201, 31.7.2002, p. 37.

4.3.2 Set out below are some concrete amendments to a number of the provisions in the proposal, which comprises 24 articles (and not 20, as incorrectly indicated in several language versions):

4.3.2.1 *Article 1 — Subject matter*

The clear nature of the ‘contracts for the supply of services’ as the subject matter, clearly demonstrated in the definitions of ‘digital content’ and ‘supply’ in Article 2(1) and (10) of this proposal, reinforces the proposal set out with regard to Article 1 of the previous proposal for a directive.

4.3.2.2 *Article 2 — Definitions*

The EESC would reiterate its suggestion to include individual professionals in the definition of consumers.

4.3.2.3 *Article 3 — Scope*

1. The EESC can accept that payments be made in kind (against ‘counter-performance other than money’) as long as this is defined in a precise manner in terms of content; where personal or other data is provided it will be necessary to specify which data and under what conditions and in what circumstances.
2. It will also be necessary to clarify if certain services such as pay TV are included, as well as *Google* and *Facebook Messenger*, and whether certain physical access platforms or the internet of things come under tangible or intangible goods.
3. It is not clear whether the exclusion referred to in paragraph 5(a) also covers healthcare, gambling and financial services. This requires greater clarification, as otherwise it will create legal uncertainty.
4. It is not clear whether this scope also covers ‘hidden payments’, that is to say services provided for free but which can, while being carried out, include other services which themselves have to be paid for.
5. The scope of the data in Article 3(4) needing to be processed should cover not only the performance but also the ‘conclusion’ of the contract, and the processing of this data should be permitted under the conditions laid down by the law on personal data.
6. It is also essential to clarify the difference between products and services provided online, and those which are entirely tied in with tangible goods, as is the case with wearables and the internet of things, where most of the procedures are at digital level, without prejudice to the existence of a tangible good at the heart of the procedure.
7. It should be made clear that the data centre services, especially cloud computing, ought to be clearly identified in this proposal, irrespective of these being free or subject to charge, given that these services are often associated with other services or products supplied to consumers, and there is thus a risk that they might be excluded from the scope of the directive.
8. It will also be necessary to clarify if the combination of digital content services with communication services such as *Facebook Messenger* or *Google Hangout* are included since these are not currently regulated by Directive 2002/21/EC on electronic communications services, and it has been understood that some of these services should in fact be deemed to be electronic communications services, with increased consumer protection.

9. Likewise, the distinction between situations in which the data obtained are only for the performance of the contract or for meeting legal requirements is unclear. The EESC therefore suggests, as a precautionary measure, that the directive should apply to all services supplied by providing personal data, with the sole exception of those services where the supplier explicitly demonstrates that the data are only for the performance of the contract or meeting legal requirements.
10. Again, in point 4, it will be necessary to clarify when the collection of personal data is for performance of a contract or meeting legal requirements, given that in other sectors such as telecommunications and energy, personal data, although authorised for the performance of contracts, are often used for marketing campaigns carried out by the companies themselves and, in particular, whether this applies to other types of counter-performance apart from money.

4.3.2.4 **Article 4 — Level of harmonisation**

The EESC accepts the reasons for proposing maximum harmonisation, as long as a higher level of protection is guaranteed for consumers.

4.3.2.5 **Article 5 — Supply of the digital content**

The overlap between the obligation in paragraph 2 to ‘supply immediately’ and the consumer directive (2011/83/EU), which for immediate supply requires the consent of the consumer, thus waiving the 14-day right of withdrawal from the agreement (Article 16(m) of the directive) causes a lack of clarity — it seems appropriate to harmonise rules in this field, in order to eliminate the risk of overlapping rules which would be to the detriment of businesses and consumers.

4.3.2.6 **Article 6 — Conformity**

1. Paragraph 1(b): delete ‘where relevant’.
2. Paragraph 1(b): add ‘or could legitimately expect’ after ‘for which the consumer requires it’.
3. Paragraph 2(b): delete ‘where relevant’.

4.3.2.7 **Article 9 — Burden of proof**

Paragraph 3: delete ‘possible and’.

4.3.2.8 **Article 11 — Remedy for the failure to supply**

The wording does not take account of the model for supplying content in fixed-term packages — where lack of access to a single film is difficult to assess proportionately in the context of the cost of an entire package. It also does not take account of the possibility of providing other content at the same price level (preferred by users).

4.3.2.9 **Article 12 — Remedies for the lack of conformity with the contract**

Paragraph 2: replace ‘within a reasonable time’ with ‘without undue delay’.

4.3.2.10 **Article 13 — Termination**

1. Paragraph 2(b): replace ‘the supplier shall take all measures which could be expected in order to refrain from ...’ with ‘the supplier shall refrain from’.
2. Indents (c) (d) and (e) come under copyright rules which are not yet available.

4.3.2.11 **Article 16 — Right to terminate long term contracts**

The period should be only 6 months.

It must be expressly stated that this is to be free of any charge.

Brussels, 27 April 2016.

*The President
of the European Economic and Social Committee
Georges DASSIS*

APPENDIX

I. The following point of the section opinion was modified to reflect a compromise amendment adopted by the Assembly, although at least one quarter of the votes cast were in favour of retaining the original wording (Rule 54(4) of the Rules of Procedure):

a) **Point 3.4.1**

However, according to the known and published results there is not a clear majority in favour of the option chosen: consumer organisations are clearly opposed to any form of the application of the seller's law, although the majority of some business organisations and some academics support this option. For their part, the majority of Member States have cast doubt on the need for new legislation on distance purchases (which already includes online sales) and, in particular, on the appropriateness of the two directives, as it is difficult to extract precise and clearly defined guidelines. From an objective analysis of the responses to the consultations, at first glance it would appear that option 5 attracts a general consensus on the part of both professionals and consumers, depending of course on the content of the model contract rules to be agreed upon by the industry and on the degree of usage and acceptance of the trust mark by EU businesses, mainly because it is the one that entails the fewest costs for professionals.

Outcome of the vote:

For: 115

Against: 91

Abstentions: 18

II. The following compromise amendments were rejected by the Assembly, although at least one quarter of the votes cast were in favour of adopting them (Rule 54(4) of the Rules of Procedure):

b) **Point 4.2.1**

As regards the legal basis, in keeping with previous EESC opinions, most EESC members, including consumer representatives — ~~like most EESC members~~ — consider that TFEU Article 169(2) would be a more appropriate basis, insofar as it is basically the definition and protection of consumers' rights that is at stake here, and not just the completion of the single market. ~~Certain EESC members, namely~~ business representatives more focused on the necessity for entrepreneurs to have a set of clear rules to comply with, on completing the single market, agree with the Commission.

Outcome of the vote:

For: 110

Against: 110

Abstentions: 10

Rule 56(6) of the EESC's Rules of Procedure states that if the vote is a tie (an equal number of votes for and against), the chairman of the meeting shall have a casting vote. Pursuant to this rule, the chairman decided to reject the proposed compromise amendment.

c) **Point 4.2.2**

The directive option having been chosen, most EESC members, including consumer representatives, ~~at the EESC~~ considers that it should be based on minimum harmonisation, along the lines of the current sales and guarantees directive (1999/44/CE), in that the option chosen here leads to greater 'fragmentation', less legal certainty, and two classes of protection, it being certain that the 'improvements' introduced here would also have to apply to sales in the 'physical world'. EESC business representatives, however, agree with the proposal to apply maximum harmonisation, for alleged reasons of clarity in application of rights in the single market.

Outcome of the vote:

For: 102

Against: 115

Abstentions: 14

d) Point 4.2.5.3

Article 3 — Level of harmonisation

Most EESC members, including consumer representatives, state that the level of harmonisation should be minimum, with all the necessary consequences for the regime. Business representatives favour maximum harmonisation.

Outcome of the vote:

For: 112

Against: 114

Abstentions: 12

e) Point 4.2.5.4

Articles 4 and 5 Conformity with the contract

1. The durability criteria should be incorporated, influencing the period of validity of the guarantee.
2. Most EESC members, including consumer representatives, state that the definition of the conformity requirements should be worded in the negative, so as to expressly exempt consumers from having to prove that the good does not conform to requirements: the onus here should be on the seller. Business representatives however, recommend that the definition of conformity requirements should be worded generally. For them, the main criterion for establishing conformity should be whether the goods correspond to what was deemed agreed (e.g. regarding type, quantity, quality and other characteristics).
3. The wording of exceptions to the article establishes a generic exclusion of seller liability which cannot be enforceable against consumers without prejudice to the right of recourse (~~applicable to the case of VW~~).

Outcome of the vote:

For: 99

Against: 126

Abstentions: 13

f) Point 4.2.5.7

Article 9 — Consumer's remedies for the lack of conformity with the contract

1. Consumer representatives notice the provision excludes as an initial option the possibility of the good being returned immediately and payment reimbursed, which would go against consumer rights in various Member States, with significant variations (Greece, Portugal, Ireland, United Kingdom, Denmark and Lithuania). Business representatives agree — in line with maximum harmonisation — that this option has not been provided for.

2. Consumer representatives feel the notion of 'reasonable time' is a subjective one, and provides leeway for differing transpositions on this key subject, which is incompatible with maximum harmonisation. For example, in countries such as Bulgaria, France, Portugal and Luxembourg, the time period is 30 days; in Hungary, Romania, Greece and Estonia it is 15 days. The provision should establish a period corresponding to the maximum applying in some EU countries — 15 days. Business representatives state that the notion of 'reasonable time' is objective legal wording, and at the same time provides leeway for application in differing situations.
3. The term 'impossible' in paragraph 3(a) should be replaced with 'technologically impossible'.
4. Consumer representatives likewise feel the notion of 'significant inconvenience' is also subjective and should be removed or replaced with the wording found in Austrian law: 'the least inconvenience possible' and accompanied by the possibility of a similar temporary replacement being made immediately available to the consumer until the repair is completed. Business representatives refer to the fact that this well-known legal wording provides leeway for application in differing situations.
5. The Commission proposal has not taken into consideration the existing requirement in various national legislations (France, Malta, Greece, Romania, Portugal and Slovenia) obliging manufacturers to maintain an adequate stock or ensure the timely delivery to sellers of spare parts for the expected lifetime of the product, a matter linked to built-in obsolescence and the guarantee period for the replaced part.
6. ~~The Commission should establish the obligation of the seller to provide a temporary replacement.~~

Outcome of the vote:

For: 100

Against: 135

Abstentions: 2

g) Point 4.2.5.10

Article 13 — *The consumer's right to terminate the contract*

~~1. Business representatives request that the provision of Directive 1999/44/EC, art.3§ 6 would be added, providing the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.~~

1. The obligation on the consumer to pay for the use, deterioration or loss of a good in the event of the contract being terminated is highly questionable.
2. Moreover, the Court of Justice has already indicated that in the event of the right to replacement being exercised, consumers may not be required to pay compensation for using the defective product (Quelle case).
3. It is not clear what amount is to be reimbursed when the purchase has been made for an overall price for various goods without distinction.
4. Business representatives request that the provision of Directive 1999/44/EC, art.3§ 6 would be added, providing the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

Outcome of the vote:

For: 110

Against: 118

Abstentions: 18

h) Point 4.2.5.10

Article 13 — *The consumer's right to terminate the contract*

1. Most EESC members, including consumer representatives, feel the obligation on the consumer to pay for the use, deterioration or loss of a good in the event of the contract being terminated is highly questionable. Business representatives, however, support this provision.
2. *Moreover, the Court of Justice has already indicated that in the event of the right to replacement being exercised, consumers may not be required to pay compensation for using the defective product (Quelle case).*
3. *It is not clear what amount is to be reimbursed when the purchase has been made for an overall price for various goods without distinction.*

Outcome of the vote:

For: 101
Against: 132
Abstentions: 10

i) Points 1.3 and 1.4

1.3 *Moreover, with regard to the aspects addressed, ~~the~~ most EESC members, including consumer representatives, disagrees with the legal basis cited by the Commission, and proposes Article 169 TFEU instead. It therefore follows that, in principle, the measures adopted should be based on minimum harmonisation, in line with paragraph 2(a) and paragraph 4 of that Article, which has been generally accepted by the European legislator.*

1.4 *~~It therefore follows that, in principle, the measures adopted should be based on minimum harmonisation, in line with paragraph 2(a) and paragraph 4 of that Article, which has been generally accepted by the European legislator. However, business representatives agree with the legal basis cited by the Commission, since internal market issues are deemed to be dominant ~~at stake~~ and companies argue that they need one set of clear rules to comply with.~~*

Outcome of the vote:

For: 111
Against: 123
Abstentions: 12
