



Department
for Business
Innovation & Skills

**DRAFT DIRECTIVES ON THE
ONLINE SALE OF DIGITAL
CONTENT AND TANGIBLE GOODS**

UK Government call for views

JANUARY 2016

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Draft Directives on the online sale of digital content and tangible goods – call for views

The Commission’s Digital Single Market strategy aims to make the single market fit for the digital age. Realising the vision of the Digital Single Market has the potential to unlock significant economic value to UK consumers and businesses. More detail on the Government’s vision for a digital economy in Europe can be found on this microsite:

<http://engage.number10.gov.uk/digital-single-market/>.

The UK Government asked the EU to take bold steps to create a Digital Single Market that delivers for consumers, entrepreneurs and established businesses trying to break into new markets.

Introduction

This European Commission set out a [strategy](#) for the Digital Single Market (DSM) under 16 headings in May 2015. The benefits to both business and consumers from completing the DSM could be substantial. According to the European Parliament the potential benefits from the DSM overall could be worth up to €415 billion, or 3 per cent of EU GDP.

As part of the DSM strategy, the European Commission published two new draft Directives on 9th December 2015, proposing harmonised consumer rights for the sale of digital content and the online sale of tangible goods. The Commission’s proposals and associated documents can be found [here](#). The aim of the Directives is to reduce barriers to the growth of cross-border e-commerce in the European Union by setting common rules across the EU for certain key aspects of consumer law. Taking effective steps toward unlocking these barriers could have an enormous impact on UK businesses and consumers.

The draft Directives are based on existing EU law and as such mirror many of the consumer rights and obligations we already have in place in the UK. However there are also some important aspects in which the proposals differ from the rights currently in place in the UK (contained in the Consumer Rights Act 2015). If adopted as currently drafted, the proposal would therefore require some changes to the UK consumer protection regime. We have set out some brief observations on the proposals in including on the main differences with the current position in the UK in the sections following. We are therefore objectively seeking the views of interested parties. We are keen to receive observations on some or all of these potential changes, as well as broader reflections on the proposals and the benefits of having a maximum harmonisation measure from both a business and consumer perspective.

In particular, we would be grateful for your comments on the potential impacts of these changes on your business, your business members and on consumers. We would also be grateful for views on the balance of the proposals, comparing the impact of the changes to UK law against the benefits of opening up the digital single market.

Responses

Please email your views, including a brief description of your interest in the proposals, to consumer.dsm@bis.gsi.gov.uk by 10 February 2016.

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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)

The proposal on digital content means that for the first time consumers will have a clear set of rights when they buy digital content delivered in digital form (for example games, video, music, software, services for the storage of data, for digital interaction with others etc.) across the EU, and that business will have a single set of rules and obligations wherever in the EU they market and sell digital content. **The proposal, if adopted as currently drafted, would mean Member States could not regulate further in respect of the contracts within scope of the directive.**

The UK has led the way in this area, introducing the first bespoke consumer rights in Europe covering the purchase of digital content. The Commission has identified that a lack of clearly harmonised rules in this area has already led to disparities across the Member States. Legislating now will deal with this fragmentation and prevent further differences from creating more barriers.

The proposal reflects in good part the approach to digital content already in place in the UK. However, it differs in some important respects, giving rise to questions as to its proportionality, practicality, and relationship with existing EU rules in related areas. Nevertheless, we are hopeful that many of these issues can be resolved in the course of refining and clarifying the text during negotiations.

Scope – “free” digital content

The proposal seeks to include “free” digital content; that is, content which is provided in return not for money but for the agreement to provide access to the consumer’s personal and other data.

The digital content provisions in the Consumer Rights Act 2015 apply to digital content that has been paid for with money, that is associated with any paid for goods, digital content or services or that is paid for with a facility, such as a token, virtual currency or gift voucher. The only provision of the Consumer Rights Act which extends to “free” content is the remedy for damage to a device or to other digital content which is caused by the trader’s failure to use reasonable care or skill to prevent it. We also have the power to extend the UK regime to “free” content if there proved to be sufficient evidence of consumer detriment resulting from these sorts of contracts.

The EU proposal applies to a broader range of digital provision than is covered in the digital content provisions of the Consumer Rights Act. It extends the scope to contracts where the supplier supplies digital content in exchange for the consumer “actively” providing data “such as name and e-mail address or photos, directly or indirectly to the supplier for example through individual registration or on the basis of a contract which allows access to consumers’ photos”. The concept of the consumer “actively providing” access to data by way of payment for free content is not clear in the directive. For example would it require a positive action on the part of the consumer, or does it imply more than a consumer simply agreeing to make their data available? An extension to free services may mean that the obligations and remedies proposed in the event of failure to comply

with the contract are not proportionate in the circumstances. It is possible these might unduly inhibit this often low margin but very innovative business model. We do however note that financial remedies would not apply to free content.

Scope – digital services

The proposal also extends to certain types of digital services which are not currently covered by the digital content provisions in the Consumer Rights Act 2015. It is clear that this would cover, for example cloud storage and social networking; but the full extent in respect of communications services is not clear. There are already EU rules on electronic communication services and these rules and others, for example the E-commerce directive, are being reviewed or are in discussion. Their subject matter may overlap with that of the proposal although “electronic communication services as defined in Directive 2002/21/EC” (the Framework Directive)) are exempted. There is, for example, uncertainty about the extent to which pay TV may be included in other instruments which replicate or apply different rules to those in the proposal. Generally, overlap is to be avoided if possible and we think the directive could be clearer as to which services are covered and which are not.

The recitals to the directive suggest that the regime should not apply to digital content which is embedded in goods and which is integral and subordinate to the operation of the goods (for example, a programme in a washing machine). Although we think this needs clarifying in the provisions of the directive, we understand that it means that the consumer’s rights in respect of the tangible goods (for example the washing machine) apply in the event that there is a fault with the digital content (as they do in the UK).

As is the case under the Consumer Rights Act, the new rights would apply only to the digital content elements of combined or mixed contracts which cover the supply of goods and digital content as separate elements (for example a TV box included in the contract for TV or movie streaming, or games pre-loaded on hardware devices), and not to the goods element.

Data protection

The proposed remedies in the case of terminating a contract include rules on what happens to data provided by consumers and collected by the trader. Although the proposal says this directive is without prejudice to the protection of individuals with regard to the processing of personal data, any confusion with or unjustified extension of the already comprehensive EU rules in this area, including the recently agreed General Data Protection Regulation (GDPR) should be avoided.

Installation of digital content

The proposal will introduce a new provision to cover whether digital content is successfully installed in the consumer’s hardware and devices. If there is a failure in installation it will be treated as non-conformity with the contract. This provides consumers with the same non-conformity remedies where the content is installed by the supplier, or where the consumer carries out the installation in accordance with the instructions provided by the supplier.

Modification of digital content

Under the Consumer Right Act 2015 where digital content is supplied subject to the right of a trader to modify the content, the consumer's rights apply to the modified version as they apply to the original supply of the content. This does not prevent the trader from improving or adding new content if it conforms to the information originally provided by the trader, or if the trader changes the description of the content. Under the proposal, modification of digital content is not restricted where it is provided for in the contract, except to the extent that the modifications adversely affects access to or use of the digital content. In that case the contract must permit such modification and the supplier must provide notification to the consumer in advance. In such a case the consumer is able, in response, to terminate the contract

Standards and remedies

The proposal departs from the UK provisions which set the standards to be expected of products irrespective of what the contract may say (i.e. that they should be fit for purpose, as described, and, of satisfactory quality which could reasonably be expected in the circumstances). Under the proposal, "fit for purpose" is a standard which would apply irrespective of what the contract may say or omit. Fitness for purpose includes functionality, interoperability and other performance features taking into account, for example, whether money has been paid for the content, industry good practice, and any public statements made by the supplier. We think in practice that this approach will have the same effect as the approach in the UK. However, it is not in line with the proposal on online and other distance sales of goods.

As with the UK regime the essential remedy for non-conformity with the contract is for the digital content to be brought into conformity or replaced free of charge within a reasonable time. If this is impossible, disproportionate, or unlawful, the consumer is entitled to a proportionate price reduction or to terminate the contract.

Reversal of the burden of proof

Currently in the UK, there is a 6 month reverse burden of proof, which means that proving that the digital content is in conformity with the contract at the time of supply rests with the supplier for the first 6 months of the contract. Under the proposal the reversal of the burden of proof would last for as long as the period of time the digital content is provided under the contract which seems considerably more than the UK arrangement. This approach is justified in the recitals to the proposal by reference to the supplier's better knowledge and access to know how and to be better placed to assess whether faults might be due to the consumer's digital environment. These provisions will be subject to the supplier being able to show that the digital environment of the consumer is not compatible with the content, provided the consumer had been informed of the technical requirements for use prior to purchase. The consumer will be obliged cooperate to the extent necessary for the supplier to determine the digital environment.

Termination of the contract

Aside from the right to terminate in the event that a repair or replacement is not available the consumer will also be entitled to terminate after one year any contract of indefinite length or which extends beyond one year. As mentioned above, this right only relates to the digital content element of mixed or combined contracts which include, for example the supply of goods or other services.

The proposed rules on the return of consumer data to the consumer in the event the contract is terminated appear to be very broad and potentially onerous for business. They go beyond what would already be required in respect of personal data under the General Data Protection Regulation by requiring the return of other data. While it is not unreasonable to ensure that the consumer has access to data and content they have produced or stored in the course of using digital content, the extent of this obligation as described in the proposal appears to cover data which would be difficult for the trader to retrieve and which would appear to be of little practical use to the consumer.

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sale of goods (COM(2015) 635 final)

The intention of the proposal is to remove barriers to a fully functioning Digital Single Market in Europe by fully harmonising certain key mandatory rights and obligations of the parties to a contract for the online sale of goods.

The proposed Directive will replace certain aspects of the minimum harmonisation Sale of Consumer Goods and Associated Guarantees Directive (1999/44/EC) and replace it with a maximum harmonisation Directive. This means that there are implications for existing UK consumer protections found in the Consumer Rights Act [that implements the Sale of Consumer Goods and Associated Guarantees Directive (1999/44/EC) into UK law.]

Offline and online differences

The proposals could see two sets of rules existing for online and other distance sales of goods and for offline, or face-to-face, purchases. This could create differences in the rights enjoyed by consumers depending on whether they bought their goods online or off-line (face to face, in a shop, for example).

Impact on UK consumer protections

The proposal focusses on key rights and remedies that are set out in the Sale of Consumer Goods and Associated Guarantees Directive (1999/44/EC) and implemented in the UK in the Consumer Rights Act (2015). The proposal retains many of the same rights; in particular there is no change to the criteria for establishing conformity with the contract and requirements for conformity of the goods (i.e. establishing whether the goods are “fit for purpose” and free of fault). However there are some differences between the statutory remedies available to consumers in the proposal and those in the Consumer Rights Act.

In the UK the proposals as published will therefore mean that the following key rights would need to be repealed for online and other distance sales:

The short term right to reject

In the United Kingdom consumers can exercise a short term right to reject faulty goods. This right was recently clarified in the Consumer Rights Act 2015 where the short term right to reject and obtain a full refund was set at a minimum of 30 days (except in the case of perishable goods). As the Commission’s proposal is based on maximum harmonisation and it does not include a short term right to reject it would mean that the UK would need to repeal this right in relation to goods purchased online.

Repealing this right would mean that consumers would not be able to obtain a refund until they had first pursued other remedies (repair; replacement; full or partial refund if a repair or replacement cannot be provided within a reasonable time and without significant inconvenience to the buyer) unless the retailer decides to provide more generous conditions.

The proposal does not affect the rights in the Consumer Rights Directive (2011/83/EU), so consumers will still be entitled to a 14 day right of withdrawal for goods bought online or at a distance. However, unlike the short term right to reject, the consumer has to bear the cost of returning goods under the right to withdraw, and the trader may make a deduction for use from the refund, depending on the circumstances.

Loss of a one repair or replacement limit

The Consumer Rights Act 2015 provides that consumers can pursue a price reduction or refund (subject to deduction for use after 6 months) after the goods have undergone one repair or replacement. The UK would need to repeal the one repair or one replacement limit under the proposal and reinstate the position that existed before the Consumer Rights Act 2015 so that consumers can ask for a reduction in price or refund if a repair/replacement cannot be provided within a reasonable time and without significant inconvenience to the buyer.

Liability period

At present the liability and limitation periods for remedies are aligned at six years in England, Wales and Northern Ireland and five years in Scotland. The proposal will see a reduction in the UK's liability periods (the period in which a fault has to appear before a consumer can make a claim) to 2 years. The UK would have discretion as to whether to keep the limitation period (the period in which a claim must be brought) the same or to align with the EU liability period.

Deduction for use

The Consumer Rights Act provides if a repair or replacement is impossible or has failed or has not been carried out in a reasonable time or without significant inconvenience to the consumer then the consumer, may reject the goods and obtain a refund. If the final right to reject is exercised within 6 months of delivery of the goods then the trader must generally give the consumer a full refund. After the first 6 months, the trader may apply a deduction to the refund to account for the use the consumer has had. Under the proposal traders would be able to apply a deduction to the refund whenever a consumer exercised the final right to reject, including during the first 6 months, but the consumer would only be liable for any decrease in value to the extent that it exceeded depreciation through regular use. Any deduction would be capped at the price paid by the consumer for the goods.

Extension of protection

Reversal of the burden of proof

The proposal includes an extension to the reversal of the burden of proof so that the consumer will have the benefit of a presumption that the goods were faulty when delivered for a period of 2 years (increased from 6 months). This would mean that, for the duration of the liability period, it would be for the supplier, not the consumer, to prove that the goods were satisfactory at the time of sale.



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