

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

Ref. 15-7172

16 November 2015

SUBCOMMITTEE IV ON FLANKING AND HORIZONTAL POLICIES

EEA EFTA Comment

on the upcoming proposal regarding contract rules for online purchases of digital content and tangible goods

1. PREFACE

- 1.1. The EEA EFTA States have continuously and actively followed the European Union's work on contract law. We have submitted comments on previous initiatives by the European Commission, among others the Green Paper on the Review of the Consumer Acquis (COM (2006) 744), the proposal for a Directive on Consumer Rights (COM (2008) 614) and the proposal for a Regulation on a Common European Sales Law (COM (2011) 635).
- 1.2. The EEA EFTA States have studied with great interest the preliminary information provided by the Commission on the upcoming instrument(s) concerning contractual rights on the supply of digital content and online sales of tangible goods, and would like to give our preliminary comments on those issues.
- 1.3. The EEA EFTA States may provide additional national comments, and this comment is without prejudice to the question of the EEA relevance of the upcoming proposal. The required thorough assessment of EEA relevance will be conducted by the EEA EFTA States when the proposal has been adopted by the EU legislator.

2. GENERAL COMMENTS

- 2.1. The EEA EFTA States welcome the Commission's initiative to propose new contract rules on digital content, and believe that this could increase consumer confidence and legal certainty to the benefit of both consumers and traders. Indeed, in our comments of 3 March 2009 on the proposal for a Consumer Rights Directive, the EEA EFTA States mentioned the need for such an instrument.

- 2.2. The EEA EFTA States firmly believe that a European instrument on contract law should provide for a high level of consumer protection, and that the general level of consumer protection in the Member States should not be reduced to the detriment of the consumer. This is vital to ensure consumer confidence, which is a prerequisite to achieve a digital single market. The preliminary information provided by the Commission on the upcoming rules has raised concerns among some stakeholders that the consumer protection will not be sufficiently high to deliver consumer confidence on key issues, *cf.* points 3.6. and 4.2.
- 2.3. We urge the Commission to make a thorough evidence-based assessment of whether each particular right needs to be fully harmonised at EU level or whether the Member States can set the level of consumer protection with regard to certain rights, particularly those issues that have been a key part of earlier dossiers regarding consumer contract law.
- 2.4. The EEA EFTA States emphasise the importance of similar consumer rights for all types of purchases, whether offline or online, goods or digital content, unless there are special circumstances that warrant a differentiated approach, for example the special information requirements and cooling off period for online sales pursuant to the Consumer Rights Directive.

3. DIGITAL CONTENT

- 3.1. The EEA EFTA States believe that, as a starting point, consumers should be afforded similar protection when purchasing digital products as provided by the Directive on Consumer Sales and Guarantees (1999/44/EC) with regard to goods. However, due to the specific characteristics of digital content, consumers should have certain special rights.
- 3.2. First, upon terminating a digital content contract, consumers should have the right to obtain their own user-generated data from the trader in a reusable format. This is essential to ensure competition between different suppliers of digital content.
- 3.3. Second, consumers should have the right to limit their financial risks in subscription contracts. Even though the Commission and EU/EEA States have done significant work in trying to tackle the problem of children making in-app purchases for exorbitant amounts, this is still a consumer problem, and the EEA EFTA States believe that legislative action is needed. One way forward could be as envisaged in the OECD Policy Guidance on Mobile and Online Payments section E iii, page 15, which states:¹

“To enable parents or guardians to monitor and limit children’s mobile and online payments for goods and services, businesses, governments and other stakeholders should: [...] iii. Develop tools which enable parents or guardians to exercise different types of controls over the purchases they authorise their children to make; this would include, for example [...] tools that enable parents or guardians to establish ceilings on the amounts that could be charged to an account during defined periods.”

¹ Organisation for Economic Co-operation and Development (OECD) (2014), “Consumer Policy Guidance on Mobile and Online Payments”, *OECD Digital Economy Papers*, No. 236, OECD Publishing (<http://dx.doi.org/10.1787/5jz432cl1ns7-en>)

Such ceilings or payment caps could be beneficial for industry and consumers alike as they would not deprive consumers of the possibility of making in-app purchases altogether, but simply limit their financial risks to a pre-set amount. In some EEA EFTA States these types of payment caps have been introduced for services billed through the telephone invoice, which has worked well for both consumers and industry.

- 3.4. Third, for purchased digital content downloaded by the consumer, he or she should have the right to a new copy upon payment of delivery costs. A particular trait of downloaded digital content is the fact that reproducing a new copy and delivering it to a consumer is practically free. For example, if a consumer purchases a movie or an app and loses his or her device, the trader will not incur any additional costs for providing the consumer with a new copy. In many cases, providers will deliver a new copy without requiring additional payment. The EEA EFTA States believe that this should be a European consumer right under the new instrument envisaged by the Commission.
- 3.5. From the preliminary documents provided by the Commission it seems that the Commission intends to propose harmonised rules on issues that are presently regulated by national legislation transposing the Unfair Terms Directive (93/13/EC). The EEA EFTA States are of the opinion that amendments to the current unfair terms regime should be addressed in the Commission's legislative assessment of the consumer acquis, including the Unfair Terms Directive, and not in a sectoral instrument on digital content. This may lead to a fragmented and unclear legal framework. As emphasised in point 2.4 above, general contract rules are preferred over specific rules, unless there are special circumstances that warrant a differentiated approach.
- 3.6. If the Commission decides to include provisions on contract terms, such as those envisaged in the preliminary documents from the Commission, the EEA EFTA States are also concerned that national consumer protection will be reduced. Lock-in periods in long-term contracts are an example of this. In some EEA EFTA States it is deemed an unfair contract term to obstruct the possibility for consumers to switch services or digital content providers. This is good for consumers, traders providing competitive products and the markets as such. In certain cases, however, where the trader makes an investment in the contract and the consumer receives an economic benefit from this investment, it can be reasonable for the trader to have the opportunity to recoup his or her investment. In such cases, traders are allowed a maximum one-year lock-in period. Consumers always have the opportunity to get out of such a contract by refunding the trader the part of the investment that has not been recouped.

4. ONLINE SALES OF TANGIBLE GOODS

- 4.1. The EEA EFTA States firmly believe that an instrument giving different contractual rights for consumers depending on the sales channel, whether online or offline, is not the way forward to achieve harmonised contract rules. If consumer rights in key areas are different online to offline, this will increase legal uncertainty among both consumers and traders, and give one sales channel a competitive advantage over the other. If the Commission sees the need for further harmonisation in this area it should be done as part of the fitness check of the Consumer Sales and Guarantees Directive, cf. point 3.5.
- 4.2. If the Commission decides to include provisions on contract terms, such as those envisaged in the provided documents, the EEA EFTA States are concerned that

consumer protection will be substantially reduced in many EU/EEA States, for instance if the Commission proposes a time limit of two years from delivery to demand remedies for non-conformity. Since many products are intended to, and consumers expect them to, last longer than two years, the EEA EFTA States believe that a two-year time limit is too short to provide consumers with fair protection.

4.3. Furthermore, this limitation on consumer redress does not fit well with another Commission strategy, namely the Circular Economy Strategy. Pursuant to the strategy's road map this initiative:²

“requires action at all stages of the life cycle of products: from the extraction of raw materials, thorough material and product design, production and consumption of goods [....].”

Furthermore it states that:

“Important barriers to the circular economy arise from market failures [...] but also governance and regulatory failures, some of which can be linked to EU legislation.”

If a short time period is implemented throughout the EU/EEA this may lead to less durable goods, as producers will no longer have the same economic incentive to make durable goods, since consumers will lose their rights after two years.

4.4. We are aware that the Commission is considering requirements on durability in the Ecodesign Directive (2009/125/EC). However, the EEA EFTA States believe that consumers' contractual rights should correspond with such product requirements. This would contribute to the efficiency of the product requirements by providing consumers with the right to demand remedies if a product lacked the required durability. If a two-year time limit is adopted, EU/EEA consumers will have no possibility for redress if a product malfunctions after two years due to a production error, or even deliberate shortening of the replacement cycle (planned obsolescence), even though it is supposed to last considerably longer pursuant to other Community instruments.

² http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2015_env_065_env+_032_circular_economy_en.pdf