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STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE IV ON FLANKING AND HORIZONTAL POLICIES

EEA EFTA Comment

on the proposal for a directive on contracts for the supply of digital content

and

on the proposal for a directive on contracts for online and other distance sales of goods

1. INTRODUCTION

- 1.1 The EEA EFTA States have studied with great interest 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) 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). In some of the EEA EFTA States, the proposals have been the subject of meetings between the respective governments and interested parties, as well as a national public consultation involving various stakeholders. Against this background, the EEA EFTA States welcome the opportunity to comment on certain aspects of the proposals.

2. DIGITAL CONTENT

- 2.1 The EEA EFTA States welcome the European Commission's proposal for new contract rules for the supply of digital content, and believe that the proposal has the potential to increase consumer confidence and legal certainty to the benefit of both consumers and traders. We support the main features of the proposal, including the inclusion of in-kind payments in the scope of the directive (cf. Article 3), the reversal of the burden of proof on the supplier (cf. Article 9), and the adoption of specific remedies in cases where the digital content is not in conformity with the contract (cf. Articles 12 and 13). The EEA EFTA States also welcome the proposal that the consumer, upon terminating the

- contract, is entitled to retrieve user-generated data within a reasonable time and in a commonly used data format (cf. Article 13).
- 2.2 However, the EEA EFTA States still have some concerns and suggestions regarding the level of harmonisation, financial risks and termination of long-term contracts.
 - 2.3 Although full harmonisation as proposed in Article 4 could be sensible from a Digital Single Market perspective, it is important to ensure that the proposal does not lower the level of consumer protection afforded by existing national standards or legislation.
 - 2.4 With respect to the financial risks inherent in certain subscription contracts for the supply of digital content, the EEA EFTA States recall their previous statement of November 2015. That statement suggested that consumers, notably parents or guardians of children making in-app purchases, should have the right to limit their financial risks in subscription contracts.
 - 2.5 Meanwhile, the public consultation in some of the EEA EFTA States confirms that the problem of children making in-app purchases for exorbitant amounts is prevalent. The EEA EFTA States would therefore encourage the Council of the EU and the European Parliament to consider whether the proposal could include mechanisms that enable parents or guardians to establish limits to the amounts that could be charged within defined periods. 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.
 - 2.6 The EEA EFTA States would also like to draw attention to the relation between the first paragraph of Article 16 of the proposed directive and the Unfair Terms Directive (93/13/EEC).
 - 2.7 In some of the EEA EFTA States, it is deemed an unfair contract term to obstruct the possibility for consumers to switch services or digital content providers. In certain cases, where the provider makes an investment in the contract resulting in an economic benefit for the consumer, it can be reasonable for the provider to have the opportunity to recoup the investment. In such cases, traders are allowed a maximum one-year lock-in period, while consumers always have the possibility to terminate the contract by refunding the provider the part of the investment that has not been recouped. This is good for consumers, traders providing competitive products and the markets as such.
 - 2.8 Noting that the first paragraph of Article 16 of the proposal seems to only grant a right to terminate long-term contracts after a certain period of time, the EEA EFTA States take the view that the proposal does not regulate the validity of lock-in terms or the requirements for upholding such terms. The EEA EFTA States would still encourage clarification, e.g. in a recital, stating that the right to termination in Article 16 does not preclude consumers from terminating the contract on other grounds under national law.
 - 2.9 That being said, the EEA EFTA States support the view that lock-in terms as mentioned in Article 16 should not exceed 12 months. Finally, and as a matter of policy, lock-in

terms lasting as long as 12 months should only be allowed if the provider makes an investment in the contract resulting in an economic benefit for the consumer.

- 2.10 The EEA EFTA States note that the proposed directive does not include a legal guarantee period. Combined with the reversal of burden of proof in Article 9, it appears that the provider is liable for lack of conformity for an undefined period of time. The EEA EFTA States assume that the proposal does not bar Member States from applying prescription rules to obligations that arise from digital content contracts, in accordance with the respective rules of prescription ascribed by the general law of obligations of the Member States, cf. Article 3 paragraph 9.
- 2.11 Finally, concerning purchased digital content downloaded by the consumer, the EEA EFTA States believe that the consumer should have the right to a new copy upon payment of delivery costs, if any. A particular trait of downloaded digital content is the fact that reproducing a new copy and delivering it to the 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 of the purchased item. In many cases, providers will deliver a new copy without requiring additional payment. The EEA EFTA States believe that this should be a European-wide consumer right in the future directive on the supply of digital content.

3. ONLINE SALES OF TANGIBLE GOODS

- 3.1 The EEA EFTA States firmly believe that laws giving different contractual rights for consumers depending on the sales channel make limited sense in a context where sales increasingly take place in an omni-channel environment. Thus, it is the view of the EEA EFTA States that EEA law applicable to contracts for the consumer sale of goods should not diverge from core contractual concepts, e.g. remedies and legal guarantees, depending on whether or not the contract is deemed to be a distance sales contract.
- 3.2 It can also be questioned whether the need for special rules for online sales of tangible goods is sufficiently pressing to merit parallel rules for online and offline sales, considering that there are already extensive EEA laws in place. The 2011 Consumer Rights Directive offers a fit for purpose framework for consumer rights which is applicable to online sales, and the Consumer Sales and Guarantees Directive ensures minimum protection standards across the European Economic Area with respect to rights and remedies available to consumers when goods do not conform to contract or legal guarantee.
- 3.3 While it could be an option to further harmonise these rules throughout the EEA, different consumer rights for online and offline purchases could increase legal uncertainty among both consumers and traders, give one sales channel a competitive advantage over the other, and result in a more fragmented legal framework. The EEA EFTA States therefore believe that the Council has taken the right approach by deciding to first work on the examination of the proposal for a directive on the supply of digital content, keeping in mind the need for coherence between that proposal and the proposal for a directive regarding online sales of tangible goods.

- 3.4 As for the question of harmonisation, the public consultation undertaken in some of the EEA EFTA States shows that representatives of consumer organisations favour a minimum harmonisation approach, while representatives of business organisations favour a full harmonisation approach. The EEA EFTA States are concerned that full harmonisation would lower the level of consumer protection in the EEA EFTA States. To the extent that the proposed directive mirrors the provisions of the Consumer Sales and Guarantee Directive, the current minimum level of consumer protection will in effect be turned into a full level of protection.
- 3.5 The EEA EFTA States are particularly concerned about the length of the proposed legal guarantee period of two years in Article 14. In some of the EEA EFTA States, consumers can claim a remedy for a faulty item up to a limit of five years, provided that the item is meant to last considerably longer than two years, and that the lack of conformity existed at the time the risk passed to the consumer. The Commission's proposal for a guarantee period of two years for all tangible goods subject to distance sales would therefore substantially reduce consumers' rights with respect to certain faulty products. Since many products are intended to last longer than two years, the EEA EFTA States believe that a two-year time limit is too short to provide consumers with adequate protection. While maintaining a preference for minimum harmonisation, the EEA EFTA States believe that the question of harmonisation should not be answered entirely in general. One possible way forward could rather be to target the full harmonisation approach at certain aspects of the proposal where the need to tackle legal fragmentation is evident, while establishing sufficiently high minimum standards in the rest of the proposal.
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