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CCBE position concerning contract rules for online purchases of goods and digital content (COM(2015) 634 and 635)

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

In this paper the CCBE wishes to provide its views in relation to the proposals for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015) 635 and a Directive on certain aspects concerning contracts for the supply of digital content (COM (2015) (634).

I. General Remarks

1. The CCBE welcomes both proposed Directives and does believe that they will favourably influence the digital market strategy and thus will enhance the desired growth of cross-border trade.

2. However, the CCBE regrets that both proposals only address issues of consumer protection and do not include the respective legal issues in business-to-business contracts, especially with regard to small businesses, deserving the same level of protection as consumers. This will create disharmony in the supply chain and will put the burden of consumer protection solely on the shoulders of the final seller. This is politically and also economically not desirable.[1]

3. The CCBE, furthermore, believes that the goal of appropriate and adequate consumer protection, as spelled out in the two proposed Directives for online sales contracts or for contracts for the supply of digital content, demands separate and special mandatory rules on standard terms of contract, over and above the Annex of Directive 93/13/EC.[2] This issue is vital in regard of many new clauses in End User License Agreements which are detrimental to the consumer. Therefore, the CCBE believes that the general protection offered to the consumer by Art. 6 Rome-I in conjunction with Art. 3 Para. 1 and Art. 4 Para. 2 of Directive 93/13/EC is not sufficient.

4. The CCBE is of the opinion that the rules for sales contracts proposed in these two Directives (634 and 635) should be harmonised amongst themselves. They also should and must be harmonised with the rules of Directive 1999/44/EC. It does not serve the desired goal of a high level of consumer protection (Art. 114 Para. 3 TFEU) to have different rules for online sales, for the supply of digital content (both maximum harmonisation) and for ”ordinary“ sales contracts (minimum harmonisation). Such integration is the only way to avoid an undesirable high degree

[1] The Austrian delegation and Members of the UK delegation, including the Bar Council of England and Wales, and the Law Society of England and Wales, do not support an extension of scope to business-to-business contracts. Furthermore, the UK delegation, contrary to the CCBE, thinks any maximum harmonisation of EU consumer law should be highly targeted to the few issues having a real, evidence-based, impact on cross-border trade. It is concerned, like a number of other stakeholders, about the gap between offline and online rules but would leave it to the co-legislators to decide where the balance of rights and obligations lies between the interests of the producers, retailers and consumers.

[2] The Austrian delegation is against the establishment of mandatory rules.

of fragmentation of the sales laws of the Member States; some of them will have as many as six different legal regimes for sales contracts.

5. All this certainly will create an unnecessary lack of coherence and will neither serve the benefit of the consumer nor of the trader. In this regard one has to address the issue that the proposed Directives will only deal with "certain aspects" of online trade and of supply of digital content, leaving many legal issues to be decided by the rules of the contract laws of the Member States (some of them will be addressed hereunder).

6. Apart from these general observations, the CCBE believes that the concept of maximum harmonisation is appropriate, and it is also adequate to table a Directive and not a Regulation.

7. Finally, the CCBE calls upon the EU institutions to ensure (in line with proposal COM(2015) 633) a swift adoption and implementation of both proposed Directives COM(2015) 634 and 635 in order to enable consumers and traders to benefit from the advantages of internet- and online-trade. The CCBE also calls upon the EU institutions to stay abreast of this rapidly developing market in order to adopt the legal rules as soon as technological developments require such new rules.

II. Special Remarks

1. Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015) 635

a) Art. 8 (3) contains a presumption over a period of two years that the goods were not in conformity at the time the consumer has taken over the possession of the respective goods, unless such presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. The CCBE believes that the time for such presumption should be reduced to six months in order to grant the consumer in an online sales contract and in an "ordinary" sales contract the same rights in cases of non-conformity.

b) It seems more adequate to delete Art. 13 and insert a provision relating to a damage claim into the Directive[3]. The right of termination (Art. 13) should not be available to the consumer in case of minor breaches of contract (non-conformity). Moreover, any unrestricted right of termination, to be exercised over a period of two years, may also be subject to a rather high degree of misuse by consumers that is certainly not desirable.

c) The hierarchy of remedies – Art. 9-12 (including a claim for damages) – adequately covers the needs of a high level of consumer protection.

d) Art. 16 seems to be a hybrid. Whilst the first sentence covers the (blank) right of recourse up the contract chain, the second sentence then leaves its implementation to the national laws of the Member States. From a political standpoint, such right of recourse against the ultimate seller, having caused the lack of conformity of the goods sold, is entirely appropriate and reasonable, as it puts the burden of consumer protection on the shoulders of the "right" party. However, the content of such right of recourse necessarily will be influenced by the remedies elected by the consumer in a specific case pursuant to Art. 9 sequ. Therefore, the necessary flesh of Art. 9-12 should be put to the bone of Art. 16 second sentence.

2. Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (COM (2015) 634

a) Apart from any regulation of this issue within the framework of the Data Protection Regulation, yet to be enacted, the CCBE calls upon the Commission to also secure that any data of the consumer should not be transferred to a third party within the framework of this Directive in order to so underline the high importance and value of personal data of the consumer. Thus, it seems questionable whether Art. 3 (4) – last sentence – is an adequate protection for the consumer, not allowing the provider to use such data for commercial purposes. However, the basic issue

[3] Such claim for damages should not rest on the concept of negligence of the debtor; the limitations of such damage claim should rest on the concept of foreseeability, and the damage recoverable should compensate all losses incurred by the creditor, including loss of profit. Any excuse to pay damages for breach of contract should be based on the well-known concept of force majeure.

here seems to be which remedies will be available to the consumer if the provider is in breach of such obligation. Clearly, the general remedies of Art. 11-12 do not cover this basic issue, as these rules relate to issues of non-conformity. Hence, there is a need for an appropriate remedy – apart from the general right of termination under Art. 13 – to the benefit of the consumer in view of Art. 3(4), last sentence. The CCBE believes that the only adequate remedy for the consumer in such cases must be a claim for liquidated damages or even for penalties, provided for within the scope of the Directive.

b) In line with the remarks under No. 1 lit. a) it seems necessary to point out that the CCBE has severe misgivings in accepting the provision of Art. 9 (1). To put the entire burden of proof on the shoulders of the provider that the content supplied was in conformity with the contractual requirements is not adequate, unless the consumer is required to substantiate his claim in some relevant aspects beforehand. But this requirement cannot be found in the text.

c) The CCBE also suggests to address the issue of transferability of digital content to a third party.[4]

d) Art. 14 dealing with damages is highly inadequate. It seems almost impossible to integrate the requirements listed in Art. 14 (1) in a coherent way (maximum harmonization) into the national laws of the Member States. The basic barrier is the wording in the second sentence ("as nearly as possible") which is not in line with basic requirements and principles of full harmonisation. The CCBE also believes that Section 2 of Art. 14 violates these principles. Hence, the CCBE favours again the implementation of a damage scheme along the lines outlined in footnote 1).

[4] See Case C-128/11 Usedsoft GmbH v. Oracle International Corp., Court of Justice of the European Union, 3 July 2012.