



Brussels, 30 April 2018  
(OR. en)

8252/18

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**Interinstitutional Files:**

2015/0287 (COD)

2015/0288 (COD)

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LIMITE

JUSTCIV 93

CONSOM 116

DIGIT 73

AUDIO 25

DAPIX 112

DATAPROTECT 67

CODEC 615

**NOTE**

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From: Presidency

To: Working Party on Civil Law Matters (Contract Law)

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No. prev. doc.: 6561/18, 7696/18

No. Cion doc.: 15251/15, 13927/17

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Subject: Amended proposal for a Directive on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC and repealing Directive 1999/44/EC  
Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content  
- Reflection paper on 'smart goods'

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The issue of 'smart goods' is a pivotal matter in the discussions on the amended draft Sales of Goods Directive ('SGD'), and for the trilogue negotiations on the draft Digital Content Directive ('DCD').

Following the preliminary exchange of views in the Working Party on Civil Law Matters meeting on 15 and 16 March 2018, based on the Commission Non-Paper (6561/18), and in order to make progress on this important issue, the Presidency would like to submit to delegations a number of ideas on the following issues for consideration in the Working Party meeting on 7 May 2018:

- a) Concept of 'smart goods' - scope and definitions
- b) EP position in the negotiations on the DCD
- c) A single, simple set of rules suitable for all types of goods

## Background

Discussions held so far in the Working Party have confirmed the Member States' (clear) wish to stick to the Council's general approach on the DCD, i.e. to make 'smart goods' (goods with embedded digital content) subject to the rules on sales of goods.

This approach is based on the understanding that, from a consumer perspective, **'smart goods' are goods**, irrespective of whether they contain digital elements or other highly technological (tangible or digital) components. For consumers, the main concern is that the goods fulfil the purpose for which they were bought. This approach is driven by the desire for legal clarity and to ensure that only one set of rules applies, irrespective of whether the defect lies in the digital component of the good or in the hardware.

However, discussions have also shown that the scope, i.e. what is to be covered by the concept of 'smart goods', may need further clarification, in particular if, and if so to what extent, 'embedded digital services' are to be covered by the goods rules. Therefore, as a first step, the concept needs to be clarified and the definitions need to be adapted.

### a) Concept of 'smart goods' - scope and definitions

Comments made so far seem to indicate that 'digital services' that have the same function as embedded digital content and/or are equally closely linked to the functioning of the good, should be covered by the goods rules in the same way as 'embedded digital content'.

However, it seems to the Presidency that the expression '*embedded digital services*' causes confusion and may not be the most suitable term for defining the intended concept, since the service itself not is usually incorporated in the good, and the good (and its embedded digital content) only provides access to such a service. The Presidency therefore suggests abandoning this terminological approach and pursuing the discussions instead from a more functional perspective.

The Presidency suggests approaching the discussion by looking at the good as a whole and defining the category of 'smart goods' by describing its possible components (embedded digital content and digital services that are so closely connected with the good in question that, from a functional perspective, they can be considered as being *a part of* the good and should therefore be treated as any other component of the good).

On the basis of this understanding, the Presidency invites delegations to consider the following drafting proposals.

Amendments to the scope rules and definitions in the proposed SGD (changes compared to the text of the COM proposal (13927/17) are indicated by **bold underlined** or ~~strikethrough~~):

#### Article 1

### Subject matter and scope

1. This Directive lays down certain requirements concerning ~~sales~~ contracts concluded between the seller and the consumer **for the sale of goods, including smart goods**, in particular rules on conformity of **such** goods, remedies in case of non-conformity and the modalities for the exercise of those remedies.

#### Article 2

### Definitions

For the purpose of this Directive, the following definitions shall apply:

- (e) 'goods' means any tangible movable items, **including smart goods**, with the exception of
- (a) items sold by way of execution or otherwise by authority of law;
  - (b) water, gas and electricity unless they are put up for sale in a limited volume or a set quantity;

**(e1) 'smart goods' means goods that incorporate digital content or are connected with a digital service [provided with the good under the same contract] in such a way that the absence of that digital content or digital service would render the good inoperable or would prevent the good from performing its main functions;**

**(e2) 'digital content' means digital content as defined in point 1 of Article 2(1) of the DCD;**

**(e3) 'digital service' means digital service as defined in point 1a of Article 2(1) of the DCD;**

Article 2

**Definitions**

12. ~~'embedded digital content' means digital content present in a good, whose absence would render the good inoperable or would prevent the good from performing its main functions, irrespective of whether that digital content was pre-installed at the moment of the conclusion of the contract relating to the good or according to that contract installed subsequently.~~

Article 3

**Scope**

3a. This Directive shall not apply to ~~embedded~~

*Option 1:* digital content incorporated in a good or a digital service connected with a good [and provided with the good under the same contract] in such a way that the absence of that digital content or digital service would render the good inoperable or would prevent the good from performing its main functions;

*Option 2:* digital content incorporated in and digital services connected with 'smart goods' as defined by point (e1) of Article 2(1) of the SGD;

b) EP position in the negotiations on the DCD

At the trilogue on 26 April 2018, the EP provided additional arguments as to why, from their point of view, it would be unacceptable to include goods with embedded digital content ('smart goods') in the scope of the SGD: including them within the scope of the SGD would create a legal gap, as the SGD only covers sales contracts. As the DCD does not only cover sales contracts, but also other forms of supply (such as lease or rental contracts), which are increasingly used also for smart goods, including them in the DCD would avoid this gap whilst ensuring the protection designed for digital content/services.

*Delegations are invited to express their views on how this concern should be addressed.*

One way of addressing this concern could be to extend the scope of the SGD to cover any form of supply of 'smart goods' (irrespective of the legal nature of the contract). This could be achieved through the following adjustment in the SGD:

*Article 1*

**Subject matter and scope**

1. This Directive lays down certain requirements concerning ~~sales~~ contracts concluded between the seller **trader** and the consumer **for the sale of goods or the supply of smart goods**, in particular rules on conformity of **such** goods, remedies in case of non-conformity and the modalities for the exercise of those remedies.

*Delegations are invited to share their thoughts on this idea.*

**c) A single, simple set of rules suitable for all types of goods**

Assuming that in future more and more goods will be 'smart goods', there seems to be a clear, common understanding in the Working Party that, in order to be future-proof, the goods rules will need to be adaptable enough to cover the great variety of goods available (including digital goods). However, rather than creating yet another set of rules to cover this type of products, the sales of goods rules should be adapted only to the extent necessary to cover the specific particularities of smart goods.

This adaptation of the goods rules, aimed at 'digitalising' them, can only be carried out once the concept of 'smart goods' (and the extent to which Member States wish to include them in the scope of sales rules) has been clarified, and this should be done in a subsequent stage when revising the individual provisions of the SGD.