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Subject: Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council
- Policy debate

I. INTRODUCTION

As part of its 'Digital Single Market Strategy for Europe'¹ the Commission adopted two proposals for Directives relating to contract law on 9 December 2015: a proposal for a Directive on certain aspects concerning contracts for the supply of digital content (hereinafter 'Digital Content Directive')² and a proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (hereinafter 'Sales of Goods Directive')³.

¹ 8672/15.
² 15251/15.
³ 15252/15.

In June 2017 the (JHA) Council adopted a general approach on the Digital Content Directive⁴. The European Parliament's JURI and IMCO committees adopted a negotiating position in November 2017, and trilogue negotiations started in December 2017. Negotiations have been very constructive and good progress has been made. The main outstanding political issues concern the treatment of goods with embedded digital content and the time limits, in particular the level of harmonisation of the legal guarantee period and the length of the reversal of the burden of proof period.

On the Sales of Goods proposal, the co-legislators made it clear that they want to avoid different legal regimes for distance and face-to-face sales. The Commission amended its proposal accordingly in October 2017⁵ (hereinafter the 'amended Sales of Goods Directive'). The European Parliament's IMCO committee adopted a negotiating position on the amended Sales of Goods proposal in February 2018. The Council Working Party on Civil Law Matters (Contract Law) completed the first examination of the amended Sales of Goods proposal in May 2018.

In order to maintain the positive dynamic and ensure further progress on both the Sales of Goods proposal and the Digital Content proposal, there is a need for political guidance on the interrelationship and consistency between both proposals in general and on the treatment of goods with embedded digital content ('smart goods') in particular.

The Presidency has therefore identified the following policy questions which would benefit from guidance from the political level at this stage with a view to paving the way for good progress to be made in the further work on the Sales of Goods proposal.

⁴ 9901/17 + ADD 1.

⁵ 13927/17.

II. QUESTIONS FOR POLICY DEBATE

The Council (Justice and Home Affairs), at its meeting on 4 and 5 June 2018, is invited to hold a policy debate on the following questions, taking into account the background information set out in the annex to this note:

1) Single set of rules for all consumer goods

Should all consumer goods be governed by one and the same set of rules?

If so, and considering the European Parliament's position on this issue, do Ministers agree

- (a) that goods which incorporate digital content or digital services ('smart goods') should be governed in a comprehensive manner by the Sales of Goods rules, and
- (b) that those rules need to be designed in an adaptable and technologically neutral manner in order to be future-proof and suitable for future developments (new types of goods)?

2) Remedies

As regards the remedies available to the consumer in the event of a lack of conformity, should the Sales of Goods rules be aligned with the main elements of the approach agreed by the co-legislators in the trilogue negotiations on the Digital Content proposal?

3) Level of harmonisation/time limits

Should the level of harmonisation with regard to the length of the legal guarantee period in the Sales of Goods proposal be consistent with the compromises found in the Council's general approach on the Digital Content proposal, in order to allow for the necessary flexibility aimed at ensuring a high level of consumer protection?

BACKGROUND**1) Goods with embedded digital content/services ('smart goods')**

1. Conscious of the fact that the functioning of more and more consumer goods depends on digital components incorporated in or interacting with the goods ('smart goods'), the Council attributed high importance to this key issue from the outset of the negotiations on the proposals for a Digital Content Directive and a Sales of Goods Directive. An initial policy debate on the question of which rules should apply to digital content embedded in goods was held by the (JHA) Council in December 2016⁶.
2. The general approach on the Digital Content Directive, endorsed by the June 2017 (JHA) Council, excludes from the scope digital content that forms an integral part of a good ('embedded digital content'). The Council thereby confirmed its understanding that the rules on sales of goods would be more suitable for such products and should therefore apply to both the digital content and to the good in which it is embedded.
3. The European Parliament has adopted a different position on this issue. According to the EP's position, digital content that is embedded in a good should be governed by the rules of the Digital Content Directive, while the good itself (the hardware) in which the content is embedded should be governed by the Sales of Goods Directive ('split approach').
4. The discussions held so far in the Council Working Party on Civil Law Matters (Contract Law) on the amended Sales of Goods proposal have confirmed the clear wish of the Member States to maintain the philosophy adopted in the June 2017 general approach on the Digital Content Directive, i.e. to have the goods with embedded digital content covered by the rules on sales of goods.

⁶ 14827/16.

5. Furthermore, the discussions of the Council Working Party seem to be leaning towards a slightly adapted Council position clarifying 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'.
6. Recent discussions in the Council Working Party also confirmed that it is of utmost importance for Member States to have a clear-cut solution that leaves no room for uncertainty as to which rules would apply to the digital content embedded in goods ('smart goods'). It was felt that the 'split approach' of the European Parliament's position would create the risk of legal uncertainty and problems in the practical application of the rules, as it could give rise to lengthy disputes on whether the defect lies in the digital content or in the hardware.
7. In the view of most Member States, the desired certainty could be best achieved if a single set of rules for the sale of goods were applied to all goods, irrespective of the nature of their components (which could be tangible, electronic, or digital). Such an approach has the advantage of providing clarity: all goods, regardless of whether or not they work on the basis of incorporated digital content or digital services, would fall under the same set of rules. There would be no need to carry out an assessment of whether, in a specific case, the lack of conformity originates in the digital component or in the hardware of the good, i.e. the kind of assessment that could give rise to lengthy disputes.
8. 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 should fulfil the purpose for which they were purchased and that in the event of defects/lack of conformity they can turn to the seller for remedies.

9. There is a common understanding in the Council Working Party on Civil Law Matters (Contract Law) that the Sales of Goods rules should be adapted to the extent necessary to cover the specificities of the digital elements in 'smart goods', rather than creating within the Sales of Goods rules a separate set of rules for this category of goods. This would ensure that a single regime would apply to all consumer goods, both 'smart' goods and 'regular' goods. In the ongoing discussions of the substantive provisions of the amended Sales of Goods proposal, the Council Working Party on Civil Law Matters (Contract Law) is therefore putting an emphasise on determining which aspects of the goods rules need to be adapted to ensure that they can also cater for the specificities of goods with digital components.
10. Further work will be needed at technical level to find appropriate terminology and definitions to incorporate the above concept into the rules and to ensure that the rules are technologically neutral and sufficiently adaptable to be suitable for future developments (new types of goods).
11. However, guidance from political level confirming that this concept should be the basis for the approach to be followed in subsequent work would be desirable at this stage to ensure that swift progress can be made in the further negotiations, and also to send out a positive signal to the European Parliament that it is the firm intention of the Council to regulate all goods, including goods with 'embedded digital content or services', in the Sales of Goods rules, as is already the direction of the current discussions in the Council Working Party.

2) Remedies in the event of a lack of conformity in the Sales of Goods proposal

12. The general approach on the Digital Content Directive endorsed by the June 2017 JHA Council reflects a compromise between Member States as regards the remedies available to consumers in the event of a lack of conformity. Under this compromise, the consumer has the right to have the digital content brought into conformity (which corresponds to repair and replacement) and, under certain conditions, has the right to price reduction or termination. This approach has been accepted by the European Parliament in the context of the Digital Content proposal trilogue negotiations.
13. In order to promote consistency between the regimes on the supply of digital content/services and on the sale of goods, a plausible solution might be to make use of the compromises reached on the Digital Content proposal - both among Member States and between the Council and the European Parliament - in order to solve similar issues in the amended Sales of Goods proposal. This would also help in the forthcoming negotiations with the European Parliament, as the present EP position on the Sales of Goods proposal, voted in February 2018, follows an approach that is very similar to the one agreed for the Digital Content proposal.
14. Discussions in the Council Working Party on Civil Law Matters (Contract Law) have shown a trend towards aligning the Sales of Goods rules with the Digital Content rules on this aspect, with a view to ensuring maximum uniformity of the rules that would apply in practice in these very closely linked fields. Having the same approach in both Directives would also help ensure that the rules of both Directives can be transposed into national law in a consistent manner.
15. The Council's political guidance could determine whether the discussions on the amended Sales of Goods proposal should continue on the basis of the compromises already found in the Digital Content proposal as regards remedies available to consumers. The political direction given by the Council on this question would not preclude further discussions relating to aspects of durability of goods in the context of the consumer's remedies.

3) Legal guarantee period in the Sales of Goods proposal

16. Discussions leading up to the general approach on the proposed Digital Content Directive revealed that the level of harmonisation and the length of the legal guarantee period were amongst the most difficult political issues for Member States. Although the majority of Member States have adopted in their national laws the time limits included in Directive 1999/44/EC, several Member States have gone beyond these standards and currently have longer liability periods in their national laws.
17. As a result, Member States decided at the time to maintain broad flexibility as regards the trader's liability for digital content supplied with a single act or a series of individual acts of supply. The Council's general approach provides by way of minimum harmonisation that the legal guarantee period shall not be shorter than two years, meaning that Member States can maintain or introduce longer periods. Therefore, while maintaining the general 'full harmonisation' nature of other elements of the Directive, Member States agreed on the necessary degree of flexibility needed on this specific issue in order to achieve a political compromise and a high level of consumer protection.
18. Since Member States need to address very similar questions in the ongoing discussions on the Sales of Goods proposal, it would be useful for the subsequent negotiations if the Council could provide political guidance as to whether the compromise found in its general approach on the Digital Content proposal could serve as a basis for the further work on the respective provisions in the Sales of Goods proposal.
