



Monetisation of Digital Business Models

Insights into Billing and Recurring Payments

Ecommerce Europe

Compromise on the Digital Content Directive



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The Internal Market and Consumer Protection Committee of the European Parliament approved the Digital Content Directive as provisionally agreed with the Council on 20 February. The compromise ensures that the DCD and the directive on the sales of goods are congruent and provide a coherent and clear legal framework. It should provide provide for a high level of protection and legal certainty for European consumers, in particular when buying cross-border, as well as supporting traders, especially SMEs, to sell EU-wide.

Specifically, it states for uniform rules on the conformity of digital content or services, remedies for non-conformity or failure to supply and how to exercise them, and for modification of long-term digital content or services. Member states must implement the directive within two years after it comes into force, and have it applicable within six months after implementation.

Scope

The directive covers B2C contracts for the supply of digital content or digital services. This includes data produced and supplied to consumers in digital form (eg music), services allowing consumers to create, process, store or access data in digital form (eg cloud storage), services for sharing data (eg Facebook) and any durable medium used exclusively as a carrier (eg DVDs).

Tangible goods with digital elements (eg smart fridges) are outside the scope and regulated under the new sales of goods directive.

In addition, the DCD covers all supply of digital content for which the consumer pays a price, which means money or virtual currency,

or provides his personal data to the trader, except where the trader processes these data only to perform the contract, or to comply with legal obligations.

‘Over the top’ interpersonal communication services (OTTs) are subject to the DCD. It is however not applicable to electronic communication services, healthcare, financial services, gambling services, non-digital services, and free open source software.

Maximum vs minimum harmonisation

The aim of the directive was to bring maximum harmonisation in contract rules for the supply of digital content. However, in several areas, member states will be allowed to maintain or introduce different provisions, such as a longer legal guarantee period. Member states may also regulate general contract law aspects, such as formation, validity, nullity, and contract termination in so far as not regulated in this directive, or the right to damages. The same accounts for rules on redress in the chain. This will not solve the issue of legal fragmentation in the EU; in other words, it will not help online merchants selling more cross-border in Europe.

Supply, conformity, and updates

The main obligation of the trader is to supply the digital content without undue delay after contract conclusion by making it available or accessible to the consumer. The digital content has to meet subjective conformity criteria and correspond to the description, quantity, quality, duration, version, functionality, compatibility, interoperability, performance features (accessibility, continuity, and security), as required by the contract, or be fit for any particular purpose for which the consumers require it and upon which they →

agreed with the trader. Furthermore, it must be supplied together with all accessories, instructions, customer assistance, and updates, as contractually agreed.

It also has to meet objective criteria, that require it to be fit for purposes for which digital content or services of the same type would normally be used, and have the features, performance, security, accessories, and instructions the consumer may reasonably expect.

In addition, traders must inform the consumers and supply them with updates, necessary to maintain conformity and security throughout the contract duration. Unless agreed otherwise, the most recent version of the digital content or service when concluding the contract must be supplied. However, for long-term contracts, the trader is allowed to modify the digital content, under certain conditions.

Liability, legal guarantee period, and reversal of proof

The trader is liable for any failure to supply the digital content or service and for any non-conformity. In addition, the trader is liable for any non-conformity that occurs within a period of at least two years from the time of supply and at least for the time of the contract duration. However, member states are allowed to introduce or maintain a longer period. Finally, the burden of proof of conformity at the time of supply is on the trader for any non-conformity apparent within a year from the time of supply of the digital content or service.

Remedies, hierarchy, and redress

Where the trader failed to supply the digital content or service, the consumer shall allow the trader a second chance. If the trader fails again, the consumer may terminate the contract. In case of non-conformity, the consumer is entitled to either have the digital content repaired or to a proportionate price reduction or contract termination. The former applies to all cases, except when the repair is impossible or would impose disproportionate costs on the trader. In addition, the repair must take place within a reasonable time, and must be free of charge and inconvenience. The latter applies to cases where the repair is impossible or disproportionate, the trader failed or refused to repair, or the non-conformities' nature justifies immediate price reduction or termination. The reimbursement must be performed without undue delay and within maximum 14 days from the day of termination notice.

About Ecommerce Europe: Ecommerce Europe is the voice of the European digital commerce sector. Through its 19 national ecommerce associations, Ecommerce Europe represents more than 75,000 companies selling goods and services online to consumers in Europe. Ecommerce Europe acts at European level to help legislators create a better framework for online merchants.

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