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**From the
Common European Sales Law (CESL)
to the
Digital Single Market (DSM) Strategy**

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Public consultation on contract rules for online purchases of digital content and tangible goods – 12 June to 3 September 2015

Supply of Digital Products

- Conformity of digital products (in the broadest sense) with the contract
- Remedies and damages for non-conforming digital products (including burden of proof and time limits)
- **Supplier's right to modify contracts**
- **Termination of long term contracts**

Online Sale of Goods

- Conformity of tangible goods with the contract
- Remedies and damages for non-conforming goods (including burden of proof and time limits)
- **Customer Guarantees**
- **Unfair standard contract terms**

Full harmonisation, B2C only or B2C and B2B



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Online Sale of Tangible Goods



The idea of CESL



Full harmonisation of selected aspects of the law of sales and unfair contract terms, restricted to online contracts ...



... would come at a much higher cost for national legal systems than the CESL:

- *National legislators either have to re-write their sales law or accept up to six different sales law regimes in a Member State.*
- *Full harmonisation of selected core issues of private law failed for good reasons in the CRD because of its disruptive effects.*
- *Exhaustive black list of unfair contract terms makes it impossible for national legislators to react quickly to new abusive clauses.*

Full harmonisation of selected aspects of the law of sales and unfair contract terms, restricted to online contracts ...



... would fail to provide to sellers the certainty they would have had under the CESL:

- *For want of a self-contained system, national courts will develop their own unwritten black lists of unfair clauses against the backdrop of national law.*
- *For want of a self-contained system, sellers remain confronted with a variety of national solutions (e.g. concerning related services, or competing remedies such as avoidance).*
- *Fully harmonising just the key rules of the CSGD and UCTD would again omit crucial issues.*

A preferable solution might be ...

- A more or less self-contained instrument, specifically tailored to meet the requirements of mass communication contracts
- B2C, B2B, and C2C in the context of platform schemes
- Shift of focus: radically simplified, but enriched by additional rules that would be crucial in distance mass contracting
- With a broad scope of application, covering tangible goods, digital products and services

AND / OR:

- Revision and improvement of existing EU legislation, in particular the CRD, the CSGD and the UCTD



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Supply of Digital Products

What users in the EU are concerned about:

- *How do I know before the conclusion of the contract whether the product is **suitable** for my digital environment (e.g. broadband connection)?*
- *How long will the digital content be usable in a rapidly changing digital environment, such as upcoming new malware, i.e. will I receive **updates**?*
- *What if my device is lost or stolen, or I buy a **new device**, do I continue to have access to the digital product?*
- *Can I use the digital product also on a device from a **different producer**, or in a different digital environment (e.g. without using Google)?*
- *Can I **transfer** the digital product to someone else, e.g. re-sell it or give it to a friend like if it was a tangible good?*
- *Can I use the digital product also while I am on holiday abroad or if I move, temporarily or permanently, to **another country**?*



- *What exactly is the **counter-performance** I am providing, and do I get reimbursed , e.g. for providing personal data, if something goes wrong?*
- *Who exactly is the supplier, in particular in the context of **platform** solutions (e.g. app stores), and against whom can I enforce my rights?*
- *What is my protection against the supplier unilaterally **modifying** the features once I have become used to the digital product?*
- *What are my rights if I am not satisfied with the product, e.g. the streaming **quality is poor** or access to my mailbox is often denied?*
- *What happens with my **user-generated content**? Do I get it back in a usable format when the contract with the supplier comes to an end?*
- *Do I get compensation for **non-economic damage** I may suffer through loss of data, such as my family photos or emails, or data leaks?*
- ...

Can all this be captured by ‘quality’ or ‘conformity’?



Even when defined broadly, ‘quality’ or ‘conformity’ is an issue mainly when the product falls short of

- what the supplier himself provided as a description, and/or
- industry standards set by the big global players.

Rules would mainly become relevant where digital products

- were supplied in exchange for a (more than insignificant) price but are poorly programmed so that it makes sense for the user to claim money back; or
- have caused personal injury, harm to user data or hardware, or other loss (but depending on whether the rules are applicable to ‘free’ products, and to what extent they foresee or rather exclude liability)



What would be required is more specific solutions, such as



statutory user rights that cannot be derogated from by agreement



statutory user rights that can be derogated from only by qualified agreement, e.g. one that is made expressly and separately



a black list of unfair terms, including terms in a license agreement (EULA) and terms defining the nature of the digital product itself



Conclusions:

- The CESL was, as such, a good initiative. Full harmonisation, for online sale of tangible goods, of the issues addressed by the CSGD and the UCTD would come at a much higher cost for national legal systems and fail to facilitate cross-border sale.
- An EU regime of customer rights in the digital world would be both necessary and timely. However, the issues addressed in the Commission's public consultation capture but a narrow segment of the actual problems, and the rules that appear to emerge are predominantly in the interest of big players in the digital industry.
- What would be required is a broader and more ambitious approach, including a charter of contractual digital user rights.