BDI

Law and Insurance

Position

On the European Commission's consultation on EU contract rules for online purchases of digital content and tangible goods

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The Federation of German industries is the umbrella organisation of German industry and industry-related service providers. It speaks on behalf of 36 sector associations and represents over 100,000 large, medium-sized and small enterprises with more than eight million employees.

Introduction

The Federation of German Industries (BDI), which has been intensively involved in the debate surrounding European contract law with comments going back to 2001, in principle welcomes the European Commission's objective of consolidating the internal market and making it more functional by promoting cross-border trade between businesses and cross-border purchases by consumers. Improving the internal market will create economic opportunities for businesses and consumers alike, and will help to make the European economy more competitive. However, any instrument designed to promote cross-border trade must gain broad general acceptance and support. This will be given first and foremost if a concrete need for regulation at European level arises and an impact assessment demonstrates corresponding regulatory gaps in the Member States or the existing *acquis*. In addition, the precise identification of the possible single market obstacle and the illustration of an economic added value via an up-to-date data analysis are required. Balanced proposals for a possible legal regime could be presented on that basis.

Against this background, it appears sensible to wait for and make good use of the results of the comprehensive evaluation of the Consumer Rights Directive (2011/83/EU) planned for 2016 in preparation of the new initiative.

The BDI responds to the individual questions raised in the consultation as follows:

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PART 1 – Digital content products

Sections 1 and 2 – Problems and need for an initiative on contract rules for digital content products at EU level (questions 1 – 6)

The BDI accepts the background analysis only to a certain extent and answers question 1 accordingly. The stated need for European rules in the area of online purchase of digital content does not appear evident; a regulatory gap is not apparent. As a result, there is only room for an optional instrument in the context of the planned initiative. However, insofar as binding provisions are chosen, preference should be given to a fully harmonised approach.

The very assumption that the consumer has no influence on contract drafting and that contracts are therefore structured inappropriately to his detriment cannot be shared in the form presented by the Commission. In principle, the provider offering the product most attractive to the consumer prevails in a competition. For instance, in relation to updates, this often even leads to a voluntary and additional service offer by businesses. In particular exceptional cases, a dominant position by an individual company can lead to different results, but these isolated cases do not justify a divergent assessment of the competition which is essentially self-regulating.

Inasmuch, no regulatory gaps are apparent (question 2). With respect to article 6 of the Rome I regulation, an appropriate level of consumer protection is ensured at national level through implementation of the Consumer Rights Directive as well as the Unfair Contract Terms Directive (93/13/EC). Furthermore, national consumer laws comprise mechanisms for damages as well as remedies. Thus, a consumer right against the seller in the event of defects already exists, contrary to the assumption in the Commission's background analysis. Moreover, most national laws, including in Germany, offer an adequate and satisfactory set of instruments for settling legal issues of concrete classification arising from digital content. Some jurisdictions even entail specific provisions with regard to this issue.

If, despite the foregoing, the aim is a regulatory initiative in this area (question 6), the introduction of an optional instrument as a test for evaluating the need and quality of regulation seems a sensible approach – bearing in mind the far-reaching consequences. However, insofar as the aim is to have binding rules, full harmonisation is necessary for the Commission's stated objectives to be realised.

Section 3 – Scope of an initiative (questions 7 – 10)

The personal scope of the initiative should be reduced to B2C transactions. A provision for B2B transactions is neither appropriate nor necessary, rather priority should be given to freedom of contract. The material scope of the initiative needs to be defined clearly and demarcated.

Regarding question 7 as to whether business-to-business transactions (B2B) should be covered by the initiative prompts a clear "no" from the BDI. The B2B area should be completely removed from the scope of the initiative. The particular need for consumer protection which partially exists in the B2C area, is not a given in transactions between companies, even where one of the contracting parties is an SME. Inasmuch, considerable concerns might arise regarding a practical demarcation between SMEs and the "*Mittelstand"* or large companies as well as the danger of considerable legal uncertainties in connection with a change of status during execution of the contract. But above all, especially in highly specialised sectors, one cannot assume that a small company is automatically inferior. Rather, the smaller partner in a B2B transaction can be the stronger contracting party which can negotiate from a position of strength on the basis of its special expertise and its unique products. Above all, binding provisions are not appropriate in this sector. Traders must be allowed to retain private autonomy over the contracts they conclude with other business partners. A limitation to pure business-to-consumer purchases is also indicated because contract law in the B2B area needs continuity which must not be disrupted by the dynamic adjustments of consumer rules.

The BDI's further responses to this questionnaire are therefore limited to the B2C relationship.

Question number 9 relates to individual concrete product types and their possible inclusion in the initiative. The very approach taken by the question itself thus highlights a central problem in the current discussion. For a differentiated discussion around the proposal, but also for the subsequent application of the initiative in practice, it is of decisive importance that legal certainty regarding the scope is guaranteed. Clear definitions of what the concepts of "digital content" but also "online-purchase" cover and possibilities for a secure classification also of future online products are necessary. At the same time, it is important to distinguish from other contract types such as mixed contracts which should not be included in the scope of a sales law initiative because of their specific *de jure* and *de facto* particularities. Demarcating sales contracts from purchases of rights and

work contracts, for instance in the case of software specially adapted for the consumer, is needed.

The same applies for question number 10 in relation to what types of counter-performance should fall within the scope of the initiative. In any event, these should be reduced to financial values, i.e. remuneration, which can be clearly identified as such. The first question that arises is whether a transaction without counter-performance is a sale at all and hence can fall within the stated scope of the initiative as an "online purchase". Furthermore, a corresponding clarification that this is applicable only if the transaction of digital content is made against remuneration is also indicated since the initiative would also otherwise be problematic for assessment in terms of legal policy aspects. The entire open software sector would be disrupted *de facto*. The liability exemptions usual in this sector and accepted under case law would no longer be possible on the basis of this provision. It does not seem appropriate to impose the same liability criteria to a donor as to a seller. In addition, it is questionable whether any issues should be addressed via sales law. Rather, a solution via data protection law could be more effective.

Section 4 – Content of an initiative (questions 11 – 28)

Regarding the content of the initiative, it is essential first and foremost that there is no one-sided over-regulation of consumer protection but rather a fair balance of the interests of consumers and companies. A balance between the rights and obligations of companies and consumers must be ensured. This applies for the aspects of burden of proof and periods for asserting remedies but also for the extent and design on remedies and damages.

Regarding question number 11 about problematic areas of contract law (the list includes quality, remedies, termination and contract modification), reference can be made to the fundamental statements on the question of the need for an initiative. Since national laws offer an adequate set of civil law instruments, an essential aspect which would make a corresponding initiative necessary is not discernible.

With regard to ensuring the quality of products – the object of question number 12 – priority should in any event be given to the contractual agreement between the parties (regarding type, quantity, properties and similar criteria). Insofar as no agreement has been concluded, a reference to general criteria as in article 2 of directive 1999/44/EC (Consumer Sales Directive) seems sensible.

In particular, principles of the burden of proof – as also expressed in the Consumer Sales Directive – should be taken into consideration in any new initiative. An extended reversal of the burden of proof beyond the six-month period set out there – as hinted at in question number 13 – should be rejected.

The same must apply for a move away from the obligation to report a defect without undue delay or an exaggerated extension of time limits, as contemplated in question numbers 16 and 17. Insofar, appropriate periods must be maintained. Anything else would upset the balance of interests between consumers and companies. A buyer who actually finds a defect would otherwise have the possibility to continue to use the object/content purchased for a long period without risk and cost-free to the detriment of the seller, and then subsequently still be able to assert his rights. This would open the door to an unfair enrichment of the buyer at the expense of the seller. Moreover, it should be borne in mind that unduly long periods of prescription have a drastic impact in sales law above all. That is because the seller must build the risk of any claims by consumers into its price and constitute reserves – a real competition disadvantage for SMEs in particular.

In response to question number 18 about a concrete appropriate period, the BDI therefore believes that there should be a two-year period for the exercise of legal remedies from completion of the transaction. This seems correct against the background described and has proved its worth in German remedy law.

Regarding the extent and nature of remedies available to the consumer addressed in question number 14 and question number 19, the BDI believes it necessary to take into account primarily essential contract law principles: the hierarchy of remedies, the right to cure and seller liability only in case of fault. Fundamentally, a range of rights (claim for cure, damages, termination and price reduction) should be made available to the consumer, along the lines of § 437 BGB (Civil Code) in German law. This requires a test as to the extent to which these rights are genuinely applicable to digital content.

However, a hierarchy of remedies must be ensured in any case. Otherwise, the buyer can make use immediately and on an equal footing of rights such as repair, replacement, price reduction, termination and damages in the event of a defect. Not only would this seem astonishing, as the principle of priority of the right to cure was originally a model for the EU. Above all, the absence of priority of the right to cure, i.e. of the seller's right to make a second delivery, is unacceptable to industry. Giving preference to cure is

extremely important for companies especially in the area of high-value goods and innovative products. Failing to apply the hierarchy of remedies would lead to considerable cost increases for all traders and to higher prices to the detriment of consumers. In addition, it should be borne in mind that unacceptable liability traps can arise for the final supplier in the chain in such a system.

Moreover, an obligation to pay damages can persist only in the case of fault by the company, i.e. in the case of an attributable defect – in line with contract law valuation principles. An unreasonable risk situation would otherwise be created for companies which would be priced into products, once again to the detriment of consumers. In addition, the development of digital product markets in Europe could be impeded. The BDI further regards an unlimited obligation to pay damages as inappropriate. Limitations should be foreseen here.

Regarding the aspects of further rights raised in question numbers 21 to 28, in particular in the area of termination by the consumer but also contract modification by the seller, the need for an appropriate and balanced design continues to be in the foreground. The parties should be given the greatest possible contractual freedom bearing in mind the diversity of product types in the area of digital content.

PART 2 – Online sale of tangible goods

Sections 1 and 2 – Problems and need for an initiative on contract rules for online sales of tangible goods at EU level (questions 29 – 34)

The BDI assesses that the portents and conditions for the idea of a Common European Sales Law have not changed fundamentally. The earlier debate can be transposed almost 1:1 to the online purchase of tangible goods. In addition, the envisaged binding structure of the initiative, the inclusion of national sales as well as the conceivable and unjustified considerable legal differences depending on the distribution route chosen will lead to more matter for discussion. Furthermore, in the eyes of German industry, the fundamental question of whether the absence of a common contract law impedes cross-border traffic so significantly that a harmonised contract law needs to be established has still not been adequately answered.

Particularly for consumers, linguistic, cultural and emotional barriers are more important. This means that their removal, together with further practical uncertainties, inter alia secure service for receipt, appear to

SMEs to be the real obstacle to cross-border activity. The figures presented hitherto, from which the Commission deduces a demand among companies, fail to convince. Evidence of a significant impediment in the single market through the absence of a common contract law has not yet been produced. However, this would be essential to make this initiative persuasive but also to build a necessary foundation and basis for action by the Commission.

The BDI has already examined in detail the issues surrounding EU regulation of sales of tangible goods in its earlier positions and refers expressly to the corresponding documents in the framework of this set of questions which can be downloaded at http://www.bdi.eu/Europaeisches-Vertragsrecht.htm.

Section 3 – Content of the initiative (questions 35 – 51)

Regarding the further individual questions raised on the online sale of tangible goods, the BDI also refers expressly to its detailed positions on the idea of a European Common Sales Law. In particular, the BDI positions on the proposal for a regulation on a European Common Sales Law of 14 February 2012 (http://www.bdi.eu/download_content/RechtUndOeffentlichesAuftragswesen/Stn_GB_D485.pdf) and on the draft Lehne-Berlinguer report of 12 June 2013 (http://www.bdi.eu/download_content/Stellungnahme_BDI_GEK_Lehne_Bericht.pdf) are relevant.

Furthermore, the fundamental reservations and comments expressed above on the theme of "online digital content" can also be transposed to the online purchase of tangible goods and questions 35 – 47. In particular on

- **an exclusion of B2B contracts,**
- **an appropriate balance of the interests of all parties,**
- **ensuring the quality of products**,
- **the hierarchy of remedies and the right to cure,**
- **validity periods,**
- **liability for fault and**
- **the burden of proof,**

the answers provided in part 1 of the consultation to questions 7 – 19 should be referred to accordingly.

However, it should be pointed out that the rules for a tangible sale call for an even more critical examination – due to the general comparability with an offline purchase by contrast with digital content. For instance, failing to

include a right to cure (see question 41) is extremely questionable in terms of preserving resources and environmental protection.
Regarding the issue of harmonised provisions on **commercial guarantees**, raised in question numbers 48 and 49, it should also be added that, in the BDI's view, no additional rules should be created. However, insofar as these are foreseen, their design must in any event be optional and not binding. Anything else would fail to recognise the voluntary character of the guarantee but also the competitive situation between companies.

In the area of unfair contract terms – raised in question numbers 50 and 51 – both a list of contract terms and a list of standard contract terms should be rejected. This applies for a structure involving a "black list" just as it does for the introduction of a "grey list". The Unfair Contract Terms Directive already offers adequate protection against unfair terms in the General Terms and Conditions of consumer contracts. In addition, insofar as consideration is being given to a verification also of contract terms, i.e. individually negotiated agreements, priority should be given to the principle of private autonomy. This applies all the more with respect to price terms and the other primary obligations of a contract. The equal rights of the contracting parties in individual agreements must be ensured by taking into account that a verification amounting to an assessment of the General Terms and Conditions cannot be applied.