Chambers Ireland Submission to the Department of Jobs, Enterprise and Innovation on the Proposed Digital Content Directive

April 2016

Introduction:

Chambers Ireland represents the largest network of businesses in the State. With almost 50 Chambers located in every major town and city in the country, we are uniquely positioned to understand the needs of the business community and to represent their views. We welcome the opportunity to feed into this consultation. Our views set out in this submission have been structured in accordance with the areas we feel are most relevant to the needs and interests of the Irish business community.

European Commission Proposed Directive on Certain Aspects Concerning Consumer Contracts for the Supply of Digital Content [COM (2015) 634]

As part of the earlier consultation on the Consumer Rights Bill 2015 in September of last year, Chambers Ireland welcomed the initiative taken by the Department to bring legal clarity to business and consumers with regard to digital contracts. Additionally, we also highlighted a number of issues with Part Three of the General Scheme for the Consumer Rights Bill.

Although digital technology has undergone rapid development, the law has been slower to respond. A review of EU consumer protection legislation undertaken by the European Commission in 2006-2007 identified the non-application of existing legislation to contracts for intangible digital content as a 'particularly important problem', especially with respect to the absence of legislative rights and remedies for intangible content.[1] While the rights and remedies for consumers who enter digital contracts are broadly similar to those outlined in the rest of the Consumer Rights Bill, we were concerned that the proposed legislation may impact the efficacy of the Digital Single Market. In a Digital Single Market, both consumers and traders should be confident in trading cross-border without barriers that may be created by differences between national rules. We noted that there was a concern amongst the business community that if multiple jurisdictions introduce their own rules for digital contracts, this would mean that online suppliers of goods and services who wish to serve a pan-European market may potentially need to be knowledgeable about, and comply with, 28 differing sets of national regulations. Identifying which regulation applies in each individual case would be extremely difficult for business owners.

Therefore, we welcome the approach taken by the Commission to opt for a harmonised approach to rules for consumer contracts for supply of digital content across all 28 EU Member States. Full harmonization can ensure the adoption of uniform provisions at European level and spur the removal of contract law barriers, all of which contribute to stronger Single Market. That being said, while this approach has its merits, the proposed Directive should also include some limitations. We welcome commitments within the proposed directive that Member States should keep maintain their ability on how they would categorise their contract sales laws. They should remain free to define them as services, leases or sales contracts. It is important that the benefits of this proposed Directive are balanced for both the business and the consumer.

[1] 1 European Commission. 2007. Green Paper on the Review of the Consumer Acquis [COM (2006) 744), p. 24.

We would note however that it would have been our preference that prior to the launch of this proposal by the Commission a more thorough analysis should have been carried out of the currently applicable rules in the field of online contract sales law for digital content. Indeed, most issues encountered by companies are in the areas of copyright law, IPR, data protection and privacy law. It is important that the Commission ensures that the framework put in place takes into account, for example, the forthcoming General Data Protection Regulation in order to avoid the emergence of different policy regimes existing next to another. For the Digital Single Market to work properly, consideration must be given to all areas of law that impact digital content providers. It is not enough to harmonise digital content rules across all 28 Member States, if a harmonised approach is not also taken when it comes to all applicable areas of the law affecting digital content.

Definition of Digital Content (Article 2)

The definition of digital content has been broadly defined in the draft directive and includes *"services which allow the creation, processing and storage of data"*. This broad definition should indeed avoid discrimination between service providers and provide for a future-proof level-playing field in a fast changing environment.

It is the view of Chambers Ireland that this is the correct approach to take as too narrow or too prescriptive a definition would impede innovation and the development of digital content products.

Objective criteria if explicit benchmarks are lacking in the contract? (Recital 24 and Article 6).

Chambers Ireland agrees with the European Commission's assessment that determining conformity of the digital content product provided by the supplier should be accessed through the promises made in the contract between supplier and consumer only.

However, in the event that benchmarks have not been explicitly outlined, the assessment (contrary to art 6 §2) should not be carried out using objective criteria. Instead, conformity should be assessed using subjective criteria. Too complex a monitoring process would be required to thoroughly analyse what would be *"fit for the purpose for which digital content of the same description would normally be used".* The rapid evolution of digital products would require the constant updating of objective criteria lists making it unduly burdensome both for legislators and for the companies and consumers.

The proposed reversal of the burden of proof (art 9; 10; recital 32)

It is the view of Chambers Ireland that it should be the contractual party that is claiming non-conformity with the contract that should bear the burden of proof. The provision on the burden of proof is handled differently than in the Sale of Consumer Goods Directive[1]. According to article 5 §3 of this Directive the burden of proof with respect to the conformity rests on the party that is claiming non-conformity. But if this non-conformity becomes apparent within six months of delivery this party will not have to prove that this non-conformity already existed at the time of delivery. In such a case the benefits of the presumption that the non-conformity already existed at that time apply.

[1] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

In contrast to the wording of Sales of Consumer Goods Directive, Article 9 § 1 suggests that the burden of proof should be shifted to the supplier. The supplier would have to prove that digital content is in conformity with the contract and that this was the case at the time of the supply. Therefore the approach proposed by the Commission in fact gives the impression that providers of digital content in the EU are always *a priori* delivering defective products. Such a presumption would not be a positive signal especially for innovative start-ups in the digital sector.

Additionally, the introduction of an unlimited timeframe for the reversal of the burden of proof is unacceptable for suppliers of digital content. Due to the constant evolution of the digital sector, companies should only have to prove conformity with the contract for a limited, predetermined and manageable period of time. It is the view of Chambers Ireland that the concept on the burden of proof and the 6-months' time-limit for the presumption as defined in the Directive on the Sale of Consumer Goods (DIR 1999/44/EC, article 5 §3) to be adequate for digital content.

Finally, paragraph 2 in article 9 stipulates that the burden of proof would be passed on to the consumer if the supplier can prove that the digital content can't be used as should be expected because the product is incompatible with the consumer's digital environment (and provided that the technical requirements were specified in the contract). In effect, the supplier would still need to invest considerable efforts (both in man hours and resources) to prove the incompatibility of the consumer's digital environment. As currently established in the proposed Directive, in the case that a consumer complains about the digital content provided, the supplier would need to take positive steps to obtain the consumer's incident reports, check internet connection or even ask for virtual access to his digital environment. At a minimum, this should not be expected from small companies. However, it is also our view that the consumer should have to prove that his or her environment is in fact compatible and that the problem is to be identified somewhere else. In the case that the technical requirements are duly specified in the contract, it should not be expected that the supplier would invest resources to evaluate the compatibility of the consumer's environment.

Liability of suppliers (art 10)

Chambers Ireland agrees that suppliers should be liable for a failure to supply the digital content and for any lack of conformity which exists at the time the digital content is supplied. However, it should be made clear in the Directive that in the field of digital content and in a sector characterised by continuous product updates and improvements, sometimes *"bugs"* might appear. This is especially the case for games and software. Applying a quality standard that includes freedom from minor defects is unrealistic and unreasonable. Furthermore, legislation on the sale of goods requires goods to comply with their description, sample or model. While the general principle that digital content should comply with any description or sample provided by the trader is not open to challenge, it is important to ensure that its application does not have negative implications for traders of digital products. Software providers in particular are concerned that the requirement that digital content comply with its original description does not take adequate account of the dynamic nature of software products. These products are subject to regular updates that may replace obsolete or vulnerable functionalities with the result that the software might no longer comply with its original description.

In our earlier submission to the Department for Jobs, Energy and Innovation, we welcomed the steps taken to integrate this into the General Scheme of the Consumer Rights Bill, particularly in Heads 44, 46 and 51, where acknowledgement is given to the rapidly evolving nature of digital content with regard to the need for updates, patches for potential bugs and so forth. Therefore, we would urge the Commission and Department as they draft this legislation to ensure that the ever evolving nature of digital goods is taken into account. As companies and entrepreneurs continuously innovate, it is important that our legal structures support and do not impede that innovation.

Termination of a contract (article 13)

Article 13 and article 16 of the draft directive provide that consumers can exercise their right to terminate a contract by notice to the supplier given by *any means.* Chambers Ireland believes that the number of ways how a notice can be given by a consumer should be limited and specified.

In the case of long term contracts, the supplier and the consumer should be able to include in the contract that even after the expiration of the first 12 months of the contract, the contract will be automatically renewed for the same length of time as the lapsed contract. In the case the long term contract does not mention automatic renewal, consumers should be given the possibility to terminate it after the first 12 months upon notification to the supplier.

Approach to damages (art 14)

The consumers' right to damages in the case of a lack of conformity should be an area left to the Member States' competence. In that regard, there is an inconsistency between Article 2 § 5 and Article 14. Whereas Article 2 defines damages as a *"sum of money to which consumers may be entitled as compensation for economic damage to their digital environment"*, article 14 also defines damages as an obligation for suppliers to "*put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract."* Not only is it nearly impossible to determine what that position might be, moreover, article 14 is not aligned with the definition of damages in Article 2.

Modification of digital content (Article 15)

Traders should be able to modify digital content products if the contract stipulates that the trader has the right to unilaterally modify the product. This right should be upheld as long as these modifications are justified. Most commonly, digital content providers modify their products in order to remove redundant functionalities or ameliorate certain features with a view to continuously improve user experience. The draft directive foresees that if the modifications *"adversely affect"* the use of the digital content, the consumer should have the right to terminate the contract and should be notified on a durable medium of the modification.

Chambers Ireland considers that the wording *"adversely affects"* could be potentially be subject to a highly subjective interpretation. It is our view that suppliers should be permitted to give notice of modification through other means than on a *"durable medium"* as the latter could incur significant costs. If the modification made by the supplier is of urgent nature and for instance pertains to the security of the product, no notification should be needed if the contract stipulates that this type of modification might occur during the time that the consumer is using the product.

Conclusion:

Chambers Ireland welcomes the steps taken by the European Commission and the Department for Jobs Innovation and Enterprise has taken to review, update and clarify legislation so that both the consumer and the business better understands their rights and obligations when it comes to contracts for the supply of digital content. Ensuring that the Digital Single Market works for businesses across all 28 member states will be hugely important in the coming years, as the cross border trade of digital good and services becomes a much larger part of all our economies. However, innovation and growth in Europe's Digital Single Market should be at the heart of this legislation. As this legislation is drafted, it is important that a balance is struck between the rights of the consumer and that of the digital content provide.