

# Client Alert

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## Digital Single Market Strategy Update: Europe Proposes Further Harmonisation of Consumer Protection Laws

By Susan McLean and Kristina Ehle

The European Commission has published two draft directives on the supply of digital content and the online sale of goods which aim to help harmonise consumer law across Europe. In proposing these new laws, the European Union is making progress towards one of the main goals in its [Digital Single Market Strategy](#) (announced in May 2015), which is concerned with strengthening the European digital economy and increasing consumer confidence in online trading across EU Member States. According to the Commission, only 12% of EU retailers sell online to consumers in other EU countries, while more than three times as many sell online in their own country. The Commission has also announced a plan to carry out a fitness check of other existing European consumer protection laws.

In this Alert we outline the potential implications of these latest developments, with particular focus on the UK and Germany.

### DIGITAL CONTENT AND ONLINE SALES OF GOODS

This is not the first time that the Commission has tried to align consumer laws across the EU: the Commission's last attempt at a Common European Sales Law faltered in 2015. But the Commission has now proposed two new directives dealing with contracts for the [supply of digital content](#) ("**Draft Digital Contract Directive**") and [sales of online goods](#) ("**Draft Online Goods Directive**") (together, the "**Proposed Directives**"). The Online Goods Directive will replace certain aspects of an Existing Sales of Consumer Goods and Associated Guarantees Directive ("**Existing Goods Directive**"), whereas the Digital Contract Directive introduces a new set of rights for consumers when they buy digital content across the EU.

Part of the issue with previous EU legislative initiatives in this area is that "harmonised" has really meant "the same as long as a country doesn't want to do anything different". This time, the Proposed Directives have been drafted as so-called "maximum harmonisation measures", which would preclude Member States from providing any greater or lesser protection on the matters falling within their scope. The Commission hopes that this consistent approach across Member States will encourage consumers to enter into transactions across EU borders, while also allowing suppliers to simplify their legal documentation by using a single set of terms and conditions for all customers within the EU.

The Proposed Directives will need to be adopted by the EU Parliament and Council before becoming law. Member States would then have two years to transpose the Proposed Directives into national law.

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## CONSUMER PROTECTION FITNESS CHECK

Following publication of the Proposed Directives, the Commission also published a [Roadmap](#) setting out its plan to carry out a “fitness check” of six consumer protection directives (the Misleading and Comparative Directive, Unfair Commercial Practices Directive, Price Indication Directive, Unfair Contract Terms Directive, Sales and Guarantee Directive and Injunctions Directive (“**CP Directives**”)), with the aim of assessing the effectiveness, efficiency, coherence and relevance of the CP Directives.

The Commission will look at the extent to which the fundamental objectives of the CP Directives have been achieved, whether further harmonisation is necessary, whether there is potential for complication of the current regulatory framework and whether there is scope of consolidation of EU consumer law. The Commission will also consider whether the Unfair Contract Terms Directive should be reinforced by a blacklist of terms that are always deemed to be unfair.

The Commission also wishes to look at whether consumer rules should also apply in business-to-business transactions, in particular, transactions with SMEs and not-for-profit entities that don’t qualify as consumers under the current rules. Lastly (with the rise of the sharing economy in mind), the Commission wants to review the issues arising in both consumer-to-consumer transactions and consumer-to-business relations.

The Proposed Directives will be taken into account when the fitness check is being performed, and are expected to have an impact on the Commission’s findings in these areas.

The Commission will also consider as part of this review sector-specific consumer protection directives and EU legislation related to retail commerce, such as the E-Commerce Directive and the Services Directive, both of which contain consumer information requirements.

Evidence will be gathered during 2016, including via an online public consultation, and the Commission aims to publish its report on the results of the fitness check in the second quarter of 2017.

The Commission is also carrying out a separate review of the existing [Consumer Rights Directive](#) which has been in force since June 2014 (**CRD**) and the results of that review will also feed into the fitness check.

## DRAFT DIGITAL CONTENT DIRECTIVE

### SCOPE

The Draft Digital Content Directive would apply only in business-to-consumer sales, and would not extend to SMEs. In addition, digital content providers in certain sectors, such as financial services, gambling or health care, are outside the scope of the directive. The rules would apply: (i) regardless of the method of sale (unlike the Draft Online Goods Directive), and (ii) to both digital content sold to the consumer (*i.e.*, licensed on a perpetual basis), and digital content supplied under a temporary licence. Currently, most EU member states do not have national consumer protection legislation specifically concerning sales of digital content to consumers (the issue tends to be covered by sales of goods or services rules). The Commission believes that there is a risk of further legal fragmentation if no action is taken at EU level.

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The key provisions of the Draft Digital Content Directive include:

- **Supplier's liability for defects:** If the digital content is defective, the consumer can request that the defect be fixed. This can be done by the supplier providing an update of the content, or by asking the consumer to access/download a new copy of the digital content. There will not be a time limit to the supplier's liability for such defects, because, unlike goods, digital content is not subject to "wear and tear".
- **Reversal of burden of proof:** If the digital content is defective, it will be the supplier's responsibility to prove that the defect did not exist at the time of supply. The Commission believes that this is important because the technical nature of digital content means that it can be difficult for consumers to prove the cause of a problem. Software companies have criticised this approach on the basis that they believe that it will be almost impossible for them to prove that their digital products were not defective. The proper function of software depends on the hardware, operating system and other software used on the consumer's systems; each of the interfaces to those systems or the incorrect use of the software may be responsible for an issue. Analysing and identifying the issue would mean that the provider would have to access the consumer's system, and providers argue that this would cause unreasonable effort and costs for the provider.
- **Right to end a contract:** Consumers will have the right to terminate long-term contracts and contracts to which the supplier makes major changes.
- **Contract established in exchange for data:** If the consumer has obtained a digital content or service in exchange for personal data, the new rules clarify that the supplier should stop using the data when the contract terminates.

## IMPLICATIONS FOR THE UK

Since 1 October 2015, UK consumers have enjoyed new rights and remedies with respect to digital content under the [Consumer Rights Act \(CRA\)](#). The Draft Digital Content Directive would reduce UK consumer protection in some areas and enhance it in others. Accordingly, various concerns have been raised by the UK's Department for Business, Innovation & Skills (**BIS**), the UK competition regulator (**CMA**) and the UK's Chartered Trading Standards Institute (**CTSI**).

- **Scope:** The Draft Digital Content Directive applies to a broader range of digital content than the CRA. In particular, the CRA applies only where digital content has been paid for. The Directive extends remedies to "free" content in that the Directive covers content that is provided for non-monetary consideration, e.g., in exchange for the consumer actively providing personal data. BIS suggests that the concept of "actively providing" data is not clear. Does this simply require a positive action by the consumer? Is simply agreeing to make data available sufficient to pass this test? The CMA believes that consumers would need to do more than, say, "click" a button. Whereas BIS states that extending rights to cover free services may not be proportionate, the CMA broadly welcomes the proposed approach, but suggests how this works in practice will need careful consideration. The Draft Digital Content Directive also extends to certain types of digital services not currently covered in the CRA (e.g., cloud storage services and social networking). However, BIS believes that the Directive could be clearer as to which services are covered and which are not, to avoid overlap/conflict with other EU legislation.

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- **Data protection:** BIS states that although the Draft Digital Content Directive is without prejudice to applicable data protection law, “any confusion with or unjustified extension of the already comprehensive EU rules in this area including the GDPR should be avoided”.
- **Installation of digital content:** The Draft Digital Content Directive introduces new provisions regarding installation which are not covered in the CRA.
- **Modification of digital content:** Under the Draft Digital Content Directive, more restrictions are imposed on modifications by suppliers and consumers have a new right to terminate the contract if the trader makes a modification that adversely affects access to or use of the digital content. Although it agrees with the general thrust, the CMA has concerns that a trader’s right to update content shouldn’t be used to dilute consumer control.
- **Standards and remedies:** BIS believes that the approach to standards in the Draft Digital Content Directive (*i.e.*, fit for purpose, as described and of satisfactory quality) will have the same effect as the applicable provisions in the CRA. However, BIS points out that they are not in line with the regime in the Online Goods Directive, which isn’t helpful. The CMA agrees that alignment would help avoid market distortions and uncertainty.
- **Reversal of the burden of proof:** Currently in the UK there is an assumption that digital content complies with the contract for six months after purchase. Under the Draft Digital Content Directive, this reversal of the burden of proof has the potential to continue for a considerably longer period.
- **Termination:** The Draft Digital Content Directive introduces a new right to terminate after one year any contract of indefinite length or that extends beyond one year. In addition, with respect to the new rules on the return of consumer data, BIS believes that these appear very broad (beyond what is required under data protection law) and potentially onerous. BIS suggests that it could be difficult for the trader to retrieve this data which “would appear to be of little practical use to the consumer”.

## IMPLICATIONS FOR GERMANY

In Germany, no statutory consumer law specific to digital content currently exists. Instead, German courts apply general laws on the sale or rental of items (including consumer-specific rules) where digital content is provided in exchange for payment. Where the digital content is provided in exchange for non-monetary considerations (*e.g.*, user-generated content or user data), the statutory rules on barter contracts apply. The Draft Digital Content Directive would constitute the first comprehensive legal framework for the supply of digital content in Germany.

- **Standards and remedies:** Under the Draft Digital Content Directive, digital content needs to be in conformity with the contract or, where the contract is silent, to at least be fit for ordinary use. These rules explicitly determine conformity of digital content by mirroring the corresponding rules of the Existing Goods Directive. Therefore, only a few changes to German law will be required, as many of the existing rules are already applied to digital content in Germany.
- **Reversal of the burden of proof:** The reversal of the burden of proof provisions in the Existing Goods Directive, which state that consumer goods are considered to have been defective at the time of delivery

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if a defect is found within six months, currently only apply to physical goods. In particular, with regard to digital content licensed for a limited term only (which is considered a rental contract and not a sales transaction), the burden of proof is currently with the licensee. The permanent reversal of the burden of proof for digital content under the Draft Digital Content Directive would be an entirely new concept under German law.

- **Right to damages:** The Draft Digital Content Directive stipulates that consumers are entitled to damages caused by the defective content. As the German Civil Code generally provides for comprehensive rules on compensation of economic damages, we do not expect that substantive changes will be required.
- **Termination:** The termination right for long-term contracts after one year (as contemplated by the Draft Digital Content Directive) would enhance existing German consumer protection law. Under existing law, contract terms of up to two years are enforceable in standard agreements with consumers.
- **Reimbursement:** Under the Draft Digital Content Directive, following termination, the seller must reimburse the purchase price or, where the content was provided in exchange for non-monetary consideration, refrain from using what the seller received from the consumer (e.g., the user-generated content or data). The latter provision extends consumers' rights under German law.

## DRAFT ONLINE GOODS DIRECTIVE

As with the Draft Digital Content Directive, the Draft Online Goods Directive would only apply in business-to-consumer sales. Only goods sold online or otherwise at a distance fall within its scope. As such, any face-to-face sales are not covered. Contracts for the supply of services would not be subject to the Directive. Where a contract is for the supply of both goods and services, the rules would apply only to those elements of the contract that relate to goods.

The key provisions of the Draft Online Goods Directive include:

- **Reversal of the burden of proof for two years:** Under existing law, a consumer asking for a remedy for a defective product does not have to prove that the defect existed at the time of delivery; it is up to the seller to prove that the defect did not exist. Currently, the time period during which the seller has this burden of proof varies by Member State; under the new law, this period will be extended to two years throughout the EU.
- **No notification duty:** Consumers won't lose their rights if they don't inform the seller of a defect within a certain period of time (as is currently the case in some Member States).
- **Minor defects:** If the seller is unable or fails to repair or replace a defective product, consumers will have the right to terminate the contract and be reimbursed also in cases of minor defects.
- **Secondhand goods:** For secondhand goods purchased online, consumers will now have the possibility to exercise their rights within a two-year period, as is the case with new goods, instead of the one-year period that currently applies in some Member States.

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## IMPLICATIONS FOR THE UK

The Draft Online Goods Directive retains many of the same key rights and remedies set out in the Existing Goods Directive and recently implemented in the UK under the CRA. However, there are some differences between the statutory remedies proposed in the Draft Online Goods Directive and the CRA and it's likely that a number of key rights under the CRA would likely need to be repealed for online and other distance sales, which has led to concerns being raised by BIS, CMA and CTSI, in particular:

- **Short-term right to reject:** Under the CRA, consumers have a right to reject and obtain a full refund within 30 days. This would need to be repealed in relation to goods purchased online. However, consumers' rights under the Consumer Rights Directive would not be affected so consumers would still be entitled to a 14-day right of withdrawal for goods bought online or at a distance. However, unlike the short-term right to reject, the consumer has to bear the cost of returning the goods under the right to withdraw and the trader may make a deduction for use from the refund, depending on the circumstances. CTSI sees this proposed change as a retrograde step and doesn't consider the CRD provisions sufficient to ameliorate the problems caused by the removal of the right to reject. The CMA is also unhappy with the change, believing it would reduce certainty, to the disadvantage of both consumer and trader.
- **Loss of one repair or replacement limit:** Under the CRA, consumers can pursue a price reduction or refund after the goods have undergone one repair or replacement. This would need to be repealed. The UK would be required to reinstate the law that existed before the CRA which, according to CTSI, lacked clarity and led to significant consumer frustration, *i.e.*, consumers can ask for a price reduction or refund if a repair/replacement cannot be provided within a *reasonable time and without significant inconvenience*. The CMA also disagrees with the removal of this key protection and recommends the draft Directive be amended in line with the CRA.
- **Liability period:** Currently, the liability and limitation periods for remedies are six years in England, Wales and Northern Ireland and five years in Scotland. The Draft Online Goods Directive would reduce the liability period (*i.e.*, period in which a fault has to appear before a consumer can make a claim) to two years. Again, CTSI and CMA don't support this change, believing it a significant reduction in consumer rights.
- **Deduction for use:** The approach to deduction for use under the CRA is different and would need to be updated. Under the CRA if a repair or replacement is impossible or has failed or has not been carried out in a reasonable time or without significant inconvenience to the consumer, then the consumer may reject the goods and obtain a refund. If the final right to reject is exercised within six months of delivery of the goods, then the trader must generally give the consumer a full refund. After the first six months, the trader may apply a deduction to the refund to account for the use the consumer has had.

On the other hand, the Draft Online Goods Directive will enhance consumer protection under the CRA by extending the reversal of the burden of proof from six months to two years. During this extended period, it will be the responsibility of the supplier to prove that the goods were satisfactory at the time of sale. On this point, CTSI is not supportive as it says it is not sure this enhancement strikes the right balance and may be unfair on

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businesses. The CMA supports the proposal in principle, but the proposal doesn't offset its concerns regarding the reductions in consumer protection introduced by the draft Directive.

Other concerns have been raised in the UK. For example, suppliers operating in the UK would be subject to different rules depending on the method they use to supply goods: offline selling would fall within the scope of the CRA, whereas online or distance selling would engage the provisions of the Proposed Directives. Suppliers using both methods would be required to comply with both sets of rules, and there are concerns from both CTSI and CMA that this could lead to confusion for consumers, and challenges for suppliers juggling two different sets of rights. CMA also points out that the different rules could lead to market distortion, with consumers more inclined to buy offline, thus reducing online growth.

## IMPLICATIONS FOR GERMANY

The Existing Goods Directive, which is amended by the Draft Online Goods Directive, is currently transposed into the German Civil Code.

It is worth noting that in Germany, with the exception of the provisions on the trader's redress, the reversal of the burden of proof, some features of the consumer guarantee and the mandatory nature of the rules, most of the rules of the Existing Goods Directive have been extended to non-consumer sales contracts. It remains to be seen whether a similar extension will be made with regards to the changes in the Draft Online Goods Directive, which would impact B2B ecommerce transactions.

- **Reversal of the burden of proof:** As set by the Existing Goods Directive, under existing German law, if there is a defect within the first six months following delivery of the goods, the burden of proof that the delivered goods were not defective at the time of delivery lies with the supplier. The Draft Online Goods Directive would extend this reversal of the burden of proof to two years. It remains to be seen how this reversal of the burden of proof would be treated by the German courts that have tended to minimize the impact of the existing reversal.
- **No notification duty:** There is no notification duty with regard to defects for consumers under current German law, so its abolition in the Draft Online Goods Directive would not impact German law.
- **Minor defects:** German law currently only provides for a proportionate reduction of the purchase price in case of minor defects, but not for a termination right. A right to terminate would be an extension of consumer rights under German law.
- **Liability period:** Currently, sellers in Germany are already liable for defective goods sold online for two years, which is the corresponding statute of limitations. Consequently, there will be no change under the Draft Online Goods Directive.
- **Reimbursement for returns:** Under existing German law, the seller may refuse to reimburse the buyer until the goods have been returned. The Draft Online Goods Directive requires the seller to reimburse the consumer within 14 days from receipt of the termination notice.
- **Compensation for decrease in value:** Consumer sales law in Germany currently prohibits deduction for use and compensation of value when a consumer terminates the sales contract. The Draft Online Goods

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Directive requires the consumer to pay for a decrease in the value of the goods insofar as the decrease exceeds depreciation through regular use.

## CONCLUSION

Although the Proposed Directives still have a long way to go before they become law, they demonstrate that there is a keen desire for harmonisation at the EU level.

Being able to have one set of terms and conditions for all customers in Europe would certainly appeal to many businesses that already offer, or would like to offer, consistent terms for their cross-border sales to consumers, and are currently having to navigate a patchwork of consumer laws.

A possible alternative would have been to apply the consumer law of the home country of the respective provider also to transactions with consumers seated in another Member State. The e-Commerce Directive (2000/31/EC) is an example of this “country of origin principle”. This alternative approach not only would benefit the businesses actually involved in cross-border e-commerce, but would also prevent additional costs and efforts for many small and medium-sized businesses that do not aim to do cross-border business, but nevertheless would have to implement the new fully harmonised consumer rules proposed by the Commission.

## Contact:

### Susan McLean

44 (20) 79204045  
[smclean@mofo.com](mailto:smclean@mofo.com)

### Kristina Ehle

49 (30) 72622-1346  
[kehle@mofo.com](mailto:kehle@mofo.com)

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