

**Position Paper on the proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (COM (2015) 635) and a Directive on certain aspects concerning contracts for the supply of digital content (COM (2015) 634)**

The Notaries of Europe have taken note of the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods (COM (2015) 635) and a Directive on certain aspects concerning contracts for the supply of digital content (COM (2015) 634) published on 9 December 2015 and wish to contribute to the reflections underway on these proposals.

**I. Directive on certain aspects concerning contracts for the supply of digital content (COM (2015) 634)**

The Notaries of Europe approve of the endeavor to create a set of harmonised rules tailored to the specificities of the supply of digital content. They would like to contribute the following observations to the discussion on the proposed directive.

The Notaries of Europe welcome the limitation of the scope of the Directive to *contracts* whose main subject matter is the provision of digital content and the corresponding exclusion of “*services performed with a predominant element of human intervention by the supplier where the digital format is used mainly as a carrier*” from the scope of the Directive in Art. 3 (5) lit. a of the proposal (comp. already recital 19 “*services performed personally by the supplier and where the digital means are only used for delivery or access purposes*”). Indeed, in cases where the digital format is used as a mere means to deliver the output of a human service and thus as a mere carrier, the human service clearly constitutes the characteristic performance and the liability for the content should follow the rules applicable this characteristic performance. Legal services thus should generally fall outside the scope (e.g. a lawyer might draft a contract and send it to the parties via email or a notary might transfer an authenticated contract to the parties in a digital format). To avoid any interpretation uncertainties, the Notaries of Europe suggest excluding services which clearly fall under Art. 3 (5) lit. a, such as legal services, from the scope of the directive by means of a non-exhaustive list.

Even in cases which do not qualify for the exception pursuant to Art. 3 (5) lit. a, it should be made clear in Art. 6 of the proposal (conformity of digital content with the contract), that the directive does not apply to the conformity of the *substantive content* delivered in a digital format (e.g. substantive accuracy and comprehensiveness of the content), but merely the technical conformity of digital content with the contract. If a legal document for example is contained in an electronic format, the remedies of the draft directive should only apply to faults of the digital format (e.g. the file cannot be opened or copied) but not the legal content (wrong advice has been given, incorrect data has been used).

The Notaries of Europe further ask that “supply of digital content” within the meaning of the directive be defined so as to explicitly exclude the delivery of (digital) excerpts from electronic public registers (e.g. real estate register, companies’ register, last will’s register). The supply of such excerpts should not fall under the scope of the directive, as it lacks the commercial element which the directive presupposes (comp. the scope of the Directive as described in Article 3 of the proposal: supply of digital content *against a price or counter-performance in the form of personal data or any other data*). The exemption should apply to registers held by public authorities and public officers such as notaries. The Notaries of Europe would more generally like to draw attention to the fact that, according to the current

wording of the proposal, online information offers by public administrations in general might be considered to fall under its scope if the consumer is required to provide his or her email address or any other personal data in order to obtain the information. This entails a clear risk of a tangible reduction of information portals by public authorities and therefore a decrease in e-government services. In order to avoid this consequence, information offers by public authorities should be explicitly exempted from the scope of the directive.

Moreover, the Notaries of Europe would like to point out that the wording of Article 14 of the proposal (Right to damages) can be read so as to exclude provisions by the Member States awarding damages in cases not mentioned in Article 14, for example for other types of injuries than economic loss. The Notaries of Europe therefore suggest explicitly clarifying that Article 14 does not exclude provisions by the Member States for the redress of injuries outside of the scope of this provision and that the provisions of tort law remain untouched by the directive.

Finally, as far as mixed contracts (*i.e.* a combination of digital and substantive/physical content) are concerned, the Notaries of Europe see a need for a clearer regulation of the interplay between the proposed directive and the rules applicable to the other elements of the contract. Pursuant to recital 20 of the proposed directive, where, under a contract, the provider offers digital content together with goods, which do not function merely as a carrier of the digital content, the Directive should apply only to the digital component. The other elements should be governed by the applicable law. On the other hand, recital 11 states that “*the directive should not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods*”. The problem is that it is not always possible to draw a clear distinction between the “goods component” and the “digital content component”, as, for example, defects of the digital content may induce a lack of conformity of the good itself, especially in cases where the digital content is essential to the functioning of the good. In that case, the Directive should clearly provide which rules are applicable. The Notaries of Europe suggest to exclusively apply the directive on the supply of digital content where a defect of the “digital content component” induced a lack of conformity of the good itself. Another question which needs to be expressly dealt with in the proposal is the question of the legal consequences of a defect of the digital content on the “goods” or “services” component of a mixed-contract. The Notaries of Europe suggest to solve this question in the same fashion as described in the first part of this position paper (I.) with respect to the proposal of a directive on online and other sales of goods (*i.e.* right to terminate the entire contract if the consumer has no interest in the performance altogether due to the termination of the “digital content component” of the contract).

## **II. Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635**

The Notaries of Europe would like to contribute the following observations to the discussion on the proposal of a directive on certain aspects concerning contracts for the online and other distance sales of goods.

In order to achieve a scope of application tailored to the purpose of the directive, contracts concluded before a civil law notary should be excluded from its scope of application. Indeed, such contracts, even if they are exceptionally concluded at a distance, are not typical “distance contracts” within the aim of the directive (*i.e.* e-commerce and similar business models

through more traditional means of distant communication). More importantly, contracts concluded before a civil law notary do not fall within the purpose of the directive as set out in Recitals 1 – 11 of the Proposal: The directive sets out to create a fully harmonised set of rules regarding key contractual rights arising out of business-to-consumer distance sales contracts in order to unleash the full potential of the digital single market by eliminating uncertainties as to the applicable law in the different Member States, which were found to be a major obstacle to cross-border transactions (compare sp. recitals 1, 4, 7, 9). Due to his obligation to comprehensively and impartially inform the parties about the applicable law and its content (including remedies for lack of conformity), this uncertainty does not arise in the case of contracts authenticated by a civil law notary, or, to speak in the terms of Article 3 (3) lit. i) of the Directive on Consumer Rights (2011/83/EC), a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope. In addition, the typical inequality between consumer and seller in business to consumer contracts, which warrants specific consumer protection law, is levelled through the intervention of the notary due to his comprehensive obligations of impartial advice and information. This is the reason for the exclusion of such contracts in the Directive on Consumer Rights. For all of the above reasons, a similar provision is warranted in the currently proposed Directive.

In the definition of “sales contract” in Article 2 (a), the meaning of “undertakes to transfer” needs further clarification, namely with respect to the (potential) application of the proposed Directive to leasing contracts. The question is whether a conditional obligation of transfer of property or even a unilateral purchase option of the buyer would be sufficient to induce the application of the directive.

The Notaries of Europe further see the need for provisions which deal with the legal consequences of a lack of conformity of tangible goods in the context of mixed contracts, that is contracts which fall under the scope of the Directive only in part (for example a contract for the sale of immovable property which includes the transfer of tangible goods such as a built-in kitchen, the sale of a care apartment or contracts where the sale of goods and the provision of services are inextricably linked). In such cases, the link between the different elements of the contract calls for parallel provisions on specific points, to avoid unwarranted fragmentation and complications. One example is that it should be possible to provide for a common relevant time for establishing conformity with the contract, which is currently not the case, as the principles in Article 8 are mandatory. The Notaries of Europe therefore suggest to provide for the possibility to derogate by contract from the dispositions in Article 8 of the Directive and thus modify the relevant time for the assessment of the conformity of the contract. Furthermore, the Directive should explicitly regulate the legal consequences of a termination of the part of the contract relating to tangible goods’ lack of conformity on the mixed-contract as a whole and provide for the right of the consumer to terminate the whole contract in case both contracts are linked in a way that the consumer has no interest in the sole performance of the remaining element of the contract.

Moreover, the proposal does not always reach a fair balance between the rights and interests of the seller and the consumer. On the one hand, in case of termination of the contract due to a lack of conformity, Article 13 (3) (b) of the proposal deprives the consumer of his or her right of retention by obliging him or her to return the goods “*without undue delay and in any event not later than 14 days from sending the notice of termination*” and thus irrespective of the reimbursement of the purchase price by the seller. Such a provision fails to achieve a fair balance of the interests at hand in case of termination of a synallagmatic contract due to a lack

of conformity of the goods sold, *i.e.* where the ground for termination lies in the sphere of the seller. On the other hand, the proposal lacks explicit provisions comparable to Article 2 (3) of the Consumer Rights Directive (no lack of conformity if the consumer was aware, or could not reasonably be unaware of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer) and Article 3 (6) of the same directive (no termination of the contract in case of a minor defect).

The Notaries of Europe further point out that, as a full harmonization directive, in its current drafting the proposal might give rise to uncertainties as to whether it excludes provisions by the Member States on damages altogether. The Notaries of Europe therefore suggest expressly clarifying that damages remain outside of the scope of the directive.

However, while welcoming the aim to further encourage cross-border e-commerce, the Notaries of Europe finally regret that the proposed directive will lead to further fragmentation of EU-consumer law as well as sales law within the European Union by providing for an additional set of rules limited to distance sales of goods.