

DIGITALEUROPE position on embedded digital content and the Digital Contracts Directives

Brussels, 29 August 2018

Executive summary

DIGITALEUROPE believes that **the Tangible Goods Directive (which, jointly with the Digital Content Directive, are often referred to as the ‘Digital Contracts Directives’ package) should apply both to goods and digital content embedded in goods**, i.e. digital content whose absence or unavailability would render the good inoperable or would prevent the good from performing its main functions. Examples of such digital content include the firmware which enables a speaker’s volume controls and the operating system of a smart TV. Here are the main arguments underpinning our view:

- The Sales and Guarantees Directive currently applies both to goods and digital content embedded in them. It is a regime that works well and ensures legal certainty – we see no reason why goods and embedded content should fall under separate regimes.
- If goods and digital content embedded in them were to fall under separate regimes (Tangible Goods Directive and Digital Content Directive respectively), traders (a) would be burdened with deciding whether a fault in a particular good is due to a hardware or content malfunction – a decision that requires technical expertise; and (b) might decide to turn first to the content provider to seek a remedy. DIGITALEUROPE believes that those two elements would result in undue delays and an unsatisfactory level of after sales service for the consumer. **The Tangible Goods Directive should apply to goods in their entirety and the manufacturers of goods should be the ones to identify where the fault lies and how to remedy it.**

1. Embedded digital content and the scope of the Digital Contracts Directives

DIGITALEUROPE has actively participated in the discussions surrounding the Tangible Goods and Digital Content Directives (TGD and DCD respectively) since the European Commission proposed them in December 2015, holding numerous meetings with EU officials and producing various position papers on the topic.

The two Directives, often referred to as the Digital Contracts Directives, are crucial to the operations of the various DIGITALEUROPE members which produce devices and digital content destined for consumers. The obligations the Directives impose on traders are relevant to our members directly (as some companies are both producers and traders) and indirectly (in the case of companies which make their products available to consumers via traders). It should also be noted that, even though the two Directives impose obligations on traders (thus creating a standard point of contact for the consumer) rather than on producers, usually traders and producers work together to ensure that the appropriate remedies are offered for goods and content which are not in conformity with the contract concluded between trader and consumer.

Before adopting the two Directives, Council and Parliament will need to agree whether digital content embedded in goods should fall under the scope of the DCD or the TGD, and this decision will have important consequences for the operations of DIGITALEUROPE members. The vast majority of our goods – everything from smart TVs and PCs to speakers and cameras – have digital content embedded in them: depending on the text that Parliament and Council will agree on, conformity issues related to those goods will fall under the DCD or the TGD. Therefore, it is extremely important to DIGITALEUROPE that the co-legislators agree on a solution which provides legal clarity for all parties concerned (traders, producers and consumers) and allows producers to fix conformity issues as efficiently as possible, without undue delays.

In view of our concerns on legal clarity, DIGITALEUROPE believes that embedded digital content, including updates to such content, should fall under the scope of the TGD. Embedded content should be defined as content whose absence or unavailability would render the good inoperable or would prevent the good from performing its main functions. It is not important whether the content was pre-installed before the good was sold to the consumer or was installed after the sale, whether the content is installed in the good itself or is permanently connected to the good (e.g. an app which is installed in the consumer’s smartphone and which is required to operate a fitness tracker), or whether the user needs to agree to an End User Licensing Agreement (EULA) in order to use the content. Examples of embedded digital content would include the firmware which enables the volume controls in a speaker, the Operating System (OS) upon which a smart TV runs, and the middleware which allows the OS and the apps installed in a mobile phone to be interoperable. Conversely, a weather-forecast app installed in a mobile phone would not be considered as embedded content. Furthermore, in our view it is important to avoid any ambiguity as to the applicable regime for updates to embedded digital content. **The TGD should clearly state that its scope encompasses not only embedded content but also updates to such content, to avoid that embedded digital content would be regulated under the TGD while updates would be governed by the DCD.**

In the following paragraphs we discuss the rationale behind our position on the embedded content issue.

Currently the Sales and Guarantees Directive (Directive 1999/44 EC) applies to goods in their entirety – both to the hardware part of the good and to any embedded content – and this system works well in practice. To give a concrete example, if within the legal guarantee period a consumer complains to the trader regarding a malfunctioning smart TV they have bought, the trader will ask the TV manufacturer to assess and fix the problem. The manufacturer will then establish exactly where the problem lies: the fault could lie in the OS on which the TV runs, in the TV’s firmware, in a hardware component etc. Once the manufacturer has established where the fault lies they will either try to fix it themselves or, if the fault relates to digital content provided by a third party and which is essential to the functioning of the TV, the manufacturer will ask the third party in question to provide the solution. Throughout this whole process there is legal clarity about the set of rules that all parties involved must follow (i.e. the Sales and Guarantees Directive), and it is also clear that the trader’s first port of call is the TV manufacturer and not the producers of digital content which is embedded in the device.

In DIGITALEUROPE’s view, if the DCD and the TGD are adopted then goods and content embedded in them should fall in their entirety under the TGD, in the same way that goods and their embedded content currently fall under the Sales and Guarantees Directive. This way the after sales operations of our members which manufacture goods would continue to use one set of rules and of our members would have legal certainty regarding the rules that apply in the sphere of legal guarantees.

We firmly believe that, if embedded digital content were to fall under the DCD, legal uncertainty would be created:

- Would traders continue to use the manufacturer of the good as their first port of call, or would traders decide to turn directly to the provider of the digital content? As demonstrated above it is important that, when a good malfunctions, the manufacturer of the good is the first party to assess the good and establish exactly where the problem lies. This is the most efficient way to ensure that the consumer receives comprehensive after-sales care and is offered the appropriate remedy.
- Our understanding is that the Parliament would favour a regime under which the trader would be tasked with deciding whether the conformity issue is due to a hardware fault (in which case the manufacturer of the good would need to offer a remedy and the TGD would apply), or due to a fault present in a piece of digital content embedded in the good (in which case the content producer would need to offer a remedy and the DCD would apply). However, the trader is not always best placed to take such a decision: a sales person would typically lack the technical knowledge required to establish exactly where the fault lies. Once again, it would make more sense if the good were to be sent to the manufacturer so that the latter pinpoints the fault and decides on the appropriate course of action or remedy.

2. DIGITALEUROPE amendments on embedded digital content

As discussed in the previous section, DIGITALEUROPE believes that embedded content should fall under the scope of the TGD. We would therefore like to propose amendments to the TGD (inspired by the Council’s General Approach on the DCD and amendments proposed by other industry associations) which define the term ‘embedded content’ and clarify that the TGD applies to such content. The TGD amendments we propose for the TGD should be mirrored in the text of the DCD, i.e. the latter should explicitly exclude embedded digital content from its scope and provide a definition for the term.

PROVISION	DIGITALEUROPE PROPOSED AMENDMENTS TO TGD
New article 1(1)(a)	This Directive should not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content. However, this Directive should apply to digital content embedded in goods and updates provided to such content.
New article 2(f)(a)	<p>‘Embedded digital content’ means digital content present in or permanently connected to a good, whose absence or unavailability would render the good inoperable or would prevent the good from performing its main functions, irrespective of whether that digital content was pre-installed at the moment of the conclusion of the contract relating to the good or installed subsequently according to that contract.</p> <p>‘Function’ means the basic principle determining the use of a product by a consumer under the normal conditions of use recommended by the producer.</p>

	<p>‘Main function’ means the function or functions most relevant to the consumer under the normal conditions of use recommended by the producer.</p>
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Justification

By including embedded digital content in the scope of the TGD we would ensure that companies which produce goods and embedded digital content have legal clarity that one set of rules (i.e. the TGD) applies to goods in their entirety. Currently companies which produce goods apply one set of rules (the Sales and Guarantees Directive) when it comes to legal guarantees and DIGITALEUROPE believes that this system works well and should be carried over into the TGD.

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE's members include in total over 35,000 ICT Companies in Europe represented by 63 Corporate Members and 39 National Trade Associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

DIGITALEUROPE MEMBERSHIP

Corporate Members

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National Trade Associations

Austria: IOÖ	Germany: BITKOM, ZVEI	Slovenia: GZS
Belarus: INFOPARK	Greece: SEPE	Spain: AMETIC
Belgium: AGORIA	Hungary: IVSZ	Sweden: Foreningen Teknikföretagen i Sverige, IT&Telekomföretagen
Bulgaria: BAIT	Ireland: TECHNOLOGY IRELAND	Switzerland: SWICO
Croatia: Croatian Chamber of Economy	Italy: Anitec-Assinform	Turkey: Digital Turkey Platform, ECID
Cyprus: CITEA	Lithuania: INFOBALT	Ukraine: IT UKRAINE
Denmark: DI Digital, IT-BRANCHEN	Luxembourg: APSI	United Kingdom: techUK
Estonia: ITL	Netherlands: Nederland ICT, FIAR	
Finland: TIF	Poland: KIGEIT, PIIT, ZIPSEE	
France: AFNUM, Syntec Numérique, Tech in France	Portugal: AGEFE	
	Romania: ANIS, APDETIC	
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