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From:	the Dutch Presidency and the incoming Slovak Presidency
To:	Working Party on Civil Law Matters (Contract Law)
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Subject:	Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) - Revised text proposal

Delegations will find in the Annex to this note a revised text of the above proposal drawn up jointly by the Presidency and the incoming Slovak Presidency in the light of the discussions held in the Working Party on Civil Law Matters (Contract Law) during the first semester 2016 and taking into account the written comments from delegations (see documents 7746/16 JUSTCIV 53 CONSOM 73 DIGIT 30 AUDIO 36 CODEC 401 + ADD 1 to 22, 7937/16 JUSTCIV 61 CONSOM 83 DIGIT 37 AUDIO 43 CODEC 457 and 9346/16 JUSTCIV 126 CONSOM 115 DIGIT 54 AUDIO 67 CODEC 718) and the basic principles and political guidelines for future work approved by the Council (Justice and Home Affairs) at its meeting on 9 and 10 June 2016 (see document 9768/16 JUSTCIV 160 CONSOM 137 DIGIT 67 AUDIO 76 CODEC 809, further referred to as 'Political guidelines').

Changes compared to the text of the Commission proposal are marked in **bold** or by (...) for deleted text.

The following abbreviations are used in the footnotes of the text:

- **'CRD'**: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council
- **'Online sales of goods proposal'**: 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
- **'Directive 1999/44'**: 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
- **'Digital content proposal'** or **'this Directive'**: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content
- **'GDPR'** or **'General Data Protection Regulation'**: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Article 1

Subject matter

The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection¹ by laying down common rules on certain requirements concerning contracts between suppliers and consumers for the supply of digital content or a digital facility (...), in particular rules on

- conformity of digital content **or a digital facility** with the contract,
- remedies in case of the lack of such conformity and the modalities for the exercise of those remedies, as well as on
- **the modification of digital content or a digital facility** and **the** termination of **long-term** contracts.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. 'digital content' means
 - (a) data which is produced and supplied in digital form, for example video **files**, audio **files**, applications, digital games and any other software,

¹ It is suggested that the additional elements of the Directive's objectives mentioned in point 1 of the 'Political guidelines' (such as increased legal certainty, reduction of transaction costs, making it easier for businesses, especially small and medium-sized enterprises ('SMEs'), to sell EU-wide, building greater confidence amongst European consumers when buying across borders) are included in the recitals [recitals (3) to (7)].

1a. 'digital facility' means

- (a) a [service] [facility] allowing the creation, processing or storage of data in digital form, where such data is **uploaded to or created in that facility** by the consumer, **for example a cloud storage or file hosting service; or**
- (b) a [service] [facility] allowing **the sharing of or any other interaction with data in digital form uploaded or created by the consumer and** other users of the [service] [facility], **for example social media, video or audio sharing websites or platforms;**

Option 1:

- 2. 'integration' means **the incorporation of digital content or a digital facility into the consumer's digital environment in order to meet the (...) intended purpose of the digital content or digital facility within that environment;**

Option 2:

- 2. 'integration' means **the linking of digital content or a digital facility with the different components of the consumer's digital environment in order that the digital content or digital facility can be used in accordance with the contract (...);**

- 3. 'supplier' means any natural or legal person, irrespective of whether privately or publicly owned², who is acting, including through any other person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft, or profession **in relation to contracts covered by this Directive;**

² Delegations are invited to express their views as to whether further clarification is needed with regard to services provided by public entities giving access to public data, such as public registers. In this context, delegations are also invited to share their experience on how such services are treated in their Member State under the CRD.

4. 'consumer'³ means any natural person who in contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession **in relation to contracts covered by this Directive**;⁴

5. (...) ⁵

Option 1:

6. 'price' means money **or any other type of currency or a digital representation of value including virtual currency, such as bitcoins**, that is due in exchange for the supply of digital content **or a digital facility**;

Option 2:

6. (...) *deletion of the definition of 'price'*

6a. **'personal data' means personal data as defined by Article 4(1) of Regulation (EU) 2016/679⁶**;

³ Delegations are invited to express their views as to whether a recital on 'dual purpose contracts' (such as the second sentence of recital (17) of the CRD) should be added to this Directive.

⁴ A clarification (such as the one contained in recital (13) of the CRD) could be added in the recitals of this Directive to make clear that the Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises.

⁵ See footnote 58 on Article 14.

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

6b. 'counter-performance other than money' means personal data [as defined by Article 4(1) of Regulation (EU) 2016/679]⁷ or any data other than personal data that is due to be provided in exchange for the supply of digital content or a digital facility;

Option 1:

7. 'contract for the supply of digital content or a digital facility' means any contract under which the supplier supplies or undertakes to supply digital content to the consumer or provides or undertakes to provide the consumer access to a digital facility in exchange for the payment of a price or [provision of personal data or other data][a counter-performance other than money];

Option 2:

7. (...) *deletion of the definition of 'contract'*

8. 'digital environment' means hardware, software and any network connection (...) used by the consumer to access or make use of digital content or a digital facility;

Option 1⁸:

9. ['interoperability' means the standard hardware and software environment with which the digital content or digital facility and all its functionalities (...) are compatible;]

Option 2⁹:

9. 'interoperability' means the compatibility of the digital content or digital facility and its functions (...) with a standard hardware and software environment;

⁷ The reference to Regulation (EU) 2016/679 can be deleted if the definition of 'personal data' proposed in Article 2(6a) is included in the Directive.

⁸ Option 1 of the definition 'interoperability' takes over the wording used in recital (19) of the CRD which does not contain a definition in the text of the Articles.

⁹ Options 2 and 3 set out alternatives that try to provide a more specific wording.

Option 3:

9. 'interoperability' means the ability of **the digital content or digital facility** to perform **[its functions] [the functions owed under the contract] when operating** with a concrete digital environment;

9a. **'Functionality'**¹⁰ means the ways in which the digital content or digital facility can be used to perform its functions having regard to its purpose;

10. 'supply' means providing access to **the digital content or digital facility** or making **the digital content or digital facility** available;

11. 'durable medium'¹¹ means any instrument which enables the consumer or the supplier to store information addressed personally to that person in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

[12. **'tangible medium'**¹² means a tangible movable item that functions exclusively as a carrier for the supply of digital content].

¹⁰ The proposed definition of 'functionality' took inspiration from the common denominators of recital (26) of this proposal and of recital (19) of the CRD.

¹¹ Note to translators: the definition of 'durable medium' corresponds to the definition used in Article 2(1) of the CRD.

¹² The question of whether a definition of 'tangible medium' is needed (and the exact wording of such as definition) should be discussed together with Article 3(3).

Article 3

Scope

Option 1:

1. This Directive shall apply to any contract where the supplier supplies **or undertakes to supply** digital content **or a digital facility** to the consumer (...)and, in exchange, **the consumer pays or undertakes to pay** a price or [actively][consciously]¹³ provides **or undertakes to provide** [a counter-performance other than money]¹⁴ [personal data or other data] to the supplier.¹⁵

¹³ Under the Commission proposal, the concept of 'actively provided' intends to exclude from the scope of the Directive situations, such as (please see recital (14)):

- where the supplier collects meta data, such as the IP address, or other automatically generated information such as information collected and transmitted by a cookie, without the consumer actively supplying it, even if the consumer accepts the cookie (e.g. browsing on the internet by using a search-machine); or
- where the consumer is exposed to advertisements exclusively in order to gain access to digital content.

Delegations are invited to indicate whether they agree that the above situations should be excluded from the scope of the Directive and, in the affirmative, whether the requirement that the counter-performance data is provided 'actively' (or 'consciously'), in their view, is needed/is an appropriate term to achieve this objective.

¹⁴ This option would be used if a definition of 'counter-performance other than money' is included in the Directive (see the proposal in option 1 of Article 2(6b)).

¹⁵ The wording of Article 3(1) paragraph is very much linked to the question of whether or not a definition of 'contract for the supply of digital content or a digital facility' (as proposed in option 1 of Article 2(7)) will be included in the Directive, and whether or not a definition of 'counter-performance other than money' (as proposed in option 1 of Article 2(6b)) will be inserted.

Option 2¹⁶:

1. This Directive shall apply to any contract **under which** the supplier supplies **or undertakes to supply** digital content to the consumer **or provides** or undertakes to **provide the consumer access to a digital facility (...)** in exchange **for the payment of a price or [provision of personal data or other data]**[a counter-performance other than money(...)].

2. This Directive shall apply **where** the supply of digital **content or a digital facility is** developed according to consumer's specifications.
3. With the exception of Articles 5 and 11, this Directive shall apply to any **tangible** medium incorporating digital content **in such a way that the tangible medium serves** exclusively as carrier of digital content.¹⁷

Embedded software:

Option 1 (*'goods rules' to apply also with regard to the digital content*):

- 3a. **This Directive shall not apply to digital content which is an integral part of a good, irrespective of whether the integrated digital content was pre-installed at the moment of the conclusion of the contract or according to the contract installed subsequently, and contributes to the execution of the main functions of the good [or it was provided under the same contract as the good].**

¹⁶ If a definition of 'contract for the supply of digital content or a digital facility' as proposed in option 1 of Article 2(7) is included in the Directive, the wording of Article 3(1) under option 2 could be shortened as follows:

"This Directive shall apply to any contract for the supply of digital content or a digital facility between a supplier and a consumer [as defined in Article 2(7) of this Directive] (...)."

¹⁷ Article 3(3) should be discussed together with the definition of 'tangible medium' in Article 2(12).

Option 2 (*broad 'split approach' - 'goods rules' apply to the good in which the digital content is embedded, 'digital content rules' apply to the embedded digital content*):

3a. This Directive shall also apply to digital content which is embedded in goods.

Option 3 (*more specific 'split approach' specifying that the non-conformity of the hardware does not fall under the 'digital content rules'*):

3a. This Directive shall also apply to goods in which digital content is embedded 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, [except for the lack of conformity which clearly lie(s) in the hardware of the good][unless the supplier proves that the lack of conformity lies in the hardware of the good].

4. This Directive shall not apply (...) **where the personal data or other data is provided by the consumer not as counter-performance but exclusively because without this data it would not be possible for the supplier to supply the digital content or digital facility or the supplier needs this data to comply with legal requirements to which the supplier is subject and the supplier does not process the personal data or other data for any other purpose. (...)**

5. This Directive shall not apply to contracts regarding:

- (a) **services other than the supply of digital content or a digital facility provided by the supplier by using digital means where the digital means are only used for providing such services by the supplier to the consumer;**
- (b) electronic communication services as defined in Directive 2002/21/EC;
- (c) healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU;
- (d) gambling services meaning services which involve wagering a stake with **pecuniary** value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means **or any other technology for facilitating communication** and at the individual request of a recipient of a service;
- (e) financial services **as defined in Directive 2002/65/EC.**

6. **Where a contract for the supply of digital content or a digital facility includes additional contractual obligations for the provision of services or goods [other than those in which the supplied digital content is embedded], this Directive shall only apply to the obligations and rights of the parties as supplier and consumer of the digital content or digital facility.**¹⁸
7. [If any provision of this Directive conflicts with a provision of another Union act governing a specific sector or subject matter, the provision of that other Union act shall take precedence over this Directive.]¹⁹
8. This Directive is without prejudice to the protection of individuals with regard to the processing of personal data **as granted by Regulation (EU) 2016/679 ('General Data Protection Regulation')**.
9. (...) This Directive shall not affect **the possibility of Member States to regulate** general contract **law aspects**²⁰, such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract **in so far as they are not regulated in this Directive, or the right to damages.**²¹

¹⁸ Discussions on Article 3(6) should keep in mind the solution/option chosen in relation to 'embedded software' (Article 3(3a)).

¹⁹ In the discussions so far, the provision in paragraph 8 was perceived as not being sufficiently clear. In the light of this and in light of points 3 and 7 of the 'Political guidelines', it is suggested considering to either identify more specifically any possibly conflicting rules, or, if no such conflicts exist, to delete paragraph 8.

²⁰ Delegations are invited to give their views as to whether a clarification should be inserted in the recitals that the draft Directive does not determine the legal nature of the contracts for the supply of digital content or digital facilities and that the question whether such contracts constitute, for instance, a sales, service, rental or sui generis contract, is left to the national laws of the Member States.

²¹ Delegations are invited to express their views as to whether a clarification should be added in in Article 3(9) (or in the recitals) that it is left to national law to regulate any consequences of a non-conformity caused by an event outside the control of the supplier, such as non-conformity caused by a failure of a third party or by *force majeure*.

Article 4

Level of harmonisation²²

Member States shall not maintain or introduce provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

Article 5

Supply of the digital content or digital facility

1. (...) The supplier shall supply the digital content **or digital facility** to
 - (a) the consumer; or
 - (b) **a third party chosen by the consumer, which could also be an internet service provider or another person or entity** which operates a physical or virtual facility, **such as an electronic platform, for making the digital content or digital facility** available to the consumer or allowing the consumer to access it.
2. **Unless the parties have agreed otherwise**, the supplier shall **make available** the digital content **or digital facility, or give access to it**, [immediately after the conclusion of the contract][**without undue delay**][**without undue delay, but no later than [14][30] days from the conclusion of the contract**].²³
3. The **supplier shall have complied with his obligation to supply**(...) when the digital content **or digital facility is available or accessible** to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is **applicable**.

²² In accordance with point 9 of 'Political guidelines' it is suggested that the discussion of Article 4 is left for a later moment when the content of the other provisions of the draft Directive has become clearer.

²³ Paragraph 2 should be discussed in context with the (different options put for discussion under) Article 11.

Article 6

Conformity of the digital content with the contract

1. **The supplier shall ensure that, in order to conform with the contract, the digital content or digital facility shall, where applicable:**
- (a) be of the **description**²⁴, quantity, quality, duration²⁵ and version and shall possess functionality, interoperability and other performance features such as accessibility, continuity²⁶ and security, as required by the contract [including in any pre-contractual information which forms integral part of the contract]²⁷;
 - (b) be fit for any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of the conclusion of the contract and which the supplier accepted;
 - (ba) comply with the trial version or preview of the digital content or digital facility made available by the supplier, unless the difference between the supplied digital content or digital facility and the trial version or preview was brought to the consumer's attention before the contract was concluded;**
 - (c) be supplied along with any **accessories**, instructions and customer assistance as stipulated by the contract²⁸; and
 - (d) be updated as stipulated by the contract.

²⁴ Delegations are invited to express their views as to whether some of the criteria mentioned in this paragraph (duration, version, accessibility, continuity and security) should be considered as subcategories/examples of the broader criteria 'description, quantity, quality, functionality, interoperability and other performance features' and could therefore be moved to the recitals.

²⁵ It could be explained in the recitals that 'duration' means the duration of digital content, such as a movie.

²⁶ It could be explained in the recitals that 'continuity' means that the digital content/facility functions 'without interruptions'.

²⁷ Delegations are invited to express their views as to whether the reference to 'pre-contractual information, which forms integral part of the contract' should be maintained in the text of the Article or, given that any 'integral part of the contract' would be covered by the requirement required by the contract', this clarification should be moved to the recitals (please keep in mind that Article 4(1)(c) of the 'Online sales of goods proposal' contains a separate point for this criterion).

²⁸ Delegations are invited to express their views as to whether this criterion should be part of the 'subjective' or the 'objective' conformity criteria, or both, keeping in mind that in Article 5(b) of the 'Online sales of goods proposal' this criterion is proposed as an objective criterion ('as the consumer may expect to receive').

2. (...) ²⁹ .
3. Where the contract stipulates that the digital content **or digital facility** shall be supplied over a period of time, the digital content **or digital facility** shall be in conformity with the contract throughout the duration of that period.
4. (...) ³⁰ .
5. **In order to be in conformity** with the contract the digital content **or digital facility shall** also meet the requirements of Articles **6a**, 7 and 8 **and comply with any applicable Union or national laws in compliance with Union acts including this Directive**³¹.

Article 6a

Objective requirements for conformity of the digital content or digital facility

1. (...) **Besides complying with any conformity requirements stipulated in the contract the digital content or digital facility shall**
 - (a) be fit for the purposes for which digital content **or a digital facility** of the same **type** would normally be used, **taking into account**, where **applicable**, any existing (...) technical standards or, in the absence of such technical standards, applicable **sector specific** industry codes of conduct (...);

²⁹ It is suggested that the objective conformity criteria are moved to a separate (new) Article, see the proposed new Article 6a.

³⁰ This paragraph was moved to Article 6a(2).

³¹ This addition aims at ensuring that digital content complies with the existing intellectual property rights framework (e.g. on private copies), the future portability regulation and any other national laws complying with EU law.

(b)³² **possess the qualities, functionality, interoperability and other main performance features, such as accessibility, continuity or security which are normal in digital content or a digital facility of the same type and which the consumer may reasonably expect given the nature of the digital content or digital facility, taking into account:**

(i) **the amount paid for in money or the value of the counter-performance other than money provided in exchange for the digital content or digital facility; and**

(ii)³³ any public statement made by (...) the supplier or other persons in **previous** links of the chain of transactions unless the supplier shows that

(i) he was not, and could not reasonably have been, aware of the statement in question;

(ii) by the time of conclusion of the contract the statement had been corrected; **or**

(iii) **the decision to acquire the digital content or digital facility could not have been influenced by the statement; and**

[(c) be supplied along with any accessories, instructions and customer assistance as the consumer may expect to receive]³⁴.

2. ³⁵Unless **the parties have agreed** otherwise, digital content **or a digital facility** shall be supplied in conformity with the most recent version of the digital content **or facility**, which was available at the time of the conclusion of the contract.

³² The wording used in point (b) was inspired by the wording used in Article 5(c) of the 'Online sales of goods proposal' and Article 2(1)(d) of Directive 1999/44.

³³ Point (ii) takes over the philosophy of Article 5(c) of the 'Online sales of goods proposal' and Article 2(4) of Directive 1999/44.

³⁴ See footnote 28 on Article 6(1)(c).

³⁵ See footnote 30 on Article 6(4).

3. **Any agreement deviating from the objective criteria required in accordance with paragraphs 1 and 2 is valid only if, at the time of the conclusion of the contract, the consumer knew of this specific characteristic of the digital content and the consumer has expressly accepted it when concluding the contract.**

Article 7

Integration of the digital content

Where the digital content **or digital facility** is incorrectly integrated into the consumer's digital environment, any lack of conformity resulting from the incorrect integration shall be regarded as lack of conformity **with the contract** if:

- (a) the digital content **or digital facility** was integrated by the supplier or under the supplier's responsibility; or
- (b) the digital content **or digital facility** was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions where those instructions were **provided by the supplier** in accordance with point (c) of Article 6(1) [**or Article 6a(1)(c)**]³⁶ [**or where such instructions were not but should have been provided by the supplier** in accordance with **any of these provisions**]³⁷.

³⁶ See footnote 28 on Article 6(1)(c).

³⁷ Please see footnote 28 on Article 6(1)(c). Delegations are invited to express their views as to whether it would be sufficient if the lack of instructions constitutes a lack of conformity under Article 6(1)(c) [and/or Article 6a(1)(c)], or whether they consider it necessary to clarify in Article 7 that it also constitutes a lack of conformity if the incorrect integration was due to the lack of instructions that should have been provided by the supplier.

Article 8

Third party rights

1. (...) **The digital content or digital facility shall be free of any restriction resulting from any right of a third party, in particular intellectual property rights, which impede the use of the digital content or digital facility in accordance with the contract.**
2. (...)

Article 9

Burden of proof

Option 1:

1. The burden of proof with respect to **whether the digital content or digital facility was supplied in accordance with Article 5 or, where applicable, [Article 11(1) option 1][Article 11(1) and (1a) option 2] and whether the supplied digital content or digital facility was, at the time of supply, in conformity with the contract,** shall be on the supplier.

Option 2:

1. The burden of proof with respect to **whether the digital content or digital facility was supplied in accordance with Article 5 or, where applicable, [Article 11(1) option 1][Article 11(1) and (1a) option 2] (...)** shall be on the supplier.
- 1a. **Any lack of conformity with the contract which becomes apparent within [six months][one year][two years] from the time when the digital content or digital facility was supplied, is presumed to have existed at the time of supply.**³⁸

³⁸ In light of points 26 and 27 of the 'Political guidelines', delegations are invited to express their views as to whether a limitation in time should be added to Article 9 in relation to the burden of proof /presumption regarding a lack of conformity.

2. **[[Paragraph 1][Paragraph 1 and 1a]** shall not apply where the supplier shows that the digital environment of the consumer is not compatible with interoperability and other technical requirements of the digital content and where the supplier informed the consumer of such requirements before the conclusion of the contract.]
3. The consumer shall cooperate with the supplier **in order to allow the supplier to ascertain (...) the consumer's digital environment to determine whether the lack of conformity with the contract existed at the time when the digital content or digital facility was supplied.** The obligation to cooperate shall be limited to the **extent necessary, respecting the right to privacy. To that end, the supplier shall make use of the least intrusive** technical means which are **at the disposal of both parties [and only in exceptional and duly justified circumstances [where there are no other means], the consumer shall be required to allow the supplier virtual access to the consumer's digital environment]**. Where the consumer fails to cooperate, the **[rule on the burden of proof set out in paragraph 1 (option 1 above)] [presumption set out in paragraph 1a (option 2 above)] shall not apply** , **provided that the supplier informed the consumer in a clear and comprehensible manner³⁹ about this consequence of a lack of cooperation.**

³⁹ Delegations are invited to indicate whether a standard form should be created setting out the information that the supplier should give to the consumer in this regard.

Article 10

Liability of the supplier⁴⁰

1. The supplier shall be liable (...) for:
 - (a) any failure to supply the digital content **or digital facility in accordance with Article 5** [, **or where applicable, [Article 11(1) option 1][Article 11(1) and (1a) option 2]**
 - (b) any lack of conformity **with the contract**
 - (i) which exists at the time the digital content **or digital facility** is supplied; **or**
 - (ii) which occurs during the duration **of the contract agreed upon in the contract**, where the contract provides that the digital content **or digital facility** shall be supplied over a period of time (...).

Option 1:

2. **The consumer shall be entitled to the remedies for the lack of conformity with the contract of the digital content or digital facility where the lack of conformity becomes apparent within *** years [from the relevant time for establishing conformity] [from the time the digital content or digital facility was supplied].**

⁴⁰ In light of points 26 and 27 of the 'Political guidelines', delegations are invited to express their views as to whether a limitation in time should be added to Article 10 for situations where there is a lack of conformity with the contract, and if so, whether such a limitation should follow the logic of Article 14 of the 'Online sales of goods proposal' (see Option 1 above) or whether it should take precedent from Article 5(1) of Directive 1999/44 (see Option 2 above).

Furthermore, delegations are invited to express their views as to whether a limitation in time should be added to Article 10 for situations where there is a failure to supply – taking into account the fact that the CRD currently does not include such a limitation in time with regard to the failure of the trader to deliver the goods.

If, under national legislation, the rights laid down in Article 12 are subject to a limitation period, that period shall not be shorter than [*** years from the relevant time for establishing conformity with the contract] [*** years from the time the digital content or digital facility was supplied].⁴¹

Option 2:

2. The supplier shall be held liable under Article 10 where the lack of conformity with the contract for the supply of the digital content or digital facility becomes apparent within *** years as from delivery of the goods.

If, under national legislation, the rights laid down in Article 12 are subject to a limitation period, that period shall not expire within [that period] [a period of *** years from the time of supply].⁴²

Article 11

Remedy for the failure to supply

Option 1⁴³:

1. Where the supplier has failed to supply the digital content **or digital facility** in accordance with Article 5, the consumer shall be entitled to terminate the contract (...), **unless the supplier, upon the request of the consumer, supplies the digital content or digital facility without undue delay.**

⁴¹ When discussing options 1 and 2, delegations are invited to give their views as to whether it is required/appropriate to add this second sentence (that was inspired by the second sentence of Article 14 of the 'Online sales of goods proposal') taking into account the general obligation of the Member States to enact the obligations resulting from this Directive (see Articles 18(1) and 21(1)).

⁴² See previous footnote.

⁴³ Option 1 clarifies that the consumer, before terminating the contract, has the *possibility* to give the supplier a 'second chance'.

Option 2⁴⁴:

1. Where the supplier has failed to supply the digital content or digital facility in accordance with Article 5 at the time agreed upon with the consumer or within the time limit set out in Article 5(2)⁴⁵, the consumer shall call upon him to make the supply within an additional period of time appropriate to the circumstances.
 - 1a. If the supplier fails to supply the digital content or facility within that additional period of time, the consumer shall be entitled to terminate the contract.
 - 1b. Paragraph 1 shall not be applicable to contracts for the supply of digital content or a digital facility where the supplier has refused to supply or where the supply within the agreed period is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the supplier, prior to the conclusion of the contract, that supply by or on a specified date is essential. In those cases, if the supplier to supply the digital content or digital facility at the time agreed upon with the consumer or within the time limit set out in Article 5 (2), the consumer shall be entitled to terminate the contract immediately (...).

2. Where the consumer terminates the contract in accordance with [paragraph 1 option 1] [paragraphs 1a or 1b option 2], Articles 13, 13a and 13b shall apply accordingly.

⁴⁴ Option 2 takes over the logic of Article 18(2) of the CRD which provides for an *obligation* of the consumer to give the supplier a 'second chance' before the consumer may terminate the contract.

⁴⁵ By referring to 'the time limit set out in Article 5(2)' the wording of paragraph 1 intends to cover all different options put for discussion in Article 5(2). The wording of Article 11(1) might need to be aligned depending on which of the options is chosen in Article 5(2).

Article 12

Remedies for the lack of conformity with the contract

1. In the case of a lack of conformity with the contract, the consumer shall be entitled to have the digital content **or digital facility** brought into conformity with the contract free of charge, [for example by issuing updates or requiring the consumer to access a new copy of the digital content]⁴⁶, unless this **would be factual or legally impossible or would impose costs on the supplier that would be disproportionate, taking into account the circumstances of the case including (...)**:
 - (a) the value the digital content **or digital facility** would have if **there were no lack of conformity with the contract**; and
 - (b) the significance of the lack of conformity with the contract (...).
2. The supplier shall bring the digital content **or the digital facility** in conformity with the contract pursuant to paragraph 1 within a reasonable time, [and in any event within 30 days]⁴⁷, from the time the supplier has been informed by the consumer about the lack of conformity with the contract and without any significant inconvenience to the consumer, taking account of the nature of **the digital content or digital facility** and the purpose for which the consumer required this digital content **or digital facility**. **The consumer shall be entitled to withhold the payment of any outstanding part of the price, until the supplier has brought the digital content or digital facility into conformity with the contract.**⁴⁸

⁴⁶ It is suggested moving these examples to the recitals.

⁴⁷ Delegations are invited to express their views as to whether a specific time period should be inserted (keeping in mind Article 9 (3) of the proposed Directive on online sale of goods), or whether a clarification should be inserted in the recitals (which could take inspiration of recital (18) of the 'Online sales of goods proposal').

⁴⁸ The addition of this sentence intends to align this provision with Article 9(4) of the 'Online sales of goods proposal'.

3. The consumer shall be entitled to either a (...) reduction of the price in the manner set out in paragraph 4 where the digital content **or digital facility** is supplied in exchange for a payment of a price, or **the termination of the contract in accordance with** paragraphs 5 to 7 and Articles 13, where
- (a) the remedy to bring the digital content in conformity **with the contract** is impossible **or disproportionate in accordance with paragraph 1;**
 - (b) the supplier has not **brought the digital content or digital facility in conformity with the contract** within a reasonable time, [not exceeding 30 days]⁴⁹ ;
 - (c) the remedy to bring the digital content **or facility** in conformity **with the contract** would cause significant inconvenience to the consumer; or
 - (d) the supplier has declared, or it is equally clear from the circumstances, that the supplier will not bring the digital content **or digital facility** in conformity with the contract.
4. The reduction in price shall be proportionate to the decrease in the value of the digital content **or digital facility supplied to** the consumer compared to [the value **that** the digital content **or digital facility would have if it was in** conformity with the contract] [**the counter-performance provided by the consumer**].

The supplier shall reimburse the consumer under this paragraph without undue delay, and in any event within 14 days from the day on which the supplier is informed of the consumer's decision to invoke his right for a price reduction.

The supplier shall give the refund using the same means of payment as the consumer used to pay for the digital content or digital facility, unless the consumer expressly agrees otherwise.

The supplier must not impose any fee on the consumer in respect of the refund.

⁴⁹ See footnote 47 on paragraph 2.

5. **Where the digital content has been supplied in exchange for a price the consumer shall be entitled to terminate the contract only if the lack of conformity with the contract [Option 1: impairs the functionality, interoperability or other main performance features] [Option 2: is not only minor and adversely affects the functionality, interoperability or other main performance features] of the digital content or digital facility (...) required in accordance with Articles 6 and 6a. The burden of proof that the lack of conformity with the contract [Option 1: does not impair the functionality, interoperability or other main performance features of the digital content or digital facility][Option2: affects the functionality, interoperability or other main performance features of the digital content or digital facility only in a minor manner] shall be on the supplier.**
6. **Where the digital content or digital facility has been supplied in exchange for a counter-performance other than money, the consumer shall be entitled to terminate the contract for any lack of conformity with the contract.**
7. ⁵⁰ **Where the contract stipulates that the digital content or digital facility shall be supplied over a period of time in exchange for a payment of a price (...), the consumer shall be entitled to terminate the contract only in relation to that part of the period of time where the digital content or digital facility has not been in conformity with the contract, unless the lack of conformity with the contract is such as to justify termination of the contract as a whole.**

⁵⁰ Article 13(5) of the Commission proposal.

Article 13

Exercise of the right of termination

1. The consumer shall exercise the right to terminate the contract by (...) means **of an unequivocal statement to the supplier setting out his decision to terminate the contract.**⁵¹

1a. The burden of proof of exercising the right of termination in accordance with this Article shall be on the consumer.⁵²

(...)⁵³

Article 13a

Obligations of the supplier in the event of termination

1. ⁵⁴ (...) **The supplier shall reimburse to the consumer all sums paid under the contract without undue delay and in any event within 14 days from the day on which the supplier is informed of the consumer's decision to terminate the contract in accordance with Article 13.**

⁵¹ The wording of paragraph 1 was aligned with the language used in point (b) of Article 11(1) of the CRD. Delegations are invited to express their views as to whether additional elements of Article 11 of the CRD should be included in Article 13 for coherence purposes (for instance Article 11(4) of the CRD giving the possibility to use an electronic (standard) form for the termination of the contract and requiring an acknowledgment of receipt).

⁵² This new paragraph 1a is copied from Article 11(4) of the CRD.

⁵³ Paragraphs 2 to 6 of Article 13 were moved to the new Articles 13a and 13b and Article 12 as follows:

Paragraph 2(a) = Article 13a(1)

Paragraph 2(b) = Article 13a(2)

Paragraph 2(c) = Article 13a(3)

Paragraph 2(d) = Article 13b(1)

Paragraph 2(e) = Article 13b(2)

Paragraph (3) = Article 13a(4)

Paragraph 4 = Article 13b(3)

Paragraph 5 = Article 12(7)

Paragraph 6 = Article 13(1a)

⁵⁴ Paragraph 1 tries to take over the philosophy of Article 13(1) of the CRD

The supplier shall carry out the reimbursement using the same means of payment as the consumer used to pay for the digital content or digital facility, unless the consumer has expressly agreed otherwise. The supplier shall not impose any fee on the consumer in respect of the refund.

- 1a. ⁵⁵Where the consumer terminates a part of the contract in accordance with **Article 12(7), (...)** the supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time when the digital content **or digital facility** was not in conformity with the contract.
2. **In respect of personal data of the consumer, the supplier shall comply with the obligations applicable under Regulation 2016/678 (...)** .
3. ⁵⁶**In respect of data other than personal data (...)**provided by the consumer **or uploaded or created by the consumer when using the digital content or digital facility, the supplier shall make available to the consumer technical possibilities to receive that data.**

The consumer shall be entitled to **receive** the **data** free of charge, without **hindrance from the supplier**, in reasonable time and in a commonly used **and machine-readable** format.

4. (...) **The supplier may prevent any further use of the digital content or digital facility** by the consumer, in particular by making the digital content **or digital facility no longer** accessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph 3.

⁵⁵ Article 13(6) of the Commission proposal.

⁵⁶ The revised wording of paragraph 3 tries to align this paragraph with terminology used in the GDPR ('receive', 'without hindrance', 'commonly used data and machine-readable format'), see Article 20(1) of the GDPR.

Article 13b

Obligations of the consumer in the event of termination

1. **Where** the digital content **or digital facility** was not supplied on a **tangible** medium, the consumer shall refrain from using **it** or making it available to third parties (...).

2. **Where** the digital content was supplied on a **tangible** medium, the consumer shall:
 - (a) (...) refrain from using it or making it available to third parties; **and**

Option 1:

- (b) upon the request of the supplier⁵⁷, return, at the supplier's expense, the **tangible** medium to the supplier without undue delay, and in any event **within** 14 days from the receipt of the supplier's request.

Option 2:

- (b) (...) return, at the supplier's expense, the **tangible** medium to the supplier without undue delay, and in any event **within** 14 days **from sending the notice of termination, unless the supplier informed the consumer that this was not necessary.**

3. [The consumer shall not be liable to pay for any use made of the digital content **or the digital facility** in the period prior to the termination of the contract.]

⁵⁷ Delegations are invited to express their views as to whether, under option 1, the supplier should be required to make the request for the return of the tangible medium within a certain deadline, for instance 14 days from the day on which the supplier is informed of the consumer's decision to terminate the contract, in order to avoid that the consumer is left in uncertainty whether or not the supplier wants the tangible medium back.

Article 14

(...) ⁵⁸

Article 15

Modification of the digital content

Option 1:

1. Where the contract **stipulates** that the digital content **or digital facility** shall be supplied over a period of time (...), the supplier may alter **the** functionality, interoperability and other main performance features of the digital content (...), to the extent **that** those alterations adversely affect access to or use of the digital content by the consumer, only if:
 - (c) the contract **allows for and gives a valid reason for such an alteration;**
 - (d) the consumer is **informed of the modification and the corresponding right to terminate the contract free of charge**, reasonably in advance **in a clear and comprehensible manner** on a durable medium; **and**
 - (e) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the **day on which the consumer is informed of the modification**
 - (f) (...).

⁵⁸ In accordance with 15 and 16 of the ‘Political guidelines’, Article 14 was deleted.

It is suggested that a clarification be included in the recitals that damages are left to national law. Such a clarification could be worded along the following lines:

“The Directive does not regulate any entitlement for the compensation of damages caused to the consumer by a lack of conformity of the digital content or facility with the contract or a failure to supply the digital content. The Directive should, hence, not affect the possibility of the Member States to enact or maintain rules on the right to damages under their national laws.”

Option 2:

1. Where the contract **stipulates** that the digital content **or digital facility** shall be supplied over the period of time, **the consumer may terminate the contract when** the supplier **alters the** functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security, **unless those alterations are mere improvements or have only a non-significant detrimental** affect (...) to the use of the digital content **or digital facility** by the consumer, **and provided that**
 - (a) the contract **allows for and gives a valid reason for such an alteration;**
 - (b) the consumer is **informed of the modification and the corresponding right to terminate the contract free of charge**, reasonably in advance **in a clear and comprehensible manner** on a durable medium; **and**
 - (c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the **day on which the consumer is informed of the modification**
 - (d) (...).

2. Where the consumer terminates the contract in accordance with paragraph 1, **Articles 13, 13a and 13b shall apply accordingly.**

The supplier shall reimburse to the consumer **only** the part of the price paid corresponding to the period of time after modification of the digital content **or digital facility**.

(...)

Article 16

Right to terminate long term contracts for the supply of digital content

1. Where the contract provides for the supply of the digital content **or digital facility** for a **fixed** duration **longer than 12 months** or **where** any combination of **subsequent contracts or** renewal periods exceeds 12 months **from the moment of the conclusion of the initial contract**, the consumer shall be entitled to terminate the contract [**free of charge**] any time after the expiration of 12 months.

2. The consumer shall exercise the right to terminate the contract **in accordance with Article 13(1). The consumer shall give the notice of termination at least 30 days before he wants the termination to take effect.**
3. Where the digital content **or digital facility** is supplied in exchange for a payment of a price, the consumer remains liable to pay the part of the price for the digital content **or digital facility** supplied corresponding to the period of time before the termination becomes effective. **The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after the termination of the contract.**
4. **Where the consumer terminates the contract in accordance with this Article, Articles 13, 13a and 13b shall apply accordingly.**

(...)

Article 17

Right of redress

Where the supplier is liable to the consumer because of any failure to supply the digital content or a lack of conformity with the contract resulting from an act or omission by a person in **previous** links of the chain of transactions, the supplier shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the supplier may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

Article 18

Enforcement

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.

2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:
- (a) public bodies or their representatives;
 - (b) consumer organisations having a legitimate interest in protecting consumers;
 - (c) professional organisations having a legitimate interest in acting.

Article 19

Mandatory nature

1. Unless otherwise provided for in this Directive, any contractual term which, to the detriment of the consumer, excludes the application of the national measures transposing this Directive, derogates from them or varies their effects before the lack of conformity with the contract is brought to the supplier's attention by the consumer, shall not be binding on the consumer.
2. This Directive shall not prevent suppliers from offering consumers contractual arrangements which go beyond the protection provided for in this Directive.⁵⁹

⁵⁹ The new paragraph 2 takes over the provision of Article 3(6) of the CRD (where this clarification is set out in the scope provision).

Article 20

Amendments to Directive 1999/44/EC, Regulation (EC) No 2006/2004, Directive 2009/22/EC

1. In Article 1 (2) of Directive 1999/44/EC, point (b) is replaced by the following:

"(b) consumer goods: shall mean any tangible movable item, with the exception of:

- goods sold by way of execution or otherwise by authority of law,*
- water and gas where they are not put up for sale in a limited volume or set quantity,*
- electricity,*
- a **tangible** medium incorporating digital content where it has been used exclusively as carrier of the digital content to the consumer as referred to in Directive (EU) N/XXX⁶⁰."*

2. In the Annex to Regulation (EC) No 2006/2004, the following point is added:

"21. Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on contracts for the supply of digital content (OJ...)"

3. In Annex I to Directive 2009/22/EC the following point is added:

"16. Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on contracts for the supply of digital content (OJ...)"

⁶⁰ Directive (EU) N/XXX of the European Parliament and of the Council of on contracts for the supply of digital content (OJ ...)

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by *[the date of two years after the entry into force]* at the latest.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 22

Review

The Commission shall, not later than on *[the date of five years after entry into force]* review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content against counter-performance other than that covered by this Directive, in particular supplied against advertisement or indirect collection of data.

Article 23

Entering into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Brussels,