Council of the European Union

Brussels, 8 June 2017
(OR. en)

10080/1/17
REV 1

Interinstitutional File:
2015/0287 (COD)

JUSTCIV 139
CONSOM 248
DIGIT 160
AUDIO 86
DAPIX 227
DATAPROTECT 114
CULT 85
CODEC 1001

NOTE

From:	General Secretariat of the Council
To:	Council
No. prev. doc.:	9901/17 + ADD 1, 9832/17, 9833/17
No. Cion doc.:	15251/15
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) - General approach = Statements by delegations to be included in the minutes of the Council

Delegations will find in the Annex a joint Statement of the delegations of Portugal, France, Italy, Romania and Cyprus, a Statement of the delegation of Austria, and a joint Statement of the delegations of Latvia, Lithuania and Luxembourg to be entered into the minutes of the Council (Justice and Home Affairs), 8-9 June 2017.

A further Statement of the delegation of the Czech Republic to be entered into the minutes of the Council (Justice and Home Affairs), 8-9 June 2017, is set out in document 9833/17.

ANNEX

Joint Statement by Portugal, France, Italy, Romania and Cyprus to be included in the minutes of the Council

Portugal, France, Italy, Romania and Cyprus reserve the right to seek improvements in the text in the future interinstitutional negotiations with the European Parliament and expect that trilogue will lead to a more ambitious directive in favour of consumer protection within the European Union, notably in the provisions concerning the reversal of burden of proof on the supplier.

The compromise proposed by the Presidency, with one-year maximum harmonisation, is not in line with the two-year minimum harmonisation set out for the time-limit on the supplier's liability (legal guarantee), which will unjustifiably hinder the protection of our consumers in relation to typically very complex digital content or digital services.

It is not reasonable to expect that consumers will be able to fully understand such digital content or services, still less that they will be able to prove non-conformity when it occurs just after one year from a one-off supply.

In the case of Portugal, France, Italy, Romania and Cyprus, the maximum harmonisation of one year for the time-limit on the reversal of the burden of proof and the lack of alignment with the proposed two-year time limit for the supplier's liability (legal guarantee) will represent a major setback for consumer protection.

Statement by the Republic of Austria for inclusion in the minutes of the Council

Despite its concerns regarding the requirement for a specific warranty regime for contracts for the supply of digital content, Austria has always taken part actively and constructively in the negotiations in the Council working party. It is all the more regrettable that many of Austria's proposals, whether concerning issues of content or of legal drafting, are not reflected in the current compromise text although they have been supported by other Member States. Although progress has been made in the course of the negotiations, there are still elements in the compromise text which are unclear and will give rise to considerable legal uncertainty. This applies particularly to the provisions concerning digital content integrated into products. In the interests of transparent regulation, rules on these products needed to be established which would be straightforward for consumers, suppliers and legal practitioners to follow, in order to avoid problems of differentiation. Unfortunately, the current text fundamentally fails to fulfil this requirement. Unclear legal drafting also affects the provisions on the start of the time-limit for the warranty (Article 9a(3)(ii) and on the termination of contracts (Article 13a(1) in conjunction with Article 13b(3).

The right balance between the interests of suppliers and consumers also has not always been struck. As regards the issue of the reversal of the burden of proof in Article 10(1a), Austria has always advocated a six-month time-limit for the reversal of the burden of proof. The provisions on the one-year time-limit for the reversal of the burden of proof and on warranty under contracts without payment where personal data are processed will give rise to a heavy burden on suppliers. On the other hand, the supplier's virtually unlimited unilateral right to modify content represents a deterioration in the consumer's position. Here - as Austria has repeatedly proposed - a criterion which takes adequate account of the consumer's interests need to be incorporated, such as whether the modification is such as the consumer can reasonably be expected to accept.

Ultimately, the provisions contained in the proposal are closely connected with those of the parallel proposal on certain aspects concerning contracts for the online and other distance sales of goods, so that the warranty in contracts for the supply of digital content should really not be treated separately.

Joint Statement by Latvia, Lithuania and Luxembourg to be included in the minutes of the Council

Fast developing digital products such as digital content are one of the main drivers for the growth of the digital economy. Therefore, Latvia, Lithuania and Luxembourg (hereinafter – *the Member States*) welcome that the Directive aims at enhancing the smooth functioning of the Digital Single Market by setting uniform rules for consumer protection with regard to contracts for the supply of digital content. In overall, *the Member States* believe that the General Approach is a delicate balance between the different interests of the Member States, as well as between the high level of consumer protection and business-friendly environment. Therefore, *the Member States* support the General Approach.

Nevertheless, *the Member States* would like to express the concerns on some aspects of the text endorsed today.

Considering already existing problems in practice, mainly, related to the different national regulations, the full harmonisation principle is a key to complete the well-functioning Single Market for both consumers and businesses. Therefore, *the Member States* regret that the European Commission's original proposal was watered down by allowing Member States to keep different national provisions on some elements of the Directive, notably on the legal guarantees periods, the termination of unlimited period contracts and the consequences of the termination of bundle contracts. This way the regulatory barriers to cross-border trade and, hence, the fragmentation of the Single Market will remain, which holds back the consumers and businesses from the benefits of the truly integrated Digital Single Market. Any further, even minor deviation from the level of harmonisation would jeopardise the aim of the whole Directive.

The Member States reserve the rights to stand behind the concerns expressed above in future interinstitutional negotiations.