



Council of the
European Union

Brussels, 23 December 2016
(OR. en)

15674/16

**Interinstitutional File:
2015/0287 (COD)**

LIMITE

**JUSTCIV 321
CONSOM 322
DIGIT 147
AUDIO 137
DAPIX 234
DATAPROTECT 111
CODEC 1919**

NOTE

From: the Presidency and the incoming Maltese Presidency
To: Working Party on Civil Law Matters (Contract Law)

No. prev. doc.: 9768/16,10231/16, 14827/16
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)
- Revised text proposal

Delegations will find in the Annex a revised text of the above proposal drawn up jointly by the Presidency and the incoming Maltese Presidency in the light of the discussions held in the Working Party on Civil Law Matters (Contract Law) during the second semester 2016.

Changes compared to the text of the Commission proposal are marked in **bold** or by (...) for deleted text. In the footnotes **bold** is used for high-lightening keywords.

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 service (...)**, in particular rules on
- conformity of digital content **or a digital service** with the contract,
- remedies in case of the lack of such conformity **or a failure to supply** and the modalities for the exercise of those remedies, as well as on
- **the modification of digital content or a digital service** 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 data which is produced and supplied in digital form, for example video **files**, audio **files**, applications, digital games and any other software,²

¹ It is suggested that the additional elements of the Directive's objectives mentioned in point 1 of the 'Political guidelines' of June 2016 (doc. 9768/16), 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)].

² It is suggested to include a list of examples of digital content in the recitals: movies, music files, games, e-books or other e-publications, which can be either downloaded or streamed online.

1a. 'digital service' means

(a) a service allowing **the consumer** the creation, processing or storage of data in digital form (...); **or**

(b) a service allowing **the** sharing of **or** any other interaction with data in digital form **uploaded or created by the consumer and** other users of **that service**; ³

2. 'integration' means **the linking and incorporation of digital content or a digital service with the** components of **the consumer's** digital environment **in order for the digital content or digital service to be used in accordance with the contract (...)**;

3. 'supplier'⁴ means any natural or legal person, irrespective of whether privately or publicly owned⁵, who, **in relation to contracts covered by this Directive**, 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;

³ It is suggested to include a list of **examples of 'digital services'** in the recitals: software-as-a-services such as word processing, video and audio file editing, games and any other software offered in the cloud computing environment, sharing and other file hosting.

⁴ It is suggested to clarify in the recitals that

- **platforms** can be suppliers under this Directive if they are acting for purposes relating to their own business as the direct contractual partner of the consumer for the supply of digital content or a digital service;
- Member States remain free to extend the application of the rules of this Directive to platforms which do not fulfil the requirements of being a "supplier" as defined in this Directive;
- Member States remain free to regulate liability claims of the consumer against third parties other than the supplier of the digital content in the meaning of this Directive, such as **developers**, which are not (at the same time) the supplier.

⁵ As regards public entities providing access to public data, please see the proposed exclusion from the scope in point (f) of Article 3(5).

4. 'consumer'⁶ means any natural person, who in **relation to** contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession;⁷
5. (...) ⁸
6. 'price' means money **or a digital representation of value including a virtual currency**⁹ that is due in exchange for **the supply of** digital content **or a digital service**;
- 6a. '**personal data**' means **personal data as defined by Article 4(1) of Regulation (EU) 2016/679**¹⁰;
- 6b. '**other data**' means **any data other than 'personal data' as defined by Article 4(1) of Regulation (EU) 2016/679**;

⁶ It could be clarified in the recitals that Member States remain free to extend the application of the rules of this Directive to '**dual purpose contracts**', where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract (wording inspired by recital (17) of the CRD).

⁷ It is suggested to add a clarification (as the one contained in the third sentence of recital (13) of the CRD) in the recitals of this Directive to make clear that the Member States remain competent 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**.

⁸ See footnote 56 on Article 14.

⁹ The recitals could explain that **virtual currencies** have no other purpose than to serve as a way of payment and that they should therefore not be considered as digital content or digital service within the meaning of this Directive, but as 'price'. The recitals could also clarify that 'digital representations of value' also include **electronic vouchers or e-coupons**.

¹⁰ 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).

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 service;**
9. 'interoperability' means the ability of **the digital content or digital service to operate successfully** with a **standard hardware or software environment;**
- 9a. **'Functionality' means the ability of the digital content or digital service to perform its functions having regard to its purpose;**
10. (...) ¹¹
11. 'durable medium' ¹² 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 ¹³.
12. **'embedded digital content' means digital content which operates as an integral part of the good, irrespective of whether that 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.**

¹¹ In the light of the revised wording of Article 5, the definition of 'supply' was considered redundant and was therefore deleted.

¹² It is suggested to add a recital inspired by recital 23 of the CRD: 'A durable media should enable the consumer to store the information for as long as it is necessary for him to protect his interests stemming from his relationship with the supplier. Such media should include in particular paper, USB sticks, CD-ROMs, DVDs, memory cards or the hard disks of computers as well as e-mails.'

¹³ Note to translators: the definition of 'durable medium' corresponds to the definition used in Article 2(10) of the CRD.

Article 3

Scope

1. This Directive shall apply to any contract where the supplier supplies **or undertakes to supply** digital content **or a digital service** to the consumer (...) and, in exchange, **the consumer pays or undertakes to pay** a price or actively provides **or undertakes to provide as a counter-performance (...)** **personal data or other data** ¹⁴.
2. This Directive shall apply **where** the (...) digital **content or a digital service** is developed according to consumer's specifications.
3. With the exception of Articles 5 and 11, this Directive shall apply **also**¹⁵ to any **tangible medium which incorporates** digital content **in such a way that the tangible medium serves** exclusively as carrier of digital content.

¹⁴ In the discussions relating to data as counter-performance ('personal data' - 'other data', 'actively' - 'passively') many issues remained open, so far. The Presidency therefore did not engage in a substantive revision as regards those aspects. Further discussions will have to take into account the CLS opinion (doc. 15287/16) and opinion of the European Data Protection Supervisor etc. A revised text for this provision may thus be proposed at a later stage.

¹⁵ The addition of the word 'also' aims at clarifying that the Directive applies to both the carrier and the digital content.

*Embedded digital content:*¹⁶

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

3a. This Directive shall not apply to embedded digital content.

Option B (*apply the 'digital content rules', by way of a rebuttable assumption, also to the tangible good*):

3a. This Directive shall also apply to goods containing embedded digital content, unless the supplier proves that the lack of conformity lies in the hardware of the good.

¹⁶ In the policy debate of the Council (JHA) on 8 December 2016, there was a slight trend towards option A on 'embedded digital content' as presented in document 14827/16, but since option B also had considerable support both options have been retained in the text for further discussion. However, with a view to aligning the wording used for the description of 'embedded digital content' a proposal for a definition was inserted in Article 2(12) for the discussion of the Working Party.

4. This Directive shall not apply (...) **where the consumer does not pay or undertake to pay a price in exchange of the supply of digital content and the personal data or other data provided by the consumer in exchange for the supply of the digital content or service are exclusively used by the supplier for supplying the digital content or digital service, for the digital content or service to function properly or for the supplier to comply with legal requirements to which the supplier is subject, and the supplier does not use these data otherwise. (...)**¹⁷
5. This Directive shall not apply to contracts regarding:
- (a) **services or work products rendered in digital form** where the digital means are used **only for making such services or work products available to the consumer**;
 - (b) electronic communication services as defined in Directive 2002/21/EC;¹⁸
 - (c) healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU;¹⁹
 - (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;

¹⁷ It is suggested moving paragraph 4 directly after paragraph 1.

¹⁸ Delegations are invited to give their views as to whether the remedies proposed in the Digital Content Directive should be provided also for so-called **OTTs** (applications and services, including communication services, over the internet, such as 'Skype', 'WhatsApp' or 'Facetime') and, thus, whether these kinds of services should come within the scope of the Digital content Directive. (Please see WK 621/2016 for further information on this matter).

¹⁹ Delegations are invited to express their views as to whether it should be clarified that point (5)(c) excludes services supplied by a health professional, but that **'Health Apps'** such as digital applications for measuring blood pressure should come within the scope of the Digital content Directive.

- (e) financial services;²⁰
 - (f) **supply of digital content where it forms part of a performance or event, addressed to the general public, such as digital cinematographic projections;**
 - (g) **digital content provided by public sector bodies of the Member States as regulated by Directive 2003/98/EC²¹ to the extent that no charges are made or these charges are limited to the marginal costs in accordance with paragraph 1 of Article 6 of Directive 2003/98/EC as amended.**
6. **Where a contract for the supply of digital content or a digital service includes additional contractual obligations for the provision of services or goods,** this Directive shall only apply to the obligations and **rights** of the parties as supplier and consumer of the digital content **or digital service.**²²
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.

²⁰ Delegations are invited to express their views as to whether digital services such as '**Bank Apps**' giving access to the consumer's bank account should come within the scope of the Digital content Directive or whether such services should be regulated by the sectoral legislation on financial services, only.

²¹ Directive 2003/98/EC of the EP and the Council of 17 November 2003 on the re-use of public sector information (as amended by Directive 2013/37/EU).

²² Article 3(6) should be discussed together with Article 16.

8. **Regulation (EU) 2016/679 applies to any processing of personal data under this Directive (...). In particular, this Directive does not regulate the rights of consumers as data subjects under Regulation (EU) 2016/679 and it does not affect the choice of the controller of legal bases for the lawful processing of personal data under the conditions laid down in Article 6(1) of Regulation (EU) 2016/679.**²³
- [8a. **This Directive is without prejudice to the rules on copyright and related rights in the information society as laid down in Directive 2001/29/EC.]**
9. (...) This Directive shall not affect **the possibility of Member States to regulate general contract law aspects**²⁴, 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**²⁵, or the right to damages.

²³ When discussing Article 3(8), delegations are invited to also keep in mind recital 22 of the initial Commission proposal, which reads as follows:

'The protection of individuals with regard to the processing of personal data is governed by Directive 95/46/EC of the European Parliament and of the Council and by Directive 2002/58/EC of the European Parliament and of the Council, which are fully applicable in the context of contracts for the supply of digital content. Those Directives already establish a legal framework in the field of personal data in the Union. The implementation and application of this Directive should be made in full compliance with that legal framework.'

²⁴ It is suggested adding a clarification in the recitals that the draft Directive does not determine the **legal nature of the contracts** for the supply of digital content or digital service 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.

²⁵ It is suggested to include a clarification in the recitals that it is left to national law to regulate any consequences of a **non-conformity** of the digital content or service with the contract that is due to any impediment **outside the supplier's control** and the supplier could not be expected to have avoided or overcome the impediment or its consequences.

Article 4

Level of harmonisation²⁶

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 service

1. (...) The supplier shall supply the digital content **or digital service** to
 - (a) the consumer; or
 - (b) (...) a physical or virtual facility²⁷ **chosen by the consumer²⁸ for the purpose of supplying the digital content or digital service to the consumer.**
2. Unless the parties have agreed otherwise, the supplier shall supply the digital content **or digital service without undue delay** after the conclusion of the contract.
3. The **supplier shall have complied with his obligation to supply (...)** when the digital content **or digital service is available or accessible** to the consumer or, where point (b) of paragraph 1 applies, to the **physical or virtual facility** chosen by the consumer.

²⁶ In accordance with point 9 of 'Political guidelines' of June 2016 (doc. 9768/16) 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.

²⁷ **Examples for 'physical or virtual facility'** could be given in the recitals (for instance, an electronic platform or a cloud storage).

²⁸ The recitals could also clarify that the physical or virtual facility **cannot** be considered to be **chosen by the consumer** if this facility is under the supplier's control or where the consumer selected this physical or virtual facility for receiving the digital content or digital service but that choice was offered by the supplier.

Article 6

Conformity of the digital content or service with the contract

1. **The supplier shall supply to the consumer digital content or a digital service which is in conformity with the contract.**²⁹ In order to conform with the contract, the digital content or digital service shall, where **applicable**:
 - (a) be of the **description**, quantity and quality, (...) and shall possess functionality, interoperability and other (...) features³⁰(...) , as required by the contract³¹;
 - (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 any trial version or preview of the digital content or digital service made available by the supplier, unless the difference between the supplied digital content or digital service and the trial version or preview was brought to the consumer's attention before the contract was concluded;

²⁹ This additional sentence takes over the philosophy of Article 2(1) of Directive 1999/44 by expressively setting out the obligation of the supplier.

³⁰ It is suggested to insert further **specifications of the conformity criteria and examples** of the features of the digital content/service in a recital which could be worded along the following lines:
"The digital content or service should comply with the requirements agreed between the supplier and the consumer in the contract. In particular, it should comply with the description, quantity (for example the number of music files that can be accessed), quality (for example the picture resolution), duration (for example the length of a movie), language, and version agreed in the contract. It should also possess the security, functionality, interoperability and other features, such as accessibility, continuity (which should mean that the content or service is not interrupted), as required by the contract."

³¹ Moreover, it could be clarified in the recitals that the requirements of the contract should include the **pre-contractual information** which form, in accordance with Directive 2011/83/EU, an integral part of the contract.

(c) be supplied along with any **accessories**, instructions and customer assistance as stipulated by the contract; and

(d) be updated as stipulated by the contract³².

2. (...) ³³

3. Where the contract stipulates that the digital content **or digital service** shall be supplied over a period of time, the digital content **or digital service** shall be in conformity with the contract throughout the duration of that period.

4. (...) ³⁴.

5. (...) ³⁵.

³² It is suggested inserting an explanation along the following lines in the recitals:
Given that digital content and services are constantly developing, suppliers may agree with consumers to provide new versions and features as they become available. Therefore the conformity of the digital content or digital service should also be assessed in relation to whether the digital content or service is updated in the manner that has been stipulated in the contract. A lack of **updates** that are agreed in the contract should be considered as a lack of conformity of the digital content or service. Moreover, defective or incomplete updates should also be considered as a lack of conformity of the digital content or service, as this would mean that they are not performed in the manner stipulated in the contract.

³³ The objective conformity criteria were moved to a separate Article (new Article 6a).

³⁴ Paragraph 4 was moved to Article 6a(3).

³⁵ Paragraph 5 was moved to Article 6a(4).

Article 6a

Objective requirements for conformity of the digital content or digital service

1. (...) **In addition to complying with any conformity requirements stipulated in the contract the digital content or digital service shall**
 - (a) be fit for the purposes for which digital content **or a digital service** 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 (...);
 - (b)³⁶ **possess the qualities**, functionality, interoperability and other **main** features, such as **performance**, accessibility, continuity **or** security **which are normal in digital content or a digital service of the same type and which the consumer may expect**³⁷, taking into account 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 service** could not have been influenced by the statement; **and**
 - (c) **be supplied along with any accessories and instructions as the consumer may expect to receive.**

³⁶ The wording used in point (b) was inspired by the wording used in Article 5(c) of the 'Online sales of goods proposal' and Articles 2(1)(d) and 2(4) of Directive 1999/44.

³⁷ It could be explained in the recitals that any reference to what can be expected of or by a person under this Directive should be understood as a reference to what can **reasonably** be expected. The standard of reasonableness should be objectively ascertained, having regard to the nature of the digital content, to the circumstances of the case and to the usages and practices of the parties involved. (*language inspired by the wording used in recital (18) of the 'Online sales of goods proposal'*)

2. **There shall be no lack of conformity in the meaning of paragraph 1 if, at the time of the conclusion of the contract, the consumer knew that a specific characteristic of the digital content or service was deviating from the conformity requirements stipulated in paragraph 1 and the consumer has expressly³⁸ accepted this deviation when concluding the contract.**
- 3.³⁹ Unless **the parties have agreed** otherwise, digital content **or a digital service** shall be supplied in conformity with the most recent version of the digital content **or service** available at the time of the conclusion of the contract.
4. **In order to be in conformity** (...) the digital content **or digital service shall** also meet the requirements of Articles 7 and 8.

Article 7

Integration of the digital content

Where the digital content **or digital service** 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 service** was integrated by the supplier or under the supplier's responsibility; or
- (b) the digital content **or digital service** was intended to be integrated by the consumer and the incorrect integration was due to shortcomings⁴⁰ in the integration instructions where those instructions were **provided by the supplier**.

³⁸ Delegations are invited to give their views as to whether it should be clarified in the recitals that this deviation should only be possible if the consumer accepts it separately from other statements or agreements and by way of active and unequivocal conduct, for instance by ticking a box or activating a button or a similar function.

³⁹ Article 6(4) of the Commission proposal.

⁴⁰ The recitals could clarify that incompleteness or a lack of clarity of the installation instructions, which the average consumer would find misleading, should be considered 'shortcomings'.

Article 8

Third party rights

1. (...) **The digital content or digital service 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 service in accordance with the contract.**

2. (...)

OPTION 1 FOR ARTICLES 9 AND 10⁴¹

*Article 9*⁴²

Liability of the supplier

1. The supplier shall be liable (...) for
 - (a) any failure to supply the digital content **or digital service in accordance with Article 5;**
 - (b) any lack of conformity
 - (i) which exists at the time **of supply of the digital content or digital service, where the contract provides for a single act of supply; or**
 - (ii) which occurs during the duration **of the contract**, where the contract provides **for more than one act of supply or for continuous supply** over a period of time (...).
2. **The rights of the consumer laid down in Article 12 shall be subject to a prescription period of [2 years]. The prescription period shall begin to run from the time when the consumer has become, or could be expected to have become, aware of the lack of conformity.**

⁴¹ Please note that the order to Articles 9 and 10 has been inverted, because it seemed more logic to have the burden of proof rule after the rule setting out the liability of the supplier. Please also note that the wording of Article 9(1) and 10(1), 10(2) and 10(3) is the same under both options.

⁴² **Option 1** aims at achieving the limitation of the supplier's liability by a harmonisation of the prescription period applying for both scenarios of supply described in point (i) and (ii) of paragraph 1(b).

Article 10

Burden of proof

1. The burden of proof with respect to **whether the digital content or digital service was supplied in accordance with Article 5** shall be on the supplier.
2. **The burden of proof with respect to whether the supplied digital content or digital service was in conformity at the time indicated in point (b)(i) of Article 9(1), or, where the contract provides for more than one act of supply, in point (b)(ii) of Article 9(1), shall be on the supplier.**
3. **Paragraph 2** shall not apply where the supplier **demonstrates** that the digital environment of the consumer is not compatible with (...) the technical requirements of the digital content **or service** and where the supplier informed the consumer of such requirements before the conclusion of the contract.⁴³
4. The consumer shall **allow the supplier to ascertain (...)** the consumer's digital environment **to the extent necessary for determining whether the lack of conformity existed at the time indicated in point (b) of Article 9(1). In particular, the consumer shall tolerate the use of the least intrusive** technical means, which are **at the disposal of both parties**. Where the consumer **refuses to allow the supplier to ascertain the consumer's digital environment**, the rules on the burden of proof set out in **paragraphs 1 and 2 shall not apply, provided that the supplier informed the consumer in a clear and comprehensible manner about this consequence of a lack of cooperation.**

⁴³ Delegations are invited to express their views as to whether the clarification set out in paragraph 3 should be moved to the recitals as an example of a situation how the supplier can prove that there is no lack of conformity (thus, to be understood as an explanation of a subjective conformity criteria rather than a deviation of the burden of proof rule set out in paragraph 2).

OPTION 2 FOR ARTICLES 9 AND 10⁴⁴

*Article 9*⁴⁵

Liability of the supplier

1. The supplier shall be liable (...) for
 - (a) any failure to supply the digital content **or digital service in accordance with Article 5;**
 - (b) any lack of conformity
 - (i) which exists at the time **of supply of the digital content or digital service, where the contract provides for a single act of supply; or**
 - (ii) which occurs during the duration **of the contract**, where the contract provides **for more than one act of supply or for continuous supply** over a period of time (...).

⁴⁴ See footnote 41.

⁴⁵ **Option 2** is inspired by the rules of Directive 1999/44 and puts for discussion a limitation in time of the guarantee period (period during which the defect has to become apparent).

As 'one-off supply' of digital content seems to be largely comparable to a sales situation, paragraph 2 took inspiration from the first sentence of Article 5(1) of Directive 1999/44. With respect to digital content/services supplied over a period of time, paragraph 3 suggests using the 'period of the contract' as the criterion for limiting the guarantee period, given that in such situations any defect of the supplied digital content/service necessarily occurs during the 'contract duration'.

Unlike option 1, option 2 does not aim at harmonising prescription periods; however, in order to prevent that limitation periods under national law undermine the guarantee period, a rule similar to the one provided for by the second sentence of Article 5(1) of Directive 1999/44 is suggested in paragraph 4 of this option. Paragraph 4 tries to make a link to both scenarios referred to in paragraph 1(b): to the time of supply as regards cases of 'one-off supply' (point (i)), and to the relevant 'period of supply' as regards continuous or repeated acts of supply (as described in point (ii)).

2. **In cases [where the contract provides for a single act of supply] as referred to in point (b)(i) of paragraph 1, the supplier shall be held liable under Article 12 where the lack of conformity becomes apparent within [2 years] as from the time of supply.**
3. **In cases [where the contract provides for more than one act of supply or for continuous supply] as referred to in point (b)(ii) of paragraph 1, the supplier shall be held liable under Article 12 for any lack of conformity that becomes apparent during the duration of the contract.**
4. **If, under national legislation, the rights laid down in Article 12 are subject to a limitation period, that period shall not expire within a period of [2 years] as from the time of supply or the period of supply in accordance with point (b)(i) or point (b)(ii) of paragraph 1 respectively.**

Article 10

Burden of proof

1. The burden of proof with respect to **whether the digital content or digital service was supplied in accordance with Article 5** shall be on the supplier.
2. **The burden of proof with respect to whether the supplied digital content or digital service was in conformity at the time of supply or the period of supply indicated in point (b)(i) or point (b)(ii) of Article 9(1) respectively, shall be on the supplier.**
3. **Paragraph 2** shall not apply where the supplier **demonstrates** that the digital environment of the consumer is not compatible with (...) the technical requirements of the digital content **or service** and where the supplier informed the consumer of such requirements before the conclusion of the contract.⁴⁶

⁴⁶ See footnote 43.

4. The consumer shall **allow the supplier to ascertain (...)** the consumer's digital environment **to the extent necessary for determining whether the lack of conformity existed at the time indicated in point (b) of Article 9(1).** In particular, the consumer shall tolerate the use of the least intrusive technical means, which are **at the disposal of both parties.** Where the consumer **refuses to allow the supplier to ascertain the consumer's digital environment,** the rules on the burden of proof set out in paragraphs 1 and 2 shall not apply, provided that the supplier informed the consumer in a clear and comprehensible manner about this consequence of a lack of cooperation.

Article 11

Remedy for the failure to supply⁴⁷

Option 1⁴⁸:

1. Where the supplier has failed to supply the digital content **or digital service** 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 service without undue delay.**

Option 2⁴⁹:

1. Where the supplier has failed to supply the digital content **or digital service in accordance with Article 5, the consumer shall call upon him to make the supply within an additional period of time appropriate to the circumstances.**

⁴⁷ In the discussions of Article 11 so far, there has been nearly equal support for options 1 and 2. Both options have therefore been retained in the text for further discussion. However, in an attempt to simplify the wording, paragraph (1b) of Option 2 has been reworded.

⁴⁸ **Option 1** clarifies that the consumer, before terminating the contract, has the *possibility* to give the supplier a 'second chance'.

⁴⁹ **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.

- 1a. If the supplier fails to supply the digital content or service within that additional period of time, the consumer shall be entitled to terminate the contract.**
- 1b. The consumer shall be entitled to terminate the contract immediately where the supplier has failed to supply the digital content or a digital service in accordance with Article 5 and:**
- (a) the supplier has refused to supply, or**
 - (b) the supply at the agreed time or within the agreed period was essential for the consumer taking into account all the circumstances attending the conclusion of the contract, or**
 - (c) the consumer informed the supplier, prior to the conclusion of the contract, that supply by or on a specified date is essential.**

- 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.**

Article 12

Remedies for the lack of conformity

- 01. In the case of a lack of conformity, the consumer may request to have the digital content or digital service brought into conformity, or to have an appropriate reduction in the price, or to terminate the contract under the conditions set out in this Article.**

1. The consumer shall be entitled to have the digital content **or digital service** brought into conformity⁵⁰ free of charge, unless this **would be 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 service** would have if **there were no lack of conformity**; and
 - (b) the significance of the lack of conformity (...).
2. The supplier shall bring the digital content **or the digital service** in conformity with the contract pursuant to paragraph 1 within a reasonable time, 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 service** and the purpose for which the consumer required this digital content **or digital service**. **The consumer shall be entitled to withhold the payment of any outstanding part of the price to the extent justified by the lack of conformity, until the supplier has brought the digital content or digital service into conformity.**
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 service** is supplied in exchange for a payment of a price, or **the termination of the contract in accordance with paragraphs 5 to 6 and Articles 13, 13a and 13b**, where
 - (a) the remedy to bring the digital content **or digital service** in conformity is impossible **or disproportionate in accordance with paragraph 1**;
 - (b) the supplier has not **brought the digital content or digital service in conformity with the contract** within a reasonable time;
 - (ba) **the same lack of conformity reappears, despite an attempt by the supplier to bring the digital content or digital service in conformity**;

⁵⁰ Examples of how the digital content can be brought in conformity could be included in the recitals (see recital 36 which mentions already, for instance, 'by **issuing updates or requiring the consumer to access a new copy of the digital content**').

(c) the remedy to bring the digital content **or service** 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 service** in conformity.

4. The reduction in price shall be proportionate to the decrease in the value of the digital content **or digital service supplied to** the consumer compared to the value **that** the digital content **or digital service would have if it was in** conformity.

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 service, unless the consumer expressly agrees otherwise.

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

5. **Where the digital content has been supplied in exchange for the payment of a price the consumer shall be entitled to** terminate the contract only if the lack of conformity is **not minor**. The burden of proof that the lack of conformity is **minor** shall be on the supplier.
6. **Where the digital content or digital service has not been supplied in exchange for the payment of a price but for personal data or other data, the consumer shall be entitled to terminate the contract under the conditions of paragraph 3 even if the lack of conformity is minor.**

7. ⁵¹ Where **the contract stipulates that** the digital content **or digital service shall be** supplied **over a period of time** in exchange for a payment of a price (...), the consumer **shall be entitled to a reduction in price proportionate to** the period of time **during which** the digital content **or digital service** has not been in conformity (...), **unless the lack of conformity is such as to justify the termination of the contract..**

Article 13

Exercise of the right of termination

1. The consumer shall exercise the right to terminate the contract by (...) means **of a statement to the supplier expressing the consumer's decision to terminate the contract.**⁵²

(...)⁵³

⁵¹ Article 13(5) of the Commission proposal.

⁵² The wording of paragraph 1 was inspired by the language used in point (b) of Article 11(1) of the CRD.

⁵³ Paragraphs 2 to 6 of Article 13 of the Commission proposal 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 = deleted

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.**

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 service, unless the consumer has expressly agreed otherwise. The supplier shall not impose any fee on the consumer in respect of the refund.

2. **In respect of personal data of the consumer, the supplier shall comply with the obligations applicable under Regulation 2016/678 (...).**
3. **In respect of other data (...) provided by the consumer or uploaded or created by the consumer when using the digital content or digital service, the supplier shall make that data available⁵⁵ to the consumer.**

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

The supplier shall not be required to make available data created by the consumer when using the digital content or digital service to the extent that data only has utility within the context of using the digital content or digital service, or which relates only to the consumer's activity when using the digital content or digital service or which has been aggregated with other data by the supplier and cannot be disaggregated or only with disproportionate efforts.

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

⁵⁵ Possible means for making the data available to the consumer, such as setting up a data exchange interface, could be mentioned as examples in the recitals.

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

Article 13b

Obligations of the consumer in the event of termination

1. **After the termination of the contract**, the consumer shall refrain from using **the digital content or digital service and from** making it available to third parties (...).
2. **Where** the digital content was supplied on a **tangible** medium, the consumer shall upon the request of the supplier, return, at the supplier's expense, the **tangible** medium to the supplier without undue delay after the receipt of the supplier's request. **If the supplier decides to request the return of the tangible medium, that request shall be made within 14 days from the day on which the supplier is informed of the consumer's decision to terminate the contract.**
3. The consumer shall not be liable to pay for any use made of the digital content **or the digital service** in the period prior to the termination of the contract, **during which the digital content or the digital service was not in conformity.**

Article 14

(...) ⁵⁶

*Article 15*⁵⁷

Modification of the digital content

Option 1:

1. Where the contract **stipulates** that the digital content **or digital service** 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:
 - (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) (...).

⁵⁶ In accordance with 15 and 16 of the ‘Political guidelines’ of June 2016 (doc. 9768/16), 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.”

⁵⁷ The Working Party has not yet held an in-depths discussion of Articles 15 and 16 as revised by document 10231/16. The wording of document 10231/16 is therefore taken over from document 10231/16 as starting point for further discussions.

Option 2:

1. Where the contract **stipulates** that the digital content **or digital service** 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 service** 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 service**.

(...)

Article 16⁵⁸

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 service** 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 service** 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 service** 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.

⁵⁸ See previous footnote.

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,