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**NOTE**

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From:	The French delegation
To:	Working Party on Civil Law Matters (Contract Law)
No. prev. doc.:	15674/16
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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 - Comments from the French delegation on Articles 8 and 15

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**Article 8: THIRD PARTY RIGHTS**

We remain opposed to the current wording of Article 8 and of the proposed recital, and would like them to be deleted.

This wording reflects a conception according to which third party rights, and intellectual property rights in particular, prevent the consumer from using the content. But in our view it is the supplier's failure to fulfil its legal obligations which prevents the consumer from using the content, not third party rights.

We would like to reiterate that we are strongly attached to the protection of intellectual property rights and do not wish to see it undermined by this proposal. We would point out that the European Commission has embarked on a process of copyright reform aimed at adapting copyright to the digital world, which in itself confirms the importance of copyright for the internal market.

And although, during the discussions in the Working Party on Civil Law Matters, going beyond the specific wording of Article 8, a number of interpretative options were put forward, in our view none of them meets the concerns expressed.

1. One of the interpretations put forward consisted in viewing Article 8 as focusing on cases of non-conformity due to failure by the supplier to inform the consumer of the existence of a restriction on the use of the digital content.

But, firstly, Directive 2011/83 already lays down an obligation for the supplier to inform the consumer of restrictions on the use of digital content, in Article 5(1)(g) and the related recital 19.

Secondly, the proposal for a Directive provides for an obligation for the supplier to inform the consumer of any technical restriction on the content, as part of the supplier's more general obligation to ensure the functionality of the digital content. This obligation is laid down in Article 6(1)(a) and Article 6a(1)(b), and in recital 26, which refers to the absence or presence of any technical restrictions such as protection via Digital Rights Management or regional coding. For the record, we would point out that the definition of 'functionality' in the 23 December compromise proposal is: *'the ability of the digital content or digital service to perform its functions having regard to its purpose'*.

Consequently, the possible purpose of such an interpretation of the provision of information to the consumer is already served by all these provisions, and the related lack of conformity is covered in Articles 6 and 6a. This interpretation of Article 8 therefore does not offer any evident added value.

2. According to a second interpretation put forward in the course of the discussions, the aim of Article 8 could be a form of warranty of title in favour of the consumer, based on the provisions of the Vienna Convention on the Sale of Goods.

Whether at international level or in French law, such a legal warranty of title exists only in connection with contracts of sale, which, legally, implies a transfer of ownership. But where digital content is concerned, most of the contracts covered by the proposal for a Directive only confer a right to use digital content, without entailing a transfer of ownership, except in the case of content supplied on a physical medium (as provided for in Article 3(3)). Consequently, this interpretation does not appear to be appropriate, either. Besides, in our view the current wording of Article 8 does not seem to have the effect of establishing such a warranty.

3. Lastly, under another interpretation referred to in the discussions, based on recital 31 of the Commission proposal and the recital proposed by the Presidency in footnote 14 of the January compromise proposal, the focus would be on infringement of intellectual property rights as a lack of conformity for which remedies are provided for in Article 12.

We do not share this interpretation, since in most cases the content supplier, as defined in the proposal, is the copyright holder. The current proposal does not specify whether on-line intermediation services (platforms) are to be considered as content suppliers. In this regard, we would reiterate our preference for on-line intermediation services to be included in the concept of 'supplier', in particular by applying a set of criteria, as we have proposed previously.

If the platform is to be considered a 'supplier' only in cases where it offers 'digital content' which it edits, or where it supplies a 'digital service', this would result in a confusing situation for the consumer. It would mean, for example, that Netflix, which offers films for which it has a licence as well as series which it has created (e.g. 'House of Cards', 'The Crown'), could be, for a single subscriber, at times a supplier (within the meaning of Article 2(3) of the proposal) and at times a third party (within the meaning of point (b) of Article 5(1)). According to this interpretation, this company would therefore be responsible for conformity problems encountered by consumers in certain cases, but not in others.

In any case, we would emphasise that the supply of content infringing intellectual property rights implies the marketing of content which is unlawful, since it is recognised as infringing. The unlawful nature of the subject of a digital content contract should, as in the case of goods, render the contract null and void, the subject of the contract being regarded as not for sale. It is therefore not a question of conformity, as suggested by this interpretation, but a question of failure to supply. The reference to Article 8 in Article 6a(4) on conformity criteria should therefore be deleted. We do not think that the Directive should deal with these questions relating to the validity and consequently nullity of contracts, which should continue to be governed by national law.

In addition, we would point out that the remedies provided for by the proposal for a Directive (Article 11 et seq) do not cover the different types of failure to supply. The consumer is therefore protected by the measures provided for by Article 11, without it being necessary to determine in this text the causes of the failure to supply. This protection is not linked to Article 8 in any way.

**We therefore request that Article 8 be deleted or reworded as follows: '*The supplier shall deliver the digital content or digital service in compliance with the rights of third parties, including those based on intellectual property*'.**

## **Article 15**: MODIFICATION OF THE DIGITAL CONTENT

We have reservations about the relevance of Article 15 as it stands to the aim of ensuring a high level of consumer protection.

We express these reservations in particular on account of French legislation on **unfair terms**. It is uncertain whether Article 15 is compatible with Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, or with national legislation transposing that Directive into Member States' national law. Under French law, clauses allowing the trader to modify unilaterally the terms in the contract relating to its duration, to the features or price of the product to be delivered, or to the service to be provided, are black clauses which are indisputably regarded as unfair (Article L.212-1 and point 3 of Article R.212-1 of the new Consumer Code).

However, we understand the argument put forward by the European Commission that Article 15 makes it possible to cover the practices of traders who aim to allow broad scope for modification in their general terms and conditions, particularly in the cloud computing sector. Furthermore, by virtue of their specific nature compared with traditional goods, content operated via a remote service and digital services are frequently modified, particularly with a view to correcting vulnerabilities or improving their features. It is important not to dissuade suppliers of digital content and digital services from making such modifications.

The supplier's ability to modify the digital content or digital service should be dependent on the provision of specific and equivalent guarantees for the consumer (a), and the subject of the modification should be clearly defined (b).

(a) The fact that the contract allows modification and gives a valid reason for it, and that the consumer is informed of this modification and of the ensuing right to terminate the contract free of charge, ensures a minimum level of consumer protection in relation to the supplier's ability to modify the digital content or digital service. Similarly, where the consumer objects to the modification, he or she should be able to continue to use the unmodified digital content or service for a reasonable period of time, for which there is currently no provision in Article 15.

(b)As regards the **subject of the modification**, however, the modifications referred to in Article 15 may in fact be the updates provided for in the contract, which are therefore covered by the subjective conformity criterion provided for in point (d) of Article 6(1). The aim of Article 15 therefore seems to be poorly defined and could equally well consist in giving the consumer the right to terminate the contract for certain categories of update where there is no lack of conformity (not covered in Article 6). In view of this uncertainty, the categories of update mentioned in the proposal must be clarified. We therefore propose that a distinction be made between:

- the **updates referred to in point (d) of Article 6(1) and the minor upgrades** provided for by the contract, which in our opinion are dealt with in Article 15 and do not give the consumer the right to terminate the contract; these should be updates for the purpose of improving the digital content (addition, modification or updating of one or more items of data in a table, like GPS maps or the words in a dictionary) or digital service (optimisation of the functionalities and performance);
- the **updates necessary for the performance of the contract**, ensuring the objective conformity of the digital content or digital service, which we would like to see included in Article 6a of the proposal; these should be corrective and patching updates (correction of security vulnerabilities, bugs, etc.), which are usually invisible to the consumer;
- **major upgrades**, referred to in Article 15 and giving the consumer the right to terminate the contract, which constitute a new version (e.g. software version 1.1 being replaced by version 2.0).

For the sake of clarity, these different categories of modification of the digital content or digital service should be defined in Article 2 of the proposal.

Article 2

9. “interopérabilité”

9a. “fonctionnalité”

9b. « mise à jour ou mise à niveau mineure prévue par le contrat » : processus d'amélioration qui modifie la fonctionnalité, la compatibilité, l'interopérabilité ou d'autres caractéristiques du contenu ou du service numérique et qui peut avoir un effet préjudiciable mais uniquement non-significatif/peu important sur l'utilisation du contenu ou du service numérique par le consommateur.

9c. « mise à jour nécessaire à l'exécution du contrat » : processus de correction et de réparation, en particulier des vulnérabilités de sécurité et des bogues, destiné à garantir la conformité objective du contenu ou du service numérique.

9d. « mise à niveau majeure » : processus de remplacement d'un contenu numérique exploité à distance ou d'un service numérique par une version nouvelle du même contenu ou service numérique.

Article 6, paragraphe 1

Conformité du contenu ou du service numérique avec le contrat

(...)

(d) être mis à jour **ou mis à niveau de manière mineure** comme stipulé au contrat

Article 6a, paragraphe 1, nouveau point d)

*Exigences objectives de conformité du contenu ou du service numérique*

(...)

**d) être fourni avec les mises à jour nécessaires à l'exécution du contrat**

**Mise à niveau majeure du contenu numérique exploité à distance ou du service numérique**

1. Si le contrat ~~prévoit que la fourniture du contenu ou de service numérique s'étale sur une certaine période~~ **prévoit que le contenu numérique exploité à distance ou le service numérique fait l'objet d'une fourniture continue sur une période de temps**, le consommateur peut résilier le contrat lorsque le fournisseur **fournit une mise à niveau majeure** [si le contrat **la prévoit et en donne une raison valable**].

Le consommateur est **informé de la mise à niveau majeure, de la date à laquelle la mise à niveau majeure prend effet et du droit correspondant de résilier sans aucun frais**, avec une avance raisonnable, **d'une manière claire et compréhensible** sur un support durable.

Le consommateur est autorisé à résilier le contrat sans aucun frais dans un délai d'au moins 30 jours **à compter du jour auquel le consommateur est informé de la mise à niveau majeure. La version d'essai du contenu ou du service numérique mis à niveau de manière majeure est fournie de façon à permettre au consommateur d'effectuer un choix éclairé.**

**Si le consommateur ne résilie pas le contrat, le contenu numérique ou le service numérique fourni au consommateur avant la mise à jour majeure doit continuer à être fourni au consommateur pendant un délai raisonnable après la mise à niveau majeure.**

2. Lorsque le consommateur résilie le contrat conformément au paragraphe 1, **les articles 13, 13a et 13b doivent s'appliquer en conséquence.**

Le fournisseur rembourse au consommateur **seulement** la partie du prix payé correspondant à la période de temps après la **mise à niveau majeure** du contenu **ou du service numérique**.



Comments:

- in paragraph 1, the concept of 'remotely-operated digital content' covers content processed remotely at a virtual supply facility making the content available to the consumer or allowing the consumer to access it. The consumer's use of the digital content is thus constantly visible to the supplier, without whose service the consumer can no longer use the content (application, video files, etc.), and **the supplier is able to alter this content**. This concept is different from that of digital content downloaded and processed locally in the consumer's digital environment. In this scenario, the consumer uses the digital content independently of the supplier, which therefore cannot alter the content on its own initiative.
- in (the new) paragraph 9b of Article 2, the reference to a 'non-significant detrimental effect' could be made clearer by a recital based on the UK's proposal on Article 15 for point (ab) ('the alteration can reasonably be expected of the consumer when the interests of the supplier are taken into account').

English translation:

*Article 2*

9. 'interoperability';

9a. 'Functionality';

9b. **'update or minor upgrade stipulated by the contract' means a process of improvement which alters the functionality, compatibility, interoperability, and other features of the digital content or digital service and which may have a detrimental effect, but only a non-significant detrimental effect, on the use of the digital content or digital service by the consumer.**

9c. **'update necessary for the performance of the contract' means a process of correction and patching, especially of security vulnerabilities and bugs, ensuring the objective conformity of the digital content or digital service.**

9d. **'major upgrade' means a process of replacing a remotely-operated digital content or digital service with a new version of the same digital content or digital service.**

*Article 6, paragraph 1*

Conformity of the digital content or service with the contract

(...)

(d) be updated, **or be given a minor upgrade**, as stipulated by the contract

*Article 6a, paragraph 1, new point d)*

Objective requirements for conformity of the digital content or digital service

(...)

**d) be operated with the updates necessary for the performance of the contract**

**Major upgrade of the remotely-operated digital content or digital service**

1. Where the contract ~~stipulates that the digital content or digital service shall be supplied over the period of time~~ **provides for continuous supply over a period of time of the remotely-operated digital content or digital service**, the consumer may terminate the contract when the supplier carries out **major upgrades** [where the contract allows for and gives a valid reason for such an alteration.]

The consumer is **informed of the major upgrade, the date on which the major upgrade is taking place and the corresponding right to terminate the contract free of charge**, giving reasonable advance notice and **in a clear and comprehensible manner** on a durable medium.

The consumer **shall be** 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 major upgrade. The trial upgraded version of the digital content or digital service shall be supplied so that the consumer make an informed choice.**

**Where the consumer does not terminate the contract, the digital content or digital service supplied to the consumer prior to the major upgrade shall continue to be supplied to the consumer for a reasonable time after the major upgrade.**

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** that part of the price paid which corresponds to the period of time after **the major upgrade** of the digital content or digital service.