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NOTE

From: Presidency
To: Working Party on Civil Law Matters (Contract Law)
No. Cion doc.: 15251/15
Subject: Proposal for a Directive on certain aspects concerning contracts for the supply of digital content
- Preparation of key issues for the Council

I. BACKGROUND

1. On 9 December 2015, the Commission adopted two proposals for Directives relating to contract law: a proposal for a Directive on certain aspects concerning contracts for the supply of digital content (hereinafter 'Directive on digital content')¹ and a proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods (hereinafter 'Directive on online sales of goods')².

2. The two proposed Directives are part of the 'Digital Single Market Strategy for Europe'³. Their general objective is to contribute to faster growth of the Digital Single Market for the benefit of both consumers and businesses.

¹ See document 15251/15 JUSTCIV 290 CONSOM 220 DIGIT 116 AUDIO 40 CODEC 1731 + ADD 1 + ADD 2.
² See document 15252/15 JUSTCIV 291 CONSOM 221 CODEC 1733 + ADD 1 + ADD 2.
³ See document 8672/15 COMPET 185 TELECOM 109 AUDIO 11 DIGIT 32 RECH 107 MI 291 PI 32 IND 72 ECOFIN 308 ENER 139 DATAPROTECT 70 CYBER 31 JUSTCIV 101 E-JUSTICE 56 CULT 29 EDUC 122.
3. The Netherlands Presidency has put the examination of this file at the top of its agenda. This priority is reflected, in particular, in a dense schedule of meetings held at Council Working Party level since the submission of the two proposed Directives.

4. In line with the mandate approved by the Council JHA on 10 and 11 March 2016, work at technical level concentrated first on examining the Directive on digital content, while not losing sight of the coherence between that Directive and the Directive on online sales of goods.

5. The Presidency acknowledges that the Directive on digital content is of a highly technical nature and further clarification and discussions will be needed on the details of the proposed rules before any final positions can be taken.

6. However, good progress has been made on identifying principle aspects of the Directive that will be of key importance in future discussions.

7. Thanks to the joint efforts of the Member States and the Commission and the cooperative spirit in the discussions in the Working Party on Civil Law Matters (Contract Law), as well as the very comprehensive reflections and input provided by delegations, common ground seems to have emerged on a number of those principle aspects. The Presidency would like to pin down the common understanding on this (non-exhaustive) list of identified key issues.

8. Delegations are invited to discuss, at the Working Party meeting on 3 and 4 May 2016, the key issues addressed in part II of this note with a view to submitting suggestions for political guidelines to the Council JHA in June 2016.

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4 See 6150/16 JUSTCIV 17 CONCOM 30 DIGIT 10 AUDIO 12 CODEC 165
II. **KEY ISSUES**

A. **Objectives:**

   (a) **Political objectives**

9. The purpose of the Directive on digital content is to contribute to the proper functioning of the internal market by introducing a more harmonised and clear framework of EU rules on digital content to make it easier for businesses, especially (small and medium-sized enterprises ('SMEs')), to sell EU-wide and to build greater confidence amongst European consumers when buying across borders by reducing transaction costs and providing more legal certainty.

10. Discussions have shown a general endorsement of those objectives.

   (b) **Need for coherence**

11. An important aspect emphasised throughout the discussions by many delegations was the need to maintain overall consistency in consumer legislation.

12. Therefore, the rules on contracts for the supply of digital content and the rules on contracts for the sale of goods should be aligned as much as possible and divergences should be introduced only as far as necessary to adequately address the specific nature of digital content.

13. For a frictionless application in practice, the rules of the Directive on digital content should correspond as far as possible to the existing EU regime on consumer contracts for the sale of goods, in particular regarding the definitions used in Article 2, the general principles regarding the conformity of digital content with the contract ('conformity test') under Article 6, the liability of the supplier in the event of a lack of conformity and the shift of the burden of proof according to Articles 9 and 10, the consumer remedies in Articles 12 and the main modalities for exercising those remedies under Article 13. This would benefit both businesses and consumers as these contractual rights and obligations are already familiar to them and could be applied in a consistent manner.
14. The call for more coherence was also made with regard to other, horizontal, legislation in the area of consumer protection, in particular concerning the scope of and the principles set out in Directive 2011/83/EU on consumer rights ('Consumer Rights Directive - CRD'). In this regard, the Commission, when submitting its report on the application of the CRD\(^5\), is invited to include in that report, in particular, an evaluation of the provisions of that Directive regarding all types of contracts for the supply of digital content and the digital content covered by the Directive on digital content and to assess whether further alignment between the two instruments would be needed in the future.

15. As regards the relationship between the Directive on digital content and other EU legislation, for instance as far as EU intellectual property law and EU legislation on telecommunication services are concerned, further clarification in Articles 3(7) and (8) is required.

16. Moreover, any interference with the EU General Data Protection Regulation ('GDPR') has to be avoided. The GDPR already provides for a comprehensive framework of rights for the protection of personal data. The Directive on digital content should avoid introducing divergences in the application of these rules. For further in-depth discussion, in particular concerning the consequences of termination of the contract under Articles 13, 15 and 16, a comparison table could be a helpful tool for determining which rights can be found in the GDPR and which contract-law-related rights need to be provided for in the Directive on digital content.

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\(^5\) Article 30 of the CRD provides:
"By 13 December 2016, the Commission shall submit a report on the application of this Directive to the European Parliament and the Council. That report shall include in particular an evaluation of the provisions of this Directive regarding digital content including the right of withdrawal. The report shall be accompanied, where necessary, by legislative proposals to adapt this Directive to developments in the field of consumer rights."
(c) Targeted harmonisation

17. Discussions so far in the Working Party have shown wide support for a targeted harmonisation approach aiming at facilitating cross-border trade and providing a high level of consumer protection and increased legal certainty. To achieve its objective, the Directive on digital content should, to the extent possible aim at maximum harmonisation. In any event, it should be made completely clear to the Member States to what extent their national contract laws are affected by the Directive and which aspects remain within the remits of the Member States.

18. The Presidency invites delegations to give their views on the political objectives of creating new European contract law rules on the supply of digital content as described in points 9 to 17 above and to confirm that the principles set out in those points should be observed in the future negotiation process in order to achieve these objectives.

B. Scope of the Directive on digital content

(a) Business to consumer contracts

19. There was clear support in discussions at Working Party level for the Directive on digital content to apply to business-to-consumer contracts only.

(b) Definition of digital content and types of counter-performance

20. Driven by the aim of establishing a technologically-neutral definition of digital content that prevents circumvention of the rules by a simple change in the design or technical concept of the digital content, discussions so far in the Working Party have shown broad support in principle for a definition that covers, in a comprehensive manner, a very large variety of digital content that is on the market right now and that is open to future developments.
21. Further discussions will however be needed as regards embedded digital content. Applying the rules on the sale of goods to products that contain embedded software in such a way that its functions are subordinate to the main functionalities of the goods is one option. However, there also seems to be merit in continuing reflections on other options, such as retaining the rules on the sale of goods as far as the tangible medium itself is concerned while applying the rules on the supply of digital content to the digital content.

22. Given the increased value of personal data in modern business models, broad support in principle was also expressed for the idea that the Directive should also apply where digital content is supplied in exchange for personal data.

23. The question, however, of whether or not the Directive should also apply to contracts concerning digital content supplied in exchange for data other than personal data requires further reflection, in particular since it is not yet clear what is meant by this concept ('other data').

(c) Right to damages

24. Discussion so far did not demonstrate a need for establishing rules on the compensation of damages in the Directive on digital content. The provision proposed in Article 14 met with much concern by delegations. All Member States' laws provide for a system of damages, though the extent and modalities might differ from one Member State to another. Given that Article 14 contains a far-reaching reference to the national laws of the Member States, this provision was perceived as causing more confusion than clarity; it would not contribute to the strengthening of the internal market or to increased consumer protection.

25. In the light of this, the Directive should not cover the right to damages, so Article 14 should be deleted. For the sake of clarity, it should however be considered to insert a clarification in the recitals declaring that nothing in the Directive affects any rights to damages existing under national law of the Member States.

26. The Presidency invites delegations to give their views on the outlines for the scope of the Directive on digital content as described in points 19 to 25 above and to confirm that those outlines should be the starting point in the future negotiation process.
C. **Right balance between consumers' and suppliers' interests**

27. In the discussions held so far, it was highlighted that it was of utmost importance for the new rules to attain a well-balanced regime by setting a high level of consumer protection while at the same time creating a business-friendly environment for EU entrepreneurs, and for the new rules to be technologically neutral and user-friendly. In view of this there was a general agreement that the Directive on digital content needs to be adjusted on certain points in order that the rules benefit the internal market and EU citizens alike.

The following elements were identified as being of particular importance for striking such balance and establishing technologically neutral and user-friendly rules:

*(a) Technologically neutral and user-friendly rules*

28. Discussion in the Working Party made it very clear that we need to tread carefully when regulating new areas. Additional technical clarifications by experts on the functioning of different types of digital content might be needed for a better understanding of the possible consequences a broad definition of digital content or a broad inclusion of different types of data as counter-performance might have in the practical application of the Directive. This applies in particular to the question of whether the remedies in their current form would be appropriate for and could be applied in a balanced way to all types of digital content and data covered by the broad scope as currently proposed.

29. Considering the need for a coherent and user-friendly and fair set of rules, it may be necessary to examine whether diverging rules applicable to different types of digital content or contracts for the supply of digital content covered by the Directive could have any added value, in particular with regard to the conformity test, consumer remedies and the rules on restitution after termination of the contract. Moreover, it needs to be seen how it can be ensured that consumers are aware of their rights when they provide personal data in exchange for digital content. Future discussions should assess these questions further.
(b) **Conformity test**

30. The initial Commission proposal to give precedence to 'subjective' conformity criteria (i.e. criteria agreed in the contract, mostly under standard terms and conditions) when applying the conformity test raised strong concerns, in particular because such a rule would undermine consumer protection given that consumers normally have little influence over the (standard) contractual terms and this would put the burden on consumers to carefully scrutinise the contract.

31. For greater balance, an approach that is more consistent with Directive 1999/44/EC should also be applied to digital content. To that end, the conformity of the digital content should be assessed against a combination of 'objective' conformity criteria (such as the fitness of the digital content for the usual purpose of use) that are clear, simple and flexible in application and the 'subjective' conformity criteria stemming from the contract.

(c) **Clear rules on the supply ('delivery') of the digital content**

32. In order to provide the consumer with effective rights, it is necessary for the Directive on digital content to provide for clear rules on the supply of digital content, in particular, on the moment when the digital content is supposed to be supplied ('delivered') to the consumer.

33. In this respect it is suggested that the moment of supply should be set at the point in time at which the digital content reaches the consumer’s device or a third party intermediary nominated by the consumer. This means the supplier should be liable where the failure to deliver is due to reasons which do not have their origin in the consumer’s digital environment or in matters within the control of the consumer.

34. Moreover, there seems to be a need to further reflect on the merit in imposing the burden of proof of successful delivery on the supplier.
(d) Liability of the supplier in the event of a lack of conformity and burden of proof

35. The supplier should be liable towards the consumer where the supplied digital content is not in conformity with the contract. In discussions so far, however, the approach not to provide for any limitation in time on either the supplier's liability for non-conformity of the digital content or for the related reversal of the burden of proof (Article 9(1)), was considered by several delegations as not providing for an appropriate balance.

36. With a view to creating more balance between consumer rights and business interests, suppliers should not be liable towards the consumer for a period which is unlimited in time or limited only by national prescription periods which might vary from one Member State to another. The rules should ensure that both parties, at a given moment, have legal certainty about the existence of possible conformity claims.

37. The same reasoning should also guide further reflection on a possible need for a limitation in time as regards the provisions on the shift of the burden of proof in Article 9(1).

(e) Remedies in the event of non-conformity

38. When the supplier fails to supply digital content in conformity with the contract, the consumer should, in principle, be entitled to have the digital content brought into conformity within a reasonable time, without significant inconvenience and without incurring any costs, or where that is not possible, to have the price reduced or the contract terminated. Discussions so far in the Working Party have shown broad support for the idea of such a hierarchy of consumer remedies.

39. However, with a view to ensuring a high level of consumer protection there seems to be merit in considering providing for a certain degree of flexibility in the application of this hierarchy of remedies by allowing for some exceptions where appropriate due to the particular circumstances of a case.
(f) **Other rights for the consumer**

40. Discussion of Articles 15 and 16 concerning the modification and termination of long-term contracts have shown support for the underlying objective of protecting consumers against unfair contract terms which may tie the consumer to a long term contract he no longer wants. Further reflection on how this objective could be best achieved is needed at technical level.

41. The Presidency invites delegations to give their views on the elements that are of particular importance in striking the right balance between the interests of the consumer and the interests of the supplier and to confirm that the outlines set out in the points 27 to 40 above should be the starting point in the future negotiation process.