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LIMITE

JUSTCIV 125  
CONSOM 232  
DIGIT 147  
AUDIO 77  
DAPIX 208  
DATAPROTECT 105  
CULT 78  
CODEC 913

**NOTE**

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From: the Presidency  
To: Coreper

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Subject: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading)  
- Preparation of a general approach

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Delegations will find in the Annex the text of the Articles and of a number of recitals of the above proposal proposed by the Presidency as a compromise with a view to the adoption of a general approach by the Council (Justice and Home Affairs) at its meeting on 8 and 9 June 2017.

Changes compared to the text of the Commission proposal are marked in **bold** or by (...) for deleted text. In the footnotes **bold** is also 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
  - **'GDPR'**: 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)
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*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 protection<sup>1</sup> 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**.

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<sup>1</sup> Additional elements of the Directive's objectives as 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, should be included in the recitals [recitals (3) to (7)].

## 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,<sup>2</sup>
- 1a. '**digital service**' means
  - (a) a service allowing **the consumer** the creation, processing or storage of, **or access to**, 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**;<sup>3</sup>

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<sup>2</sup> The recitals should list examples of digital content (movies, music files, games, e-books or other e-publications, which can be either downloaded or streamed online) which could be worded along the following lines:

*"This Directive should address problems across different categories of digital content, digital services and its supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this Directive should cover, among others, movies, music files, games, e-books or other e-publications, and also digital services which allow the creation, processing or storage of data including software-as-a-services such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media. While there are numerous ways for digital content to be supplied, such as transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply to all digital content and digital services independently of the medium used for the transmission or the provision of access to it. However, this Directive should not apply to the provision of access to the internet."*

<sup>3</sup> The recitals should also list **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 (*see proposed recital language in the previous footnote*).

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 conformity criteria as provided for by this Directive (...)**;
3. 'supplier'<sup>4</sup> means any natural or legal person, irrespective of whether privately or publicly owned<sup>5</sup>, who, **in relation to contracts covered by this Directive**, is acting (...) for purposes relating to that person's trade, business, craft, or profession;
4. 'consumer'<sup>6</sup> 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;<sup>7</sup>
5. (...) <sup>8</sup>

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<sup>4</sup> 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 or the digital service in the meaning of this Directive, such as **developers**, which are not (at the same time) the supplier.

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

<sup>6</sup> It should 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).

<sup>7</sup> 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**.

<sup>8</sup> See the footnote on Article 14.

6. 'price' means money **or a digital representation of value including a virtual currency**<sup>9</sup> 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**<sup>10</sup>;
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. '**compatibility**' 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**;
- 9b. '**interoperability**' means **the ability of the digital content or digital service to operate successfully with a digital environment different from the one for which it was supplied by the supplier**;
10. (...) <sup>11</sup>

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<sup>9</sup> The recitals could explain that **virtual currencies, to the extent that they are recognised by national law of the Member States**, have no other purpose than to serve as a way of payment. 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**.

<sup>10</sup> 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).

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

11. 'durable medium'<sup>12</sup> 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<sup>13</sup>.
12. **'embedded digital content' means digital content present in a good, whose absence would render the good inoperable or would prevent the good from performing its main functions, irrespective of whether that digital content was pre-installed at the moment of the conclusion of the contract relating to the good or according to that contract installed subsequently.**<sup>14</sup>

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<sup>12</sup> The recitals should provide an explanation along the lines of recital 23 of the CRD:

*"A durable medium 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."*

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

<sup>14</sup> The definition of Article 2(12) could be further explained in the recitals along the following lines:

*"It is necessary to clarify the rules applying to cases where digital content is embedded in goods. To that end, the distinctive criterion should be whether the digital content operates as an integral part of the good. Digital content should be considered an integral part of a good where the absence of such digital content would render the good inoperable or would prevent the good from performing its main functions.*

*Therefore, the rules applicable to goods should determine the remedies for consumers in case of a lack of conformity of the goods with embedded digital content including the embedded software.*

*However, where the absence of the digital content does not render the good inoperable or does not impact the performance of the main functions of the good, the digital content should not be considered to be embedded in the good in terms of the definition in this Directive. Therefore, this Directive should apply to such digital content. To the extent that digital content present in a good is not to be considered embedded in the good in the meaning of this Directive but is supplied to the consumer under the same contract as the good, the rules of this Directive concerning bundle contracts should apply."*

### 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 (...).

**It shall not apply (...) to the supply of digital content or a digital service for which the consumer does not pay or undertake to pay a price and does not provide or undertake to provide personal data to the supplier.**<sup>15</sup>

**It shall also not apply where personal data are exclusively processed by the supplier for supplying the digital content or digital service, or for the supplier to comply with legal requirements to which the supplier is subject, and the supplier does not process these data otherwise.**

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<sup>15</sup> An explanation along the following lines will be added in the recitals:

*"In the digital economy, digital content is often supplied without the payment of a price and suppliers use the consumer's personal data they have access to in the context of the supply of the digital content or digital service. Those specific business models apply in different forms in a considerable part of the market. A level playing field should be ensured.*

*This Directive should apply to contracts where the supplier supplies or undertakes to supply digital content or a digital service to the consumer. Member States should remain free to determine whether the requirements for the existence of a contract under national law are fulfilled. The Directive should not apply where the consumer does not pay or does not undertake to pay a price and does not provide personal data to the supplier. This Directive should not apply to situations where the supplier only collects metadata, the IP address or other automatically generated information such as information collected and transmitted by cookies, except where this is considered as a contract by national law. Similarly, this Directive should also not apply to situations where the consumer, without having concluded a contract with the supplier, is exposed to advertisements exclusively in order to gain access to the digital content or digital service.*

*However, Member States should remain free to extend the application of the rules of this Directive to such situations or to otherwise regulate such situations which are excluded from the scope of this Directive."*



2. This Directive shall **also** apply **where** the (...) digital **content or digital service is** developed according to the consumer's specifications.
3. With the exception of Articles 5 and 11, this Directive shall apply **also**<sup>16</sup> to any **tangible** medium **which incorporates** digital content **in such a way that the tangible medium serves** exclusively as carrier of digital content.<sup>17</sup>
- 3a. **This Directive shall not apply to embedded digital content.**
4. (...)
5. This Directive shall not apply to<sup>18</sup> contracts regarding:
  - (a) **the provision of services** where the digital form is used by the supplier only for **transmitting the products of such services to the consumer;**<sup>19</sup>

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<sup>16</sup> The addition of the word 'also' aims at clarifying that the Directive applies to both the carrier and the digital content.

<sup>17</sup> A recital will clarify that this Directive should not hinder the application of other Union consumer protection laws, in particular the application of the right to withdrawal provided for by the CRD in case of CD's, DVD's, USB-sticks or similar tangible mediums.

<sup>18</sup> It could be expressly clarified in the recitals that Member States retain the possibility to regulate the areas exempted by Article 3(5) which could be worded along the following lines:

*"Member States should remain free to extend the application of the rules of this Directive to contracts which are excluded from the scope of this Directive, or to otherwise regulate such contracts."*

<sup>19</sup> The exception of paragraph (a) could be explained further in the recitals along the following lines:

*"As this Directive applies to contracts which have as their object the supply of digital content or digital services to the consumer, it should not apply to contracts where the main subject matter of the contract is the provision of professional services such as translation services, architectural services or other professional advice services which are often performed personally by the supplier, regardless of whether digital means are used by the supplier in order to produce the output of the service or deliver it to the consumer. Similarly, this Directive should not apply to public services such as social security services or public registers where the digital means are only used for transmitting or communicating the service to the consumer. This Directive should also not apply to authentic instruments and other notarial acts, regardless of whether they are performed, recorded, reproduced or transmitted by digital means."*

(b) electronic communication services as defined in Directive 2002/21/EC;<sup>20, 21</sup>

(c) healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU;<sup>22</sup>

(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;

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<sup>20</sup> The exception of paragraph (b) reflects the policy choice to exclude from the scope of this Directive traditional telecommunication services (number-based interpersonal communication services), but to allow consumers to benefit from the remedies provided in this Directive in cases of lack of supply or lack of conformity for the so-called 'over the top' (OTT) communication services. This is reflected by referring to Directive 2002/21/EC, which covers only traditional telecom operators, but does not cover number-independent interpersonal communications, such as OTTs.

<sup>21</sup> The exception of paragraph (b) could be explained further in the recitals along the following lines:

*"The market of on-line services provided by 'over the top' (OTT) communication and messaging services, that is interpersonal communication services (ICS) which are not number-dependent and do not utilise traditional communication networks but allow communications between IP addresses across the internet, is rapidly evolving. In recent years, the emergence of new apps and digital services (OTTs) that provide ICS over the Internet, has led more consumers to use such services as a means of communication. For these reasons, it is necessary to provide effective consumer protection with respect to these emerging services. The remedies provided for by this Directive for cases of lack of supply and lack of conformity should therefore apply to OTTs."*

<sup>22</sup> The exception of paragraph (c) could be explained further in the recitals along the following lines:

*"The provisions of this Directive should not apply to healthcare which should therefore be excluded from its scope. Directive 2011/24/EU defines healthcare as 'health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices'. The exclusion of 'healthcare' from the scope of this Directive should therefore also apply to any digital content that constitute a medical device, as defined by Directives 93/42/EEC, 90/385/EEC or 98/79/EC, where such medical device is prescribed or provided by a health professional as defined by Directive 2011/24/EU. However, the remedies of this Directive should apply to any medical device, such as HealthApps, that the consumer obtains on the free market without being prescribed or provided by a health professional."*

- (e) financial services as defined by point (b) of Article 2 of Directive 2002/65/EC;<sup>23</sup>
- (f) supply of digital content where the digital content is made available to the general public other than by signal transmission as a part of a performance or event, such as digital cinematographic projections;<sup>24</sup>
- (g) digital content provided in accordance with Directive 2003/98/EC<sup>25</sup> by public sector bodies of the Member States.

6. Without prejudice to paragraph 3a, where a single contract between the same supplier and the same consumer includes in a bundle elements of supply of digital content or a digital service and elements of the provision of other services or goods, this Directive shall only apply to the elements of the contract concerning the digital content or digital service. Article 16 shall not apply where the bundle includes elements of electronic communication services regulated by Directive 2002/21/EC.

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<sup>23</sup> The exception of paragraph (e) could be explained further in the recitals along the following lines:

*"The existing Union legislation relating to financial services contains numerous rules on consumer protection. Financial services as defined by the legislation in that sector, in particular by Directive 2002/65/EC, cover also digital content or digital services relating to or giving access to financial services and are therefore covered by the protection of Union financial services legislation. Contracts relating to digital content or services that constitute a financial service should therefore be excluded from the scope of this Directive."*

<sup>24</sup> The exception of paragraph (f) could be explained further in the recitals along the following lines:

*"This Directive should not apply to digital content which is provided to a larger public other than by signal transmission, such as digital television services, but as part of an artistic or other event, such as a cinematographic projection or an audio-visual theatrical performance."*

<sup>25</sup> 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).

**The effects that the termination of the digital content or digital service element of a bundle contract in accordance with this Directive may have on the other elements of the bundle contract shall be governed by national law.<sup>26</sup>**

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.

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<sup>26</sup> Further explanations along the following lines could be added in a recital:

*"Digital content or digital services are often combined with the provision of goods or other services and offered to the consumer within the same contract comprising in a bundle different elements, such as the provision of digital television and the purchase of electronic equipment or the provision of internet access services. In such cases, the contract between the consumer and the supplier includes elements of a contract for the supply of digital content or service but also elements of other contract types, such as sales of goods or services contracts. This Directive should only apply to the elements of the overall contract which consist in the supply of digital content or digital services. The other elements of the contract should be governed by the rules applicable to those contracts under national law or, as applicable, the rules of another Union act governing a specific sector or subject matter. Likewise, any effects that the termination of the part of the contract relating to the supply of digital content or services may have on the parts of the contract relating to other elements of the contract shall be governed by national law."*

8. **Union law on the protection of personal data<sup>27</sup> applies to any personal data processed in connection with contracts referred to in paragraph 1.<sup>28</sup>**

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<sup>27</sup> The recitals will specify that Union law on the protection of personal data is a comprehensive body of law, broader than the Regulation (EU) 2016/679 (GDPR). It covers several pieces of secondary legislation (Regulation (EU) 2016/679 (GDPR), Directive 2002/58/EC (e-privacy) but also, and in the first place, provisions of primary law (Articles 8 and 52 of the Charter of Fundamental Rights, Article 16 of TFEU).

<sup>28</sup> Further explanations will be given in the recitals, which could be worded along the following lines:

*"Union law provides a comprehensive framework on the protection of personal data. That framework applies to any personal data processed in connection with the contracts covered by this Directive. In particular, this Directive is without prejudice to the provisions of Regulation (EU) 2016/679 and Directive 2002/58/EC. In case of conflict between the provisions of this Directive and Union law on the protection of personal data, the latter prevails.*

*Consequently, personal data shall only be transmitted, collected and processed in accordance with the provisions of Regulation (EU) 2016/679 (GDPR) and the e-privacy Directive (Directive 2002/58/EC) (reference to be updated following ongoing amendments of this legislation).*

*This Directive does not regulate the conditions for the lawful processing of personal data, as this question is regulated by Regulation (EU) 2016/679, in particular its Article 6(1). As a consequence, any processing of personal data in connection with a contract coming within the scope of this Directive is lawful only if it is in conformity with Article 6(1) of Regulation (EU) 2016/679 relating to the legal grounds for the processing of personal data.*

*When processing of personal data is based on consent (point (a) of Article 6(1) of Regulation (EU) 2016/679), the specific provisions of Regulation (EU) 2016/679 including the conditions whether consent is freely given apply. This Directive should neither regulate the validity of the consent given nor the consequences of its withdrawal.*

*The GDPR also contains comprehensive rights as to the erasure of data ('right to be forgotten'), data portability and return of data. This Directive is without prejudice to these rights. These rights apply to any data provided by the consumer to the supplier or collected by the supplier in connection with any contract coming within the scope of this Directive and when the consumer terminated the contract in accordance with this Directive."*

<sup>29, 30</sup> **In particular, this Directive is without prejudice to the provisions of Regulation (EU) 2016/679 and Directive 2002/58/EC. In case of conflict between the provisions of this Directive and Union law on the protection of personal data, the latter prevails.**

**8a. This Directive is without prejudice to national and Union laws on copyright and related rights.**

9. (...) This Directive shall not affect **the possibility of Member States to regulate** general contract **law aspects**<sup>31</sup>, such as rules on formation, the validity, the nullity or effects of contracts, including the consequences of the termination of a contract **in so far as they are not regulated in this Directive**<sup>32</sup>, **or the right to damages.**

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<sup>29</sup> It is suggested clarifying also in the recitals that the right of the consumer to withdraw consent in terms of the GDPR remains completely unprejudiced and entirely applicable. Such recital could be worded along the following lines:

*"Pursuant to Union law on the protection of personal data, the consumer has the right to erasure ('right to be forgotten'). This includes the consumer's right to withdraw consent for the processing of personal data, which right applies fully also in connection with the contracts covered by this Directive. The right of the consumer to terminate the contract in accordance with this Directive is without prejudice to the consumer's right in accordance with Regulation (EU) 2016/679 to withdraw any consent given to the processing of his or her personal data."*

<sup>30</sup> Moreover, it could be clarified in the recitals that the Digital Content Directive does not regulate any effects that the withdrawal of consent under the GDPR would have on the contract, and that this matter remains within the competence of the Member States:

*"The Directive should not regulate the consequences for the contracts covered by this Directive in case the consumer withdraws the consent for the processing of his or her personal data. This remains a matter for the national law of Member States."*

<sup>31</sup> A recitals will clarify 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.

<sup>32</sup> A clarification will be included in the recitals that it is left to national law to regulate any consequences of **lack of supply or a lack of conformity** of the digital content or digital 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, such as force majeure.

*Article 4*

**Level of harmonisation**

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 the consumer.  
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.
2. The **supplier shall have complied with his obligation to supply**<sup>33</sup> (...) when
  - (a) the digital content **or any means suitable for accessing or downloading the digital content is received by the consumer or by the physical or virtual facility**<sup>34</sup>  
**chosen by the consumer for that purpose;**
  - (b) **the digital service is made accessible** to the consumer or to the **physical or virtual facility** chosen by the consumer **for that purpose.**

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<sup>33</sup> The recitals should clarify that if the reasons for the failure to supply by the supplier are in the sphere of the consumer, the supplier should not be liable under this Directive, for instance if it is due to the consumer's internet connection.

<sup>34</sup> A clarification will be added in the recitals worded along the following lines:

*"There are various ways for digital content to reach consumers. It is opportune to set simple and clear rules as to the modalities and the time for performing the supplier's main contractual obligation to supply digital content to the consumer. Considering that the supplier is not in principle responsible for acts or omissions of another entity which operates a physical or virtual facility for instance an electronic platform or a cloud storage facility, which the consumer selected for receiving or storing the digital content, it should be sufficient for the supplier to supply the digital content to this facility. However, the physical or virtual facility cannot be considered to be chosen by the consumer if this facility is under the supplier's control or is contractually linked with the supplier as well as where the consumer selected this physical or virtual facility for receiving the digital content or digital service but that choice was the only one offered by the supplier to receive or access the digital content or digital service. In those cases, failure to supply digital content or make a digital service accessible from that facility in accordance with the Directive shall be subject to the same remedies as if the supplier had failed to supply the digital content or service to the consumer. With regard to the time of supply, in line with market practices and technical possibilities, and in order to provide for certain degree of flexibility, the digital content should be supplied without undue delay, unless the parties decide to agree otherwise in order to cater for other supply models."*



## Article 6

### Subjective requirements for conformity of the digital content or digital service

1. **The supplier shall supply to the consumer digital content or a digital service which is in conformity with the contract.**<sup>35</sup> In order to conform with the contract, the digital content or digital service shall, in particular, where applicable:
  - (a) be of the **description**, quantity and quality, (...) and shall possess functionality, **compatibility**, interoperability and other (...) features<sup>36</sup> (...), as required by the contract<sup>37</sup>;
  - (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;

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<sup>35</sup> This additional sentence takes over the philosophy of Article 2(1) of Directive 1999/44/EC by expressively setting out the obligation of the supplier.

<sup>36</sup> Further **specifications of the conformity criteria and examples** of the features of the digital content or service will be given 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, **compatibility**, interoperability and other features, such as **performance**, accessibility and continuity **for example whether the content or service is interrupted or not**, as required by the contract."*

<sup>37</sup> Moreover, it could be clarified as follows 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:

*"The requirements of the contract should include those resulting from the pre-contractual information which, in line with Directive 2011/83/EU, forms 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 contract<sup>38</sup>.

2. (...) <sup>39</sup>

3. (...) <sup>40</sup>

4. (...) <sup>41</sup>.

5. (...) <sup>42</sup>.

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<sup>38</sup> An explanation along the following lines could be inserted in the recitals:

*"Given that digital content and services are constantly developing, suppliers may agree with consumers to provide updates 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 to in the contract should be considered as a lack of conformity of the digital content or service with the contract. Moreover, defective or incomplete updates should also be considered as a lack of conformity of the digital content or service with the contract, as this would mean that they are not performed in the manner stipulated in the contract."*

<sup>39</sup> The objective conformity criteria were moved to a separate Article (new Article 6a).

<sup>40</sup> Paragraph 3 was moved to Article 6a(3a).

<sup>41</sup> Paragraph 4 was moved to Article 6a(3).

<sup>42</sup> 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 (...) **national and Union laws**, technical standards or, in the absence of such technical standards, applicable **sector specific** industry codes of conduct (...);
  - (b) **be of the quantity and possess the qualities**, functionality, **compatibility** and other features, such as **performance**, accessibility, continuity or security, **including security updates**,<sup>43</sup> **which are normal for the use of a digital content or a digital service of the same type and which the consumer may reasonably expect**<sup>44</sup>, 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

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<sup>43</sup> A recital will provide further clarity on security updates:

*"The objective assessment of conformity should also be based on whether the supplier ensures a constant level of secure functioning of the digital content or service by issuing the necessary security updates, which are normal for a digital content or digital service of the same type, in order to address emerging security threats and vulnerabilities for such time as is necessary taking into account the terms and nature of the contract. For example, in the case of digital content or digital services supplied to consumers in a continuous manner over a period of time, this obligation continues to apply for the time during which the digital content or digital service is available or accessible to the consumer."*

<sup>44</sup> It will be explained in the recitals that *"the standard of reasonableness with regard to any reference in this Directive to what can be reasonably expected of or by a person should be objectively ascertained, having regard to the nature **and purpose** of the digital content or digital service, to the circumstances of the case and to the usages and practices of the parties involved. **In particular, the reasonable time for bringing the digital content in conformity should be objectively ascertained, having regard to the nature of the lack of conformity.**"*

- (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 reasonably expect to receive;**

**(d) comply with any trial version or preview of the digital content or digital service, made available by the supplier before the conclusion of the contract (...);**

**(e) be updated as necessary for the functioning of the digital content or digital service.**

**2. There shall be no lack of conformity within the meaning of paragraph 1 if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the digital content or digital service was deviating from the conformity requirements stipulated in paragraph 1 and the consumer has expressly and separately accepted this deviation when concluding the contract.**<sup>45</sup>

**3.**<sup>46</sup> 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 digital service** available at the time of the conclusion of the contract.

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<sup>45</sup> A recital will clarify this provision further as follows:

*"A deviation from the objective requirements of conformity should only be possible if the consumer is specifically informed about it, and was therefore aware or could not be reasonably unaware of the deviation, and the consumer accepts it separately from other statements or agreements and by way of active and unequivocal conduct. Both conditions could for instance be fulfilled by ticking a box or activating a button or a similar function."*

<sup>46</sup> Article 6(4) of the Commission proposal.

- 3a.<sup>47</sup> 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 (...) throughout the duration of that period.
- 4.<sup>48</sup> **In order to be in conformity** (...) the digital content **or digital service shall** also meet the requirements of Articles 7.

*Article 7*

**Integration of the digital content or digital service**

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 shortcomings<sup>49</sup> in the integration instructions where those instructions were **provided by the supplier**.

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<sup>47</sup> Article 6(3) of the Commission proposal.

<sup>48</sup> Article 6(5) of the Commission proposal.

<sup>49</sup> 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**<sup>50</sup>

1. (...) **The digital content or digital service shall not be in violation of any right of a third party, in particular intellectual property rights, which impedes the use of the digital content or digital service in accordance with Articles 6 and 6a..**
  
2. **Where such a violation occurs, Member State shall ensure that the consumer is entitled to the remedies for the lack of conformity provided for by Article 12, unless national law provides for the nullity or rescission of the contract for the supply of the digital content or digital service as a result of such violation.**

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<sup>50</sup> This Article will be explained further in a recital as follows:

*"The digital content or digital service should comply with any right of a third party, in particular those based on intellectual property, so that the use of the digital content or digital service in accordance with the contract is not impeded. The violation of third party rights might effectively bar the consumer from enjoying the digital content or some of its features; for example when the third party rightfully compels the supplier to stop infringing those rights and to discontinue offering the digital content in question. Legal defects are particularly important for digital content, which, by its nature, is subject to intellectual property rights. In the event of a violation of third party rights, this Directive should not affect the national laws of the Member States which provide for the nullity of the contract, or for its rescission, for example for breach of legal warranty against eviction."*

*Article 9*<sup>51</sup>

**Liability of the supplier**

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 **of the digital content or digital service**
  - (i) which exists at the time **of supply, where the contract provides for a single act of supply or a series of individual acts of supply;**<sup>52</sup> or
  - (ii) which occurs during the duration **of the contract** where the contract provides **for continuous supply** over a period of time (...).

*Article 9a*

**Time limits**

1. **In cases referred to in point (b)(i) of Article 9, if under national legislation the supplier is only liable for any lack of conformity that becomes apparent within a period of time after supply, that period shall not be less than two years from the time of supply.**

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<sup>51</sup> Please note that the order to Articles 9 and 10 has been inverted, because it seemed more logical to have the burden of proof rule after the rule setting out the liability of the supplier.

<sup>52</sup> Further explanations could be inserted in the recitals, which could be worded along the following lines taking as a starting point recital 34 of the Commission proposal:

*"The supplier should be liable to the consumer in the event of a lack of conformity (...) and for any failure to supply the digital content or digital service. As digital content or digital services may be supplied to consumers through one or more individual acts of supply or continuously over a period of time, it is justified that the time for establishing conformity of the digital content or service should be determined according to those different moments of supply.*

*Digital content can be supplied to consumers through a single act of supply, for instance when consumers download an e-book and store it on their personal device. Similarly, the supply may consist of a series of such individual acts, for instance where consumers receive a link to download a new e-book every week.*

2. **In cases referred to in point (b)(ii) of Article 9, the supplier shall be held liable under Article 12 for a lack of conformity that becomes apparent within the duration of the contract.**
3. **If, under national legislation, the rights laid down in Article 12 are subject to a limitation period, that period shall not expire earlier than two years:**
  - (i) **in the cases referred to in point (b)(i) of Article 9 as from the time of supply;**
  - (ii) **in the cases referred to in point (b)(ii) of Article 9 as from the end of the contract or from the moment when the consumer becomes aware or is deemed to be aware of the lack of conformity, whichever is the earlier.**<sup>53</sup>

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Continuation of footnote 52 from the previous page: *The distinctive element of this category of digital content is the fact that consumers thereafter have the possibility to access and use the digital content indefinitely. In those cases, the conformity of the digital content should be assessed at the time of supply, and therefore the supplier should only be liable for any lack of conformity which exists at the time when the single act of supply or each individual act of supply takes place.*

*Digital content or digital services can also be supplied to consumers in a continuous manner over a period of time. The continuous supply may include cases where the supplier makes a service available to consumers for a fixed or an indefinite period of time, such as a 2-year cloud storage contract or an indefinite social media platform membership. The distinctive element of this category is the fact that the digital content or service is available or accessible to consumers only during the fixed duration of the contract or for as long as the indefinite contract is in force. Therefore, it is justified that the supplier in such cases should only be liable for a lack of conformity which appears during this period of time. The element of continuous supply should not necessarily require a long-term supply. Cases such as on-line streaming of a video clip should be considered continuous supply over a period of time, regardless of the actual duration of the audio-visual file. Cases where specific elements of the digital content or service are made available periodically or on several instances during a period of time should also be considered a continuous supply over a period of time, for instance when the contract stipulates that an anti-virus software will be automatically updated every 1st day of each month of the 1-year contractual period, or that the supplier shall issue updates whenever new features of a digital game become available, and the digital content or service is available or accessible to consumers only during the fixed duration of the contract or for as long as the indefinite contract is in force."*

<sup>53</sup> A recital will clarify as follows:

*"Member States should remain free to regulate national limitation periods. However, such limitation periods should not prevent consumers from exercising their rights throughout the period during which the supplier is liable for a lack of conformity. While this Directive should therefore not harmonise the starting point of national limitation periods, it should ensure that such periods do not expire before the end of the period during which the supplier is liable for a lack of conformity."*



*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.
  - 1a. **In cases referred to in point (b)(i) of Article 9, the burden of proof with respect to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the supplier for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied.**
  - 1b. **In cases referred to in point (b)(ii) of Article 9, the burden of proof with respect to whether the digital content or digital service was in conformity during the duration of the contract shall be on the supplier for a lack of conformity which becomes apparent during the duration of the contract.**
2. **Paragraphs 1a and 1b** 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 digital service** and where the supplier informed the consumer of such requirements **in a clear and comprehensible manner** before the conclusion of the contract.
3. The consumer shall cooperate with the supplier to the extent **reasonably** possible and necessary **to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified in points (b)(i) or (b)(ii) of Article 9, as applicable, lay in** the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are least intrusive for the consumer. Where the consumer fails to co-operate, the burden of proof with respect to whether the **lack of conformity** existed at the time specified in **points (b)(i) or (b)(ii) of Article 9, as applicable**, shall be on the consumer.

*Article 11*

**Remedy for the failure to supply**

1. Where the supplier has failed to supply the digital content **or digital service** in accordance with Article 5, **the consumer shall call upon the supplier to supply the digital content or digital service. If the supplier then fails to supply the digital content or digital service without undue delay<sup>54</sup>, or within an additional period of time as expressly agreed to by the parties**, the consumer shall be entitled to terminate the contract (...).
  
2. **Paragraph 1 shall not apply and the consumer shall be entitled to terminate the contract immediately where:**
  - (a) **the consumer and the supplier have agreed, or it is clear from the circumstances attending the conclusion of the contract, that a specific time for the supply is essential for the consumer and the supplier fails to supply the digital content or digital service by or on that time; or**
  
  - (b) **the supplier has declared, or it is clear from the circumstances, that the supplier will not supply the digital content or digital service.**

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<sup>54</sup> It is suggested clarifying in a recital that given the nature of digital content ‘without undue delay’ in many circumstances could mean "immediately". Such a recital could be worded along the following lines:

*"When following a failure to supply the supplier is called upon by the consumer to supply the digital content or digital service without undue delay, the supplier should act as quickly as possible. Considering that digital content or a digital service is supplied in digital form, the supply does not require, in the majority of situations, any additional time to make the digital content or digital service available to the consumer. Therefore, in some cases the supplier should supply the digital content or digital service immediately."*

*Article 12*

**Remedies for the lack of conformity**

- 01. In the case of a lack of conformity, the consumer shall be entitled 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 conformity (...)<sup>55</sup>, unless this **would be impossible<sup>56</sup> 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 (...).

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<sup>55</sup> The 'free of charge' requirement was moved to paragraph 2.

<sup>56</sup> A recital will clarify that the notion of 'impossibility' covers not only factual impossibility but also situations where bringing the digital content or digital service into conformity would not be possible due to any legal reason or impediment.

2. The supplier shall bring the digital content or **digital service into** conformity (...) pursuant to paragraph 1 within a reasonable time<sup>57</sup> from the time the supplier has been informed by the consumer about the lack of conformity (...), **free of charge** 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 **the digital content or digital service**.<sup>58</sup>
3. The consumer shall be entitled to either **an appropriate** reduction of the price **in accordance with** 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** paragraph 5 (...), **in any of the following cases:**
  - (a) the remedy to bring the digital content or **digital service** in conformity is impossible<sup>59</sup> **or disproportionate in accordance with paragraph 1;**
  - (b) the supplier has not **brought the digital content or digital service in conformity in accordance with** paragraph 2;

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<sup>57</sup> A recital could clarify that nothing prevents the consumer and the supplier from agreeing on a time within which the supplier will bring the digital content or digital service into conformity.

<sup>58</sup> A recital (and not Article 3(9)) should clarify that the Member States have the possibility to regulate the consumer's right to withhold payment until the supplier has brought the digital content or digital services into conformity. The recitals should also clarify that Member States are free to regulate whether the supplier shall be entitled to retain any reimbursement due to the consumer on termination of the contract until the consumer complies with his obligation to return the tangible medium to the supplier. Proposed text to be added in Recital 10:

*"Member States should also remain free to regulate the rights of the parties to withhold the performance of their obligations or part thereof until the other party performs its obligations. For example, Member States should be free to regulate whether the consumer, in cases of lack of conformity, shall be entitled to withhold payment of the price or part thereof until the supplier has brought the digital content or digital service into conformity, or whether the supplier shall be entitled to retain any reimbursement due to the consumer upon termination of the contract until the consumer complies with his obligation under Article 13b(2) to return the tangible medium to the supplier."*

<sup>59</sup> See footnote 56 above on the notion of impossibility under Article 12(1).

- (ba) **a lack of conformity appears despite the supplier's attempt to bring the digital content or digital service into conformity;**
- (c) **the lack of conformity is of such a serious nature as to justify the immediate price reduction or termination of the contract;**<sup>60</sup>
- (d) the supplier has declared, or it is (...) clear from the circumstances, that the supplier will not bring the digital content **or digital service** into conformity **within a reasonable time or without significant inconvenience for the consumer.**

4.<sup>61</sup> 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.

Where **the contract stipulates that** the digital content **or digital service shall be** supplied **over a period of time** in exchange for the payment of a price (...), **the reduction in price shall apply to** the period of time **during which** the digital content **or digital service** has not been in conformity.

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<sup>60</sup> Further explanations and examples could be given in the recitals along the following lines:

*"In certain situations it is justified that the consumer should be entitled to have the price reduced or the contract terminated immediately, for instance where the consumer cannot be expected to maintain confidence in the ability of the supplier to bring the digital content or digital service into conformity due to the serious nature of the lack of conformity, a previous failure of the supplier to successfully bring the digital content or digital service in conformity or where it is clear that the supplier will not bring the digital content or digital service in conformity. For example, the consumer should be entitled to directly request the termination of the contract or the price reduction where the consumer is supplied anti-virus software which itself is infected with viruses and would constitute an instance of such a serious lack of conformity."*

<sup>61</sup> Explanations along the following lines could be included in the recitals to further clarify Article 12(4):

*"In a situation where the consumer is entitled to a reduction of the price paid for the digital content or digital service which is supplied over a period of time, the calculation of the price reduction should take into consideration the decrease of value both due to the lack of conformity as well as due to the time during which the consumer was unable to enjoy the digital content or digital service in conformity."*

5. **Where the digital content or digital service 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.

*Article 13*

**Exercise of the right of termination**

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.**<sup>62</sup>

(...)

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<sup>62</sup> The wording of paragraph 1 was inspired by the language used in point (b) of Article 11(1) of the CRD.

*Article 13a*

**Obligations of the supplier in the event of termination**

1. (...) **In the event of termination of the contract the supplier shall reimburse to the consumer all sums paid under the contract.**

<sup>63</sup>**However, in cases where the contract provides for the supply of the digital content or digital service over a period of time and the digital content or digital service had been in conformity for a period of time prior to the termination of the contract, the supplier shall reimburse to the consumer only the proportionate part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity, and any part of the price paid by the consumer in advance for any remaining period of the contract had it not been terminated.**

2. **In respect of personal data of the consumer, the supplier shall comply with the obligations applicable under Regulation (EU) 2016/679 (...).**

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<sup>63</sup> The second subparagraph of Article 13a(1) regulates the issue of partial reimbursement in case of termination of the contract. It does not only refer to "continuous supply", but to all cases where the digital content is supplied over a period of time, and therefore the consumer should only be partially reimbursed when the digital content or service was not in conformity only during parts of that period.

3. **Furthermore, the supplier shall make available<sup>64</sup> to the consumer any digital content (...) to the extent that it does not constitute personal data, which was uploaded or created by the consumer when using the digital content or digital service supplied by the supplier.**

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

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

**The supplier shall also refrain from using any of that digital content which this Article requires to be made available to the consumer, unless more than one consumer generated the particular content and other consumers are able to make use of it.**

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.**

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<sup>64</sup> 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.



### *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 13c*<sup>65</sup>

#### **Deadlines and means of reimbursement by the supplier**

1. Any reimbursement to be done by the supplier to the consumer pursuant to Article 12(4) or 13a(1) due to price reduction or termination of the contract shall be done 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 or his right to terminate the contract.**

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<sup>65</sup> The new Article 13c merges into one separate single Article the provisions on deadlines and means of reimbursement by the supplier, which were previously contained in Article 12(4) and Article 13a(1).

2. **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 expressly agrees otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.**
3. **The supplier shall not impose any fee on the consumer in respect of the reimbursement.**

*Article 14*

(...) <sup>66</sup>

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<sup>66</sup> 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."*

**Modifications of the digital content or digital service**<sup>67</sup>

1. Where the contract **specifies** that the digital content or digital service shall be **available to the consumer over a period of time (...)**, the supplier **shall be allowed to modify (...)** the digital content or digital service supplied to the consumer (...), **provided the following conditions are met:**

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<sup>67</sup> Taking as a basis recital 45 of the Commission proposal, further explanations could be given in the recitals along the following lines:

*"This Directive should also address modifications, such as updates and upgrades, which are done by suppliers on the digital content or digital service which is available to the consumer over a period of time under an existing contract. Considering the fast evolving character of digital content and digital services, such updates, upgrades or similar modifications may be necessary and are often of advantage for the consumer. Some of such modifications may be stipulated as updates in the contract, forming part of the contractual commitment. Other modifications may be required to fulfil the objective requirements for conformity of the digital content or digital service as set out in this Directive. Yet other modifications, which are foreseeable at the time of conclusion of the contract would have to be expressly agreed by the consumer when concluding the contract.*

*Besides these modifications aimed at maintaining conformity, the supplier should be allowed under certain conditions to modify features of the digital content or digital services provided that the contract gives a valid reason for such a modification. Such valid reasons could encompass cases where the modification is necessary to adapt the digital content to a new technical environment or to an increased number of users or for other important operational reasons.*

*In order to balance consumer and business interests, such a possibility of the supplier should be coupled with a right of the consumer to terminate the contract where these modifications negatively impact the use of or access to the digital content or digital service in a more than only minor manner. To what extent modifications negatively impact the use of or access to the digital content or digital service by the consumer should be objectively ascertained having regard to the nature and purpose of the digital content or digital service and to the quality, functionality, interoperability and other main features which are normal in digital content or service of the same type. The rules concerning such updates, upgrades or similar modifications should however not concern situations where, for instance as a consequence of distributing a new version of the digital content or digital service, the parties conclude a new contract for the supply of the digital content or digital service."*

- (a) the contract **allows and gives a valid reason for such a modification**, and
- (b) **the modification is provided without additional costs for the consumer, and**
- (c) the consumer is **informed in a clear and comprehensible manner** of the modification, **provided that in the cases referred to in paragraph 2 the consumer is informed** reasonably in advance **on a durable medium of the features and time of the modification, and of his right to terminate the contract in accordance with paragraph 2 and 3, or, where applicable, about the possibility to maintain the digital content or digital service without modification in accordance with paragraph 5.**

(...)

2. **The consumer shall be entitled to terminate the contract (...) if modification negatively impacts the access to or use of the digital content or digital service by the consumer, unless such negative impact is only minor.**<sup>68</sup>
3. **The consumer shall be entitled to exercise the right to terminate the contract in accordance with paragraph 2 without additional costs and within no less than 30 days from the day on which he is informed according to paragraph 1(c). The right to terminate the contract shall end not earlier than 14 days from the date of application of the modification. (...)**

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<sup>68</sup> Further explanations on the relation between article 15 and article 12 could be given in a recital along the following lines:

*"Where such a modification negatively impacts the access or use of the digital content or digital service by the consumer, the consumer should enjoy as a result of such a modification the right to terminate the contract free of any cost. Where the requirements of Article 15(1) are not satisfied, the consumer's rights of bringing the digital content or digital service in conformity, having the price reduced or the contract terminated as provided for by Article 12 remain unprejudiced. Similarly, where, subsequently to a modification a lack of conformity of the digital content or digital service occurs that has not been caused by the modification, the consumer should continue to be entitled to rely on remedies for the lack of conformity in relation to this digital content or digital service as provided for by Article 12."*

4. **Where the consumer terminates the contract in accordance with paragraphs 2 and 3 (...), the supplier shall reimburse to the consumer only the proportionate part of the price paid corresponding to the period of time after the modification of the digital content or digital service.**
5. **Paragraphs 2 to 4 shall not apply if the supplier has enabled the consumer and the consumer has accepted to maintain without additional costs the digital content or digital service without the modification, and the digital content or digital service remains in conformity.**

#### *Article 16*

#### **Right to terminate long-term contracts for the supply of digital content or digital service**

1. **Where the contract provides for the supply of the digital content or a digital service for a fixed duration<sup>69</sup> longer than 12 months (...), the consumer shall be entitled to terminate the contract free of charge any time after the expiration of 12 months.<sup>70</sup>**

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<sup>69</sup> The recitals will clarify that Article 16 only applies to fixed term contracts with a duration of more than 12 months and does not affect national rules on the termination of contracts of indefinite duration. Furthermore, the recitals will clarify that Member States remain free to regulate the conditions under which a fixed term contract can be tacitly renewed and the conditions under which such tacit renewals can be deemed as a continuation of the initial contractual period.

<sup>70</sup> The recitals could clarify that this Directive should not affect any right of the consumer to terminate a contract relating to digital content or digital service during a procedure on adjustment of debts as foreseen under national law.

2. The consumer shall exercise the right to terminate the contract **in accordance with Article 13. The consumer shall give the notice of termination no less than 30 days before the termination becomes effective.**
- 3.<sup>71</sup> Where the consumer terminates the contract in accordance with this Article, **Articles 13a, 13b and 13c shall apply accordingly. (...)**
4. Where the digital content **or digital service** is supplied in exchange for the payment of a price, the consumer **shall** remain liable to pay the part of the price for the supplied digital content **or digital service** corresponding to the period of time before the termination becomes effective. **The supplier shall reimburse to the consumer only the proportion of the price paid corresponding to the period of time after the termination of the contract.**

*Article 17*

**Right of redress**

Where the supplier is liable to the consumer because of any failure to supply the digital content **or digital service 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.

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<sup>71</sup> The order of paragraphs 3 and 4 has been inverted.

## *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 **failure to supply or the lack of conformity with the contract is brought to the supplier's attention by the consumer [or before the modification of the digital content or service in accordance with Article 15 is brought to the consumer's attention by the supplier]**, 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.**<sup>72</sup>

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<sup>72</sup> 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/XXX<sup>73</sup>."*

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 **certain aspects concerning** 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 **certain aspects concerning** contracts for the supply of digital content (OJ...)"*

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<sup>73</sup> Directive (EU) N/XXX of the European Parliament and of the Council of ... on certain aspects concerning 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 (first of the month) of two years after the entry into force]* at the latest.
  - 1a. **They shall apply those measures from *[6 months after the transposition date according to paragraph 1]*.**
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 **or digital services** (...) other than that covered by this Directive(...), **including the possible application of the Directive to the embedded digital content.**

*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,

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