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To:	Council
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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) - Policy debate

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.

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.

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.
3. The Netherlands Presidency has put the examination of this file at the top of its agenda. This priority is reflected, in particular, in the dense schedule of meetings held at Council Working Party level (15 meeting days) since the submission of the two proposed Directives.
4. In line with the mandate approved by the Council JHA on 10 and 11 March 2016⁴, 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. Good progress in the discussions at Working Party level has been made on the proposed Directive on digital content. The Working Party on Civil Law Matters (Contract Law) managed to finalise a first examination of the substantial Articles of that Directive. On the basis of the reflections in the Working Party and the very comprehensive input provided by delegations in their written contributions, principal aspects of the Directive could be identified that will be of key importance in the continued discussions concerning that proposal.
6. 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.
7. However, common ground seems to have emerged on a number of the principal aspects identified. The Presidency would like to pin down this common understanding with a view to giving guidance for the future work and to paving the way for further substantial progress to be made on the proposed Directive on digital content.

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.

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

8. Coreper, at its meeting on 24 May 2016, generally approved the (non-exhaustive) list of identified basic principles and political guidelines, as set out in the Annex of this note, and agreed to submit them for endorsement to Council.

II. CONCLUSION

9. In the light of the above, Council is invited
 - to endorse the basic principles of the overall architecture for a Directive on certain aspects of business-to-consumer contracts for the supply of digital content and the political guidelines for the future work, both being set out in the Annex of this note, with a view to paving the way for further substantial progress to be made on the proposed Directive.
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BASIC PRINCIPLES AND POLITICAL GUIDELINES FOR FUTURE WORK

A. Objectives

(a) Political objectives

1. The purpose of the Directive on digital content is to contribute to the proper functioning of the internal market by introducing a more harmonised framework of EU contract law rules on business-to-consumer contracts for the supply of digital content, while providing a high level of consumer protection and increased legal certainty, thereby reducing transaction costs and making it easier for businesses, especially small and medium-sized enterprises ('SMEs'), to sell EU-wide and building greater confidence amongst European consumers when buying across borders.
2. Discussions have shown a general endorsement of those objectives, so they should therefore guide the forthcoming negotiations and be reflected in the text of the Directive.

(b) Need for coherence

3. An important aspect emphasised throughout the discussions by many delegations was that the overall consistency in EU consumer contract legislation needs to be maintained and that the new EU rules on the supply of digital content can dovetail well with national general contract law.

4. In order to avoid fragmentation of the legislation and to allow for a frictionless application of the rules in practice also in cases of, for instance, 'bundle contracts' that do not only cover digital content, the rules on business-to-consumer contracts for the supply of digital content and the rules on business-to-consumer 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. To that end, the general principles underpinning the existing EU regime on business-to-consumer contracts for the sale of goods should be the starting point for the further deliberations regarding, for instance, the definitions, the conformity of digital content with the contract (*'conformity test'*), the supply of digital content and the liability of the supplier in the event of a lack of conformity, (for more details see section C).

5. In this context, it is also important to take into account relevant information resulting from the evaluation of several EU consumer and marketing law directives under the 'Regulatory Fitness and Performance Programme' ('REFIT'), including the Consumer Sales and Guarantees Directive 1999/44/EC, which is expected to be available later this year, and to bear in mind the need for coherence between the proposed Directive on digital content and the proposal for a Directive on online sales of goods.

6. Furthermore, with a view to overall coherence in EU consumer legislation it is of pivotal importance that the new legislation on digital content links well with Directive 2011/83/EU on consumer rights ('Consumer Rights Directive' - 'CRD'). In this regard, the Commission is invited to include in its report on the application of the CRD⁵ an evaluation of the application of the CRD, and in particular of the pre-contractual information requirements provided for in that Directive, to all types of contracts for the supply of digital content covered by the Directive on digital content, with a view to helping assess in how far the two instruments (in particular the definitions used therein) may need to be aligned to ensure greater coherence.
7. As regards the relationship between the Directive on digital content and other EU legislation, such as EU intellectual property law and EU legislation on telecommunication services, further clarification is required in Article 3(7).
8. Moreover, any interference with the application of the EU General Data Protection Regulation ('GDPR') needs to be avoided. The GDPR already provides a comprehensive framework of rights for the protection of personal data. The Directive on digital content should avoid introducing any divergence in the application of these rules. To facilitate further in-depth discussion in the Council Working Party on Civil Law Matters on the legal grounds for processing personal data in the context of contracts for the supply of digital content, a comparative table and a more in-depth exchange with data protection experts could help identify which rights related to the protection of personal data can be found in the GDPR and which contract-law-related rights need to be provided for in the Directive on digital content.

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) *Harmonisation*

9. Discussions so far have shown wide support for an approach that aims at harmonising at EU level those contract-law-related aspects that are essential for achieving the objectives of the Directive. In line with this targeted approach, it should be made completely clear in the Directive to what extent national contract laws are affected by the Directive and which aspects remain within the national competence of the Member States. The aim in the forthcoming negotiations should be to achieve full harmonisation to the largest extent possible, bearing in mind that final decisions on the level of harmonisation with regard to the individual provisions of the Directive can only be taken once the substantive debate is more advanced.

B. *Scope of the Directive on digital content*

(a) *Business-to-consumer contracts*

10. There was clear support in discussions for the EU contract law rules on the supply of digital content to apply only to business-to-consumer contracts. The Directive on digital content should therefore focus on business-to-consumer contracts with one potential exception as regards a possible right of recourse of the supplier in the chain of transactions (Article 17).

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

11. Driven by the aim of establishing legislation that is technologically-neutral and prevents circumvention of the rules by, for instance, a simple change in the design or technical concept of the digital content or the use of a different distribution channel, discussions so far have shown broad support in principle for the Directive to cover digital content in a comprehensive manner. The Directive on digital content should therefore define 'digital content' in a way that covers a very large range of the digital content that currently exist on the market whilst remaining open to future technical developments. Moreover, in order to ensure overall coherence, the possible need for consequential changes to definitions of digital content used in other EU legislation, such as the CRD, should be borne in mind.

12. Further discussions will be needed as regards the rules that should apply to embedded digital content. One option could be to apply the rules on the sale of goods to products which contain embedded software in such a way that its functions are subordinate to the main functionalities of the goods. However, it also seems to be worth continuing to consider alternatives, such as applying the rules on the sale of goods to the tangible medium itself whilst applying the rules on the supply of digital content to the digital content.
13. Support in principle was expressed for the idea that the Directive could also apply to contracts where digital content is supplied in exchange for a counter-performance other than money. Given the increased value of personal data in modern business models, the Directive on digital content should apply to the supply of digital content in exchange of personal data. However, how the Directive should apply to such contracts should be further discussed. In particular clarification is needed on the exact meaning and appropriateness of using the concept 'actively provided personal data'.
14. More substantive examination is required on the question whether, and if so, to what extent contracts on digital content supplied in exchange for 'other data' could be covered by the Directive, since it is not yet clear what is meant by that concept. The question of what is meant by 'actively provided' is also of importance here.

(c) Right to damages

15. Discussions so far did not demonstrate a need to establish rules on damages in the Directive on digital content in order to achieve its objectives. The provision proposed in Article 14 raised considerable concern amongst delegations. All Member States' laws provide for a system of damages, though the extent and modalities may 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 nor to the provision of a high level of consumer protection and increased legal certainty.

16. Accordingly, the Directive should not cover the right to damages, so Article 14 and the definition of damages under Article 2(5) could be deleted. For the sake of clarity, it should however be considered to insert a clarification in the Directive declaring that nothing in the Directive affects the possibility for Member States to enact or maintain rules on the right to damages under their national laws.

C. *Right balance between consumers' and suppliers' interests*

17. 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. This means that they should establish a high level of consumer protection while at the same time creating a business-friendly environment for EU entrepreneurs, and that they should be technologically neutral, effective and user-friendly. In view of this requirement, there was general agreement that the Directive on digital content needs to be adjusted on some specific points in order that the rules benefit the internal market and EU citizens alike.

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

18. Discussions made it very clear that we need to tread carefully when regulating new areas. Technical input by IT-experts to the Council Working Party on Civil Law Matters could be beneficial in order to gain a better understanding of the possible consequences that the inclusion of a wide variety of digital content and different types of counter-performance could have on the practical application of the Directive.

19. For the rules to be user-friendly, technologically neutral and open to future technical developments, it is important that future work focuses on the new rules to be sufficiently flexible to suit the various forms of digital content and different types of counter-performance covered by the Directive without over-complicating the legal landscape. In this context, it also needs to be explored how it can be ensured that consumers are aware of their rights when they provide a counter-performance other than money in exchange for digital content.

(b) Conformity test

20. 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 has raised concerns by several Member States. This is mainly because such a rule could create the risk that suppliers, by putting very weak conformity requirements in their contracts, avoid liability for non-conformity which would undermine consumer protection given that consumers normally have little influence over the (standard) contractual terms. Another concern was that this would put the burden on consumers to carefully scrutinise the contract.
21. For greater balance, a starting point for the further deliberations should be an approach that is more consistent with Directive 1999/44/EC and the Directive on online sales of goods, which would mean the conformity of the digital content would have to be assessed against both the contract terms and against a set of '*objective*' conformity criteria as defined by EU law.

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

22. Discussions have shown that, 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.
23. In this respect it was suggested that the rules on the supply of digital content could be more closely aligned with the rules on the delivery of goods under the CRD and 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 would in principle 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.

24. Some technical input by IT experts to the Council Working Party on Civil Law Matters would be beneficial in order to understand fully how the supply of digital content works in practice and to cater appropriately for situations where the supply fails due to a third party.
25. Moreover, there may be merit in reflecting on whether to provide for a burden of proof rule in the Directive with regard to the question whether the digital content was successfully delivered.

(d) Liability of the supplier in the event of a lack of conformity and burden of proof

26. Discussions so far have shown a general agreement for the supplier to be liable to the consumer where the supplied digital content is not in conformity with the contract. However, the approach not to provide for any minimum or maximum limitation in time on neither the supplier's liability for non-conformity of the digital content nor for the related reversal of the burden of proof (Article 9(1)), was considered by several delegations as not providing for an appropriate balance.
27. With a view to creating more balance between consumer interests and business interests and providing more legal certainty, the starting point in the further deliberations could be an approach where the Directive determines for how long and under which conditions the consumer can hold the supplier liable for a lack of conformity and can benefit from the shift of the burden of proof provided for in Article 9(1). Such approach would be more consistent with Directive 1999/44/EC and the Directive on online sales of goods.

(e) Remedies in the event of non-conformity

28. There was general agreement on the basic principle that when the supplier fails to supply digital content in conformity with the contract, the consumer should be entitled to have the digital content brought into conformity within a reasonable time, without significant inconvenience and without incurring any costs, or to have the price reduced or the contract terminated.
29. Discussions so far have also shown wide support for the idea of providing for a certain order in accessing these consumer remedies though no overall agreement was reached on this question. Any lack of conformity should be remedied in a manner which is efficient for the parties in a given case. How this could be best achieved, requires further discussions.

(f) Other rights for the consumer

30. Discussion of Articles 15 and 16 concerning the modification of digital content and termination of long-term contracts have shown support for the underlying objective of protecting consumers against unfair contract terms which may tie them to a modified contract or a long-term contract they no longer want. Further reflection is needed at technical level on how this objective could best be achieved in a proportionate manner taking into account the consumers' and suppliers' interests and bearing in mind the broader legal framework on unfair contract terms.