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From:	General Secretariat of the Council
To:	Council Working Party on Civil Law Matters (Contract Law)
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Subject:	Proposal for a directive on certain aspects concerning contracts for the supply of digital content - Compilation of Member States' replies concerning Articles 3(6) and 16

1. At the meeting of the Working Party on Civil Law Matters (Contract Law) on 17 March 2017, the Presidency invited delegations to communicate in writing their positions on Article 16 and Article 3(6) of the proposal for a Digital Content Directive.

2. The compilation attached in the Annex sets out the responses received from delegations by 11 April 2017 (BE, DE, IE, FR, NL, PT, FI, SE, UK).

ANNEX

BELGIUM

General comments

In general Belgium does not feel a need to specifically regulate long term contracts for the supply of digital content/service (Article 16).

In combination with Article 3(6) this would mean that mixed long term contracts will experience two speeds, namely specific termination rules for the digital content/service part, and general contract law for the rest of the contract. Since this is often offered as a package/bundle of services (with the necessary advantages for the consumer), the termination of a part of it will have consequences for the rest of the contract (e.g. the price, possible termination of other services, …).

If desired and necessary, long term contracts should rather be regulated in general as a principle through the Unfair Contract Terms Directive. But this is another discussion and better held when considering to adapt the directive on unfair contract terms.

Taking this remark into consideration, Belgium considers that Article 16 exceeds the intended scope of the current proposal (conformity rules), Belgium is not in favour of this article and would like to it to be deleted.

Relation with Telecom-rules

In the Telecom sector there are many bundles offered that contain digital content/service. According to the proposed European Electronic Communications Code (current version, Article 98), all long term contracts are capped at 24 months, not 12 months as suggested in the proposal for a Digital Content Directive. Furthermore, the European Electronic Communications Code states that Member States can maintain or adopt shorter maximum duration periods. This would mean that depending on the national law of a member state, a consumer can terminate his telecom-contract after 24 months, 12 months or even after 6 months.

This is currently the case in Belgium, where a consumer has the right to terminate a fixed term contract for electronic communications after 6 months without any costs or having to pay additional fees. A contract of indefinite duration may be terminated at any time. In both cases the consumer has the right to fix the date of termination: a term of notice of termination shall only be applicable when the consumer does not fix a date of termination. These rights also apply to TV services, which form very often part of a bundle with electronic communications.

Maintaining Article 16 and the 12 month period for the supply of digital content/service, will have a negative impact on our consumer protection in the telecom sector.

For example, a consumer purchases a telecom-bundle that has internet, telephone and digital TV services. According to Article 3(6) of the proposal for a Digital Content Directive, the internet and telephone services would fall under telecom-rules (in Belgium termination of a fixed term contract after 6 months without any costs), the digital TV under the Digital Content Directive-rules (such as Article 16 and termination after 12 months).

- ➔ The digital TV however, cannot be supplied without use of an electronic communication service (either telephone or cable). These are tied together as part of one contract. As it stands (Article 16 of the proposal for a Digital Content Directive), a consumer in Belgium would be able to e.g. terminate his internet and telephone service after 6 months, but could still be tied to the part of the bundle-contract for the digital TV for at least another 6 months? Without being able to enjoy it…

  This would lead to the fact that the consumer would necessarily need to keep his telephone service, and so in practice Article 16 would directly influence Belgian telecom-rules on termination and as such hinder switching between operators and reduce competition.

Vice versa, in member states where the 24 month cap applies, a consumer could terminate the part of the bundle regarding digital content/service after 12 months (Article 16 of the proposal for a Digital Content Directive), but would be tied to the rest of the bundle for another 12 months.

As stated under our general comments, there would also be consequences for the price of the bundle when a part of it is terminated (since a bundle is more advantageous than separate contracts).

These are situations that need to be avoided, and so Article 16 of the proposal for a Digital Content Directive needs to be deleted.

GERMANY

Presidency's text proposal (23/12/16)	**Germany's text proposal**	**Comments**
Article 3 **Scope**		
6. **Where a contract for** the supply of digital content **or a digital service includes additional contractual obligations for the provision of services or goods**, this Directive shall only apply to the obligations and **rights** of the parties as supplier and consumer of the digital content **or digital service**.	6. **Where a contract for** the supply of digital content **or a digital service includes additional contractual obligations for the provision of services or goods**, this Directive shall only apply to the obligations and **rights** of the parties as supplier and consumer of the digital content **or digital service**. **Where the consumer is entitled to terminate the contract for the supply of digital content or digital service according to this Directive, the right to terminate shall also apply to the additional contractual obligations for the provision of services or goods.**	- Issue of bundled contracts: It is hard to separate "digital content" from "additional contractual obligations", as a single, unified contract can be difficult to split up. Where a contract bundles together multiple services, the services *can* in some cases be subject to different provisions. But this divisibility usually ends in the event of defaults in performance and contract termination in particular. This is because the services are not usually unrelated to one another for the parties involved and are not merely bundled together in a contract by chance, but are usually linked according to the will of the parties. The question arises of what, according to this Directive, should happen to these additional contractual services when a consumer exercises his right to terminate. Would the consumer retain these services even though they may be of no use without the digital content/service? → Proposed addition: Where the consumer is entitled to terminate the contract for the supply of digital content or digital service according to this Directive, the right to terminate shall also apply to the additional contractual obligations. - Question: Multiple forms of digital content/digital services can also be interlinked in a single contract. Is Article

		3(6) also applicable to bundled contracts of digital content/digital services? - Question: How does this relate to Article 100 of the EECC (bundled offers) for cases where telecommunications services are provided in a bundled contract? With regard to other elements of the contract, Article 100 EECC refers to specific provisions of the EECC which apply "except where the provisions applicable to another element of the bundle are more favourable to the end-user". For bundles comprising telecommunications services, Article 100 would take precedence over this provision (also according to Article 3(7)) as a sector-specific law. As the favourability principle in Article 100 EECC only applies to the "other element", this would likely result in another split (digital content/service 12 months and telecommunications service 24 months).
Article 16 **Right to terminate long term contracts for the supply of digital content**		– Issue of bundled contracts: What happens to the "additional contractual obligations" from Article 3(6) to which Article 16 would not apply? → This problem could be solved by Germany's proposed addition to Article 3(6), as the special right of termination in Article 16 would then also apply to the additional contractual obligations. - Note: different commitment period for electronic communications services in Article 98 EECC (24 months); such services are often offered as a "package" (communications service, router, film streaming service) with the aim of "cross-subsidisation" (amortisation over the duration of the contract). The provider may change its pricing model in future if amortisation were only otherwise possible over a longer contract period (on the issue of splitting, see comment under Article 3(6)). However, it should be taken into account that the consumer bears the costs in all cases (higher price or longer contract period even if a service is no longer used; restrictions on changing

		supplier, which does not encourage competition). Article 16 is also particularly relevant for start-ups, as this provision will provide incentive to change supplier, thereby lowering the barriers to market entry. - Important: It must be made clear that, in addition to Article 16, termination for cause without notice must always be possible for fixed-term contracts (clarification in the recitals, possibly in the form of an example of provisions from general contract law which, pursuant to Article 3(9), remains in the hands of the Member States)
1. Where the contract provides for the supply of the digital content **or digital service** for **a fixed** duration **longer than 12 months** or **where** any combination of **subsequent contracts or** renewal periods exceeds 12 months **from the moment of the conclusion of the initial contrac**t, the consumer shall be entitled to terminate the contract [**free of charge**] any time after the expiration of 12 months.		– Question: What does "free of charge" mean in terms of its distinction from para. 3? Which costs are meant here exactly? If this refers to costs related to the right to terminate (e.g. special payment upon termination, contractual penalty, "administrative fee" etc.), then "free of charge" should be retained: No costs should be imposed on the consumer for exercising a special right of termination which is granted by law.
2. The consumer shall exercise the right to terminate the contract **in accordance with Article 13(1). The consumer shall give the notice of** termination **at least 30** days **before he wants the termination to take effect.**	The consumer shall exercise the right to terminate the contract **in accordance with Article 13~~(1)~~. The consumer shall give the notice of** termination **at least 30** days **before he wants the termination to take effect**.	
3. Where the digital content **or digital**	**Where the consumer terminates the contract**	- First sentence: References from para. 4; what is important is that Article 13a(1)

service is supplied in exchange for a payment of a price, the consumer remains liable to pay the part of the price for the digital content **or digital service** supplied corresponding to the period of time before the termination becomes effective. **The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after the termination of the contract.**	**in accordance with this Article, Article 13a, with the exception of Article 13a (1), and 13b shall apply accordingly.** Where the digital content **or digital service** is supplied in exchange for a payment of a price, the consumer ~~remains liable~~ **shall only be obliged** to pay the part of the price ~~for the digital content **or digital service** supplied~~ corresponding to the period of time before the termination becomes effective. **The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after the termination of the contract.**	(restitution) does not apply; no reference to Article 13, as reference already made in para. 2. - second sentence: although purely declaratory (the obligation to pay is already stipulated in the contract), it is still useful in order to clarify the "ex nunc" effect of the termination. - third sentence: although purely declaratory, it is still useful for reasons of clarification (as Article 13a(1) is excluded in the first sentence).
4. Where the consumer terminates the contract in accordance with this Article, Articles 13, 13a and 13b shall apply accordingly.		- now included in Article 12(3) (see above)
(…)		

IRELAND

Article 3(6)

While we have no issue with the substance of Article 3(6), we would welcome clarification of the scope of the provision. The Commission text of the paragraph reads as follows:

> *Where a contract* includes elements in addition to the supply of digital content, this Directive shall apply only to the obligations and remedies of the parties as supplier and consumer of the digital content (our emphasis).

Recital (20) of the Commission text elaborates as follows:

> *Where, under a contract or bundle of contracts*, the supplier offers digital content in combination with other services such as telecommunication services or goods which do not function merely as a carrier of the digital content, this Directive should only apply to the digital content component of such a bundle (our emphasis).

The SK/MT text of 23 December 2016 amends the paragraph as follows:

> *Where a contract for the supply of digital content or a digital service* includes additional contractual obligations for the provision of services of goods, this Directive shall only apply to the obligations and rights of the parties as supplier and consumer of the digital content or digital service (our emphasis).

It is not clear to us if there is any significance in the substitution of 'contract for the supply of digital content or a digital service' for 'contract'. On the one hand, it can be argued that the Commission text has to be read as referring to a contract for the supply of digital content or a digital service given the general scope provision at Article 3(1) ('This Directive shall apply to any contract where the supplier supplies digital content to the consumer …'). It is possible on the other hand to argue that the Commission text was intended to be more open-ended and to apply to digital content or a digital service supplied under a contract that might not be classified as a digital content or digital service contract under a main purpose or other test for the classification of contracts.[1] For its part, the corresponding provision on 'bundled offers' at Article 100(1) of the proposed Directive for a European Electronic Communications Code seems not to require that a bundle be classified as a contract for electronic communications services in order to come within the scope of the Article, stating –

> If a bundle of services or a bundle of services or goods offered to an end-user comprises at least a publicly available electronic communications services … Articles 95, 96(1), 98 and 99(1) shall apply mutatis mutandis to all elements of the bundle …

Unlike Article 3(1) of the digital content proposal, moreover, the proposed Directive for an electronic communications code does not appear to have a general scope provision that would restrict its application to contracts for the supply of electronic communications services.

The question therefore is whether Article 3(6) is to be construed broadly so that it covers the digital content or digital component of *any* contract regardless of how that contract is classified or how minor or otherwise a part of the contract is accounted for by the digital content or service component. Alternatively, is the paragraph to be construed more restrictively so that it covers only contracts that qualify as contracts for the supply of digital content or a digital service under a main purpose or equivalent test. If the first of these is the correct or preferred interpretation, the general scope provision at Article 3(1) may need to be reviewed.

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[1] The Commission Guidance on the Consumer Rights Directive proposes a main purpose test for the differentiation of sales and service contracts. It states that, as the criterion for the classification of a contract as a sales contract under the definition of that term at Article 2(5) of the Directive is the transfer of the ownership of the goods, a contract should be classified as a sales contract if its main purpose is the transfer of ownership of certain goods even it also covers related services provided by the seller and irrespective of the relative value of the goods and services. European Commission. 2014. *DG Justice Guidance Document Concerning Directive 2011/83/EU on Consumer Rights*, section 2.2 (Mixed purpose contracts).

Article 16 (Right to terminate long term contracts for the supply of digital content)

We have reservations about Article 16 stemming from concerns that its application to digital content or service contracts may be relatively limited while its application to bundled contracts may give rise to complications with the rules on bundled contracts in the current and proposed telecoms frameworks and to possible adverse effects on the pricing of such contracts.

Application

With the exception of some digital television contracts of 18 months' duration, the digital content and service contracts of which we aware appear mainly to involve contracts of indeterminate duration that can be terminated at any time (for example, social media contracts), contracts of 12 months' duration (some cloud storage contracts and digital television contracts), and contracts with short subscription and termination periods of typically one month (for example Netflix and Spotify). Contracts of indeterminate duration are now outside the scope of Article 16, while contracts of 12 months' duration would only come within its scope if renewed at least once. If a consumer has not exercised the right not to renew the contract at the end of the initial 12 month period, however, it is not obvious that he or she would choose to terminate it within the subsequent 12 month period. Though a one-month contract that is renewed 12 or more times (or a two month contract renewed six or more times etc.) would seem to come within the scope of Article 16 by virtue of the stipulation relating to any combination of subsequent contracts or renewal periods exceeding 12 months from the moment of the conclusion of the initial contract, it should not do so in our view. A consumer who can terminate a contract within any one month, or other short, period does not require the protection afforded by Article 16.

Bundled Contracts

The existing contracts to which Article 16 would largely apply are bundled contracts for broadband, digital television, and telephone (mobile and/or fixed line) services whose current duration is 18 or 24 months. Bundled contracts of varying duration are widely availed of by consumers. A recent Eurobarometer survey found that half of all EU households purchased bundled communications services – defined as packages combining two or more of fixed line telephone, mobile telephone, fixed or mobile Internet access and television channels or other services, up from 38 per cent in 2009.[2]

The main component of such contracts to which, by virtue of Article 3(6), Article 16 would apply is the digital television component.[3] While Article 16 would permit the consumer to terminate the digital television element of a bundled contract of this kind after 12 months, he or she would continue to be bound by the other parts of the bundled contracts for the remainder of its duration. It is not clear that the right to terminate one part of the contract would be of material benefit to consumers in this situation given that they would then have to contract with another television service provider and would not be in a position to avail of other bundled offers. Recital (252) of the proposed Electronic Communications Code notes of this situation:

> Where divergent contractual rules on contract termination and switching apply to the different services (in a bundle), and to any contractual commitments regarding acquisition of products which form part of a bundle, consumers are effectively hampered in their rights under this Directive to switch to competitive offers for the entire bundle or parts of it.

It is for this reason that, as outlined below, the proposed Code takes a different approach to bundled contracts than that proposed at Article 3(6) of the digital content proposal.

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2 Special Eurobarometer 438. 2016. E-Communications and the Digital Single Market, p.24.

3 We assume in line with recital 20 that the data element of a contract which includes mobile phone services would be outside the scope of the proposed Directive as this functions essentially as a carrier of a digital content or service rather than a digital content or service in its own right.

Overlap with Telecoms Rules

Given the potential impact of Article 16 on the large number of bundled contracts comprising telecoms services and digital content, regard must be had to the current and proposed telecoms rules on bundled contracts and long-term contracts. Article 30 of Directive 2002/22/EC on Universal Service and Users' Rights, as amended by Directive 2009/136/EC, provides that the initial contract period of consumer contracts for electronic communications services shall not exceed 24 months. Undertakings providing electronic communications services must also offer users the possibility to subscribe to contracts with a maximum duration of 12 months. Article 98 (1) of the proposed Electronic Communications Code retains the permitted maximum initial contract period of 24 months, but would allow Member States to adopt or maintain shorter maximum durations. It would appear to be open to a Member State accordingly to provide for a maximum duration shorter than the 12 months permitted by Article 16, such as 6 months. While, unlike Article 16, the proposed Code only directly regulates the duration of the initial contract period, Article 98(2) provides that where a contract or national law provides for a fixed duration contract to be automatically prolonged, the consumer is entitled to terminate the contract with one months' notice unless he or she has expressly agreed to the extension of the contract.

Article 100 of the proposed Code takes a different approach to bundled contracts than that proposed at Article 3(6) of the digital content proposal. It provides that where a bundle of goods and services includes a publicly available electronic communications service (other than a number-independent service), a number of provisions of the Code on end-users' rights, including Article 98 on the duration and termination of contracts, would apply 'mutatis mutandis to all elements of the bundle except where the provisions applicable to another element of the bundle are more favourable to the end-user.' As Article 16 would presumably be held to be more favourable to the end-user than Article 98, however, it would apply to the digital content element of a bundle. It is not clear however whether Article 16 would prevail where, in accordance with Article 98, of the proposed Code, a Member State provided for a maximum contract duration of less than 12 months.

The different rules applying to the duration and termination of long-term bundled contracts in the proposed Directives on digital content and electronic communications services are complex and potentially confusing for consumers and suppliers. The maximum contract duration differs as do the treatment of combinations of renewals and subsequent contract periods, the discretion afforded Member States to set shorter contract durations, and the approach taken to the different elements of bundled contracts. Given the extensive recourse to bundled contracts involving telecoms and other services, this is far from satisfactory or desirable.

Market Impact

Giving consumers the right to terminate contracts for the digital content element of mixed contracts after 12 months is likely have an impact on the business model underpinning contracts of longer duration, whether discrete or bundled. Suppliers who offer longer-term contracts contend that, in enabling certain fixed and set-up costs to be spread over an extended contract period, their extended duration facilitates more favourable price terms for consumers. In the case of digital television services, for example, the cost of set-top boxes, satellite dishes and installation services is discounted and covered by subscription charges over the extended contract period. In contracts involving mobile phone services, handsets are commonly provided below-cost and the cost recouped through the charges for phone and data services over the duration of the contract period. Suppliers whose business model is premised on longer-term contracts contend that the automatic right of termination after 12 months provided for in Article 16 will undermine amortised or discounted price models of this kind. In previous discussions on Article 16, the Commission appeared to accept that the price of services may rise in some cases if the right to terminate after 12 months results in a reduction in contract durations. While it may be argued that that any adverse consequences of this kind would be offset by the benefits to consumers from greater ease of switching, the pricing and other effects of Article 16 did not to our knowledge form part of the impact assessment for the proposal. In the absence of evidence on such effects, we are reluctant to lose the present pricing benefits of longer-term contracts for the possible benefits from greater ease of switching.

Conclusion

While we can endorse the aims of Article 16, we think on balance that the potential disadvantages outweigh the advantages, particularly given the likely impact on bundled contracts and the complexity around the related rules in the proposed electronic communications code. We would support the deletion of the Article, but would consider other possible solutions. These might include a provision along the lines of Article 98 of the electronic communications code – a maximum duration of 24 months but with a requirement on suppliers to offer also a maximum duration of 12 months and/or a right for Member States to fix a shorter duration in national law, and a right of termination where fixed term contracts are automatically extended without the consumer's express agreement.

FRANCE

Article 3 paragraphe 6 :

Les autorités françaises sont attachées à ce que la cohérence entre la proposition de directive et les autres textes du droit de l'Union susceptibles d'être impactés soit garantie.

À ce titre, il importe d'assurer une cohérence d'approche entre l'article 3(6) du texte et l'article 100 de la proposition de directive établissant un code européen des communications électroniques (CECE) et les considérants afférents. Le CECE prévoit en effet que, dans le cas des offres groupées, le régime prévu par cette proposition cesse de s'appliquer lorsque les dispositions applicables à des éléments de l'offre sont soumises à des dispositions plus favorables à l'utilisateur final.

Dans un souci de clarté et de sécurité juridique, les autorités françaises estiment opportun de préciser au considérant 20 que si un contenu ou un service numérique est compris dans un contrat mixte relevant de l'article 100 de la proposition de directive CECE, les règles pertinentes du CECE s'appliquent aux éléments de contenu ou service numérique sauf lorsque les dispositions applicables à ces éléments sont plus favorables à l'utilisateur final. Elles proposent également un complément rédactionnel afin de lire le considérant 20 en lien avec l'article 3 (7) de la proposition qui règle les situations de conflit de normes applicables au contenu numérique en renvoyant à la règle sectorielle. Par conséquent les autorités françaises proposent **ci-après** les éléments rédactionnels permettant :

- d'une part d'aligner davantage la formulation du considérant 20 sur celle du considérant 255 de la proposition du CECE qui fait expressément référence à la proposition de directive sur la fourniture de contenu numérique. Elles privilégient en effet la mention de cette précision au sein du considérant et non dans le dispositif de l'article 3(6) dans la mesure où les contrats mixtes ne comportent pas toujours une composante liée à un service de communication électronique ;

- d'autre part d'aligner la rédaction de l'article 3(6) sur celle du considérant 20 qui débute en ces mêmes termes.

sur le considérant 20 :

"(20) Where, under a contract or a bundle of contracts, the supplier offers digital content in combination with other services such as telecommunication services or goods, which do not function merely as a carrier of the digital content, this Directive should only apply to the digital content component of such a bundle. The other elements should be governed by the applicable law. **However, 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. For instance, where a digital content or service is part of a bundle offer which falls under Article 100 of the Directive establishing the European Electronic Communications Code (Recast) and that there is a conflict between the directives, the relevant provisions of the Code shall apply to all elements of the bundle except where, as provided for under the code, the provisions applicable to the digital content or service under this directive on certain aspects concerning contracts for the supply of digital content are more favorable to the consumer.**"

sur l'article 3(6):

"Where a contract **or a bundle of contracts** for the supply of digital content or a digital service includes additional contractual obligations for the provision of services or goods, this Directive shall only apply to the obligations and rights of the parties as supplier and consumer of the digital content or digital service."

Article 16 :

Les autorités françaises sont favorables au maintien de l'article 16 dans le dispositif de la proposition de directive et à la durée de 12 mois à partir de laquelle il permet au consommateur de résilier un contrat de fourniture de contenu ou de service numérique.

Cette disposition apparaît favorable au développement de meilleures conditions de concurrence à l'intérieur du marché unique du numérique et à la réduction d'effets de verrouillage liés à des délais d'engagements longs dans certains contrats de fourniture de contenu et de service numérique. Elles sont en ce sens également protectrices des intérêts du consommateur, qui dispose de la possibilité de changer plus facilement de fournisseur de contenu ou de service numérique lorsqu'il est engagé dans une relation contractuelle de long terme.

Toutefois, les autorités françaises souhaitent s'assurer que l'article 16 ne fasse pas obstacle à l'application du droit national (article L.215-1 et suivants du Code de la consommation) pour des contrats de service numérique reconductibles à l'intérieur d'une période de douze mois. Aussi, un contrat à reconduction tacite d'une durée de trois mois serait soumis aux règles nationales ; en revanche, lorsque l'addition des reconductions tacites excède la période de 12 mois, ces contrats seraient de nouveau inclus dans le champ d'application de l'article 16.

Les autorités françaises souhaitent également que les Etats membres puissent maintenir les dispositions de droit national relatives à la force majeure ou à l'imprévision, par le recours à l'article 3.9 qui vise les règles générales du droit des contrats. Elles proposent en ce sens un complément rédactionnel à l'article 3 (9**)** comme suit **:**

"(…) This Directive shall not affect the possibility of Member States to regulate general contract law aspects such as rules on formation, the validity or effects of contracts, including **the grounds** and the consequences of the termination of a contract in so far as they are not regulated in this Directive, or the right to damages."

Un considérant devrait de même être ajouté pour illustrer ce paragraphe. En particulier, s'agissant des causes de résiliation du contrat, il devrait être clarifié que le droit national continue de régir les causes de résiliation non prévue par la directive et leurs effets, comme la résiliation pour cause de force majeure ou d'imprévision prévue en droit national.

THE NETHERLANDS

Article 3(6) – Bundles

The Dutch delegation supports the current wording.

Article 16 – Right to terminate long-term contracts for the supply of digital content

Consumers need protection in case of long-term contracts, to avoid excessively long contracts or continuous tacit renewal. Generally, the Dutch delegation therefore supports the approach of Article 16.

In addition to the terms Member States know from the Unfair Contract Terms Directive, Dutch law contains specific unfair contract terms concerning long-term contracts. The level of consumer protection in these national provisions is considerably higher than the level Article 16 provides. This legislation is politically sensitive and has been proven both useful and highly popular. If the Council opts for maximum harmonization on this topic, the Dutch delegation desires to maintain this high level of protection. Therefore, the Dutch delegation suggests the following changes that would benefit consumers considerably and grant sufficient flexibility to suppliers:

- The scope of Article 16 should be expanded to contracts of unspecified duration. It is unclear why the Directive only covers contracts of a fixed duration. Expanding the scope to long-term contracts of any kind tallies well with the aim of harmonizing aspects of consumer contract law.

- The Dutch delegation remains in doubt whether tacit renewal is covered by the current wording of Article 16. It should be clarified that tacit renewal does fall under this Article. After tacit renewal, consumers should be entitled to terminate the contract regardless of the contract's prolonged duration. This means, for instance, that a tacit renewal of a six-month contract brings about a right to terminate at any time. The notification period prescribed by Article 16 remains applicable.

- Instead of a notification period of "*at least 30 days*", it is more fitting to require a period of "*at most 30 days*". A period of at least 30 days in all cases is rigid and somewhat long given the dynamic nature of digital content and digital services: digital content or a digital service can be altered relatively fast and suppliers are able to respond swiftly to changes in the market. A period of at most 30 days would be more favourable to consumers and gives flexibility to suppliers as to the duration of the period. After all, it sets a time cap instead of a minimum standard. This opens the possibility of a shorter period if the supplier and the consumer so desire while it preserves the possibility to require a 30-day period. Furthermore, the term for notice for the consumer may not exceed the term for notice for the supplier. Finally, in the case of a trial subscription, the contract may not contain a provision that states that the contract is renewed after the trial period.

- The supplier and consumer may deviate from these provisions if they explicitly agreed to do so and the supplier has a valid reason for this deviation.

Newspapers, periodicals, and magazines fall under more favourable rules for suppliers in the Netherlands. It may be required from the consumer to notify his desire to terminate the contract longer in advance to protect the vulnerable publishing industry. The Dutch delegation will have to study this issue further, to see if suppliers in industries that are easily impacted by big fluctuations in the number of customers should be subject to more flexible rules.

PORTUGAL

Article 3(6)

Scope

According to Article 3(6), the proposal shall also apply to mixed contracts, i.e. agreements containing aspects of more than one type of contract. We support the view that such contracts should not be excluded from the scope of the directive simply because of their nature. However, going beyond this assertion, its exact scope is unclear as several questions arise from the sentence *this Directive shall only apply to the obligations and rights of the parties as supplier and consumer of the digital content or digital service*. Where digital content is supplied together with goods or services what remedies can the consumer use? Those made available by Articles 11 and 12? Those made available by general contract law under national law? Both? While Articles 11 and 12 cannot settle all aspects of the matter, their current relationship with other pieces of legislation is lacking clarity. Sensitive questions do not present themselves when consumers ask for the supply of the digital content or its 'repair'. Yet, the same will not necessarily hold true for price reduction or termination.

In a case where a consumer buys an e-book reader which contains a defective operative system, a price reduction will only be possible as long as there is a cash price for its software and the device remains usable (compensation for losses may be possible but only under national law). Termination, by contrast, could be available but that course of action would mean the Directive would not *only apply to the obligations and rights of the parties as supplier and consumer of the digital content or digital service* as suggested by paragraph 6. Furthermore, termination – while equitable on the aforementioned example – can prove to be an inadequate remedy for every case. Let us assume, for instance, that a car is bought along with a set of digital navigation maps. Under similar circumstances, allowing for termination, even when the supplier has failed to supply the digital content, is excessive.

For these reasons, it is important to ensure the Directive does not prejudice a case-by-case assessment (namely, allowing for, when necessary, 'predominant purpose' or 'gravamen of the action' tests).

As matters stand at present, we feel the need for further discussion and cannot give a more definite position as to Article 3(6).

Article 16

Right to terminate long term contracts for the supply of digital content

We support the approach. Digital content is often offered on a subscription basis. While some markets and products have developed towards business models based on short-term subscription periods (i.e., music or video streaming services), others rely on long term commitments (i.e., newspapers and magazines). In the latter case, consumers may be bound to the contract for a significant period of time (minimum contractual periods of 12 or 24 months are not uncommon). Recognizing this reality and taking also into account the pace of technological and market developments, the consumer should have the right to terminate long term contracts. This right prevents lock-in situations, provides an incentive to perform the contract and encourages competition.

On the downside, we fear that, taking a minimum contractual period of 12 months as a time reference, long term contracts will become increasingly common.

In respect of compensation, the consumer shall, in our view, be entitled to terminate the contract free of charge at any point in time when exercising the right to terminate once the first 12 months have elapsed. Under national law we have laid down conditions for supplier compensation in the event of early termination. Regrettably, those rules, being the cause of many disputes, have had a more than expected detrimental effect on consumer protection.

Finally, we believe it would be appropriate to determine at which precise point in time the termination of the contract becomes effective (either on Article 16 or 13). Accurately identifying the effective date of termination (by clarifying, for example, when the notice given starts to run) is of great importance to the consumer since the liability to pay or to reimburse is assessed as of this date.

FINLAND

Article 16

In general, we think that Article 16 is acceptable as drafted in the compromise proposal.

We have, however, one specific concern which stems from our national law relating to over-indebted consumers. According to Act 57/1993 on the Adjustment of the Debts of a Private Individual, after the start of debt adjustment the consumer is entitled to terminate a tenancy contract or any other contract where the consumer is the debtor, e.g. a contract concerning the supply of digital content. The termination becomes effective two months after the notice of termination and the consumer is obliged to pay only remuneration for the period of notice, but no other compensation due to the premature termination of the contract.

As it certainly was not the intention that the proposed Directive would affect debt adjustment proceedings and, in particular the rights of the consumer debtors in such proceedings, *a recital should be added in the proposal in order to clarify that the consumer would have right to terminate the contract in such a situation at any time after the conclusion of the contract.*

Article 3(6)

The scope of the provisions relating to mixed contracts in paragraph 6 and to those relating to embedded digital content in paragraph 3a are not sufficiently clear as they stand. This is mainly due to the definition of embedded digital content.

It does not seem evident whether e.g. a navigating system (pre-)installed in a car would be considered as embedded digital content and hence the Directive would not applicable according to option A, or whether Article 3(6) would be applicable. In our view, a navigating system is *not* an integral part of the car. However, neither does the wording of paragraph 6 ("where a contract for the supply of digital content or a digital service includes *additional* contractual obligations for the provision of services or goods", …) fit very well to this type of situation where the sale of a good is clearly the main purpose of the contract.

In general, the solution where the Directive is applicable only on that part of the contract which concerns the supply of digital content or service seems a reasonable starting point. However, there might be some unwanted consequences for the consumers in cases of bundled contracts, e.g. because of differences in the applicable rules. Some flexibility might therefore be needed in order to enable the judge to apply one single regime where the circumstances of the case justify such a solution.

SWEDEN

Article 16

In general, we believe that Article 16 could be accepted as drafted in the revised text proposal (document 15674/16).

However, we have noted that Article 98 (Contract duration and termination) and Article 100 (Bundled offers) in the Commission proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (below referred to as the "Telecom proposal") seem to have similarities to Article 16 in the revised text proposal.

Article 100(1) of the Telecom proposal (document 7430/17) means that if a bundle of services or a bundle of services and terminal equipment offered to consumers comprises an internet access service, Articles 96(1), 98 and 99(1) and the information requirements listed in points a) to e) of Article 95(4) shall apply mutatis mutandis to all elements of the bundle except where the provisions applicable to another element of the bundle are more favourable to the end user.

In this context, Article 98(1) states that Member States shall ensure that conditions and procedures for contract termination are not a disincentive against changing service provider and that contracts concluded between consumers and providers of internet access services and publicly available interpersonal communications services do not mandate commitment period longer than 24 Months. Member States may adopt or maintain shorter maximum durations for the initial commitment period.

In light of this, it is clear that there actually is some kind of interconnection between the abovementioned Articles. It could be noted that recital (252) of the Telecom proposal (document 7430/17) also refers to the rules of contracts for the sales of goods or for the supply of digital content.

In many cases, Article 16 seems to be more favourable to the consumer than the corresponding Article 98 in the Telecom proposal. However, one might imagine that there may well be situations where Article 16 does not come into play at all in case of a bundled offer comprising of both an internet access service and digital services, such as streaming services. That seems to be the case if a Member States implements a shorter commitment period under Article 98(1) than the 12-Month period expressed in Article 16. Besides, the various services in a bundled offer will probably very often be treated differently due to the fact that the regimes seem to end up in different solutions for long term agreements and bundled offers. It is not easy to make an assessment of the practical consequences of this.

In light of this, we should consider to clarify, e.g. in a recital, the interaction between Article 16 and those Articles in the Telecom proposal.

Article 3(6)

In general, we can support the approach outlined in Article 3(6) in the revised text proposal (document 15674/16). However, we need to better understand the scope of the Article.

For instance, we would like to better understand what kind of obligations, services and goods we are covering with the phrase "additional contractual obligations for the provision of services or goods"? In case of a bundled agreement, when is it deemed to be "a contract for the supply of digital content or a digital service" and contrary a contract for the supply of that other bundled service or good, e.g. an electronical communication service?

We also may want to discuss Article 3(6) in light of the rules on embedded digital content. In that context, it would be worthwhile to clarify the concept "which operates as an integral part of the good" in the definition on embedded digital content as well as the word "additional" in Article 3(6).

Under Swedish consumer law, a bundled contract comprising of both the sale of a good and the provision of a service will not fall under the Swedish Consumer Sales Act in case the servicing element of the contract constitutes the predominant part of the agreement. In such a case, the agreement will instead fall under the Consumer Services Act. Having that said, we nevertheless find the proposed solution that the Directive is applicable only on that part of the contract which concerns the supply of digital content or digital service to be a reasonable starting point. However, there might be a need for flexibility in case the circumstances indicate that only one single regime should be applied, e.g. due to the fact that one part of the bundle is a predominant part.

UNITED KINGDOM

Article 16 Digital Content Directive:

We question the need for Article 16 including why 12 months has been selected when contracts for electronic communications currently under the European Electronic Communications Code are permitted for up to 24 months. If 24 months is acceptable to Member States and the Commission as being suitable for phone and pay TV transmission and internet service provision, which probably costs significantly more or at least a similar amount to digital content or services contracts, a similar period should be acceptable for the supply of digital content.

There is no additional risk of detriment to justify a stricter approach for digital content compared to electronic communications services and it remains the case that if digital content or services fail to conform to the contract at any point during the contract, then the consumer has access to the proposed remedies, including, if necessary, termination.

If there is a need for some rules on longer-term contracts to address particular vulnerabilities, which to a large extent already works effectively, then a more nuanced approach would appear to be necessary. In any case, to ensure consistency and in the absence of evidence to the contrary, contracts of a period up to 24 months should be permitted.

Also, the three main difficulties, which Article 16 would introduce to usual market practices in the sector includes:

- restricting the length of and the renewal or extension of contracts for standalone digital content and services contracts;
- restricting the length of contract for digital content bundles with other goods and installation services, and therefore choice and convenience for consumers; and,
- restricting digital content or services contracts bundled with electronic communications services which is not consistent with the switching provisions in the new European Electronic Communications Code.

Our view is that contract lengths of 24 months are permissible as set out under Article 98 of the European Electronic Communications Code. This is in contrast to the proposal for a Digital Content Directive, which according to Article 16, requires contract lengths of 12 months. This apparent anomaly and contradiction between the requirements of the European Electronic Communications Code and Digital Content Directive has created confusion and uncertainty for some end-users and providers. The respective regimes should make clear which particular contract period prevails and needs to be adhered to by suppliers.

Standalone contracts:

We would raise the issue of why a business/consumer should not be able to request that their contract be extended, or re-contracted for a further period, provided they do so knowingly. Consumers are quite capable of considering the potential benefits and dis-benefits of continuing to contract with a supplier which they have already experienced for at least 12 (or 24) months. When the contract runs out, consumers should be able to decide whether to continue for further periods. Also, at this point suppliers often respond to the possibility of consumers leaving by offering better deals or discounts.

An unhindered right to terminate any time after the first 12 (or 24) months will inhibit initial and subsequent offers, which consumers tend to prefer and which suppliers are able to agree to because they are aware that the consumer is committed and a given level of income from them can be relied upon. Also, suppliers may become reluctant to offer any further fixed duration contracts with the benefits they carry for the consumer, forcing them to look elsewhere, when they would otherwise have been content to sign up for a further period. For the same reason, it would also inhibit supplier investment.

Vulnerability occurs for consumers where contracts are automatically extended, or agreed by tacit agreement, or by roll-over provisions. If there is to be measured protection for longer term contracts, then the right to terminate where there is no non-conformity should apply only if contracts are extendable by tacit agreement or by automatic rollover. This will help to prevent tie-ins and detriment through consumer inertia and there is wording in the proposed revised European Electronic Communications Code (Article 98(2)), which has been improved upon in the drafting suggestions below.

Digital content or services bundled with goods or installation services:

We have concerns about digital TV and content as initial contracts are often for 18-24 months because this enables the supplier to spread the significant up-front cost of the recorder box and the cost of installation. This works both for consumers and suppliers because these costs (which can be significant) are spread over a longer period, thereby allowing take up of the contracts by consumers, who might not be able to afford the upfront costs, or otherwise prefer to spread the costs, meaning a bigger potential customer base for business and therefore investment. There appears to be no available evidence that this causes any significant problems for consumers.

Digital content or services bundled with Electronic Communications:

We have serious concerns about Article 100 of the European Electronic Communications Code, as it suggests that the bundles rules should not apply where other EU rules in relation to elements of a bundle are “more favourable to the end user”. This is confusing and a subjective element of the proposed European Electronic Communications Code which should be deleted (as indicated previously to the Commission) if it is not to undermine the beneficial intentions of the European Electronic Communications Code in providing improved protection for bundles and switching.

The proposed new European Electronic Communications Code contains specific provisions designed to allow consumers to switch full bundles without feeling constrained by different contractual obligations in relation to the different elements of the bundle. This is achieved by applying certain rules in the European Electronic Communications Code to all of the constituent parts of a bundle, including any non-electronic communications elements such as digital content and services.

This needs to be reflected in Article 3(6) which, as it stands, appears to be inconsistent with the European Electronic Communications Code. There should be no doubt that the European Electronic Communications Code bundles provisions prevail in the circumstances in the face of the maximum harmonisation of the digital content directive. The fact that digital content may be subject to the bundles rules in the new European Electronic Communications Code should not affect consumers' other contractual rights set out in the proposal for a Digital Content Directive.

Therefore, a specific reference to the new rules in the European Electronic Communications Code should be included in Article 3(6) of the proposal for a Digital Content Directive while keeping the current exemption (enabling the recouping of the costs of goods or other services sold with digital content or services where digital content rights are activated in respect of the digital content element). The addition exempts, only as far as the European Electronic Communications Code switching provisions are concerned, digital content which is bundled with electronic communications, ensuring that the European Electronic Communications Code rules prevail where necessary. In effect, this exempts the digital content or service concerned from any restriction on the duration of contracts which is not aligned with the electronic communications regime and ensures switching is not inhibited by different contractual requirements or arrangements for transferring to new providers.

Proposed Amendments:

The following pages set out some of our proposed amendments to Article 16 and 3(6) of the proposal for a Digital Content Directive and to the European Electronic Communications Code, which will help to resolve the above mentioned issues and apply new rules for long-term contracts only where they are necessary and which are result in consistency between the requirements of the proposal for a Digital Content Directive and the European Electronic Communications Code.

Proposed changes to the European Electronic Communications Code:

Article 100

Bundled offers

1. If a bundle of services or a bundle of services and terminal equipment offered to consumers, micro or small enterprises, or not-for-profit organisations, comprises an internet access service, Articles 96(1), 98 and 99(1) and the information requirements listed in points (a) to (e) of Article 95(4) shall apply mutatis mutandis to all elements of the bundle ~~except where the provisions applicable to another element of the bundle are more favourable to the end-user~~.

2. Any subscription to additional services or terminal equipment provided or distributed by the same provider of an internet access service shall not extend the term of the initial contract unless explicitly agreed otherwise when subscribing to the additional services or terminal equipment.

Proposed changes to the proposal for a Digital Content Directive:

Article 16

Right to terminate long term contracts for the supply of digital content

1. Where the contract provides for the supply of the digital content **or digital service** for **a fixed** duration **longer than ~~12~~ 24 months** ~~or **where** any combination of **subsequent contracts or** renewal periods exceeds 12 months **from the moment of the conclusion of the initial contract**~~, the consumer shall be entitled to terminate the contract [**free of charge**] any time after the expiration of ~~12~~ **24** months.

Where a contract provides for a fixed duration contract for the supply of digital content or digital services to be automatically prolonged after the expiration of the initial period and unless the consumer has explicitly agreed to the extension of the contract, consumers shall be entitled to terminate the contract at any time without incurring any costs, except the cost of providing the service during the notice period.[4]

2. The consumer shall exercise the right to terminate the contract **under paragraph 1 in accordance with Article 13(1). The consumer shall give the notice of** termination **at least 30** days **before ~~he wants the~~ termination is to take effect**.

3. Where the digital content **or digital service** is supplied in exchange for a payment of a price, the consumer remains liable to pay the part of the price for the digital content **or digital service** supplied corresponding to the period of time before the termination becomes effective. **The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after the termination of the contract.**

The supplier shall reimburse the consumer within 14 days of the termination becoming effective.

4. Subject to the second sub-paragraph of paragraph 3[5]**, ~~W~~where the consumer terminates the contract in accordance with this Article, Articles 13, 13a and 13b shall apply accordingly.**

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4 While we understand that automatic roll-over contract terms, or such terms which require an unduly long period of notice would likely be considered unfair contract terms we believe that in this context, as also appears to be the case in respect of the European Electronic Communications Code, it is worth clarifying. Perhaps a cross reference to the unfair terms regime might clarify the position.

5 This will resolve a mismatch with the provision in 13a(1) which requires reimbursement within 14 days of the notice of termination and which in this case would therefore require reimbursement 14 days in advance of the termination.

Article 3(6)

Except in cases falling within the second subparagraph, ~~W~~where a contract for the supply of digital content or digital services includes elements in addition to the supply of digital content or digital services, ~~the supply of digital content **or a digital service includes additional contractual obligations for the provision of services or goods**,~~ this Directive shall only apply to the obligations and remedies ~~**rights**~~ of the parties as supplier and consumer of the digital content **or digital service**.

Where a contract includes elements of both the provision of an internet access service or a publicly available electronic communications service other than number-independent **interpersonal communications service**[6] **and the supply of digital content or digital services (together, a "bundle"), and where the bundle is subject to obligations under Directive [xxxx/xx/EU] establishing the European Electronic Communications Code, the rules contained in Articles 95, 96(1), 98, 99(1) and 100(1) of Directive [xxxx/xx/EU] shall prevail over the rules contained in this Directive in relation to the digital content element.**

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[6] This is based on the current wording being discussed in the relevant working group.