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**NOTE**

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From: The Italian delegation  
To: Council Working Party on Civil Law Matters (Contract Law)  
No. prev. doc.: 15674/16, WK 3894/17  
No. Cion doc.: 15251/15  
Subject: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content  
- Comments from the Italian delegation on Article 15

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Following the discussion held at the last meeting of the Working Party on Civil Law Matters (Contract Law) and having analyzed the compromise text of Article 15 as put forward by the Maltese Presidency on WK 3894/2017, the Italian delegation would like to share with all delegations the following documents:

1. **A drafting proposal of Article 15** made by the Italian delegation with its explanations
2. **An annex containing a comparative table** containing the previous versions of Article 15; the last column contains our drafting proposal for consideration of delegations in comparison with the previous texts.

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Having read the last compromise solution of the Maltese Presidency (WK 3894/2017), we are not able to support the proposed solution for these reasons:

- The article drafting seems to be too complex and not easy to understand.

#### **Article 15(1):**

- In our opinion it is important to maintain in the first paragraph a specific reference to contracts where the digital content or service can be used by the consumer over the time.
- We cannot support the sentence between square brackets.
- The conditions under which the consumer may exercise his/her right to terminate the contract under Article 15 must be in line with Directive 93/13/EEC on unfair terms in consumer contracts (Annex, examples of unfair terms, letter (j): “*enabling the seller or supplier to alter the terms of the contract unilaterally **without a valid reason which is specified in the contract***”).

In other words: if a contract provides the right of the supplier to modify the digital content and the same contract gives a valid reason, the term will not be unfair and the consumer may terminate the contract under Article 15.

In the compromise text there isn't any reference to the *valid reason*, so it is not in line with Directive 93/13/EEC. We think that the referral to Article 1(2) of Directive 93/13/EEC is not an appropriate mechanism of interpreting Article 15 of this Proposal.

If we want to abandon the “valid reason” we should do it within the general rules (i.e. Directive 93/13) and not create here a specific exception only for digital content, taking into account also the cases of embedded software or DVD and CD where it is not easy to draw the line with the other tangible goods.

#### **Article 15(2):**

- In Article 15(2) the sentence “*deviate in a more than minor manner*” could lead to different interpretations and it is not sufficiently precise.

### Article 15(2),(3) & (4):

- Article 15(2), (3) & (4) could be drafted in a simpler way, in order to be easily understandable, as we tried to do in our proposal.
- The reference contained in Article 15(4) “*to paragraph 3*” is not clear: it seems that the 14 days period starts “*in advance of the modification*” and not from the day of the modification itself.
- The last sentence of Article 15(4) (“*The right to terminate the contract shall end not earlier than 7 days from the date of application of the modification*”) is not clear, as we do not understand in practice when a right to termination may “end” before the 14 days period has expired.

### Article 15(5):

- We think that a specific reference to Articles 13, 13a and 13b(1) and (2), should be maintained in order to clarify the consequences of *this specific right of termination*, that is quite similar to a withdrawal and it is something different from *termination for lack of conformity* at least in our theoretical legal terms (in Italian we even use different words). Thus the application here of the rules laid down in those articles is not obvious.

Changes compared to the compromise text proposal of the Slovak and Maltese presidencies as set out in Article 15 option 1 in document 15674/16 are marked in **bold** or by ~~strikethrough~~ for deletions.

## Article 15

### Modification of the digital content or digital service

1. Where the contract ~~stipulates~~ **provides** that the digital content or digital service shall be ~~supplied~~ **available to the consumer** over a ~~the~~ period of time, the supplier may ~~alter the functionality, interoperability and other main performance features of the digital content (...), to the extent that those alterations adversely affect access to or use of the digital content by the consumer only if:~~ **update or similarly modify the digital content or digital service supplied to the consumer only if all the following requirements are met:**

- (a) the contract allows for and gives a valid reason for such an alteration; **and**
- (b) the consumer is informed ~~of the modification and the corresponding right to terminate the contract free of charge,~~ reasonably in advance in a clear and comprehensible manner on a durable medium, **of the modalities and time of modification and the corresponding right to terminate the contract free of charge.**
- ~~(c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the day on which the consumer is informed of the modification.~~

**1a. If the requirements under letter a) and b) are met, the consumer shall have the right to terminate the contract free of charge within no less than 14 days from the day on which the consumer is informed of the modification.**

2. Where the consumer terminates the contract in accordance with paragraph 1, Articles 13, 13a and 13b, **paragraph 1 and 2**, shall apply accordingly, **with the exception laid down in the following paragraph 3.**

3. The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after modification of the digital content or digital service.

## Article 15

### Modification of the digital content or digital service

1. Where the contract provides that the digital content or digital service shall be available to the consumer over the time, the supplier may update or similarly modify the digital content or digital service supplied to the consumer only if all the following requirements are met:

- (a) the contract allows for and gives a valid reason for such an alteration; and
- (b) the consumer is informed, reasonably in advance in a clear and comprehensible manner on a durable medium, of the modalities and time of modification and the corresponding right to terminate the contract free of charge.

1.a If the requirements under letter a) and b) are met, the consumer shall have the right to terminate the contract free of charge within no less than 14 days from the day on which the consumer is informed of the modification.

2. Where the consumer terminates the contract in accordance with paragraph 1, Articles 13, 13a and 13b, paragraph 1 and 2, shall apply accordingly, with the exception laid down in the following paragraph 3.

3. The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after modification of the digital content or digital service.

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## Explanation

Our proposal aims at the maximum consistency with Directive 93/13/EEC on unfair terms. We think that a term may not be legitimate if it does not fall within the requirements of this Directive, which contains general rules for any consumers' contract.

Letter (j) of its Annex qualifies as unfair a term enabling the seller or supplier to alter the terms of the contract unilaterally without a **valid reason** that must be **specified in the contract**.

For this reason we formulated a specific letter (a) in paragraph 1.

### **We tried to follow a clear order of rules:**

- Article 15(1) contains a referral to the **types of contract involved** (digital content or digital service shall be available to the consumer over the time) and to the **right to modify the digital content given to the supplier**, using the same simple words as put forward in the last compromise solution; then we described **the conditions** under which the right might be exercised, in line with directive 93/13/EEC on unfair terms.
- Article 15(1)(b) regulates **the right of being informed**, using the same condition of the last compromise solution.
- Article 15(1a) is a specific paragraph on the **consequences of the exercise by the supplier of the right of modifying the contract, i.e. the right of the consumer to terminate the contract** (free of charge and within a certain time limit).
- Article 15(2) contains an important reference to **the consequences of the exercise of the right of termination**, being otherwise uncertain the scenario of the applicable rules.
- Finally, in Article 15(3) the reimbursement is regulated as an exception from the rules laid down in Article (13a)(1)

<p><b>COMMISSION PROPOSAL</b></p> <p>1. Where the contract provides that the digital content shall be supplied over the period of time stipulated in the contract, the supplier may alter functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security, to the extent those alterations adversely affect access to or use of the digital content by the consumer, only if:</p> <p>a. the contract so stipulates;</p> <p>b. the consumer is notified reasonably in advance of the modification by an explicit notice on a durable medium;</p> <p>c. the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the receipt of the notice; and</p> <p>d. upon termination of the contract in accordance with point (c), the consumer is provided with technical means to retrieve all content provided in accordance with Article 13(2)(c).</p>	<p><b>15674/16 REVISED TEXT BY MALTESE PRESIDENCY</b></p> <p><b>OPTION 1 (majority)</b></p> <p>1. Where the contract stipulates that the digital content or digital service shall be supplied over a period of time (...), the supplier may alter the functionality, interoperability and other main performance features of the digital content (...), to the extent that those alterations adversely affect access to or use of the digital content by the consumer, only if:</p> <p>(a) the contract allows for and gives a valid reason for such an alteration;</p> <p>(b) the consumer is informed of the modification and the corresponding right to terminate the contract free of charge, reasonably in advance in a clear and comprehensible manner on a durable medium; and</p> <p>(c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the day on which the consumer is informed of the modification</p> <p>(d) (...).</p>	<p><b>WK 3894/2017 31.03.2017</b></p> <p>1. Subject to the consumer's right to terminate the contract in accordance with paragraph 2, the supplier may update or similarly modify the digital content or digital service supplied to the consumer, provided the contract so allows. [Such modifications shall come at no additional costs to the consumer, unless the contract expressly provides that they are subject to a charge].</p> <p><b>2. The consumer shall have the right to terminate the contract free of charge where such modifications deviate in a more than minor manner from the requirements of conformity of the digital content or digital service set out in points (a) and (b) of Article 6a (1).</b></p> <p><b>3. Reasonably in advance of the modification referred to in paragraph 2 and in a clear and comprehensible manner on a durable medium, the supplier shall inform the consumer of the modification, its day of application and the right to terminate the contract pursuant to paragraph 2 within the time limits according to paragraph 4.</b></p>	<p><b>Article 15</b></p> <p><b>ITALIAN PROPOSAL</b></p> <p>1. Where the contract provides that the digital content or digital service shall be available to the consumer over the time, the supplier may update or similarly modify the digital content or digital service supplied to the consumer only if all the following requirements are met:</p> <p>(a) the contract allows for and gives a valid reason for such an alteration; and</p> <p>(b) the consumer is informed, reasonably in advance in a clear and comprehensible manner on a durable medium, of the modalities and time of modification, and the corresponding right to terminate the contract free of charge.</p> <p><b>1.a If the requirements under letter a) and b) are met, the consumer shall have the right to terminate the contract free of charge within no less than 14 days from the day on which the consumer is informed of the modification.</b></p>
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<p>2. Where the consumer terminates the contract in accordance with paragraph 1, where relevant,</p> <p>a. the supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time after modification of the digital content;</p> <p>b. the supplier shall refrain from the use of the counter-performance other than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer.</p>	<p>2. Where the consumer terminates the contract in accordance with paragraph 1, Articles 13, 13a and 13b shall apply accordingly.</p> <p>The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after modification of the digital content or digital service.</p> <p>(...)</p>	<p><b>4. The consumer shall be entitled to exercise the right to terminate the contract within no less than 14 days from the day on which he is informed according to paragraph 3. The right to terminate the contract shall end not earlier than 7 days from the date of application of the modification.</b></p> <p><b>5. Where the consumer terminates the contract in accordance with paragraph 2, the supplier shall, in derogation from Article 13a(1), reimburse to the consumer only the part of the price paid corresponding to the period of time after the modification of the digital content or digital service.</b></p>	<p>2. Where the consumer terminates the contract in accordance with paragraph 1, Articles 13, 13a and 13b, par. 1 and 2, shall apply accordingly, <b>with the exception laid down in the following paragraph 3.</b></p> <p>3. <b>The supplier shall reimburse to the consumer only the part of the price paid corresponding to the period of time after modification of the digital content or digital service.</b></p>
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