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**NOTE**

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From:	the Presidency
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) - General approach

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**I. INTRODUCTION**

The Commission proposal for a Directive on certain aspects concerning contracts for the supply of digital content ('the proposed Directive', 'the Directive') was submitted on 9 December 2015<sup>1</sup> as part of the 'Digital Single Market Strategy for Europe'.

The proposal is based on Article 114 of the Treaty on the Functioning of the European Union and is thus subject to the ordinary legislative procedure.

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<sup>1</sup> Document 8672/15.

The purpose of the proposed Directive 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 and digital services, in particular rules on the consumer remedies for cases of lack of conformity or lack of supply of digital content or digital services. The proposed Directive aims at providing a high level of consumer protection and increased legal certainty with a view to building greater confidence amongst European consumers when buying cross-border and with a view to making it easier for businesses, especially small and medium-sized enterprises ('SMEs'), to sell EU-wide.

The Council (Justice and Home Affairs) held policy debates on this proposal in March (doc. 6150/16), June (doc. 9768/16) and December 2016 (doc. 14827/16). A progress report was submitted to the Council (Justice and Home Affairs) in March 2017 (doc. 7429/17).

The European Economic and Social Committee adopted its opinion on the proposed Directive on 27 April 2016.

The Maltese Presidency has acknowledged the importance of this file as part of the Digital Single Market Strategy, which is also a priority for the Council.

Building on the political guidelines approved by the Council (Justice and Home Affairs) in June 2016 (doc. 9768/16) and the results of the policy debate at the Council (Justice and Home Affairs) in December 2016, the Working Party on Civil Law Matters (Contract Law) continued its deliberations on the proposed Directive at an intensive pace.

In the light of the substantial progress made in the discussions of the Working Party on Civil Law Matters (Contract Law), the Presidency is of the opinion that a general approach can now be achieved on the text of the Articles and a number of important recitals of the proposed Directive. While broad agreement appears to be emerging on the text of the Articles and selected recitals of the future Directive as set out in Addendum 1 to this note, the remaining recitals will be subject to further discussions and be finalised as soon as possible after the approval of the general approach by the Council.

On 31 May 2017, Coreper expressed overall support for the compromise presented by the Presidency (the main elements of the compromise package are described in the Annex to this note) and decided to submit the compromise package as set out in Addendum 1 to this note to the Council (Justice and Home Affairs) on 8 and 9 June 2017 for approval as the Council's general approach.

The elements of the compromise text are to be seen as an overall package that aims at establishing a well-balanced regime of a high level of consumer protection and the creation of a business-friendly environment for EU entrepreneurs. The compromise also provides for a delicate balance between the different positions of Member States.

## **II. CONCLUSION**

Bearing in mind the importance of keeping this delicate balance, Council is invited:

- (a) to approve as a compromise package the draft general approach set out in Addendum 1 to this note,
- (b) to take note that the remainder of the recitals will be finalised at technical level as soon as possible after the Council, and
- (c) to take note that this text will constitute the basis for the negotiations with the European Parliament for a first reading agreement.

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## MAIN ELEMENTS OF THE COMPROMISE PACKAGE

### A. Scope

#### *(a) Personal data*

Acknowledging the increased value of personal data in modern business models, it was widely felt from the outset of the negotiations that the consumer should be entitled to the contractual remedies for lack of conformity or lack of supply not only under contracts where the consumer pays a price for the digital content or digital service, but also under contracts where the consumer provides personal data to the supplier. At the same time, emphasis was made throughout the discussions on the importance to ensure that any interference with the application of Union law on the protection of personal data, in particular the EU General Data Protection Regulation ('GDPR') be avoided.

In the light of this, and taking into account the written opinions provided by the Council Legal Service<sup>2</sup> and the European Data Protection Supervisor<sup>3</sup>, the Presidency compromise text includes within the scope of the proposed Directive all contracts for the supply of digital content or digital services, except those where the consumer neither pays a price nor provides any personal data to the supplier.

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<sup>2</sup> Document 15287/16.

<sup>3</sup> Document 7369/17.

With a view to achieving a balance between consumers' and businesses' interests, it was of importance to many delegations that the Directive does not apply to situations where no commercial use of the consumer's personal data is made by the supplier. Therefore, under the Presidency compromise text, the proposed Directive will not apply where personal data are exclusively processed by the supplier for supplying the digital content or digital service, or for the supplier to comply with legal requirements to which the supplier is subject, and the supplier does not process the data otherwise.

The compromise text also clarifies explicitly that any processing of personal data in the context of a contract for the supply of digital content or digital service has to comply with Union law on the protection of personal data and that, in case of conflict, Union law on the protection of personal data will prevail.

***(b) Embedded digital content***

Regarding digital content forming part of a good in a way that such good would be inoperable or would be prevented from performing its main functions in the absence of such digital content ('embedded digital content'), the majority considered it more appropriate that the rules applicable to goods determine the consumer's remedies in case of a lack of conformity or lack of supply of such goods and the embedded software.

The Presidency compromise therefore excludes embedded digital content from the scope of the proposed Directive.

*(c) OTTs and the relationship with telecommunication rules*

In light of the evolving market of new apps and digital services that provide 'over the top' (OTT) interpersonal communication and messaging services over the Internet leading to more consumers to use such services as a means of communication over traditional telecommunication services, it was deemed necessary to provide effective consumer protection with respect to these emerging services.

The Presidency compromise therefore reflects the policy decision taken by the Working Party to provide consumers using OTTs with the remedies for the lack of supply and the lack of conformity provided for by the proposed Directive.

*(d) Bundle contracts*

As regards bundle contracts which contain elements of supply of digital content or a digital service and elements of the provision of other services or goods, the Presidency compromise suggests that the proposed Directive shall only apply to the elements of the contract concerning the digital content or digital service. Any effects that the termination of the digital content or digital service element of the bundle may have on the other elements of the bundle contract are left to national law.

However, as traditional telecommunication services are already highly regulated, by way of exception, Article 16 of the Directive (providing for the consumer's rights to terminate long-term contracts) should not apply in cases where the bundle contract includes elements of traditional telecommunication services (number-based service). In such cases the EU telecommunication rules will apply to such bundle contracts.

## **B. Conformity criteria**

Following the directions given by the Council (Justice and Home Affairs) in June and December 2016, the Presidency compromise provides for a balance between '*subjective*' conformity criteria (i.e. agreed in the contract) and '*objective*' conformity criteria (i.e. stipulated by law).

The Presidency compromise text also clarifies that it is a matter of non-conformity if the digital content or digital service does not comply with third party rights, in particular those relating to intellectual property, and that in case of a violation of such rights the remedies for lack of conformity provided for by the Directive shall be applied unless national law provides for the nullity or rescission of the contract as a result of such violation.

## **C. Remedies**

### *(a) Remedies for failure to supply*

With a view to preserving both the interests of suppliers and of consumers, the Presidency compromise on the remedies for the failure to supply includes a principal obligation of the consumer to give the supplier a second chance to supply the digital content or digital service. This is, however, subject to safeguards allowing the consumer to terminate the contract immediately in certain situations without giving the supplier a second chance.

### *(b) Remedies for lack of conformity*

With a view to respecting the different Member States' systems and to preserving a fair balance between consumers' and suppliers' interests, the Presidency compromise text, contrary to the Commission proposal, does not provide for a strict hierarchy of the remedies in cases of lack of conformity, but allows for more flexibility in accessing the different remedies (bringing into conformity, price reduction, termination of the contract) by setting out the conditions for the use of the different remedies.

#### **D. Time limits for the supplier's liability for non-conformity and the reversal of the burden of proof**

As to the time limits for the liability of the supplier for non-conformity and the related time limit for the reversal of the burden of proof (Articles 9a and 10), the views of Member States diverged very strongly. The Presidency text on these provisions should therefore be seen as part of an overall compromise that attempts at approximating the diverging views as closely as possible and counting on delegations' spirit of compromise and concessions on other parts of the compromise package.

Considering the very different concepts in the Member States' national laws on guarantee periods and limitation periods, the Presidency compromise had to accept that it would not be possible to provide fully harmonised rules on the time limits. Therefore, to achieve the objectives of the proposed Directive, the Presidency compromise in Article 9a provides that any guarantee or limitation period provided under national law for the liability of the supplier for cases of lack of conformity (expressed in simplified words) may not be shorter than two years.

On the period for the reversal of the burden of proof (Article 10(1a)), the Presidency proposes a period of one year as a compromise between those delegations that prefer a short period of six months, those which prefer a period of one year and those which want to align this period with the time limit of two years provided for in Article 9a.

#### **E. Other consumer rights**

The compromise text on Articles 15 and 16 providing for the consumer's rights in the event of the modification of the digital content or digital service by the supplier, and the consumer's right to termination in the case of long-term contracts are important elements of a balanced package protecting consumers from being tied to a modified contract or a long-term contract they no longer want.