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From:	Presidency
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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) - Recitals

Delegations will find in the Annex of this document a revised version of the text of the recitals of the above mentioned proposal, taking into account the comments made by delegations at the Council Working Party on Civil Law Matters (Contract Law) on 19 and 20 July 2017 as well as informal written comments received since then. This text will be sent for approval to Coreper.

All changes compared to the text of the Commission proposal are marked in bold or by (...) for deleted text.

The recitals the text of which was approved as part of the general approach of the JHA Council on 8 and 9 June 2017 as set out in the footnotes of document 9901/17 JUSTCIV 137 CONSOM 246 DIGIT 157 AUDIO 84 DAPIX 224 DATAPROTECT 111 CULT 83 CODEC 968 are in italics.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain aspects concerning contracts for the supply of digital content

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

¹ OJ C , , p. .

Whereas:

- (1) The growth potential of e-commerce **in the Union** has not yet been fully exploited. The Digital Single Market Strategy for Europe² tackles in a holistic manner the major obstacles to the development of cross-border e-commerce in the Union in order to unleash this potential. (...)
- (2) (...) Certain aspects concerning contracts for supply of digital content **or digital services should be harmonised**, taking as a base a high level of consumer protection, **in order to achieve a genuine digital single market, to increase legal certainty, to reduce transaction costs, to build greater confidence amongst European consumers and to make it easier for businesses, especially small and medium-sized enterprises ('SMEs'), to supply digital content or digital services EU-wide.** (...) ³
- (3) (...) Businesses **often** face additional costs stemming from differences in national mandatory consumer contract law rules and legal uncertainty when **offering** digital content **or digital services** across borders. Businesses also face costs when adapting their contracts to specific mandatory rules for the supply of digital content **or digital services which** are already emerging in several Member States, creating differences in scope and content between specific national rules governing these contracts. (...)

² COM (2015) 192 final.

³ The additions to this recital reflect the idea expressed in footnote 1 of document 9901/17 ADD 1

- (4) Consumers are not **always** confident when buying cross border and especially online. One of the major factors for this lack of confidence is uncertainty about their key contractual rights and the lack of a clear contractual framework for digital content **or a digital service**. Many consumers experience problems related to the quality of, or access to, digital content **or a digital service**. For instance, they receive wrong or faulty digital content, or they are not able to access the digital content **or digital service** in question. As a result, consumers suffer financial and non-financial detriment.
- (5) In order to remedy these problems, both businesses and consumers should be able to rely on fully harmonised **contractual rights in certain core areas concerning** the supply of digital content **or a digital service across the Union. Full harmonisation of some key regulatory aspects should considerably increase legal certainty for consumers and businesses.**
- (6) **(Integrated in recital 2)**
- (7) Consumers **should** benefit from (...) harmonised rights for **the supply of** digital content **or digital services which ensure** a high level of protection. They **should** have clear **mandatory** rights when they receive or access digital content **or a digital service** from anywhere in the **Union in order to** increase their confidence in **acquiring** digital content **or a digital service (...) and to** enable them to address problems they **might** face with digital content or digital services.
- (8) This Directive should (...) **include** rules on **supply and** conformity of the digital content **or digital service**, remedies available to consumers **against suppliers** in cases of **failure to supply or a lack of** conformity of **the** digital content **or the digital service (...)** and certain modalities for the exercise of those remedies. This Directive should also harmonise certain aspects concerning the right to terminate a long term contract, as well as certain aspects concerning the modification of the digital content **or digital service**.

- (8a) **This Directive should define its scope in a clear and unequivocal manner and provide clear substantive rules for the digital content or digital services falling within its scope. Both the scope of this Directive and its substantive rules should be technologically neutral and future-proof.**
- (9) **Where the requirements related to the matters regulated by this Directive are fully harmonised, Member States are precluded within the scope of application of this Directive from providing any further formal or substantive requirements. (...) For example, Member States should not provide any rules on the reversal of the burden of proof different from what is provided for in this Directive or an obligation of the consumer to notify the supplier of a lack of conformity within a specific period. (...)**
- (10) **This Directive should not affect national laws to the extent that the matters concerned are not regulated by this Directive, such as national rules (...) regulating the (...) formation, validity, nullity or effects of contracts or the legality of the digital content or the digital service. (...) This Directive should also not determine the legal nature of the contracts for the supply of digital content or a digital service and the question of whether such contracts constitute, for instance, a sales, service, rental or sui generis contract, is left to the national laws.⁴**

⁴ This recital takes over the idea expressed in footnote 31 of document 9901/17 ADD 1.

- (10a) *This Directive does not regulate any entitlement for compensation of damages caused to the consumer by a lack of conformity of the digital content or digital service or a failure to supply the digital content or digital service. This Directive should, therefore, not affect the possibility for Member States to enact or maintain rules on the right to damages under their national laws.*⁵
- (10b) *Member States also remain free, for example, to regulate liability claims of the consumer against third parties other than the supplier of the digital content or the digital service in the meaning of this Directive, such as developers, which are not at the same time the suppliers.*⁶
- (10c) **Member States should also remain free, for example, to regulate the consequences of a failure to supply or a lack of conformity of the digital content or digital service where such failure to supply or lack of conformity is due to an impediment beyond the control of the supplier and the supplier could not be expected to have avoided or overcome the impediment or its consequences, such as force majeure.**⁷

⁵ Corresponds to footnote 66 of document 9901/17 ADD 1.

⁶ Corresponds to the 3rd indent of footnote 4 of document 9901/17 ADD 1 with a minor amendment.

⁷ This phrase reflects the idea of footnote 32 of document 9901/17 ADD 1.

- (10d) *Member States should also remain free, for example, to regulate the rights of the parties to withhold the performance of their obligations or part thereof until the other party performs its obligations. For example, Member States should be free to regulate whether the consumer, in cases of a lack of conformity, is to be entitled to withhold payment of the price or part thereof until the supplier has brought the digital content or digital service into conformity, or whether the supplier is to be entitled to retain any reimbursement due to the consumer upon termination of the contract until the consumer complies with the obligation under this Directive to return the tangible medium to the supplier.*⁸
- (10e) *Member States should remain free to extend the application of the rules of this Directive to contracts which are excluded from the scope of this Directive, or to otherwise regulate such contracts.*⁹ For instance, Member States should remain free to extend the protection afforded to consumers by this Directive also to legal or natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or SMEs.¹⁰

⁸ Corresponds to footnote 58 of document 9901/17 ADD 1, without the reference to a specific Article and with a minor amendment.

⁹ Corresponds to footnote 18 of document 9901/17 ADD 1.

¹⁰ This phrase takes over the idea expressed in footnote 7 of document 9901/17 ADD 1.

- (10f) The definition of a consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, *Member States should also remain free to determine in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, whether and under which conditions that person should also be considered as a consumer.*¹¹
- (10g) This Directive should apply to any contract where the supplier supplies or undertakes to supply digital content or a digital service to the consumer. *Platform providers can be suppliers under this Directive if they are acting for purposes relating to their own business as the direct contractual partner of the consumer for the supply of digital content or a digital service. Member States remain free to extend the application of the rules of this Directive to platform providers which do not fulfil the requirements of being a supplier as defined in this Directive.*¹²

¹¹ This phrase takes over the idea expressed in footnote 6 of document 9901/17 ADD 1.

¹² Corresponds to the first and second indent of footnote 4 of document 9901/17 ADD 1 with minor amendments.

- (11) *The Directive should address problems across different categories of digital content, **digital services**, and **their** supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content or digital service, (...) this Directive should (...) cover, **among others, computer programmes, applications, video files, music files, games, e-books or other e-publications, and also digital services which allow the creation, processing or storage of data including software-as-a-service such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.***

*As there are numerous ways for digital content or a digital service to be supplied, such as transmission on a **tangible** medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive should apply independently of the medium used for **the** transmission **or the provision of access to the digital content or digital service**. However, **this Directive should not apply to internet access services**. (...)¹³*

¹³ Corresponds to footnote 2 of document 9901/17 ADD 1 with minor amendments.

- (12) In order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for suppliers of digital content **supplied on a tangible medium such as DVDs, CDs, USB sticks and memory cards, (...) this Directive should apply both to (...) any such tangible medium and the digital content supplied on it provided that the digital content is incorporated** in such a way that the **tangible medium** functions only as a carrier of the digital content. **However, instead of the provisions of this Directive on the supplier's obligation to supply as well as on consumer's remedies for failure to supply, the provisions of Directive 2011/83/EU of the European Parliament and of the Council¹⁴ on obligations related to the delivery of goods and remedies in the event of the failure to deliver should apply. In addition, the provisions of Directive 2011/83/EU, for example on the right of withdrawal and the nature of the contract under which those goods are supplied should also continue to apply to such tangible media and the digital content supplied on it. This Directive is also without prejudice to the distribution right applicable to these goods under copyright law.¹⁵**
- (12a) **Virtual currencies as well as other digital representations of value such as electronic vouchers or e-coupons are used by consumers to pay for different goods or services in the digital single market. Considering their increasing importance in relation to the supply of digital content or a digital service, they should, to the extent that they are recognised by national law, be considered payment within the meaning of this Directive. A differentiation depending on the methods of payment could be a cause of discrimination and provide an unjustified incentive for businesses to move towards supplying digital content or a digital service against virtual currencies.**

¹⁴ OJ L 304, 22.11.2011, p. 64–88.

¹⁵ The changes in this recital reflect the idea of footnote 17 in document 9901/17 ADD 1.

However, since virtual currencies have no other purpose than to serve as a method of payment, they themselves should not be considered as digital content or a digital service within the meaning of this Directive.¹⁶

- (13) *In the digital economy, (...) **digital content or digital services are** often supplied **without the payment of a price (...)** and suppliers use the consumer's personal data they have access to in the context of the supply of the digital content or digital service. Such business models **are used** in different forms in a considerable part of the market and (...) a level playing field should be ensured. (...)*¹⁷
- (14) *(...) This Directive should apply to contracts where the supplier (...) **supplies or undertakes to supply digital content or a digital service to the consumer. Member States should remain free to determine whether the requirements for the existence of a contract under national law are fulfilled. This Directive should not apply (...) where the consumer does not pay or does not undertake to pay a price and does not provide or undertake to provide personal data to the supplier. This Directive should not apply to situations where the supplier only collects metadata (...), the IP address, or other automatically generated information such as information collected and transmitted by cookies, (...) except where this situation is considered a contract under national law. Similarly this Directive should also not apply to situations where the consumer, without having concluded a contract with the supplier, is exposed to advertisements exclusively in order to gain access to the digital content or digital service. However, Member States should remain free to extend the application of the rules of this Directive to such situations or to otherwise regulate such situations which are excluded from the scope of this Directive.***¹⁸

¹⁶ This recital reflects the idea of footnote 9 in document 9901/17 ADD 1.

¹⁷ Corresponds to footnote 15 in document 9901/17 ADD 1.

¹⁸ Corresponds to footnote 15 of document 9901/17 ADD 1 with a minor amendment.

(15) **(Deleted)**

(16) (...) **This** Directive should apply to contracts for the development of digital content tailor made to the specific requirements of the consumer including tailor made software. This Directive should also apply to the supply of visual modelling files required in the context of 3D printing **of goods**. However this Directive should not regulate the failure to supply or lack of conformity of goods produced with the use of 3D printing technology (...).

(17) **(Deleted)**

(18) (Deleted)

(18a) Since this Directive does not apply to embedded digital content, it is necessary to clarify the meaning of this concept. *Digital content should be considered an embedded digital content if it is present in a good and if its absence would render the good inoperable or would prevent the good from performing its main functions, irrespective of whether that digital content was pre-installed at the moment of the conclusion of the contract relating to the good or according to that contract installed subsequently. In these cases, the rules applicable to goods should determine the remedies for consumers in case of a lack of conformity of the goods with embedded digital content including the embedded software. However, where the absence of the digital content does not render the good inoperable or does not impact the performance of the main functions of the good, the digital content should not be considered to be embedded in the good in terms of the definition in this Directive. Therefore, this Directive should apply to such digital content. For example, the operating system of a smartphone is an embedded digital content, as its absence would prevent the smartphone from operating and performing its main functions. By contrast, additional software applications are not embedded digital content, because the absence of such applications would not prevent the phone from working or performing its main functions. To the extent that digital content present in a good is not to be considered embedded in the good in the meaning of this Directive but is supplied to the consumer under the same contract as the good, the rules of this Directive concerning bundle contracts should apply.*¹⁹

¹⁹ Corresponds to footnote 14 of document 9901/17 ADD 1.

- (19) (...) *As this Directive applies to contracts which have as their object the supply of digital content or a digital service to the consumer, it should not apply to contracts where the main subject matter of the contract is the provision of professional services such as translation services, architectural services, legal services or other professional advice services which are often performed personally by the supplier, regardless of whether digital means are used by the supplier in order to produce the output of the service or deliver it to the consumer. Similarly, this Directive should not apply to public services such as social security services or public registers where the digital means are only used for transmitting or communicating the service to the consumer. This Directive should also not apply to authentic instruments and other notarial acts, regardless of whether they are performed, recorded, reproduced or transmitted by digital means.*²⁰
- (19a) *The market for on-line services provided by 'over the top' (OTT) communication and messaging services, that is interpersonal communication services (ICS) which are not number-dependent and do not utilise traditional communication networks but allow communications over the internet, is rapidly evolving. In recent years, the emergence of new digital services such as OTTs that provide ICS over the internet, has led more consumers to use such services as a means of communication. For these reasons, it is necessary to provide effective consumer protection with respect to these emerging services. The provisions of this Directive should therefore apply to OTTs.*²¹

²⁰ Corresponds to footnote 19 of document 9901/17 ADD 1 with a minor amendment.

²¹ Corresponds to footnote 21 of document 9901/17 ADD 1 with minor amendments.

(19b) *The provisions of this Directive should not apply to healthcare which should therefore be excluded from its scope. Directive 2011/24/EU defines healthcare as 'health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices'. The exclusion of 'healthcare' from the scope of this Directive should therefore also apply to any digital content or digital service that constitutes a medical device, as defined by Directive 93/42/EEC, 90/385/EEC or 98/79/EC, where such medical device is prescribed or provided by a health professional as defined by Directive 2011/24/EU.*

*However, the provisions of this Directive should apply to any digital content or digital service that constitutes a medical device, such as Health Apps, that the consumer obtains on the free market without being prescribed or provided by a health professional.*²²

(19c) *The existing Union legislation relating to financial services contains numerous rules on consumer protection. Financial services as defined by the legislation in that sector, in particular by Directive 2002/65/EC, cover also digital content or digital services relating to or giving access to financial services and are therefore covered by the protection of Union financial services legislation. Contracts relating to digital content or digital services that constitute a financial service should therefore be excluded from the scope of this Directive.*²³

²² Corresponds to footnote 22 of document 9901/17 ADD 1 with a minor amendment.

²³ Corresponds to footnote 23 of document 9901/17 ADD 1.

(19d) *This Directive should not apply to digital content or digital service which is provided to a public audience as part of an artistic or other event, such as a cinematographic projection or an audio-visual theatrical performance.²⁴ However, this Directive should apply if digital content or digital service is provided to a public audience by signal transmission such as digital television services.*

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

Likewise, any effects that the termination of the part of the contract relating to the supply of digital content or digital services may have on the parts of the contract relating to other elements of the contract should be governed by national law.²⁵ The provision on termination of long term contracts of this Directive should not apply to contracts including components of a bundle which comprises an electronic communications service as defined in Directive 2002/21/EC, in order to avoid possible legal uncertainty for the consumers and suppliers.

²⁴ Corresponds to footnote 24 of document 9901/17 ADD 1 with a minor amendment.

²⁵ Corresponds to footnote 26 of document 9901/17 ADD 1.

- (21) This Directive **should be without prejudice to other Union acts governing matters such as telecommunication, e-commerce and consumer protection.** This Directive (...) should also be without prejudice to **national and Union laws on copyright and related rights, including the portability of online content services.**
- (22) (...) *Union law provides a comprehensive framework on the protection of personal data. That framework applies to any personal data processed in connection with the contracts covered by this Directive. In particular, this Directive is without prejudice to the provisions of Regulation (EU) 2016/679 and Directive 2002/58/EC. In case of conflict between the provisions of this Directive and Union law on the protection of personal data, the latter prevails. Consequently, personal data should only be collected or otherwise processed in accordance with the provisions of Regulation (EU) 2016/679 (GDPR) and Directive 2002/58/EC (the e-privacy Directive).*²⁶
- (22a) *This Directive does not regulate the conditions for the lawful processing of personal data, as this question is regulated especially by the GDPR, in particular its Article 6(1). As a consequence, any processing of personal data in connection with a contract coming within the scope of this Directive is lawful only if it is in conformity with GDPR provisions relating to the legal grounds for the processing of personal data. When processing of personal data is based on consent, in particular point (a) of Article 6(1) of GDPR, the specific provisions of the GDPR including the conditions whether consent is freely given apply. This Directive should regulate neither the validity of the consent given nor the consequences of its withdrawal. The GDPR also contains comprehensive rights as to the erasure of data and data portability. This Directive is without prejudice to these rights. These rights apply to any personal data provided by the consumer to the supplier or collected by the supplier in connection with any contract coming within the scope of this Directive and when the consumer terminated the contract in accordance with this Directive.*²⁷

²⁶ Reference to be updated following ongoing amendments of this legislation.

²⁷ Recital 22 and 22a correspond to footnote 28 of document 9901/17 ADD 1 with minor amendments.

- (22b) *The right to erasure and the consumer's right to withdraw consent for the processing of personal data apply fully also in connection with the contracts covered by this Directive. The right of the consumer to terminate the contract in accordance with this Directive is without prejudice to the consumer's right in accordance with the GDPR to withdraw any consent given to the processing of his or her personal data.*²⁸
- (22c) *The Directive should not regulate the consequences for the contracts covered by this Directive in case the consumer withdraws the consent for the processing of his or her personal data. This remains a matter for national law.*²⁹

²⁸ Corresponds to footnote 29 of document 9901/17 ADD 1.

²⁹ Corresponds to footnote 30 of document 9901/17 ADD 1.

- (23) *There are various ways for digital content or digital services to reach consumers. It is opportune to set simple and clear rules as to the modalities and the time for performing the supplier's main contractual obligation to supply digital content **or a digital service** to the consumer. Considering that the supplier is not in principle responsible for acts or omissions of another entity which operates a physical or virtual facility for instance an electronic platform or a cloud storage facility, which the consumer selected for receiving or storing the digital content or digital service, it should be sufficient for the supplier to supply the digital content or digital service to this facility. However, the physical or virtual facility cannot be considered to be chosen by the consumer if this facility is under the supplier's control or is contractually linked with the supplier as well as where the consumer selected this physical or virtual facility for receiving the digital content or digital service but that choice was the only one offered by the supplier to receive or access the digital content or digital service. Where the physical or virtual facility cannot be considered chosen by the consumer, the obligation of the supplier to supply the digital content or digital service is not fulfilled if the digital content or digital service is supplied to the physical or virtual facility but the consumer cannot receive or access the digital content or digital service in accordance with this Directive. In those cases, the consumer should have the same remedies as if the supplier had failed to supply the digital content or digital service. With regard to the time of supply, in line with market practices and technical possibilities, and in order to provide for a certain degree of flexibility, the digital content or digital service should be supplied **without undue delay**, unless the parties decide to agree otherwise in order to cater for other supply models.*³⁰

³⁰ Corresponds to footnote 34 of document 9901/17 ADD 1.

(24) (...) *The digital content or digital service should comply with the requirements agreed between the supplier and the consumer in the contract. In particular, it should comply with the description, quantity (for example the number of music files that can be accessed), quality (for example the picture resolution), duration (for example the length of a movie), language and version agreed in the contract. It should also possess the security, functionality, compatibility, interoperability and other features, such as performance, accessibility and continuity, for example whether the content or service is interrupted or not, as required by the contract.*³¹ *The requirements of the contract should include those resulting from the pre-contractual information which, in line with Directive 2011/83/EU, forms an integral part of the contract.*³² These requirements might also be set forth in a service level agreement, where, under the applicable national law, a service level agreement forms part of the contractual relationship between the consumer and the supplier.

³¹ Corresponds to footnote 36 of document 9901/17 ADD 1.

³² Corresponds to footnote 37 of document 9901/17 ADD 1.

- (24a) The notion of functionality should refer to the ways in which digital content or a digital service can be used. For instance, the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding may have an impact on the possibility of the digital content or digital service to perform all its functions having regard to its purpose. The notion of interoperability describes whether and to what extent digital content or a digital service is able to operate successfully in a digital environment different from the one for which it was supplied to the consumer.
- (24b) *Given that digital content and digital services are constantly developing, suppliers may agree with consumers to provide updates and features as they become available. Therefore the conformity of the digital content or digital service should also be assessed in relation to whether the digital content or service is updated in the manner that has been stipulated in the contract. A lack of updates that are agreed to in the contract should be considered a lack of conformity of the digital content or digital service. Moreover, defective or incomplete updates should also be considered a lack of conformity of the digital content or digital service, as this would mean that they are not performed in the manner stipulated in the contract.*³³

³³ Corresponds to footnote 38 of document 9901/17 ADD 1.

(25) **In order to be in conformity with the contract and** to ensure that consumers are not deprived of their rights, **for example in cases where the contract sets very low standards, the digital content or digital service should not only comply with the subjective conformity criteria, but should in addition also comply with** objective conformity criteria **set out in this Directive.** In such cases the conformity should be assessed **inter alia** considering the purpose for which **the digital content or digital service** of the same **type** would normally be used, **while it should also possess the features which are normal for the use of the same type of digital content or digital service and which consumers may reasonably expect.** *The objective assessment of conformity should also be based on whether the supplier ensures a constant level of secure functioning of the digital content or digital service by issuing the necessary security updates, which are normal for a digital content or digital service of the same type, in order to address emerging security threats and vulnerabilities for such time as is necessary taking into account the terms and nature of the contract. For example, in the case of digital content or digital services supplied to consumers in a continuous manner over a period of time, this obligation continues to apply for the time during which the digital content or digital service is available or accessible to the consumer.*³⁴

(25a) However, in order to ensure sufficient flexibility, it should be possible for the parties to deviate from the objective conformity criteria. *A deviation from the objective requirements of conformity should only be possible if the consumer is specifically informed about it, and was therefore aware or could not be reasonably unaware of the deviation, and the consumer accepts it separately from other statements or agreements and by way of active and unequivocal conduct. Both conditions could for instance be fulfilled by ticking a box or activating a button or a similar function.*³⁵

³⁴ Corresponds to footnote 43 of document 9901/17 ADD 1.

³⁵ Corresponds to footnote 45 of document 9901/17 ADD 1.

(25b) *The standard of reasonableness with regard to any reference in this Directive to what can be reasonably expected of or by a person should be objectively ascertained, having regard to the nature and purpose of the digital content or digital service, to the circumstances of the case and to the usages and practices of the parties involved. In particular, the reasonable time for bringing the digital content or digital service in conformity should be objectively ascertained, having regard to the nature of the lack of conformity.*³⁶

(26) (Moved in an amended version to recital 24a)

(27) (Deleted)

(28) (Deleted)

(29) Many types of digital content **and digital services** are supplied over a period of time. For instance, consumers access cloud services over a period of time. It is therefore important to ensure, **for example by updates**, that the digital content **or digital service** is in conformity throughout the duration of the contract.

(29a) Given the frequent improvement of digital content **and digital services**, the version of digital content **or digital service** supplied to the consumer should be the most recent one available at the time of the conclusion of the contract, **unless otherwise agreed by the parties**.

(30) In order to work properly, digital content **or a digital service** needs to be correctly integrated into the consumer's hardware and software environment. **A** lack of conformity of the digital content **or digital service resulting** from an incorrect integration should be regarded as a lack of conformity of the digital content or digital service itself, where it was integrated by the supplier or under its control, or by the consumer following supplier's instructions for integration and the incorrect integration was due to shortcomings in the required integration instructions, **such as incompleteness or a lack of clarity of the installation instructions which the average consumer would find difficult to use.**³⁷

³⁶ Corresponds to footnote 44 of document 9901/17 ADD 1.

³⁷ This phrase reflects the idea of footnote 49 of document 9901/17 ADD 1.

- (31) *The digital content or digital service should comply with any right of a third party, in particular those based on intellectual property, so that the use of the digital content or digital service in accordance with the subjective and objective conformity criteria is not impeded. The violation of third party rights might effectively bar the consumer from enjoying the digital content or **digital service** or some of its features, (...) **for example** when the third party rightfully compels the supplier to stop infringing those rights and to discontinue offering the digital content **or digital service** in question. Legal defects are a particularly important **concern** for digital content **or digital services**, which are subject to intellectual property rights. (...) **In the event of a violation of third party rights, this Directive should not affect any national laws of the Member States which provide for the nullity of the contract, or for its rescission, for example for breach of legal warranty against eviction.***³⁸
- (32) **(Moved in an amended version to recital 34d)**
- (33) **(Moved in an amended version to recital 34e)**
- (34) *The supplier should be liable to the consumer **in the event of a** lack of conformity (...) and for any failure to supply the digital content **or digital service**. As digital content **or digital services** may be supplied to consumers through one or more individual acts of supply or continuously over a period of time, it is justified that (...) **the time for establishing conformity of the digital content or digital service should be determined according to those different moments of supply.***

³⁸ Corresponds to footnote 50 of document 9901/17 ADD 1 with minor amendments.

(34a) *Digital content or digital services can be supplied to consumers through a single act of supply, for instance when consumers download an e-book and store it on their personal device. Similarly, the supply may consist of a series of such individual acts, for instance where consumers receive a link to download a new e-book every week. The distinctive element of this category of digital content or digital service is the fact that consumers thereafter have the possibility to access and use the digital content or digital service indefinitely. In those cases, the conformity of the digital content or digital service should be assessed at the time of supply, and therefore the supplier should only be liable for any lack of conformity which exists at the time when the single act of supply or each individual act of supply takes place. In order to ensure legal certainty, suppliers and consumers should be able to rely on a harmonised minimum period during which the supplier should be held liable for a lack of conformity. In relation to contracts which provide for a single act of supply or a series of acts of supply of the digital content or digital service, Member States should ensure that the supplier should be liable for not less than two years from the time of supply if under their respective national law the supplier is only liable for any lack of conformity that becomes apparent within a period of time after supply.*

(34b) *Digital content or digital services can also be supplied to consumers in a continuous manner over a period of time. The continuous supply may include cases where the supplier makes a digital service available to consumers for a fixed or an indefinite period of time, such as a 2-year cloud storage contract or an indefinite social media platform membership. The distinctive element of this category is the fact that the digital content or service is available or accessible to consumers only during the fixed duration of the contract or for as long as the indefinite contract is in force. Therefore, it is justified that the supplier in such cases should only be liable for a lack of conformity which appears during this period of time. The element of continuous supply should not necessarily require a long-term supply. Cases such as web-streaming of a video clip should be considered continuous supply over a period of time, regardless of the actual duration of the audio-visual file. Cases where specific elements of the digital content or digital service are made available periodically or on several instances during a period of time should also be considered a continuous supply over a period of time, for instance when the contract stipulates that an anti-virus software will be automatically updated every 1st day of each month of the 1-year contractual period, or that the supplier will issue updates whenever new features of a digital game become available, and the digital content or digital service is available or accessible to consumers only during the fixed duration of the contract or for as long as the indefinite contract is in force.*³⁹

(34c) *Member States should remain free to regulate national limitation periods. However, such limitation periods should not prevent consumers from exercising their rights throughout the period during which the supplier is liable for a lack of conformity. While this Directive should therefore not harmonise the starting point of national limitation periods, it should ensure that such periods do not expire before the end of the period during which the supplier is liable for a lack of conformity.*⁴⁰

³⁹ Recital 34, 34a and 34b correspond to footnote 52 of document 9901/17 ADD 1.

⁴⁰ Corresponds to footnote 53 of document 9901/17 ADD 1.

(34d) Due to the specific nature **and high complexity** of digital content **or a digital service**, as well as the supplier's better knowledge and access to know-how, technical information and high-tech assistance, **the** supplier is **likely to be** in a better position than the consumer to know **why** the digital content **or digital service** is not **supplied or is not** in conformity. The supplier is also likely to **be** in a better position to assess whether the **failure to supply or** the lack of conformity (...) is due to **the** incompatibility of the consumer's digital environment with the technical requirements for the digital content **or digital service**. Therefore in **the** case of a dispute, **while it is for the consumer to provide evidence that the digital content or digital service is not in conformity, the consumer should not have to prove that the lack of conformity existed at the time of supply of the digital content or digital service or, in the event of continuous supply, during the duration of the contract. Instead, it should be for the supplier to prove that the digital content or digital service was in conformity (...) at that time. This burden of proof should be on the supplier for a lack of conformity which becomes apparent within one year from the time of supply where the contract provides for a single act of supply or a series of individual acts of supply or during the duration of the contract where the contract provides for continuous supply over a period of time. However, where the supplier proves that the consumer's digital environment is not compatible with the (...) technical requirements, of which he informed the consumer in a clear and comprehensible manner before the conclusion of the contract, the consumer should prove that the lack of conformity of the digital content or digital service existed at the time of supply of the digital content or digital service or, where the contract provides for continuous supply over a period of time, during the duration of the contract.** ⁴¹

⁴¹ Amended version of recital 32 of the COM proposal.

(34e) **Without prejudice to the** fundamental right to the protection of private life, including confidentiality of communications, and the protection of personal data of the consumer, the consumer should cooperate with the supplier in order **for the** supplier to ascertain **whether the cause of the lack of conformity lay in** the consumer's digital environment with the use of the technically available means which are least intrusive for the consumer (...). This may often be done for instance by providing the supplier with automatically generated incident reports, or **with** details of the consumer's internet connection. Only in exceptional and duly justified circumstances where, with the best use of all other means, there is no other way possible, **the consumer may need to allow** virtual access to his or her digital environment. However, where the consumer does not cooperate with the supplier, it should be for the consumer to prove not only **that the digital content or digital service is not in conformity, but also** that the digital content **or digital service was** not in conformity (...) **at the time of supply of the digital content or digital service or, where the contract provides for continuous supply over a period of time, during the duration of the contract.**⁴²

⁴² Amended version of recital 33 of the COM proposal.

- (35) Where the supplier has failed to supply the digital content or digital service, the consumer should call upon the supplier to supply the digital content or digital service. *In those cases, the supplier should act as quickly as possible. Considering that digital content or a digital service is supplied in digital form, the supply does not require, in the majority of situations, any additional time to make the digital content or digital service available to the consumer. Therefore, in such cases the obligation of the supplier to supply the digital content or digital service without undue delay would mean to supply it immediately.*⁴³ If the supplier then fails to supply the digital content or digital service, the consumer should be entitled to terminate the contract. In specific circumstances, such as where a specific time for the supply is essential for the consumer or where it is clear that the supplier will not supply the digital content or digital service, the consumer should be entitled to terminate the contract without first calling upon the supplier to supply the digital content or digital service.
- (35a) As regards more than negligible short-term interruptions of the supply or other problems with the accessibility or continuity of the initially supplied digital content or digital service, such problems constitute instances of lack of conformity and not instances of failure to supply and the consumer should therefore be entitled to the remedies for a lack of conformity.

⁴³ This paragraph corresponds to footnote 54 of document 9901/17 ADD 1 with minor amendments.

(36) In the case of **lack of** conformity, consumers should (...) be entitled to have the digital content **or digital service** brought **into** conformity. Depending on **the** technical characteristics of the digital content **or digital service**, the supplier may select a specific way of bringing the digital content **or digital service** into conformity, for example by issuing updates or **making** a new copy of the digital content **or digital service** **available to** the consumer. Given the diversity of digital content **and digital services**, it is not appropriate to set fixed deadlines for the exercise of rights or the fulfilling of obligations related to that digital content **or digital service**. Such deadlines may not capture this diversity and be either too short or too long, depending on the case. It is therefore more appropriate **to require that the digital content or digital service be brought into conformity within a reasonable time. This should not prevent the parties from agreeing on a specific time for bringing the digital content or digital service into conformity.**⁴⁴ The digital content **or digital service** should be brought into conformity (...) free of any costs; in particular the consumer should not incur any costs associated with the development of an update for the digital content **or digital service**.

(36a) **Where the supplier has failed to bring the digital content or digital service in conformity within a reasonable time, free of charge or without any significant inconvenience to the consumer or where bringing the digital content or digital service into conformity is legally or factually impossible or would impose disproportionate costs on the supplier, the consumer should be entitled to the remedies of price reduction or termination of the contract.**⁴⁵ **The consumer can terminate the contract only if the lack of conformity is not minor. However, where the digital content or service is not supplied in exchange for a price but personal data are provided by the consumer, the consumer is entitled to terminate the contract also in cases where the lack of conformity is minor, since the remedy of price reduction is not available to the consumer.**

⁴⁴ This sentence reflects the idea in footnote 57 of document 9901/17 ADD 1.

⁴⁵ This recital reflects the idea in footnote 56 of document 9901/17 ADD 1.

- (36b) *In certain situations it is justified that the consumer should be entitled to have the price reduced or the contract terminated immediately, for instance where the consumer cannot be expected to maintain confidence in the ability of the supplier to bring the digital content or digital service into conformity due to the serious nature of the lack of conformity, or to a previous failure of the supplier to successfully bring the digital content or digital service in conformity or where it is clear that the supplier will not bring the digital content or digital service in conformity. For example, the consumer should be entitled to directly request the termination of the contract or the price reduction where the consumer is supplied anti-virus software which itself is infected with viruses and would constitute an instance of such a serious lack of conformity.*⁴⁶
- (36c) *In a situation where the consumer is entitled to a reduction of the price paid for the digital content or digital service which is supplied over a period of time, the calculation of the price reduction should take into consideration the decrease of value both due to the lack of conformity as well as due to the time during which the consumer was unable to enjoy the digital content or digital service in conformity.*⁴⁷
- (36ca) **In cases where the consumer pays a price and provides personal data, the consumer should also be entitled to all available remedies in the event that the digital content or digital service is not in conformity. In particular, provided all other conditions are met, the consumer should be entitled to have the digital content or digital service brought into conformity, to have the price reduced in relation to the money paid for the digital content or digital service or the contract terminated.**

⁴⁶ Corresponds to footnote 60 of document 9901/17 ADD 1.

⁴⁷ Corresponds to footnote 61 of document 9901/17 ADD 1.

- (37) (...) Where the consumer terminates the contract, the supplier should reimburse the price paid by the consumer. (...) **Where personal data are provided by the consumer to the supplier, the supplier should comply with the GDPR. These obligations must also be complied with in cases where the consumer pays a price and provides personal data.**
- (37a) **There is a need to balance the legitimate interests of consumers and suppliers where the digital content or digital service is supplied over a period of time and the digital content or services were in conformity for part of that period, but not for another part. Therefore, upon termination, (...) the consumer should only be entitled to the proportionate part of the price paid corresponding to the time when the digital content or digital service was not in conformity. The consumer should also be entitled to any part of the price paid in advance for any period remaining after the contract was terminated. (...)**
- (38) **(Deleted)**
- (39) **It could discourage the consumer from exercising remedies for a lack of conformity of the digital content or digital services if he or she is deprived of access to content other than personal data, which he or she uploaded or created through the use of the digital content or digital service. In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the contract, the supplier should therefore enable the consumer to also receive such content. (...)**

- (40) Following the termination of the contract (...), the supplier **should make available to the consumer the content the consumer uploaded or created through the use of the digital content or digital service other than personal data, for example by setting up a data exchange interface. The** consumer should be entitled to retrieve the **content** free of cost, (...) with the exception of costs generated by the consumer's own digital environment, for instance the costs of a network connection as they are not specifically linked to the retrieval of the content. However, the obligation of the supplier to make available such content should not apply where the content only has utility within the context of using the digital content or digital service, or relates only to the consumer's activity when using the digital content or digital service or has been aggregated with other data by the supplier and cannot be disaggregated or only with disproportionate efforts. In those cases the content does not have significant practical use or interest for the consumer while taking into account also the interests of the supplier.

Moreover, the obligation of the supplier to make available content the consumer uploaded or created through the use of the digital content or digital service should be without prejudice to the supplier's right to protect confidential information and intellectual property.

- (40a) (...) The supplier should also refrain from using **any of such content which he has to make available to the consumer, unless** more than one consumer generated **the** particular content (...) **and** other consumers **are able to** make use of it.
- (41) Where the contract is terminated, the consumer should not be required to pay for **the** use of the digital content **or digital service for any periods during** which the **digital content or a digital service was** not in conformity (...) because that would deprive the consumer of effective protection.
- (43) **(Deleted)**

(44) **(Deleted)**

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

*Besides these modifications aimed at maintaining conformity, the supplier should be allowed under certain conditions to modify features of the digital content or digital services provided that the contract gives a valid reason for such a modification. Such valid reasons could encompass cases where the modification is necessary to adapt the digital content or digital service to a new technical environment or to an increased number of users or for other important operational reasons. In order to balance consumer and business interests, such a possibility of the supplier should be coupled with a right of the consumer to terminate the contract where these modifications negatively impact the use of or access to the digital content or digital service in a more than only minor manner. To what extent modifications negatively impact the use of or access to the digital content or digital service by the consumer should be objectively ascertained having regard to the nature and purpose of the digital content or digital service and to the quality, functionality, compatibility and other main features which are normal in digital content or service of the same type. The rules concerning such updates, upgrades or similar modifications should however not concern situations where, for instance as a consequence of distributing a new version of the digital content or digital service, the parties conclude a new contract for the supply of the digital content or digital service.*⁴⁸

- (45a)** The consumer should be informed of modifications in a clear and comprehensible manner. Where a modification negatively impacts in a more than minor manner the access or use of the digital content or digital service by the consumer, the consumer should be informed on a durable medium. *A durable medium should enable the consumer to store the information for as long as it is necessary for him or her to protect his or her interests stemming from his or her relationship with the supplier. Such media should include, in particular, paper, DVDs, CDs, USB sticks, memory cards or the hard disks as well as e-mails.*⁴⁹

⁴⁸ Corresponds to footnote 67 of document 9901/17 ADD 1 with a minor amendment.

⁴⁹ Corresponds to footnote 12 of document 9901/17 ADD 1.

(45b) *Where a modification negatively impacts in a more than minor manner the access or use of the digital content or digital service by the consumer, the consumer should enjoy as a result of such a modification the right to terminate the contract free of any cost. Where the requirements for such a modification as indicated under this Directive are not satisfied and the modification results in a lack of conformity, the consumer's rights of bringing the digital content or digital service in conformity, having the price reduced or the contract terminated as provided for under this Directive remain unprejudiced. Similarly, where, subsequently to a modification a lack of conformity of the digital content or digital service occurs that has not been caused by the modification, the consumer should continue to be entitled to rely on remedies for the lack of conformity in relation to this digital content or digital service as provided for under this Directive.*⁵⁰

⁵⁰ Corresponds to footnote 68 of document 9901/17 ADD 1 without the references to specific Articles and with minor amendments.

- (46) (...) In order to stimulate competition **in the digital single market**, consumers should be enabled to respond to competitive offers and to switch between suppliers (...) without being hindered by legal, technical or practical obstacles (...). However, it is also important to protect existing investments and trust in concluded contracts. Therefore consumers should be given the right to terminate long term contracts with a fixed duration under certain balanced conditions. This does not preclude **the conclusion of** contracts for longer contractual periods. However, the consumer should be entitled to terminate any **contract concluded for a fixed duration** that (...) lasts for a period **longer** than 12 months. (...) **Member States should remain free to regulate the right of the consumer to terminate contracts of an indeterminate duration in cases other than those where termination is regulated by this Directive. Furthermore, Member States should remain free to regulate the right of the consumer to terminate a contract during a procedure on adjustment of debts.**⁵¹ **Member States should also remain free to regulate the conditions under which a fixed term contract can be tacitly renewed and the conditions under which such tacit renewals can be deemed as a continuation of the initial contractual period.**⁵² **However, the consumer should be entitled to terminate any fixed duration contract tacitly renewed after expiration of 12 months.**
- (47) The lack of conformity of the digital content **or digital service** as supplied to the consumer is often due to one of the transactions in a chain, from the original designer to the final supplier. While the final supplier should be liable towards the consumer in **the** case of lack of conformity between these two parties, it is important to ensure that the supplier has appropriate rights vis-à-vis different members of the chain of transactions in order to be able to cover his liability towards the consumer. However, it should be for the applicable national law to identify the members of the chains of transactions against which the final supplier can turn and the **detailed arrangements** and conditions of such actions.

⁵¹ Corresponds to footnotes 69 and 70 of document 9901/17 ADD 1.

⁵² The changes in this recital reflect the idea of footnote 69 of document 9901/17 ADD.

- (48) Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual rights should be afforded the right to initiate proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.
- (49) Nothing in this Directive should prejudice the application of the rules of private international law, in particular Regulations (EC) No 593/2008⁵³ and (EC) No 1215/2012⁵⁴ of the European Parliament and of the Council.
- (50) Directive 1999/44/EC of the European Parliament and of the Council⁵⁵ should be amended to reflect the scope of this Directive in relation to a **tangible** medium incorporating digital content where it has been used exclusively as carrier of the digital content to the consumer.
- (51) Regulation (EC) No 2006/2004 of the European Parliament and of the Council⁵⁶ should be amended to include a reference to this Directive in Annex I to **that Directive** so as to facilitate cross-border cooperation on enforcement of this Directive.
- (52) Directive 2009/22/EC of the European Parliament and of the Council⁵⁷ should be amended to include a reference to this Directive in its Annex so as to ensure that the consumers' collective interests laid down in this Directive are protected.

⁵³ OJ L 177, 4.7.2008, p. 6–16.

⁵⁴ OJ L 351, 20.12.2012, p.1.

⁵⁵ OJ L 171, 7.7.1999, p.12.

⁵⁶ OJ L 364, 9.12.2004, p. 1.

⁵⁷ OJ L 110, 1.05.2009, p.30.

- (53) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents⁵⁸, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (53a) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered an opinion on 14 March 2017.⁵⁹
- (54) Since the objectives of this Directive, namely to contribute to the functioning of the internal market by tackling in a consistent manner contract law-related obstacles for the supply of digital content **or a digital service** while preventing legal fragmentation cannot be sufficiently achieved by the Member States but can rather, by reasons of ensuring the overall coherence of the national **laws** through harmonised contract law rules which would also facilitate coordinated enforcement actions, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (55) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and, **in particular**, Articles 7, 8, 16, 38 and 47 thereof.

HAVE ADOPTED THIS DIRECTIVE:

⁵⁸ OJ C 369, 17.12.2011, p. 14.

⁵⁹ OJ C 200, 23.6.2017, p. 10–13.