



Plenary sitting

A8-0375/2017

27.11.2017

*****I**
REPORT

on the proposal for a directive of the European Parliament and of the Council
on certain aspects concerning contracts for the supply of digital content
(COM(2015)0634 – C8-0394/2015 – 2015/0287(COD))

Committee on the Internal Market and Consumer Protection
Committee on Legal Affairs

Rapporteurs: Evelyne Gebhardt, Axel Voss

(Joint committee procedure – Rule 55 of the Rules of Procedure)

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the ▯ symbol or ~~strikeout~~. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

CONTENTS

	Page
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION.....	5
EXPLANATORY STATEMENT.....	89
OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS	93
PROCEDURE – COMMITTEE RESPONSIBLE.....	121
FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE.....	122

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content
(COM(2015)0634 – C8-0394/2015 – 2015/0287(COD))**

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2015)0634),
 - having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0394/2015),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the reasoned opinion submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the French Senate, asserting that the draft legislative act does not comply with the principle of subsidiarity,
 - having regard to the opinion of the European Economic and Social Committee of 27 April 2016¹,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the joint deliberations of the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs under Rule 55 of the Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A8-0375/2017),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a directive Title 1

¹ OJ C 264, 20.7.2016, p. 57.

Text proposed by the Commission

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)

Amendment

Proposal for a
DIRECTIVE OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
on certain aspects concerning contracts for
the supply of digital content **and digital
services**

(Text with EEA relevance)

Amendment 2

**Proposal for a directive
Recital 1**

Text proposed by the Commission

(1) The growth potential of e-commerce has not yet been fully **exploited**. The Digital Single Market Strategy for Europe²⁹ 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. Ensuring better access for consumers to digital content and facilitating businesses to supply digital content is necessary to boost the Union's digital economy and stimulate overall growth.

²⁹ COM (2015) 192 *final*.

Amendment

(1) The growth potential of e-commerce **in the Union** has not yet been fully **realised**. The Digital Single Market Strategy for Europe²⁹ 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. Ensuring better access for consumers to digital content and facilitating businesses to supply digital content is necessary to boost the Union's digital economy and stimulate overall growth.

²⁹ COM (2015)0192.

Amendment 3

**Proposal for a directive
Recital 1 a (new)**

Text proposed by the Commission

Amendment

**(1a) Article 169(1) and point (a) of
Article 169(2) of the Treaty on the
Functioning of the European Union**

(TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU.

Amendment 4

Proposal for a directive Recital 1 b (new)

Text proposed by the Commission

Amendment

(1b) Article 38 of the Charter of Fundamental Rights of the European Union (“the Charter”) provides that Union policies are to ensure a high level of consumer protection and Article 47 of the Charter provides that everyone whose rights under Union law are violated is to have the right to an effective remedy. Article 16 of the Charter recognises the freedom to run a business in accordance with Union and national law and practices.

Amendment 5

Proposal for a directive Recital 2

Text proposed by the Commission

Amendment

(2) *For the achievement of* a genuine digital single market, *the harmonisation of* certain aspects concerning contracts for supply of digital content, taking as a base a high level of consumer protection, *is necessary.*

(2) *To achieve* a genuine digital single market, 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 increase legal certainty and to reduce transaction costs.*

Amendment 6

Proposal for a directive

Recital 3

Text proposed by the Commission

(3) Differences in national mandatory consumer contract law rules and a lack of clear contract law rules are among the key obstacles which hinder the development of the supply of digital content, as very few tailor-made rules exist at Union level. Businesses face additional costs stemming from differences in national mandatory consumer contract law rules and legal uncertainty when selling digital content across borders. Businesses *also* face costs when adapting their contracts to specific mandatory rules for the supply of digital content are already emerging in several Member States, creating differences in scope and content between specific national rules governing these contracts. In those Member States where there are not yet specific rules for the supply of digital content, traders willing to sell cross-border face uncertainty, as they will often not know which rules apply to digital content in the Member State they want to export to, nor the content of those rules and whether they are mandatory.

Amendment

(4) Businesses, *especially small and medium-sized enterprises ('SMEs')*, 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. In those Member States where there are not yet specific rules for the supply of digital content *or digital services*, traders willing to sell cross-border face uncertainty, as they will often not know which rules apply to digital content *or digital services* in the Member State they want to export to, nor the content of those rules and whether they are mandatory.

Justification

The order of Recitals 3 and 4 is inverted.

Amendment 7

Proposal for a directive

Recital 4

Text proposed by the Commission

(4) Consumers are not 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

Amendment

(3) 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

contractual framework for digital content. Many consumers *of digital content* experience problems related to the quality of, or access to, digital content. For instance, they receive wrong or faulty digital content, or they are not able to access the digital content in question. As a result, consumers suffer financial and non-financial detriment.

lack of a clear contractual framework for digital content *or digital services*. Many consumers experience problems related to the quality of, or access to, digital content *or digital services*. For instance, they receive wrong or faulty digital content *or digital services*, 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.

Justification

The order of Recitals 3 and 4 is inverted.

Amendment 8

Proposal for a directive Recital 5

Text proposed by the Commission

(5) In order to remedy these problems, both businesses and consumers should be able to rely on fully harmonised rules for the supply of digital content setting out Union-wide contractual rights *which are essential for this type of transactions*.

Amendment

(5) In order to remedy these problems, both businesses and consumers should be able to rely on fully harmonised rules for *some key regulatory aspects of* the supply of digital content *or digital services*. *Those rules should set out* Union-wide contractual rights, *whilst allowing Member States to maintain national rules in relation to certain other aspects. In that regard, the ambition of this Directive is to strike the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity*.

Amendment 9

Proposal for a directive Recital 6

Text proposed by the Commission

(6) **Fully** harmonised consumer contract law rules in all Member States will make it easier for businesses to offer digital content cross-border. They will have a stable contract law environment when selling online and otherwise at a distance to other Member States. **Fully harmonised rules specific for digital content throughout the EU will remove the complexity caused by the different national rules that currently apply to contracts for the supply of digital content.** They will also prevent legal fragmentation that otherwise would arise from new national legislations regulating specifically digital content.

Amendment

(6) Harmonised consumer contract law rules in all Member States will make it easier for businesses to offer digital content cross-border. They will have a stable contract law environment when selling online and otherwise at a distance to other Member States. They will also prevent legal fragmentation that otherwise would arise from new national legislations regulating specifically digital content **and digital services.**

Amendment 10

Proposal for a directive Recital 7

Text proposed by the Commission

(7) Consumers **will** benefit from fully harmonised rights for digital content at a high level of protection. They **will** have clear rights when they receive or access digital content from anywhere in the **EU**. This **will** increase their confidence in buying digital content. **This will** also contribute to reducing the detriment consumers currently suffer, since there will be a set of clear rights that will enable them to address problems they face with digital content.

Amendment

(7) Consumers **should** benefit from fully harmonised rights for digital content **and digital services** at a high level of protection. They **should** have clear **mandatory** rights when they receive or access digital content **or digital services** from anywhere in the **Union**. This **should** increase their confidence in buying digital content **or digital services**. This **should** also contribute to reducing the detriment consumers currently suffer, since there will be a set of clear rights that will enable them to address problems they face with digital content **or digital services**.

Amendment 11

Proposal for a directive Recital 7 a (new)

Text proposed by the Commission

Amendment

(7a) *This Directive should also apply to dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is marginal within the overall context of the contract, so that that person should also be considered a consumer.*

Amendment 12

Proposal for a directive

Recital 8

Text proposed by the Commission

(8) This Directive should fully harmonise **a set of** key rules that are so far not regulated at Union level. It should include therefore rules on conformity of the digital content, remedies available to consumers in cases of lack of conformity of digital content with the contract 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.

Amendment

(8) This Directive should fully harmonise **certain** key rules that are so far not regulated at Union **or national** level. It should include therefore rules on conformity of the digital content **or digital services**, remedies available to consumers in cases of lack of conformity of digital content **or digital services** with the contract 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 services**.

Amendment 13

Proposal for a directive

Recital 9

Text proposed by the Commission

(9) By fully harmonising **all** requirements related to the **topics** regulated by this Directive, it precludes Member

Amendment

(9) By fully harmonising **the** requirements related to the **matters** regulated by this Directive, it precludes

States, within its scope of application, from providing any further formal or substantive requirements, such as *a period during which the lack of conformity has to become apparent*, an obligation for the consumer to notify the *supplier* of a lack of conformity within a specific period *or an obligation for the consumer to pay for the use of the digital content until the moment of termination because of a lack of conformity with the contract*.

Member States, within its scope of application, from providing any further formal or substantive requirements, such as *any rules on the reversal of the burden of proof resulting in an outcome that is different to that provided for in this Directive* *or* an obligation for the consumer to notify the *trader* of a lack of conformity within a specific period.

Amendment 14

Proposal for a directive Recital 10

Text proposed by the Commission

(10) This Directive should not affect national laws to the extent that the topics concerned are not regulated by this Directive, such as national rules providing for obligations of the consumer towards the supplier of digital content or regulating the qualification, formation and validity of contracts or the legality of the content. Member States should also remain free to provide rules for the detailed conditions for the exercise of rights, such as the right to damages to the extent not covered by the Directive, or rules which provide for the consequences of termination of the contract which apply in addition to restitution rules regulated by this Directive.

Amendment

(10) This Directive should not affect national laws to the extent that the topics concerned are not regulated by this Directive, such as national rules providing for obligations of the consumer towards the supplier of digital content or regulating the qualification, formation and validity of contracts or the legality of the content. Member States should also remain free to provide rules for the detailed conditions for the exercise of rights, such as the right to damages to the extent not covered by the Directive, or rules which provide for the consequences of termination of the contract which apply in addition to restitution rules regulated by this Directive. ***Member States should be allowed to maintain or introduce national rules on remedies for 'hidden defects'. Member States should be allowed to maintain national rules on the short-term right to reject, where available in their respective legal orders on the date of entry into force of this Directive.***

Amendment 15

Proposal for a directive Recital 10 a (new)

Text proposed by the Commission

Amendment

(10a) This Directive should not affect national laws governing the conditions under which a contract for the supply of digital content or digital services is considered to be linked with or ancillary to another contract which the consumer has concluded with the supplier or another trader, and the effect this has on either contract or on the remedies to be exercised under either contract. Member States should also be free to determine the nature of such contracts, including sales, services, rental or sui generis contracts.

Amendment 16

Proposal for a directive Recital 10 b (new)

Text proposed by the Commission

Amendment

(10b) However, without prejudice to the European Electronic Communications Code^{1a}, where, under a contract or a bundle of contracts, the trader offers digital content or a digital service in combination with other services such as interpersonal communication services or goods and the digital content or digital service is not pre-installed in the goods, this Directive should only apply to the digital content or digital service component of such a bundle. The other elements should be governed by the applicable law.

^{1a} Directive .../... of the European Parliament and of the Council of ... establishing the European Electronic

Justification

Recital 10 b (new) replaces Recital 20 in the Commission proposal (see AM 27).

Amendment 17

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) *The* Directive should address problems across different categories of digital content and *its* supply. In order to ***cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than*** in Directive 2011/83/EU of the European Parliament and of the Council.³⁰ ***In particular it*** should cover services which allow the creation, processing or storage of data. While there are numerous ways for digital content to be supplied, such as transmission on a ***durable*** 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 to all digital content independently of the medium used for *its* transmission. Differentiating between different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between ***suppliers***. ***A level-playing field between suppliers of different categories of digital content should be ensured. However this Directive should not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the***

Amendment

(11) ***This*** Directive should address problems across different categories of digital content ***or digital services*** and ***their*** supply. In order to ***ensure consistency with the acquis***, the notion of digital content should ***correspond to that used*** in Directive 2011/83/EU of the European Parliament and of the Council³⁰ ***and*** should cover, ***for example, text, video, audio, applications, digital games and any other software. In order to respond to the fast pace of technological developments and to make this Directive future-proof, it should also cover digital*** services which allow the creation, processing or storage of data, ***as well as services which allow the sharing of data in digital form, including number-independent interpersonal communication services if they are not regulated by the European Electronic Communications Code.*** While there are numerous ways for digital content ***or digital services*** to be supplied, such as transmission on a ***CD, DVD or similar*** medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital ***services*** or access to the use of social media, this Directive should apply to all digital content ***or digital services*** independently of the medium used for ***their*** transmission. Differentiating between

main functionalities of the goods.

different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between *traders*. A *level playing* field between *traders* of different categories of digital content *or digital services* should be ensured.

³⁰ OJ L 304, 22.11.2011, p.64.

³⁰ *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council* (OJ L 304, 22.11.2011, p.64).

Amendment 18

Proposal for a directive Recital 12

Text proposed by the Commission

(12) In order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for *suppliers* of digital content *offered on a durable medium*, in relation to conformity requirements and remedies available to consumers for non-conformity, this Directive should apply to goods such as DVDs and CDs, *incorporating* digital content *in such a way that the goods function only as a carrier of the digital content*. The Directive should apply to *the digital content supplied on a durable medium*, independently whether *it is sold* at a distance or in face-to-face situations, so as to avoid fragmentation between the different distribution channels. *The* Directive 2011/83 should continue to apply to those goods, including *to* obligations

Amendment

(12) In order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for *traders* of *goods in which* digital content *or a digital service is embedded*, in relation to conformity requirements and remedies available to consumers for non-conformity, this Directive should apply to *digital content or digital services pre-installed in* goods, such as DVDs and CDs *or 'smart goods'*. *As regards such goods, the trader should be liable under this Directive to the consumer for meeting his obligations only in respect of the embedded digital content or digital service. Liability for the other elements of those goods should be governed by the applicable law.* This Directive should apply to *embedded* digital content *or services* independently whether

related to the delivery of goods, remedies in case of the failure to deliver and the nature of the contract under which those goods are supplied. **The** Directive is also without prejudice to the distribution right applicable to **these** goods under copyright law.

the goods in which they are pre-installed are supplied at a distance or in face-to-face situations, so as to avoid fragmentation between the different distribution channels. Directive **2011/83/EU** should continue to apply to those goods, including ***the*** obligations related to the delivery of goods, remedies in case of the failure to deliver and the nature of the contract under which those goods are supplied. ***The rules on supply of and failure to supply digital content or digital services of this Directive do not, therefore, apply to embedded digital content and embedded digital services.*** **This** Directive is also without prejudice to the distribution right applicable to **those** goods under copyright law.

Amendment 19

Proposal for a directive Recital 13

Text proposed by the Commission

(13) In the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content **is** often supplied not in exchange for a price but against **counter-performance other than money** i.e. by giving access to personal data or other data. Those specific business models apply in different forms in a considerable part of the market. Introducing a differentiation depending on the nature of the counter-performance would discriminate between different business models; ***it would provide*** an unjustified incentive for businesses to move towards offering digital content against data. ***A level playing field should be ensured.*** In addition, defects of the performance features of the digital content supplied against **counter-performance other than money** may have an impact on the economic interests of consumers.

Amendment

(13) In the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content **and digital services are** often supplied not in exchange for a price but against **data**, i.e. by giving access to personal data or other data. Those specific business models apply in different forms in a considerable part of the market. Introducing a differentiation depending on the nature of the counter-performance would discriminate between different business models, ***which provides*** an unjustified incentive for businesses to move towards offering digital content **or digital services** against data. In addition, defects of the performance features of the digital content **or digital service** supplied against **data as counter-performance** may have an impact on the economic interests of consumers. ***In order to ensure a level***

Therefore the applicability of the rules of this Directive should not depend on whether a price is paid for the specific digital content in question.

playing-field, the applicability of the rules of this Directive should not depend on whether a price is paid for the specific digital content *or digital service* in question.

Amendment 20

Proposal for a directive Recital 13

Text proposed by the Commission

(13) In the digital economy, information about individuals is often and increasingly seen by market participants as having a value *comparable to money*. Digital content *is often supplied not in exchange for a price but against counter-performance other than money i.e. by giving* access to personal *data or other* data. Those specific business models apply in different forms in a considerable part of the market. Introducing a differentiation *depending on the nature of the counter-performance would discriminate between different business models; it* would provide an unjustified incentive for businesses to *move towards offering* digital content *against data*. *A level playing field should be ensured*. In addition, defects of the performance features of the digital content supplied *against counter-performance other than money may* have an impact on the economic interests of consumers. *Therefore* the applicability of the rules of this Directive should not depend on whether a price is paid for the specific digital content in question.

Amendment

(13) In the digital economy, information about individuals is often and increasingly seen by market participants as having a value. *Specific business models have developed in which traders supply* digital content *or a digital service and the consumer is required to provide or give* access to personal data. Those specific business models *already* apply in different forms in a considerable part of the market. *This Directive does not intend to decide whether such contracts should be allowed or not. In addition, it leaves to national law the question of validity of contracts for the supply of digital content or a digital service where personal data are provided or accessed. This Directive should, in no way, give the impression that it legitimises or encourages a practice based on monetisation of personal data, as personal data cannot be compared to a price, and therefore cannot be considered as a commodity. However,* introducing a differentiation *in the rules applying to monetary and non-monetary transactions* would provide an unjustified incentive for businesses to *favour the supply of* digital content *or digital services on condition that personal data is provided*. In addition, defects of the performance features of the digital content *or digital service* supplied *when no price is paid might* have an impact on the economic interests of consumers. *With a view to ensuring a level*

playing-field and a high level of consumer protection, the applicability of the rules of this Directive should not depend on whether a price is paid for the specific digital content *or digital service* in question.

Amendment 21

Proposal for a directive Recital 14

Text proposed by the Commission

(14) As regards digital content supplied not in exchange for a price but *against counter-performance other than money*, this Directive should apply *only* to contracts where the *supplier* requests and the consumer *actively* provides data, *such as* name and e-mail address or photos, directly or indirectly to the *supplier* for example through individual registration or on the basis of a contract which allows access to consumers' photos. This Directive should not apply to situations where the *supplier* collects *data necessary for the digital content to function in conformity with the contract, for example geographical location where necessary for a mobile application to function properly*, or for the sole purpose of meeting legal requirements, for instance where the registration of the consumer is required for security and identification purposes by applicable laws. *This Directive should also not apply to situations where the supplier collects information, including personal data, such as the IP address, or other automatically generated information such as information collected and transmitted by a cookie, without the consumer actively supplying it, even if the consumer accepts the cookie.* It should also not apply to situations where the consumer is exposed to advertisements exclusively in order to

Amendment

(14) As regards digital content *and digital services* supplied not in exchange for a price but *when personal data is provided*, this Directive should apply to contracts where the *trader* requests and the consumer provides *personal* data, *as well as where the trader collects personal data. It would include, for example, the* name and e-mail address or photos, *provided* directly or indirectly to the *trader*, for example through individual registration or on the basis of a contract which allows access to consumers' photos, *or personal data collected by the trader, such as the IP address*. This Directive should not apply to situations where the *trader* collects *personal data exclusively to supply, keep in conformity or improve digital content or a digital service* or for the sole purpose of meeting legal requirements, for instance where the registration of the consumer is required for security and identification purposes by applicable laws. It should also not apply to situations where the consumer is exposed to advertisements exclusively in order to gain access to digital content *or a digital service*.

gain access to digital content.

Amendment 22

Proposal for a directive

Recital 15

Text proposed by the Commission

(15) Content generated by consumers should be treated on the same basis as any other digital content that the consumer provides or stores throughout the period of duration of the contract such as music and video files, pictures, games or applications. Content generated by consumers comprises a wide range of examples including digital images, video and audio files, blogs, discussion forums, text-based collaboration formats, posts, chats, tweets, logs, podcasting, content created on mobile devices, content created in the context of online virtual environments, ratings and collections of links referring to online content.

Amendment

(15) Content generated by consumers should be treated on the same basis as any other digital content ***or digital services*** that the consumer provides or stores throughout the period of duration of the contract such as music and video files, pictures, games or applications, ***unless this Directive provides otherwise***. Content generated by consumers comprises a wide range of examples including digital images, video and audio files, blogs, discussion forums, text-based collaboration formats, posts, chats, tweets, logs, podcasting, content created on mobile devices, content created in the context of online virtual environments, ratings and collections of links referring to online content.

Amendment 23

Proposal for a directive

Recital 15 a (new)

Text proposed by the Commission

Amendment

(15a) Suppliers of video files, pictures, software applications and other digital content should provide assurances with regard to the safety of digital content they provide, offering a high level of protection for consumers against malware.

Amendment 24

Proposal for a directive

Recital 16

Text proposed by the Commission

(16) In order to ensure a common set of rights for consumers and a level playing field for **business**, consumers should have the same remedies for digital content which **is** not in conformity with the contract irrespective of the way the content has been developed. Consequently **the** 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. However this Directive should not regulate goods produced with the use of 3D printing technology or the damage caused to them.

Amendment

(16) In order to ensure a common set of rights for consumers and a level playing field for **businesses**, consumers should have the same remedies for digital content **or digital services** which **are** not in conformity with the contract irrespective of the way **in which** the content **or service** has been developed. Consequently, **this** Directive should apply to contracts for the development of digital content **or digital services** tailor made **for** 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. However this Directive should not regulate goods produced with the use of 3D printing technology or the damage caused to them.

Amendment 25

Proposal for a directive Recital 17

Text proposed by the Commission

(17) **Digital content is highly relevant in the context of the** Internet of Things. However it is opportune to address specific issues of liability related to **the Internet of Things, including the liability for data and** machine-to-machine contracts, in a separate way.

Amendment

(17) **This Directive should apply to devices connected as part of the Internet of Things (“IoT devices”)**. However it is opportune to address specific issues of liability related to machine-to-machine contracts in a separate way.

Amendment 26

Proposal for a directive Recital 18

Text proposed by the Commission

(18) Contracts may include general terms and conditions of the **supplier** that need to be accepted by the consumer. For **some** digital **content**, **suppliers** often describe the service and measurable service targets in a service level agreement. These service level agreements are generally appended to the main contract and form an important component of the contractual relationship between the **supplier** and the consumer. They should be covered by **the definition of a contract under** this Directive, and should thus comply with the rules laid down therein.

Amendment

(18) Contracts may include general terms and conditions of the **trader** that need to be accepted by the consumer. For digital **services**, **traders** often describe the service and measurable service targets in a service level agreement. These service level agreements are generally appended to the main contract and form an important component of the contractual relationship between the **trader** and the consumer. They should be covered by this Directive, and should thus comply with the rules laid down therein.

Amendment 27

Proposal for a directive

Recital 19

Text proposed by the Commission

(19) This Directive should apply only to those services whose main subject matter is providing digital **content**. Therefore, the Directive should not apply to services, which are performed personally by the **supplier** and where the digital means are only used for access or delivery purposes, such as a translation offered by a person or other professional advice services where only the output of the service is delivered to the consumer by digital means.

Amendment

(19) This Directive should apply only to those services whose main subject matter is providing digital **services**. Therefore, the Directive should not apply to services, which are performed personally by the **trader** and where the digital means are only used for access or delivery purposes, such as a translation offered by a person or other professional advice services where only the output of the service is delivered to the consumer by digital means.

Amendment 28

Proposal for a directive

Recital 20

Text proposed by the Commission

Amendment

(20) Where, under a contract or a bundle of contracts, the supplier offers digital content in combination with other services such as telecommunication services or goods, which do not function merely as a carrier of the digital content, this Directive should only apply to the digital content component of such a bundle. The other elements should be governed by the applicable law.

deleted

Justification

Amended Recital 20 moved as Recital 10 b (new).

Amendment 29

Proposal for a directive Recital 21

Text proposed by the Commission

Amendment

(21) This Directive should not deal with copyright and other intellectual property related aspects of the supply of digital content. Therefore it should be without prejudice to any rights and obligations according to copyright law and other intellectual property laws.

(21) This Directive should not deal with copyright and other intellectual property related aspects of the supply of digital content **or digital services**. Therefore it should be without prejudice to any rights and obligations according to copyright law and other intellectual property laws.

Amendment 30

Proposal for a directive Recital 22

Text proposed by the Commission

Amendment

(22) The **protection of individuals with regard** to the processing of personal data is governed by Directive 95/46/EC of the European Parliament and of the

(22) The **pursuit of activities falling within the scope of this Directive involves the processing of personal data. This Directive is without prejudice to the rules**

Council³¹ and by Directive 2002/58/EC of the European Parliament and of the Council³² which are fully applicable in the context of contracts for the supply of digital content. *Those Directives already establish a legal framework in the field of personal data in the Union.* The implementation and application of this Directive should be made in full compliance with that legal framework.

³¹ OJ L 281, 23/11/1995, p. 31 - 50) [to be replaced by the General Data Protection Regulation, once adopted].

³² OJ L 201, 31.7.2002, p. 37–47.

of Union law applicable to the processing of personal data *within the Union, in particular Regulation (EU) 2016/679 of the European Parliament and of the Council^{31a} and Directive 2002/58/EC of the European Parliament and of the Council³² which together govern the processing of personal data carried out in the Member States under the supervision of the Member States' competent authorities, and in particular of the public independent authorities designated by the Member States. Those legal acts already establish a Union legal framework in the field of personal data and are fully applicable in the context of contracts for the supply of digital content or digital services.* The implementation and application of this Directive should be made in full compliance with that legal framework.

^{31a} Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

³² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

Amendment 31

Proposal for a directive Recital 22 a (new)

Text proposed by the Commission

Amendment

(22a) The scope of this Directive includes 'Internet of Things' (IoT) applications, which are often designed to be contextually aware of the needs and desires of the user, collecting information about their daily practices and routines, whilst remaining invisible in use and unremarkable to users. Although consumers may at least have had a chance to read the privacy policy of their IoT device before signing the contract, these privacy policies are not always understandable. Moreover, IoT devices are routinely designed with poor, or no, encryption strength and a lack of other security features. It is also common for them to rely heavily on wireless communications protocols which lack mandatory technical and security standards. Consumers generally have no idea about IoT security and, as a result, default passwords are often installed in household appliances, are never changed and are routinely compromised. This Directive, in conjunction with the core principles of Regulation (EU) 2016/679, provides for civil liability when IoT devices fail to include privacy in the architecture of the product, and for contract terms which violate any right which has been afforded to the consumer as a data subject under Regulation (EU) 2016/679 not to be binding.

Amendment 32

Proposal for a directive Recital 23

Text proposed by the Commission

(23) There are various ways for digital content 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 to the consumer. Considering that the **supplier** is not in principle responsible for acts or omissions of an internet provider or an electronic platform which the consumer selected for receiving the digital content, it should be sufficient for the **supplier** to supply the digital content to this third party. With regard to the time of supply, in line with market practices and technical possibilities, the digital content should be supplied **immediately**, unless the parties decide to agree otherwise in order to cater for other supply models.

Amendment

(23) There are various ways for digital content **or digital services** to reach consumers **or to be made accessible to them**. It is opportune to set simple and clear rules as to the modalities and the time for performing the **trader's** main contractual obligation to supply digital content **or a digital service** to the consumer. Considering that the **trader** is not in principle responsible for acts or omissions of an internet provider or an electronic platform which the consumer selected for receiving the digital content **or digital service**, it should be sufficient for the **trader** to supply the digital content **or digital service** to this third party **or to any other party designated by the consumer**. With regard to the time of supply, in line with market practices and technical possibilities, the digital content **or digital service** should be supplied **without undue delay after the conclusion of the contract**, unless the parties decide to agree otherwise in order to cater for other supply models.

Amendment 33

Proposal for a directive
Recital 24

Text proposed by the Commission

(24) ***In order to promote innovation in the Digital Single Market and cater for technological developments reflected in the fast changing characteristics of digital content, it is justified for the digital content to be, above all, in conformity with what was agreed in the contract.***

Amendment

deleted

Amendment 34

Proposal for a directive

Recital 25

Text proposed by the Commission

(25) In *cases where* the contract *does not* stipulate sufficiently clear and comprehensive benchmarks to ascertain the conformity of the digital content with the contract, *it* is necessary to set objective conformity criteria to ensure that consumers are not deprived of their rights. *In such cases* the conformity with the contract should be assessed considering the *purpose* for which digital content of the same description would normally be used.

Amendment

(25) *In order to provide clarity as to what a consumer can expect from the digital content or digital service concerned and what the trader would be liable for in the event of failure to supply it, it is essential to harmonise rules for determining conformity with the contract. Applying a combination of subjective and objective criteria should safeguard the legitimate interests of both parties to the contract.* The contract *should* stipulate sufficiently clear and comprehensive benchmarks to ascertain the conformity of the digital content *or digital service* with the contract. *It is also* necessary to set objective conformity criteria to ensure that consumers are not deprived of their rights. The conformity with the contract should be assessed considering the *quality and performance* for which digital content *or digital services* of the same description would normally be used, *taking into account what can be reasonably expected by the consumer, the nature of the digital content or digital service and, if applicable, any public statements on the specific characteristics of the digital content or digital service made by or on behalf of the trader, the producer or his representative, particularly in advertising or on labelling. Consumers' expectations vary widely depending on the type and the use of digital content and services and should therefore be objectively ascertained.*

Amendment 35

Proposal for a directive
Recital 25 a (new)

(25a) While freedom of contract with regard to the criteria of conformity with the contract should be ensured, in order to avoid circumvention of liability for lack of conformity and to ensure a high level of consumer protection, any contract clause that derogates from the mandatory rules on criteria of conformity and incorrect integration of the digital content or the digital service and that is detrimental to the interests of the consumer shall be valid only if the consumer has been specifically informed and expressly consented to it when concluding the contract.

Amendment 36

Proposal for a directive

Recital 26

Text proposed by the Commission

Amendment

(26) Due to *its* nature digital content ***needs*** to interact with other digital equipment to function properly; interoperability should therefore form a part of the conformity criteria. ***In particular it needs to interact with hardware including processor speed and graphics card features and software including a specific version of the operating system or specific multi-media player. The notion of*** functionality should ***refer to*** the ways in which digital content can be used; it should also ***refer*** to the absence or presence of any technical restrictions such as protection via Digital Rights Management or regional coding.

(26) Due to ***their*** nature, digital content ***and digital services need*** to interact with other digital equipment to function properly; interoperability should therefore form a part of the conformity criteria. ***Interoperability should be understood as the ability of the digital content or digital service to perform all its functionalities by interacting with a particular digital environment.*** Functionality should ***be understood as*** the ways in which digital content ***or a digital service*** can be used; it should also ***be understood as including*** the absence or presence of any technical restrictions such as protection via Digital Rights Management or regional coding. ***The consumer should be notified in advance of the authorised uses of the digital content, such as private copying. Where the contract concerns copyright-***

protected works, the conformity of the contract implies that all copyright laws have been respected. Contractual clauses that specifically prevent the lawful enjoyment of exceptions or limitations laid down in copyright law should constitute a lack of conformity. The conditions under which exceptions or limitations are enjoyed should continue to be determined by Union rules on copyright and related rights, which are not modified by this Directive.

Amendment 37

Proposal for a directive Recital 27

Text proposed by the Commission

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. **As recognised by the Digital Single Market Strategy** a high level of network and information security is essential across the European Union to ensure respect of fundamental rights such as the right to privacy and personal data, to increase user confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those data-driven services and technologies ensure that those qualities are guaranteed, to the extent that is proportionate to the role and function those technologies play. In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains.

Amendment

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. A high level of network and information security is essential across the European Union to ensure respect of fundamental rights such as the right to privacy and **protection of** personal data, to increase user confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security, and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those data-driven services and technologies ensure that those qualities are guaranteed, to the extent that is proportionate to the role and function those technologies play. In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains. **In this context it is important to stress that updates, including security updates, are**

necessary for ensuring the security of the operating software of smart goods such as smartphones, which require the installation by the consumer as soon as possible of the most recent version provided by the trader in order for the consumer to be protected against exploitation by persons acting with malicious intent.

Amendment 38

Proposal for a directive

Recital 28

Text proposed by the Commission

(28) When applying the rules of this Directive, **suppliers** should make use of standards, open technical specifications, good practices and codes of conduct, including in relation to the commonly used data format for retrieving the content generated by the user or any other content provided by the consumer, whether established at the international level, the European level or at the level of a specific industry sector. In this context, the Commission may **consider the promotion of** the development of international and European standards and the drawing up of a code of conduct by trade associations and other representative organisations that could support the uniform implementation of **the** Directive.

Amendment

(28) When applying the rules of this Directive, **traders** should make use of standards, open technical specifications, good practices and codes of conduct, including in relation to the commonly used data format for retrieving the content generated by the user or any other content provided by the consumer, **and including on the security of information systems and digital environments**, whether established at the international level, the European level or at the level of a specific industry sector. In this context, the Commission may **call for** the development of international and European standards and the drawing up of a code of conduct by trade associations and other representative organisations that could support the uniform implementation of **this** Directive.

Amendment 39

Proposal for a directive

Recital 28 a (new)

(28a) During a reasonable period of time, the trader should provide the consumer with updates, including security updates, in order to keep the digital content or digital service in conformity with the contract. The consumer should remain free to install those updates or not. For instance, the consumer may decide not to install the updates supplied to him where this would require an upgrade to his operating system. However, in such cases, if the consumer decides not to install the updates, the consumer cannot, unless the trader expressly agrees otherwise, reasonably expect the digital content or digital service to remain in conformity with the contract. The consumer should be made aware of the fact that the consumer's decision not to install necessary updates, including security updates, will be taken into account when assessing the trader's responsibility for maintaining the conformity of the digital content or digital service in conformity.

Amendment 40

Proposal for a directive

Recital 29

Text proposed by the Commission

(29) Many types of digital content are supplied over a period of time. **For instance, consumers** access cloud services **over a period of time**. It is therefore **important** to ensure that the digital content is in conformity with the contract throughout the duration of the contract. Moreover, given the frequent improvement of digital content, notably by updates, the version of digital content supplied to the consumer should be the most recent one

Amendment

(29) Many types of digital content **or digital services** are supplied over a period of time, **such as** access **to** cloud services. It is therefore **necessary** to ensure that the digital content **or digital service** is in conformity with the contract throughout the duration of the contract. **Significant, continuous and recurring interruptions to the supply of digital content or digital service which fall within the responsibility of the trader should be treated as cases of**

available at the time of the conclusion of the contract.

non-conformity. Moreover, given the frequent improvement of digital content *and digital services*, notably by updates, the version of digital content *or of a digital service* supplied to the consumer should be the most recent one available at the time of the conclusion of the contract, *unless the parties to the contract expressly agree that an older version will be supplied, for instance in order to ensure interoperability with the digital environment of the consumer*.

Amendment 41

Proposal for a directive Recital 30

Text proposed by the Commission

(30) In order to work properly, digital content needs to be correctly integrated into the consumer's *hardware and software* environment. Where a lack of conformity with the contract of the digital content results from an incorrect integration, it should be regarded as a lack of conformity with the contract of the digital content 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. In such scenarios the origin of the lack of conformity stems from the sphere of the *supplier*.

Amendment

(30) In order to work properly, digital content *or a digital service* needs to be correctly integrated into the consumer's *digital* environment. Where a lack of conformity with the contract of the digital content *or digital service* results from an incorrect integration, it should be regarded as a lack of conformity with the contract of the digital content *or digital service* itself, where it was integrated by the *trader* or under its control, or by the consumer following *the trader's* instructions for integration and the incorrect integration was due to shortcomings in the required integration instructions. In such scenarios the origin of the lack of conformity stems from the sphere of the *trader*.

Amendment 42

Proposal for a directive Recital 31

Text proposed by the Commission

(31) Conformity should cover material as well as legal defects. Third party rights might effectively bar the consumer from enjoying the digital content or some of its features in accordance with the contract if those third party rights are infringed, and if when the third party rightfully compels the **supplier** to stop infringing those rights and to discontinue offering the digital content in question. Legal defects are particularly important for digital content, which, by **its** nature, is subject to intellectual property rights. Therefore the **supplier** should be obliged to ensure that the digital content is free from any right of a third party, for example a copyright claim related to the digital content, which precludes the consumer from enjoying the digital content in accordance with the contract.

Amendment

(31) Conformity should cover material as well as legal defects. Third party rights might effectively bar the consumer from enjoying the digital content **or digital service** or some of its features in accordance with the contract if those third party rights are infringed, and if when the third party rightfully compels the **trader** to stop infringing those rights and to discontinue offering the digital content **or digital services** in question. Legal defects are particularly important for digital content **or digital services**, which, by **their** nature, **are** subject to intellectual property rights. Therefore the **trader** should be obliged to ensure that the digital content **or digital service** is free **from any restrictions resulting** from any right of a third party, for example a copyright claim related to the digital content **or digital service**, which precludes the consumer from enjoying the digital content **or digital service** in accordance with the contract.

Amendment 43

**Proposal for a directive
Recital 31 a (new)**

Text proposed by the Commission

Amendment

(31a) In order to avoid a legal lacuna in consumer protection in relation to contracts for the supply of digital content and digital services, the conditions for any binding commercial guarantees, and in particular pre-contractual information, advertising and guarantee statements should be laid down.

Amendment 44

Proposal for a directive

Recital 32

Text proposed by the Commission

(32) Due to the specific nature of digital content with *its* high complexity as well as the *supplier's* better knowledge and access to know how, technical information and high-tech assistance, it is the *supplier* who is in a better position than the consumer to know *the reasons for* the digital content not *being* in conformity with the contract. The *supplier* is also in a better position to assess whether the lack of conformity with the contract is due to incompatibility of the consumer's digital environment with the technical requirements for the digital content. Therefore in case of a dispute it should be for the *supplier* to prove that the digital content is in conformity with the contract, unless the *supplier* proves that the consumer's digital environment is not compatible with the digital content. *Only* where the *supplier* proves that the consumer's digital environment is not compatible with the interoperability and other technical requirements, it should be for the consumer to prove that the digital content is not in conformity with the contract.

Amendment

(32) Due to the specific nature of digital content *and digital services* with *their* high complexity as well as the *trader's* better knowledge and access to know how, technical information and high-tech assistance, it is the *trader* who is in a better position than the consumer to know *why* the digital content *or digital service is* not in conformity with the contract. The *trader* is also in a better position to assess whether the lack of conformity with the contract is due to incompatibility of the consumer's digital environment with the technical requirements for the digital content *or digital service*. Therefore, in case of a dispute, it should be for the *trader* to prove that the digital content *or digital service* is in conformity with the contract, unless the *trader* proves that the consumer's digital environment is not compatible with the digital content *or digital service*. Where the *trader* proves that the consumer's digital environment is not compatible with the interoperability and other technical requirements, it should be for the consumer to prove that the digital content *or service* is not in conformity with the contract. *The period of time during which the burden of proof for the lack of conformity with the contract is on the trader should be two years from the time when the digital content or digital service was supplied. This time limit should be reduced to one year in the case of digital content or a digital service embedded in goods. In the case of long-term contracts for the supply of digital content or a digital service, the burden of proof should remain on the trader throughout the duration of the contract.*

Amendment 45

Proposal for a directive

Recital 33

Text proposed by the Commission

(33) Without prejudice to the fundamental rights 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 to allow the **supplier** to ascertain the consumer's digital environment with the use of the least intrusive means which are at the disposal of both parties in the circumstances. This may often be done for instance by providing the **supplier** with automatically generated incident reports or 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, this may also be done by allowing virtual access to the consumer's digital environment. However, where the consumer does not cooperate with the **supplier**, it should be for the consumer to prove that the digital content is not in conformity with the contract.

Amendment

(33) Without prejudice to the fundamental rights 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 **trader** in order to allow the **trader** to ascertain the consumer's digital environment with the use of the least intrusive means which are at the disposal of both parties in the circumstances, **with the aim of determining whether the lack of conformity existed at the time of the supply of the digital content or digital service**. This may often be done for instance by providing the **trader** with automatically generated incident reports or 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, this may also be done by allowing virtual access to the consumer's digital environment. However, where the consumer does not cooperate with the **trader**, it should be for the consumer to prove that the digital content **or digital service** is not in conformity with the contract, **provided that the consumer was informed of this consequence of non-cooperation**.

Amendment 46

Proposal for a directive

Recital 34

Text proposed by the Commission

(34) The **supplier** should be liable to the consumer **for the lack of conformity with the contract and** for any failure to supply the digital content. **Moreover**, given that digital content may be supplied over a

Amendment

(34) The **trader** should be liable to the consumer for any failure to supply the digital content **or digital service and for any lack of conformity of the digital content or digital service with the contract**

period of time, *it is justified that the supplier* should be liable for any lack of conformity which occurs during that period.

that becomes apparent within two years from the time of supply. Given that digital content *or digital services* may be supplied over a period of time, *the trader* should be liable for any lack of conformity which occurs during that period. *As regards embedded digital content or embedded digital services, a similar legal guarantee regime as that which is applicable to normal goods should apply. In order to increase consumer confidence and boost cross-border sales, both online and offline, further progress should be made in the process of harmonising consumer legislation. The two-year minimum legal guarantee period laid down in Directive 1999/44/EC of the European Parliament and of the Council^{1a} should become a fully harmonised norm. However, in order not to decrease consumer protection in certain Member States, those Member States that have already introduced longer or different models of guarantee periods by the time of entry into force of this Directive should be able to maintain them.*

^{1a} *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12).*

Amendment 47

Proposal for a directive Recital 35

Text proposed by the Commission

(35) *A failure of the supplier* to supply the digital content to the consumer in accordance with the contract *is a serious breach of the main contractual obligation of the supplier, which* should allow the consumer to immediately terminate the contract. Where the *supplier* has initially not failed to supply the digital content,

Amendment

(35) *Where the trader fails* to supply the digital content *or digital services* to the consumer in accordance with the contract, *the consumer should call upon the trader to make the supply. Any failure to supply the digital content or digital service without undue delay* should allow the consumer to immediately terminate the

interruptions of the supply making the digital content not available or accessible to the consumer over a short period of time should be treated as non-conformity with the contract, and not a failure to supply. In particular, the requirement of proper continuity of the digital content should also cover more than negligible short term interruptions of the supply.

contract, ***unless the parties expressly agree to an additional period of time for the supply of the digital content or digital service***. Where the *trader* has initially not failed to supply the digital content ***or digital services***, interruptions of the supply making the digital content ***or digital services*** not available or accessible to the consumer over a short period of time should be treated as non-conformity with the contract, and not a failure to supply. In particular, the requirement of proper continuity of the digital content ***or digital services*** should also cover more than negligible short term interruptions of the supply.

Amendment 48

Proposal for a directive Recital 36

Text proposed by the Commission

(36) In the case of non-conformity with the contract, consumers should as a first step be entitled to have the digital content brought ***to*** conformity with the contract. Depending on technical characteristics of the digital content, ***the supplier may*** select a specific way of bringing the digital content ***to*** conformity with the contract, for example by issuing updates or requiring the consumer to access a new copy of the digital content. Given the diversity of digital content, it is not appropriate to set fixed deadlines for the exercise of rights or the fulfilling of obligations related to that digital content. 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 refer to reasonable deadlines. The digital content should be brought into conformity with the contract ***within a reasonable time and*** free of any costs; in particular the consumer should not incur any costs associated with the development of an update for the

Amendment

(36) In the case of non-conformity with the contract, consumers should as a first step be entitled to have the digital content ***or digital service*** brought ***into*** conformity with the contract. Depending on ***the*** technical characteristics of the digital content ***or digital service, the trader should*** select a specific way of bringing the digital content ***or digital service into*** conformity with the contract, for example by issuing updates or requiring the consumer to access a new copy of the digital content. ***To avoid any significant inconvenience for the consumer, the trader should not be entitled to make more than one attempt to rectify the same defect.*** 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

digital content.

is therefore more appropriate to refer to reasonable deadlines. The *reasonable time for bringing the digital content or digital service into conformity with the contract should be objectively ascertained, having regard to the nature of the digital content or service and the lack of conformity. The digital content or digital service* should be brought into conformity with the contract free of any costs; in particular the consumer should not incur any costs associated with the development of an update for the digital content.

Amendment 49

Proposal for a directive

Recital 37

Text proposed by the Commission

(37) As a second step, the consumer should be entitled to have the price reduced or the contract terminated. The right of a consumer to have the contract terminated should be limited to those cases where for instance bringing the digital content *to* conformity is not possible and the non-conformity impairs the main performance features of the digital content. Where the consumer terminates the contract, the supplier should reimburse the price paid by the consumer *or, where the digital content is supplied not in exchange for a price but against access to data provided by the consumer, the supplier should refrain from using it, from transferring that data to third parties or allowing third parties to access it after termination of the contract. Fulfilling the obligation to refrain from using data should mean in the case when the counter-performance consists of personal data, that the supplier should take all measures in order to comply with data protection rules by deleting it or rendering it anonymous in such a way that the consumer cannot be identified by any means likely reasonably to be used*

Amendment

(37) As a second step, the consumer should be entitled to have the price reduced or the contract terminated. The right of a consumer to have the contract terminated should be limited to those cases where for instance bringing the digital content *or digital service into* conformity is not possible and the non-conformity impairs the main performance features of the digital content *or digital service. In the case of contracts concluded by digital means, the trader should provide the consumer with an easy digital means to terminate the contract, for instance, an online form.* Where the consumer terminates the contract, the *trader* should reimburse the price paid by the consumer.

either by the supplier or by any other person. Without prejudice to obligations of a controller under Directive 95/46/EC the supplier should not be obliged to undertake any further steps in relation to data which the supplier has lawfully provided to third parties in the course of the duration of the contract for the supply of the digital content.

Amendment 50

Proposal for a directive Recital 38

Text proposed by the Commission

(38) Upon termination the **supplier** should **also** refrain from using the content generated by the consumer. However, in those cases where **more than one consumer generated particular content, the supplier** is entitled to continue to use the content generated by the consumer where **those** other consumers make use of it.

Amendment

(38) Upon termination the **trader** should refrain from using the content generated by the consumer. However, in those cases where **the user-generated content either has no utility outside the eco-system or only relates to the consumer's activity, or has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts, the trader** is entitled to continue to use the content generated by the consumer. **This is also the case** where **more than one consumer generated particular content and** other consumers **can continue to** make use of it. **This includes individual content contributions by a consumer to a collaborative project that other consumers continue to make use of. Such individual content contributions should be reusable by the trader under the conditions under which they were originally provided by the consumer also after the contract is terminated.**

Amendment 51

Proposal for a directive Recital 39

(39) *In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the contract, the supplier should allow the consumer to retrieve all data uploaded by the consumer, produced by the consumer with the use of the digital content or generated through the consumer's use of the digital content. This obligation should extend to data which the supplier is obliged to retain under the contract for the supply of the digital content as well as to data which the supplier has effectively retained in relation to the contract.*

deleted

Amendment 52

Proposal for a directive Recital 40

(40) *Where, following the termination of the contract because of a lack of conformity with the contract, the **supplier provides** the consumer **with the technical means to retrieve the** data, the consumer should be entitled to retrieve the **data** free of any costs, **for example the cost of employing** a commonly used data format **with the exception of costs generated by the consumer's own digital environment including the costs of a network connection as they are not specifically linked with the retrieval of the data.***

(40) Following the termination of the contract because of a lack of conformity with the contract, the **trader should make available to the consumer any user-generated content that does not constitute personal data, unless such content has no utility outside the context of the digital content or digital service supplied by the trader, it only relates to the consumer's activity when using the digital content or digital service supplied by the trader, or it has been aggregated with other data by the trader and cannot be disaggregated or to do so would require disproportionate effort to be made.** The consumer should be entitled to retrieve the **content** free of any costs, **and in** a commonly used **and machine-readable** data format.

Amendment 53

Proposal for a directive Recital 41

Text proposed by the Commission

(41) Where the contract is terminated, the consumer should not be required to pay for the use of digital content **which** is not in conformity with the contract because that would deprive the consumer of effective protection.

Amendment

(41) Where the contract is terminated, the consumer should not be required to pay for the use of digital content **or a digital service that** is not in conformity with the contract because that would deprive the consumer of effective protection.

Amendment 54

Proposal for a directive Recital 42

Text proposed by the Commission

(42) Considering the need to balance legitimate interests of consumers and **suppliers**, where the digital content provided over a period of time in exchange for a payment of a price, gives rise to the right to terminate, the consumer should be entitled to terminate only the part of the contract which corresponds to the time when the digital content was not in conformity with the contract. **However where the digital content is provided against a counter-performance other than money partial termination is not feasible because it is impossible to proportionally apportion a counter-performance other than money.**

Amendment

(42) Considering the need to balance legitimate interests of consumers and **traders**, where the digital content **or the digital service** provided over a period of time in exchange for a payment of a price, gives rise to the right to terminate, the consumer should be entitled to terminate only the part of the contract which corresponds to the **period of** time when the digital content **or the digital service** was not in conformity with the contract.

Amendment 55

Proposal for a directive Recital 43

Text proposed by the Commission

(43) **Due to its nature the digital content is not subject to wear and tear**

Amendment

deleted

while being used and it is often supplied over a period of time rather than as a one-off supply. It is, therefore, justified not to provide a period during which the supplier should be held liable for any lack of conformity which exists at the time of the supply of the digital content.

Consequently Member States should refrain from maintaining or introducing such a period. Member States should remain free to rely on national prescription rules in order to ensure legal certainty in relation to claims based on the lack of conformity of digital content.

Amendment 56

Proposal for a directive Recital 44

Text proposed by the Commission

(44) The principle of the *supplier's* liability for damages is an essential element of the contracts for supply of digital content. *In order to increase consumers' trust in digital content this principle should thus be regulated at Union level to ensure that consumers do not suffer a detriment if their hardware or software is damaged by digital content which is not in conformity with the contract.* Therefore, *consumers* should be entitled to a compensation for *damages* caused *to the consumer's digital environment* by a lack of conformity with the contract or a failure to supply the digital content. However, *it* should be *for Member States to lay down the detailed conditions for the exercise of the right to damages while taking into account that discounts on prices for future supplies of the digital content, especially when offered by suppliers as an exclusive compensation for losses, do not necessarily put the consumer as nearly as possible into the position in which the consumer would have been if the digital*

Amendment

(44) The principle of the *trader's* liability for damages is an essential element of the contracts for supply of digital content *or digital services*. Therefore, *the consumer* should be entitled to *claim* compensation for *detriment* caused by a lack of conformity with the contract or a failure to supply the digital content *or digital service*. However, *if the existence of such a right to claim damages is ensured in all Member States, it should not be regulated at Union level and should be determined by national law*.

content had been duly supplied and been in conformity with the contract.

Amendment 57

Proposal for a directive

Recital 45

Text proposed by the Commission

(45) *Due to technological or other reasons the supplier might be compelled to change features of the digital content supplied over a period of time. These changes are often to the advantage of the consumer as they improve the digital content. Consequently, the parties to the contract may include respective clauses in the contract which allow the **supplier** to undertake modifications. However, where such modifications negatively affect the way the consumer benefits from main performance features of the digital content, they may disturb the balance of the contract or the nature of the performance due under the contract to an extent that the consumer may not have concluded such a contract. **Therefore, in such cases** these modifications should **be subject to certain conditions**.*

Amendment

(45) *The trader should be allowed under certain conditions to **modify main performance** features of the digital content **or digital service** supplied over a period of time, **such as its accessibility and continuity provided 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**. These changes are often to the advantage of the consumer as they improve the digital content **or digital service**. Consequently, the parties to the contract may include respective clauses in the contract which allow the **trader** to undertake modifications. However, where such modifications negatively affect the way the consumer benefits from main performance features of the digital content **or digital service**, they may disturb the balance of the contract or the nature of the performance due under the contract to an extent that the consumer may not have concluded such a contract. **In order to balance consumer and business interests, such a possibility offered to the trader 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 merely minor way. 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, interoperability and other main features which are normal in digital content or a digital 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.

Amendment 58

Proposal for a directive Recital 45 a (new)

Text proposed by the Commission

Amendment

(45a) Where such a modification negatively impacts 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 conditions under which the modification is allowed are not satisfied, the consumer's rights to remedies for the lack of conformity remain unprejudiced. Similarly, where, subsequent 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 in this Directive.

Amendment 59

Proposal for a directive Recital 46

(46) Competition is an important element for a well-functioning digital single market. In order to stimulate such a competition, consumers should be enabled to respond to competitive offers and to switch between *suppliers*. In order to make this work in practice, they should be able to do so without being hindered by legal, technical or practical obstacles, including contractual conditions or lack of means for retrieving all data uploaded by the consumer, produced by the consumer with the use of the digital content or generated through the consumer's use of the digital content. However, it is also important to protect existing investments and the trust in concluded contracts. Therefore consumers should be given the right to terminate long-term contracts under certain balanced conditions. This does not preclude that consumer contracts may be concluded for longer contractual periods. However, the consumer should be entitled to terminate any contractual relation that altogether lasts for a period **longer than** 12 months. In order to prevent any circumvention of this right it should cover any contract which results in the consumer being bound by the contract **for more than** 12 months, irrespective of whether the contract *is of indeterminate* duration or is extended automatically or following *a* subsequent **agreement by the parties**.

(46) Competition is an important element for a well-functioning digital single market. In order to stimulate such a competition, consumers should be enabled to respond to competitive offers and to switch between *traders*. In order to make this work in practice, they should be able to do so without being hindered by legal, technical or practical obstacles, including contractual conditions or lack of means for retrieving all data uploaded by the consumer, produced by the consumer with the use of the digital content or generated through the consumer's use of the digital content. However, it is also important to protect existing investments and the trust in concluded contracts. Therefore consumers should be given the right to terminate long-term contracts under certain balanced conditions. This does not preclude that consumer contracts may be concluded for longer contractual periods. ***In the case of earlier termination, any advantages resulting from the conclusion of contracts with a duration exceeding 12 months should be reimbursed proportionately. The trader should provide information about the conditions and consequences for early termination of fixed-term contracts with a duration exceeding 12 months.*** However, the consumer should be entitled to terminate any contractual relation that altogether lasts for a period **exceeding** 12 months. In order to prevent any circumvention of this right it should cover any contract which results in the consumer being bound by the contract **exceeding** 12 months, irrespective of whether the contract **has an initial fixed** duration **exceeding 12 months** or is extended automatically or following a **combination of subsequent contracts or renewal periods exceeding 12 months**.

Amendment 60

Proposal for a directive Recital 47

Text proposed by the Commission

(47) The lack of conformity with the contract of the final digital content 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 case of lack of conformity with the contract between these two parties, it is important to ensure that the **supplier** has appropriate rights vis-a-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 modalities and conditions of such actions.

Amendment

(47) The lack of conformity with the contract of the final digital content **or digital service** as supplied to the consumer is often due to one of the **financial** transactions in a chain, from the original designer to the final **trader**. While the final **trader** should be liable towards the consumer in case of lack of conformity with the contract between these two parties, it is important to ensure that the **trader** has appropriate rights vis-a-vis different members of the chain of **financial** transactions in order to be able to cover his liability towards the consumer. **These rights should be strictly limited to financial transactions and not extend to situations where, for instance, the trader re-uses free third party software that the trader did not pay for.** However, it should be for the applicable national law to identify the members of the chains of transactions against which the final **trader** can turn and the modalities and conditions of such actions. **Member States should ensure that national law adequately protects the trader when determining the person against whom the trader is able to pursue remedies, the time periods and the relevant actions and conditions of exercise.**

Amendment 61

Proposal for a directive Recital 47 a (new)

Text proposed by the Commission

Amendment

(47a) This Directive does not aim to introduce a legal framework for free software licenses, where free software is

part of the provided digital content or digital service, nor does it aim to impose an obligation onto a developer merely by virtue of the fact that he has publicly made the software available under a free software license.

Amendment 62

Proposal for a directive Recital 48

Text proposed by the Commission

(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.

Amendment

(48) Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual ***and data protection*** 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. ***Those complaints or proceedings should be sufficient as a deterrent.***

Amendment 63

Proposal for a directive Recital 50

Text proposed by the Commission

(50) Directive 1999/44/EC ***of the European Parliament and of the Council***³⁵ should be amended to reflect the scope of this Directive in relation to ***a durable medium incorporating*** digital content ***where it has been used exclusively as carrier of the digital content to the consumer.***

Amendment

(50) Directive 1999/44/EC should be amended to reflect the scope of this Directive in relation to ***embedded*** digital content ***and embedded digital services.***

³⁵ OJ L 171, 7.7.1999, p.12

Amendment 64

Proposal for a directive
Recital 54 a (new)

Text proposed by the Commission

Amendment

(54a) In the light of the importance of the issues and rights addressed in this Directive for the internal market and for consumers and citizens of the Union, this Directive should be subject to close scrutiny and review, to include meaningful and detailed consultation and involvement with Member States and consumer, legal and business organisations at Union level.

Amendment 65

Proposal for a directive
Recital 55

Text proposed by the Commission

Amendment

(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 specifically *Article 16, 38 and 47* thereof.

(55) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter and specifically *Articles 7, 8, 16, 38 and 47* thereof.

Amendment 66

Proposal for a directive
Article -1 (new)

Text proposed by the Commission

Amendment

Article -1

Data protection

This Directive is without prejudice to the rules on protection of individuals with regard to the processing of personal data as granted by or in compliance with, in particular, Regulation (EU) 2016/679.

Amendment 67

Proposal for a directive Article 1 – paragraph 1

Text proposed by the Commission

This Directive *lays* down certain requirements concerning contracts for the supply of digital content *to* consumers, in particular rules on conformity of digital content with the contract, remedies in case of *the* lack of *such* conformity and the modalities for the exercise of those remedies as well as on modification and termination of *such* contracts.

Amendment

The purpose of this Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by laying down certain requirements concerning contracts for the supply of digital content *or digital services between traders and* consumers, in particular rules on conformity of digital content *or digital services* with the contract, remedies in case of *failure to supply digital content or digital services or* lack of conformity and the modalities for the exercise of those remedies as well as on modification *of the digital content or digital service* and termination of *long-term* contracts.

Amendment 68

Proposal for a directive Article 2 – paragraph 1 – point 1

Text proposed by the Commission

1. “digital content” means
 - (a) data which is produced and supplied in digital form, *for example video, audio, applications, digital games and any other software,*
 - (b) *a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and*

Amendment

1. “digital content” means data which is produced and supplied in digital form;

(c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service;

Amendment 69

Proposal for a directive Article 2 – paragraph 1 – point 1 a (new)

Text proposed by the Commission

Amendment

1a. 'digital service' means

(a) a service that allows the creation, processing or storage of data in digital form, where such data are uploaded or created by the consumer, or

(b) a service that allows the sharing of, and any other interaction with, data in digital form that has been uploaded or created by the consumer or by other users of the service, or both;

Amendment 70

Proposal for a directive Article 2 – paragraph 1 – point 1 b (new)

Text proposed by the Commission

Amendment

1b. 'embedded digital content or digital service' means digital content or a digital service pre-installed in a good;

Amendment 71

Proposal for a directive Article 2 – paragraph 1 – point 2

Text proposed by the Commission

2. 'integration' means linking **together** different components of **a** digital environment **to act as a coordinated whole in conformity with its intended purpose**;

Amendment

2. 'integration' means linking **and incorporating digital content or a digital service with the** different components of **the consumer's** digital environment **in order for the digital content or digital service to be used in accordance with the contract**;

Amendment 72

Proposal for a directive
Article 2 – paragraph 1 – point 3

Text proposed by the Commission

3. '**supplier**' means any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft, or profession;

Amendment

3. '**trader**' means any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft, or profession **in relation to contracts covered by this Directive**;

Amendment 73

Proposal for a directive
Article 2 – paragraph 1 – point 5

Text proposed by the Commission

5. 'damages' means a sum of money to which consumers may be entitled as compensation for **economic damage to their digital environment**;

Amendment

5. 'damages' means a sum of money to which consumers may be entitled as compensation for **detriment caused by a failure to supply the digital content or digital service or by a lack of conformity of the digital content or digital service with the contract**;

Amendment 74

Proposal for a directive

Article 2 – paragraph 1 – point 6

Text proposed by the Commission

6. 'price' means money that is due in exchange for digital content supplied;

Amendment

6. 'price' means money that is due in exchange for digital content **or a digital service** supplied;

Amendment 75

Proposal for a directive

Article 2 – paragraph 1 – point 7

Text proposed by the Commission

7. '**contract**' means an agreement intended to give rise to obligations or other legal effects;

Amendment

deleted

Amendment 76

Proposal for a directive

Article 2 – paragraph 1 – point 8

Text proposed by the Commission

8. 'digital environment' means hardware, **digital content** and any network connection to the extent that **they are** within the control of the user;

Amendment

8. 'digital environment' means hardware, **software** and any network connection to the extent that **it is** within the control of the user **and used by the consumer to access or make use of digital content or a digital service**;

Amendment 77

Proposal for a directive

Article 2 – paragraph 1 – point 9

Text proposed by the Commission

9. 'interoperability' means the ability of digital content to perform all its functionalities in interaction with a concrete digital environment;

Amendment

9. 'interoperability' means the ability of digital content *or a digital service* to perform all its functionalities in interaction with a concrete digital environment ***including by allowing consumers to access digital content or a digital service without having to use applications or other technologies to convert the digital content or digital service they want to have access to;***

Amendment 78

Proposal for a directive

Article 2 – paragraph 1 – point 10

Text proposed by the Commission

10. 'supply' means providing access to digital content or making digital content available;

Amendment

deleted

Amendment 79

Proposal for a directive

Article 2 – paragraph 1 – point 11 a (new)

Text proposed by the Commission

Amendment

11a. 'minor lack of conformity' means a lack of conformity that does not impair the functionality, interoperability and other main performance features of the digital content or digital service, such as its accessibility, continuity and security, where required by Article 6 and point (a) of Article 6a(1) .

Amendment 80

Proposal for a directive Article 3 – paragraph 1

Text proposed by the Commission

1. This Directive shall apply to any contract where the *supplier* supplies *digital content to the consumer* or undertakes to *do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data*.

Amendment

1. This Directive shall apply to any contract where the *trader* supplies or undertakes to *supply digital content or a digital service to the consumer whether through the payment of a price or under the condition that personal data is provided by the consumer or collected by the trader or a third party in the interest of the trader*.

Amendment 81

Proposal for a directive Article 3 – paragraph 2

Text proposed by the Commission

2. This Directive shall apply to any contract for the supply of digital *product* developed *according to* consumer's specifications.

Amendment

2. This Directive shall apply to any contract for the supply of digital *content or digital services* developed *in accordance with the* consumer's specifications.

Amendment 82

Proposal for a directive Article 3 – paragraph 3

Text proposed by the Commission

3. With the exception of Articles 5 and 11, this Directive shall apply to *any durable medium incorporating* digital content *where the durable medium has been used exclusively as carrier of* digital content.

Amendment

3. With the exception of Articles 5 and 11, this Directive shall apply to *embedded* digital content *or embedded digital services. Unless otherwise provided, references to* digital content *or digital services in this Directive also cover embedded digital content or embedded*

digital services. As regards goods with embedded digital content or embedded digital services, the trader shall be liable under this Directive to the consumer for meeting his obligations only in respect of the embedded digital content or digital service. The rules of this Directive are without prejudice to the protection granted to consumers by the applicable Union law with respect to other elements of such goods.

Amendment 83

Proposal for a directive Article 3 – paragraph 4

Text proposed by the Commission

4. This Directive shall not apply to digital content *provided against counter-performance other than money to the extent the supplier requests the consumer to provide personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose. It shall equally not apply to any other data the supplier requests the consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes.*

Amendment

4. This Directive shall not apply *where personal data provided by the consumer or collected by the trader is exclusively processed by the trader for supplying, maintaining the conformity of or improving this digital content or service or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose.*

Amendment 84

Proposal for a directive Article 3 – paragraph 5 – point a

Text proposed by the Commission

Amendment

(a) services performed *with a predominant element of human intervention* by the *supplier* where the *digital format is used mainly as a carrier*;

(a) services performed *personally* by the *trader and* where the *digital means are only used for the purposes of access or delivery*;

Amendment 85

Proposal for a directive

Article 3 – paragraph 5 – point b

Text proposed by the Commission

Amendment

(b) *electronic* communication services as defined in *Directive 2002/21/EC*;

(b) *interpersonal* communication services as defined in *the European Electronic Communications Code, with the exception of number-independent interpersonal communication services to the extent that those are not regulated in the European Electronic Communications Code*;

Amendment 86

Proposal for a directive

Article 3 – paragraph 5 – point e a (new)

Text proposed by the Commission

Amendment

(ea) *the provision of digital content or digital services under a free or open licence insofar as no contractual relations or obligations exist in addition to those concerning the adherence to the terms of the licence*;

Amendment 87

Proposal for a directive

Article 3 – paragraph 5 a (new)

5a. *This Directive shall not apply to the provision of public registers established in electronic form and of excerpts from such registers.*

Amendment 88

Proposal for a directive Article 3 – paragraph 6

Text proposed by the Commission

Amendment

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

6. Where a contract ***for*** the supply of digital content ***or digital services includes additional contractual obligations***, this Directive shall only apply to the ***rights and obligations*** of the parties ***in their respective capacities*** as ***trader*** and consumer of the digital content ***or digital service***.

Amendment 89

Proposal for a directive Article 3 – paragraph 7

Text proposed by the Commission

Amendment

7. If any provision of this Directive conflicts with a provision of another Union act governing a specific sector or subject matter, the provision of that other Union act shall ***take precedence over this Directive***.

7. If any provision of this Directive conflicts with a provision of another Union act governing a specific sector or subject matter, the provision of that other Union act shall ***prevail and apply to that specific sector or subject matter***.

Amendment 90

Proposal for a directive

Article 3 – paragraph 8

Text proposed by the Commission

Amendment

8. *This Directive is without prejudice to the protection of individuals with regard to the processing of personal data.*

deleted

Amendment 91

Proposal for a directive Article 3 – paragraph 9

Text proposed by the Commission

Amendment

9. *In so far as not regulated in this Directive*, this Directive shall not affect national general contract laws such as rules on formation, *the* validity or effects of contracts, including the consequences of the termination of a contract.

9. This Directive shall not affect national general contract laws such as rules on *the* formation, validity or effects of contracts, including the consequences of the termination of a contract, *in so far as they are not regulated in this Directive. This Directive shall not affect national rules on remedies for ‘hidden defects’ or the short-term right to reject. Member States may maintain or introduce national rules on remedies for ‘hidden defects’. Member States may maintain national rules on the short-term right to reject where available in Member States’ legal orders on the date of entry into force of this Directive.*

Amendment 92

Proposal for a directive Article 3 – paragraph 9 a (new)

Text proposed by the Commission

Amendment

9a. *Where, in the context of supplying digital content or digital services within the scope of this Directive, the law of Member State other than that of the consumer's permanent residence applies, the trader shall inform the consumer*

accordingly before entering into the contract.

Amendment 93

Proposal for a directive Article 3 – paragraph 9 b (new)

Text proposed by the Commission

Amendment

9b. This Directive does not affect intellectual property rights, and in particular, as regards the rights of the author, it does not affect the rights and obligations set out under Directive 2001/29/CE.

Amendment 94

Proposal for a directive Article 4 – paragraph 1

Text proposed by the Commission

Amendment

Member States shall not maintain or introduce provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

Member States shall not maintain or introduce, ***in their national law***, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, ***unless otherwise provided for in this Directive.***

Amendment 95

Proposal for a directive Article 4 a (new)

Text proposed by the Commission

Amendment

Article 4a

Information requirements

Before the consumer is bound by a contract for the provision of digital content or a digital service, the trader

shall give the consumer the information required under Articles 6 and 8 of Directive 2011/83/EU in a clear and comprehensible form.

Amendment 96

Proposal for a directive Article 5

Text proposed by the Commission

Article 5

Supply of the digital content

1. ***When performing the contract for the supply of digital content, the supplier shall supply the digital content to***

- (a) the consumer; ***or***
- (b) a third party which operates a physical or virtual facility making the digital content available to the consumer or allowing the consumer to access it and which has been chosen by the consumer for receiving the digital content.

2. ***The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise. The supply shall be deemed to take place when the digital content is supplied to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is the earlier.***

Amendment

Article 5

Supply of the digital content ***or digital service***

1. ***The trader shall supply the digital content or digital service by making it available to the following persons, or by giving the following persons access to it:***

- (a) the consumer;
- (b) a third party which operates a physical or virtual facility making the digital content ***or digital service*** available to the consumer or allowing the consumer to access it and which has been chosen by the consumer for receiving the digital content ***or digital service; or***
- (ba) any other party designated by the consumer.***

2. Unless the parties have agreed otherwise, ***the trader shall supply the digital content or digital service without undue delay after the conclusion of the contract. The trader shall be considered to have complied with his obligation to supply when the digital content or digital service is made available or is made accessible to the consumer or, where point (b) or (ba) of paragraph 1 applies, to the third party chosen by the consumer, whichever is applicable.***

Amendment 97

Proposal for a directive Article 5 a (new)

Text proposed by the Commission

Amendment

Article 5a

Conformity of the digital content or digital service with the contract

In order to be in conformity with the contract, the digital content or digital service must meet the requirements of Articles 6, 6a, 7 and 8.

Amendment 98

Proposal for a directive Article 6

Text proposed by the Commission

Amendment

Article 6

Article 6

Conformity *of the digital content* with the contract

Subjective requirements for conformity with the contract

1. In order to conform with the contract, the digital content shall, where relevant:

1. In order to conform with the contract, the digital content *or digital service* shall, where relevant:

(a) be of the quantity, quality, duration and version and shall possess functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract including in any pre-contractual information which forms integral part of the contract;

(a) be of the quantity, quality, *description*, duration and version and shall possess functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract including in any pre-contractual information, which forms integral part of the contract;

(b) be fit for any particular purpose for which the consumer requires it and which the consumer made known to the *supplier* at the time of the conclusion of the contract and which the *supplier* accepted;

(b) be fit for any particular purpose for which the consumer requires it and which the consumer made known to the *trader at the latest* at the time of the conclusion of the contract and which the *trader* accepted;

(ba) comply with the trial version or preview of the digital content or digital

service, made available by the trader, unless the difference between the digital content or digital service supplied and the trial version or preview was brought to the consumer's attention before the contract was concluded;

(c) be supplied along with any instructions and customer assistance as stipulated by the contract; and

(c) be supplied along with *all the accessories*, any instructions, *including on installation*, and customer assistance as stipulated by the contract *including in any pre-contractual information which forms an integral part of the contract*; and

(d) be updated as stipulated by the contract.

(d) be updated as stipulated by the contract *including in any pre-contractual information which forms integral part of the contract*.

2. To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1, the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and security, taking into account:

(a) whether the digital content is supplied in exchange for a price or other counter-performance than money;

(b) where relevant, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; and

(c) any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions unless the supplier shows that

(i) he was not, and could not reasonably have been, aware of the statement in question;

(ii) by the time of conclusion of the

contract the statement had been corrected;

(iii) the decision to acquire the digital content could not have been influenced by the statement.

3. Where the contract stipulates that the digital content shall be supplied over a period of time, the digital content shall be in conformity with the contract throughout the duration of that period.

4. Unless otherwise agreed, digital content shall be supplied in conformity with the most recent version of the digital content which was available at the time of the conclusion of the contract.

5. In order to conform with the contract the digital content must also meet the requirements of Articles 7 and 8.

Amendment 99

Proposal for a directive Article 6 a (new)

Text proposed by the Commission

Amendment

Article 6a

Objective requirements for conformity with the contract

1. The digital content or digital service shall, where relevant:

(a) possess qualities and performance features, including in relation to functionality, interoperability, accessibility, continuity and security, which are usually found in digital content or digital services of the same type and which the consumer may reasonably expect, given the nature of the digital content or digital service, and comply with, where relevant, any existing international or European technical standards or, in the absence of such

technical standards, applicable industry codes of conduct and good practices, including on the security of information systems and digital environments;

(b) be in line with any public statement made by or on behalf of the trader, the producer or his representative, particularly in advertising or on labelling unless the trader can show that:

(i) he was not and could not reasonably have been aware of the respective statement on the specifics of the digital content or digital service;

(ii) by the time of the conclusion of the contract the statement had been corrected in the same or a comparable way as it has been made; or

(iii) the decision to acquire the digital content or digital service could not have been influenced by the statement.

2. In the case of contracts where the digital content or digital service is to be supplied over a period of time, the digital content or digital service shall be in conformity with the contract throughout the duration of that period. Temporary interruptions to the supply of digital content or digital service which fall on the responsibility of the trader shall be treated as cases of non-conformity if they are significant, continuous and recurring.

3. Unless otherwise expressly agreed, digital content or digital services shall be supplied in conformity with the most recent version of the digital content or digital service which was available at the time of conclusion of the contract.

4. The trader shall ensure that during a reasonable period of time the consumer is supplied with and notified of updates, including security updates, to the digital content or a digital service that are necessary in order to keep the digital content or digital service into conformity with the contract. A consumer's failure to install those updates within a reasonable

period shall have no bearing on the conformity of the digital content or digital service with the contract. Where the consumer chooses to remain with his or her present version of the digital content or the digital service, and the new version is not necessary for the digital content or service to remain in conformity with the contract, that present version shall remain available or accessible within a reasonable timeframe.

5. In order to be in conformity with the contract, the digital content or digital service must also meet the requirements of Articles 7 and 8 of this Regulation, and, where relevant, the requirements of Regulation (EU) 2016/679.

Amendment 100

Proposal for a directive Article 7

Text proposed by the Commission

Article 7

Integration of the digital content

Where the digital content is incorrectly integrated into the consumer's digital environment, any lack of conformity resulting from the incorrect integration shall be regarded as lack of conformity of the digital content if:

- (a) the digital content was integrated by the *supplier* or under the *supplier's* responsibility; or
- (b) the digital content was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions where those instructions were supplied in accordance with point (c) of Article 6(1) or should have been supplied in accordance

Amendment

Article 7

Integration of the digital content *or digital service*

Where the digital content *or digital service* is incorrectly integrated into the consumer's digital environment, any lack of conformity resulting from the incorrect integration shall be regarded as lack of conformity *with the contract* of the digital content *or digital service* if:

- (a) the digital content *or digital service* was integrated by the *trader* or under the *trader's* responsibility; or
- (b) the digital content *or digital service* was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions where those instructions were supplied in accordance with point (c) of Article 6(1) or should have been supplied

with Article 6(2).

in accordance with Article 6a.

Amendment 101

Proposal for a directive

Article 8

Text proposed by the Commission

Article 8

Third party rights

1. ***At the time*** the digital content is ***supplied to the consumer, the digital content*** shall be free of any right of a third party, including based on intellectual property, so that the digital content ***can be used*** in accordance with the contract.

2. Where the digital content is supplied over a period of time, the ***supplier*** shall, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party, including ***that*** based on intellectual property, ***so*** that the digital content ***can be used*** in accordance with the contract.

Amendment

Article 8

Third party rights

1. The digital content ***or digital service*** shall be free of ***any restriction resulting from*** any right of a third party, including ***any right*** based on intellectual property that ***might prevent the consumer from using*** the digital content ***or digital service*** in accordance with the contract.

2. Where the digital content ***or digital service*** is supplied over a period of time, the ***trader*** shall, for the duration of that period, keep the digital content ***or digital service*** supplied to the consumer free of ***any restriction resulting from*** any right of a third party, including ***any right*** based on intellectual property that ***might prevent the consumer from using*** the digital content ***or digital service*** in accordance with the contract.

Amendment 102

Proposal for a directive

Article 8 a (new)

Text proposed by the Commission

Amendment

Article 8a

Any contract clause excluding, derogating from or varying the effects of Articles 6a, 7 and 8 to the detriment of the consumer shall be valid only if, at the time of conclusion of the contract, the consumer

has been specially informed of the specific condition of the digital content or digital service and the consumer expressly accepted that specific condition when concluding the contract.

Amendment 103

Proposal for a directive Article 8 b (new)

Text proposed by the Commission

Amendment

Article 8b

Commercial guarantees

1. Any commercial guarantee shall be binding on the guarantor under the conditions laid down in:

(a) pre-contractual information provided by the trader, including any pre-contractual statement which forms an integral part of the contract;

(b) advertising available at the time of or before the conclusion of the contract; and

(c) the guarantee statement.

2. The guarantee statement shall be made available in writing or in another durable medium and drafted in plain, intelligible language. It shall include the following:

(a) a clear statement of the legal rights of the consumer as provided for in this Directive and a clear statement that those rights are not affected by the commercial guarantee; and

(b) the terms of the commercial guarantee that go beyond the legal rights of the consumer, information about the duration, transferability, territorial scope and existence of any charges which the consumer might incur in order to benefit from the commercial guarantee, the name and address of the guarantor and, if

different from the guarantor, the person against whom any claim is to be made and the procedure by which the claim is to be made.

Amendment 104

Proposal for a directive Article 9

Text proposed by the Commission

Article 9

Burden of proof

1. The burden of *proof with respect to the* conformity with the contract *at the time indicated in Article 10 shall be on the supplier.*

2. Paragraph 1 shall not apply where the *supplier* shows that the digital environment of the consumer is not compatible with interoperability and other technical requirements of the digital content and where the *supplier* informed the consumer of such requirements before the conclusion of the contract.

3. The consumer shall cooperate with the *supplier* to the extent possible and

Amendment

Article 10

Burden of proof

1. The burden of *proving that a lack of conformity existed at the time specified in Article 9 shall be on the trader, when a lack of conformity with the contract becomes apparent during the following periods:*

(a) within two years of the date of supply of the digital content or digital service;

(b) within one year of the date of delivery of the embedded digital content or digital service;

(c) within the duration of the contract, where the contract provides for continuous supply of digital content or digital service or delivery of embedded digital content or digital service over a period of time.

2. Paragraph 1 shall not apply where the *trader* shows that the digital environment of the consumer is not compatible with interoperability and other technical requirements of the digital content *or digital service* and where the *trader* informed the consumer of such requirements *in a clear and comprehensible manner* before the conclusion of the contract.

3. The consumer shall cooperate with the *trader* to the extent possible and

necessary to **determine** the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are the least intrusive for the consumer. Where the consumer fails to cooperate, the burden of proof with respect to the **non-conformity** with the contract shall be on the consumer.

necessary to **ascertain** the consumer's digital environment **in order to establish whether the lack of conformity of the digital content or digital service existed at the time of supply**. The obligation to cooperate shall be limited to the technically available means which are the least intrusive for the consumer. **Only in exceptional and duly justified circumstances where there are no other means available, shall the consumer grant the trader upon request virtual access to the consumer's digital environment.** Where the consumer fails to cooperate **and where the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract**, the burden of proof with respect to the **lack of conformity** with the contract shall be on the consumer.

(Article 9 of the Commission proposal has become Article 10 in the Parliament's amendment.)

Amendment 105

Proposal for a directive Article 10

Text proposed by the Commission

Article 10

Liability of the **supplier**

The **supplier** shall be liable to the consumer for:

- (a) any failure to supply the digital content;
- (b) any lack of conformity **which exists at the time the digital content is supplied; and**

Amendment

Article 9

Liability of the **trader**

1. The **trader** shall be liable to the consumer for:

- (a) any failure to supply the digital content **or digital service in accordance with Article 5;**
- (b) any lack of conformity **of the digital content or digital service with the contract:**
 - (i) **which exists at the time of supply of the digital content or digital service and becomes apparent within two years from**

the time of supply, where the contract provides for a single act of supply or a series of individual acts of supply; or

(ii) which becomes apparent during the period of time mentioned in the contract, where the contract provides that the digital content or digital service is to be supplied over a period of time; and

(c) where the contract provides that the digital content shall be supplied over a period of time, any lack of conformity which occurs during the duration of that period.

(c) any lack of conformity with the contract of embedded digital content or an embedded digital service which exists at the time of delivery of the goods in which the digital content or digital service is embedded and becomes apparent within two years from the time of delivery.

1a. In respect of point (c) of paragraph 1, Member States may maintain more stringent provisions of national law that are already in force at the date of entry into force of this Directive.

(Article 10 of the Commission proposal has become Article 9 in the Parliament's amendment.)

Amendment 106

Proposal for a directive Article 11

Text proposed by the Commission

Article 11

Remedy for the failure to supply

Where the **supplier** has failed to supply the digital content in accordance with Article 5 the consumer shall be entitled to terminate the contract **immediately under Article 13**.

Amendment

Article 11

Remedy for the failure to supply

1. Where the **trader** has failed to supply the digital content **or digital service** in accordance with Article 5, **the consumer shall call upon the trader to supply the digital content or digital service. If the trader fails to supply the digital content or digital service without undue delay, or within an additional period of time as expressly agreed to by the parties, the consumer shall be entitled to terminate the**

contract.

1a. Paragraph 1 shall not apply:

(a) where the trader has refused to supply the digital content or digital services; or

(b) where supply within the agreed period is essential taking into account all the circumstances attending the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that supply by or on a specified date is essential.

In those cases, if the trader fails to supply at the relevant time pursuant Article 5(2), the consumer shall be entitled to terminate the contract immediately.

1b. Where the consumer terminates the contract, Articles 13, 13a, 13b and 13c shall apply.

Amendment 107

Proposal for a directive Article 12

Text proposed by the Commission

Article 12

Remedies for the lack of conformity with the contract

1. In the ***case of a lack of conformity with the contract***, the consumer shall be entitled to have the digital content brought into conformity with the contract ***free of charge***, unless this is impossible, disproportionate or unlawful.

Amendment

Article 12

Remedies for the lack of conformity with the contract

-1. In the case of a lack of conformity with the contract, the consumer shall be entitled to have the digital content or digital service brought into conformity, or to receive a proportionate reduction in the price, or to terminate the contract under the conditions set out in this Article.

1. In the ***first place***, the consumer shall be entitled to have the digital content ***or digital service*** brought into conformity with the contract, unless this is impossible, disproportionate or unlawful.

Bringing the digital content into conformity with the contract shall be deemed *to be* disproportionate where the costs *it imposes* on the *supplier* are unreasonable. The following shall be taken into account when deciding whether the costs are unreasonable:

- (a) the value the digital content would have if it were in conformity with the contract; and
- (b) the significance of the lack of conformity with the contract for attaining the purpose for which the digital content of the same description would normally be used.

2. The *supplier* shall bring the digital content *in* conformity with the contract pursuant to paragraph 1 within a reasonable time from the time the *supplier* has been informed by the consumer about the lack of conformity with the contract and without any significant inconvenience to the consumer, taking account of the nature of digital content and the purpose for which the consumer required this digital content.

3. The consumer shall be entitled to either a proportionate reduction of the price in the manner set out in paragraph 4 where the digital content is supplied in exchange for a payment of a price, or terminate the contract under paragraph 5 and *Article 13*, where

- (a) the remedy to bring the digital content in conformity is impossible, disproportionate or unlawful;

Bringing the digital content *or digital service* into conformity with the contract shall be deemed disproportionate *in particular* where the costs *imposed* on the *trader* are unreasonable. The following shall be taken into account when deciding whether the costs are unreasonable:

- (a) the value the digital content *or digital service* would have if it were in conformity with the contract; and
- (b) the significance of the lack of conformity with the contract for attaining the purpose for which the digital content *or a digital service* of the same description would normally be used.

2. The *trader* shall bring the digital content *or digital service into* conformity with the contract pursuant to paragraph 1 within a reasonable time from the time the *trader* has been informed by the consumer about the lack of conformity with the contract, *free of charge* and without any significant inconvenience to the consumer, taking account of the nature of *the* digital content *or the digital service* and the purpose for which the consumer required this digital content *or digital service*.

The consumer shall be entitled to withhold the payment of any outstanding part of the price, or where the lack of conformity is minor, of an appropriate proportion thereof, until the trader has brought the digital content or digital service into conformity with the contract.

3. The consumer shall be entitled to either a proportionate reduction of the price in the manner set out in paragraph 4 where the digital content *or the digital service* is supplied in exchange for a payment of a price, or *may* terminate the contract under paragraph 5 and *Articles 13, 13a, 13b and 13c* where:

- (a) the remedy to bring the digital content *or digital service* in conformity is impossible, disproportionate or unlawful, *in accordance with paragraph 1*;

(b) the *supplier* has not **completed the remedy within the time specified in** paragraph 2;

(c) **the remedy to bring the digital content in conformity would cause significant inconvenience to the consumer; or**

(d) the *supplier* has declared, or it is equally clear from the circumstances, that the *supplier* will not bring the digital content in conformity with the contract.

4. The reduction in price shall be proportionate to the decrease in the value of the digital content which was received by the consumer compared to the value of the digital content **that is** in conformity with the contract.

5. The consumer may terminate the contract only if the lack of conformity with the contract **impairs functionality, interoperability and other main performance features of the digital**

(b) the *trader* has not **brought the digital content or digital service in conformity in accordance with** paragraph 2;

(ba) **a lack of conformity appears despite the trader's attempt to bring the digital content or digital service in conformity; or**

(d) the *trader* has declared, or it is equally clear from the circumstances, that the *trader* will not bring the digital content **or digital service** in conformity with the contract **within a reasonable time or without significant inconvenience for the consumer.**

4. **The consumer shall exercise the right to a proportionate reduction of the price by means of an unequivocal statement setting out his decision, notified to the trader.** The reduction in price shall be proportionate to the decrease in the value of the digital content **or digital service** which was received by the consumer compared to the value **that** the digital content **or digital service would have if it was** in conformity with the contract.

Where the contract stipulates that the digital content or digital service is to be supplied over a period of time in exchange of the payment of a price, and for a certain period the digital content or digital service did not conform to the contract, the price reduction shall apply to the period during which the digital content or digital service has not been in conformity with the contract.

5. The consumer may terminate the contract only if the lack of conformity with the contract **is not minor**. The burden of proof that the lack of conformity with the contract does not impair functionality,

content such as its accessibility, continuity and security where required by Article 6 paragraphs (1) and (2). The burden of proof that the lack of conformity with the contract does not impair functionality, interoperability and other main performance features of the digital content shall be on the *supplier*.

interoperability and other main performance features of the digital content *or digital service* shall be on the *trader*.

5a. The consumer shall not be entitled to a remedy to the extent that the consumer has contributed to the lack of conformity with the contract or to its effects.

Amendment 108

Proposal for a directive Article 12 a (new)

Text proposed by the Commission

Amendment

Article 12a

Remedies for the lack of security

In the case of a lack of security, the consumer shall be entitled to have the digital content or digital service brought into conformity with the contract free of charge.

Amendment 109

Proposal for a directive Article 13

Text proposed by the Commission

Amendment

Article 13

Article 13

Termination

Exercise of the right to terminate

1. The consumer shall exercise the right to terminate the contract by notice to the supplier given by any means.

The consumer shall exercise the right to terminate the contract by *means of an unequivocal statement setting out his decision to terminate the contract, notified to the trader. Where contracts are concluded by digital means, the trader*

shall provide the consumer with an easy digital means to terminate the contract. The termination shall become effective 14 days after the notification, or on a later date indicated by the consumer.

2. Where the consumer terminates the contract:

(a) the supplier shall reimburse to the consumer the price paid without undue delay and in any event not later than 14 days from receipt of the notice;

(b) the supplier shall take all measures which could be expected in order to 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 with the exception of the content which has been generated jointly by the consumer and others who continue to make use of the content;

(c) the supplier shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent that data has been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used data format;

(d) where the digital content was not supplied on a durable medium, the consumer shall refrain from using the digital content or making it available to third parties, in particular by deleting the digital content or rendering it otherwise unintelligible;

(e) where the digital content was supplied on a durable medium, the consumer shall:

- (i) *upon the request of the supplier, return, at the supplier's expense, the durable medium to the supplier without undue delay, and in any event not later than 14 days from the receipt of the supplier's request; and*
- (ii) *delete any usable copy of the digital content, render it unintelligible or otherwise refrain from using it or making it available to third parties.*
3. *Upon termination, the supplier may prevent any further use of the digital content by the consumer, in particular by making the digital content not accessible to the consumer or disabling the user account of the consumer, without prejudice to point (c) of paragraph 2.*
4. *The consumer shall not be liable to pay for any use made of the digital content in the period prior to the termination of the contract.*
5. *Where the digital content has been supplied in exchange for a payment of a price and over the period of time stipulated in the contract, the consumer may terminate the contract only in relation to that part of the period of time where the digital content has not been in conformity with the contract.*
6. *Where the consumer terminates a part of the contract in accordance with paragraph 5, paragraph 2 shall apply, with the exception of point (b) in regards to the period during which the digital content was in conformity with the contract. The supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time when the digital content was not in conformity with the contract.*

Amendment 110

Proposal for a directive

Article 13 a (new)

Text proposed by the Commission

Amendment

Article 13a

Obligations of the trader in the event of termination

1. In the event of termination of the contract the trader shall reimburse to the consumer all sums paid under the contract.

If the contract provides for the supply of digital content or a digital service in exchange for a payment of a price and over a period of time, where the consumer terminates a part of such contract in accordance with Article 12(5), the trader shall reimburse to the consumer the part of the price corresponding to the period of time during which the digital content or digital service was not in conformity with the contract and any part of the price paid by the consumer in advance for any remaining period of the contract had it not been terminated.

2. In respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679.

3. The trader shall make every effort that he could be expected to make to refrain from the use of any user-generated content to the extent that it does not constitute personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, with the exception of:

(a) the content that cannot be refrained from using without disproportionate and unreasonable effort because it has no utility outside the context of the digital content or digital service supplied by the trader;

(b) the content that cannot be refrained from using without

disproportionate and unreasonable effort because it only relates to the consumer's activity when using the digital content or digital service supplied by the trader;

(c) the content which has been generated jointly by the consumer and others, when other consumers can continue to make use of the content;

(d) the content that has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts.

4. *The trader shall, upon request by the consumer, make available to the consumer any user-generated content to the extent that it does not constitute personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader. The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used and machine-readable data format.*

The obligation to make available such user-generated content shall not apply in case the user-generated content:

(a) cannot be made available without disproportionate and unreasonable effort because it has no utility outside the context of the digital content or digital service supplied by the trader;

(b) cannot be made available without disproportionate and unreasonable effort because it only relates to the consumer's activity when using the digital content or digital service supplied by the trader; or

(c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts.

5. *Upon termination, the trader may prevent any further use of the digital content or digital service by the consumer,*

in particular by rendering the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph 4.

Amendment 111

Proposal for a directive Article 13 b (new)

Text proposed by the Commission

Amendment

Article 13b

Obligations of the consumer in the event of termination

- 1. After termination of the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties, for instance by deleting the digital content or any usable copy or rendering the digital content or digital service otherwise inaccessible.***
- 2. In the case of embedded digital content or an embedded digital service, the consumer shall, at the request of the trader, return, at the trader's expense, the good in which the digital content or digital service is embedded to the trader without undue delay, and in any event not later than 14 days from the receipt of the trader's request. If the trader decides to request the return of the good in which the digital content or digital service is embedded, that request shall be made within 14 days from the day on which the trader is informed of the consumer's decision to terminate the contract.***
- 3. The consumer shall not be liable to pay for any use made of the digital content or digital service in the period prior to the termination of the contract during which the digital content or the digital service was not in conformity.***

Amendment 112

Proposal for a directive Article 13 c (new)

Text proposed by the Commission

Amendment

Article 13c

Time limits and means of reimbursement by the trader

- 1. Any reimbursement to be done by the trader to the consumer pursuant to Article 12(4) or 13a(1) due to price reduction or termination of the contract shall be done without undue delay and in any event within 14 days from the day on which the trader is informed by means referred to in Articles 12 and 13 of the consumer's decision to invoke his right for a price reduction or his right to terminate the contract.*
- 2. The trader shall carry out the reimbursement using the same means of payment as the consumer used to pay for the digital content or digital service, unless the consumer expressly agrees otherwise.*
- 3. The trader shall not impose any fee on the consumer in respect of the reimbursement.*

Amendment 113

Proposal for a directive Article 14

Text proposed by the Commission

Amendment

Article 14

Article 14

Right to damages

Right to damages

1. The supplier shall be liable to the consumer for any economic damage to the

Member States shall ensure that the consumer is entitled to claim

digital environment of the consumer caused by *a lack of conformity with the contract* or a failure to supply the digital content. *Damages shall put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity* with the contract.

2. *The Member States shall lay down detailed rules for the exercise of the right to damages.*

compensation for the detriment caused by a failure to supply the digital content *or digital service or a lack of conformity of* the digital content *or digital service* with the contract.

Amendment 114

Proposal for a directive Article 15

Text proposed by the Commission

Article 15

Modification of the digital content

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 alternations adversely affect access to or use of* the digital content *by the consumer, only* if:

- (a) the contract *so stipulates*;
- (b) the consumer *is notified* reasonably in advance *of the modification by an*

Amendment

Article 15

Modification of the digital content *or digital service*

1. Where the contract provides that the digital content *or the digital service is to* be supplied *or made accessible over a* period of time stipulated in the contract, the *trader* may *only* alter *the* functionality, interoperability and other main performance features of the digital content *or digital service beyond what is necessary to maintain in conformity* the digital content *or digital service in accordance with Article 6a* if:

- (a) the contract *allows for, and gives a valid reason for, such a modification*;
 - (aa) *such a modification can reasonably be expected by the consumer*;
 - (ab) *the modification is provided without additional cost to the consumer*; and
- (b) *the trader notifies* the consumer reasonably in advance *in a clear and comprehensible manner and* on a durable

explicit notice on a durable medium;

(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

(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).

2. Where the consumer terminates the contract in accordance with paragraph **1**, *where relevant*,

(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;

(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.

medium of the modification and, where applicable, of his right to terminate the contract under the conditions provided for in paragraph 1a;

1a. The consumer shall be entitled to terminate the contract if the modification negatively impacts the access to or the use of the digital content or digital service by the consumer, unless such negative impact is only minor. In that case, the consumer shall be entitled to terminate the contract free of charge within 30 days after the receipt of the notice or from the time when the digital content or digital service is altered by the trader, whichever is later.

2. Where the consumer terminates the contract in accordance with paragraph **1a** of this Article, **Articles 13, 13a and 13b** shall apply accordingly.

Amendment 115

Proposal for a directive Article 16

Text proposed by the Commission

Article 16

Right to terminate long term contracts

1. Where the contract provides for the supply of the digital content for an *indeterminate period* or where the initial contract *duration or any combination of renewal periods exceed 12 months*, the consumer shall be entitled to terminate the contract any time after the expiration of the first 12 months period.

2. The consumer shall exercise the right to terminate the contract by notice to the *supplier* given by *any* means. The termination shall become effective 14 days after the receipt of the notice.

Amendment

Article 16

Right to terminate long term contracts

1. Where the contract provides for the supply of the digital content *or digital service* for an *initial fixed contract duration exceeding 12 months* or where *any combination of subsequent contracts or renewal periods exceeds 12 months from the moment of conclusion of the initial contract*, the consumer shall be entitled to terminate the contract *free of any additional charges* any time after the expiration of the first 12 months period.

1a. Where the consumer terminates a fixed term contract and the contract duration or any combination of renewal periods exceeds 12 months, the trader shall be entitled to proportionate compensation for those advantages he has given to the consumer because of the contract duration exceeding 12 months.

Before the consumer is bound by a contract, or any corresponding offer, the trader shall provide the consumer with information on the conditions for terminating a contract with a duration of more than 12 months in a clear and comprehensible manner, if that information is not already apparent from the context, and on the consequences of early termination in case an advantage had been granted to the consumer because of the duration of the contract.

2. The consumer shall exercise the right to terminate the contract by notice to the *trader* given by means *of an unequivocal statement setting out his decision to terminate the contract*. The termination shall become effective 14 days after the receipt of the notice, *or at a later*

3. Where the digital content is supplied in exchange for *a* payment of a price, the consumer remains liable to pay the part of the price for the digital content supplied corresponding to the period of time before the termination becomes effective.

4. *Where* the consumer terminates the contract in accordance with this Article:

(a) the supplier shall take all measures which could be expected in order to refrain from the use of other counter-performance 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;

(b) the supplier shall provide the consumer with technical means to retrieve all any content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent this data has been retained by the supplier. The consumer shall be entitled to retrieve the content without significant inconvenience, in reasonable time and in a commonly used data format; and

(c) where applicable, the consumer shall delete any usable copy of the digital content, render it unintelligible or otherwise refrain from using it including by making it available to a third party.

5. Upon termination, the *supplier* may prevent any further use of the digital content by the consumer, in particular by making the digital content not accessible to the consumer or disabling the user account of the consumer, *without prejudice to*

date indicated by the consumer.

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

4. *When* the consumer terminates the contract in accordance with this Article, *the trader shall in respect of personal data comply with the obligations applicable under Regulation (EU) 2016/679 and Directive 2002/58/EC.*

4a. Where applicable, the consumer shall delete any usable copy of the digital content or digital service, render it unintelligible or otherwise refrain from using it including by making it available to a third party.

5. Upon termination, the *trader* may prevent any further use of the digital content *or digital service* by the consumer, in particular by making the digital content *or digital service* not accessible to the consumer or disabling the user account of

paragraph (4) point (b).

the consumer.

Amendment 116

Proposal for a directive Article 17 – paragraph 1

Text proposed by the Commission

Where the **supplier** is liable to the consumer because of any failure to supply the digital content or a lack of conformity with the contract resulting from an act or omission by a person in **earlier** links of the chain of transactions, the **supplier** shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the **supplier** may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

Amendment

Where the **trader** is liable to the consumer because of any failure to supply the digital content **or digital service** or **because of** a lack of conformity with the contract resulting from an act or omission by a person in **previous** links of the chain of transactions, the **trader** shall be entitled to pursue remedies against the person or persons liable in the chain of **financial** transactions. The person against whom the **trader** may pursue remedies and the relevant actions and conditions of exercise, shall be determined by national law.

Amendment 117

Proposal for a directive Article 18 – title

Text proposed by the Commission

Enforcement

Amendment

Enforcement **and information**

Amendment 118

Proposal for a directive Article 18 – paragraph 1

Text proposed by the Commission

1. Member States shall ensure that adequate **and** effective means exist to ensure compliance with this Directive.

Amendment

1. Member States shall ensure that adequate, effective **and dissuasive** means exist to ensure compliance with this Directive, **taking account in particular of**

the need for consumers to be informed about, and enabled to enforce, their rights in practice.

Amendment 119

Proposal for a directive Article 18 – paragraph 2 – point c a (new)

Text proposed by the Commission

Amendment

(ca) not-for-profit bodies, organisations or associations, active in the field of the protection of data subjects' rights as defined in Article 80 of Regulation (EU) 2016/679.

Amendment 120

Proposal for a directive Article 20 – Title

Text proposed by the Commission

Amendment

Amendments to Directive 1999/44/EC, Regulation (EC) No 2006/2004, Directive 200922/EC

Amendments to **Directive 1993/13/EEC**, Directive 1999/44/EC, Regulation (EC) No 2006/2004, Directive 200922/EC

Amendment 121

Proposal for a directive Article 20 – point -1 (new) Directive 93/13/EEC Annex – paragraph 1

Text proposed by the Commission

Amendment

-1. In the Annex to Directive 93/13/EEC, the following points are added in paragraph 1:

"(qa) enabling the trader to unduly limit the interoperability of digital content or a digital service with hardware and other

digital content or digital services;

(qb) requiring the consumer to conclude an additional contract for the supply of digital content or a digital service or a contract pertaining to hardware with the trader or a third party;

(qc) circumventing by contractual means the rights of the data subject under Regulation (EU) 2016/679 governing the protection of consumers' personal data;

(qd) enable the trader to limit the usability of the digital content when the consumer is offline where this is not strictly necessary for the provision of the digital content;

(qe) restrict uses of digital content permitted under Directive 2001/29/EC, Directive 96/9/EC, Directive 2009/24/EC or Directive 2012/28/EU."

Amendment 122

Proposal for a directive

Article 20 – point 1

Directive 1999/44/EC

Article 1 – paragraph 2 – point b

Text proposed by the Commission

"(b) consumer goods: shall mean any tangible movable item, with the exception of:

- goods sold by way of execution or otherwise by authority of law,
- water and gas where they are not put up for sale in a limited volume or set quantity,
- electricity,
- ***a durable medium incorporating digital content where it has been used exclusively as carrier of the digital content to the consumer as referred to in Directive (EU) N/XXX³⁹.***

Amendment

"(b) consumer goods: shall mean any tangible movable item, with the exception of:

- goods sold by way of execution or otherwise by authority of law,
- water and gas where they are not put up for sale in a limited volume or set quantity,
- electricity,
- ***embedded digital content or digital services, covered by Directive (EU) N/XXX³⁹.***

³⁹ Directive (EU) N/XXX of the European Parliament and of the Council of ... on contracts for the supply of digital content (OJ...)

³⁹ Directive (EU) N/XXX of the European Parliament and of the Council of ... on ***certain aspects concerning*** contracts for the supply of digital content ***and digital services*** (OJ...)

Amendment 123

Proposal for a directive

Article 20 – point 2

Regulation (EC) No 2006/2004

Annex – point 21

Text proposed by the Commission

"**21.** Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on contracts for the supply of digital content (OJ...)"

Amendment

"**21a.** Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on ***certain aspects concerning*** contracts for the supply of digital content ***and digital services*** (OJ...)"

Amendment 124

Proposal for a directive

Article 20 – point 3

Directive 2009/22/EC

Annex I – point 16

Text proposed by the Commission

"**16.** Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on contracts for the supply of digital content (OJ...)"

Amendment

"**15a.** Directive (EU) N/XXX of the European Parliament and of the Council of XX/XX/201X on ***certain aspects concerning*** contracts for the supply of digital content ***and digital services*** (OJ...)"

Amendment 125

Proposal for a directive

Article 22 – paragraph 1

Text proposed by the Commission

The Commission shall, not later than on [the date of five years after entry into force] review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content against *counter-performance* other than that covered by this Directive, in particular supplied against advertisement *or indirect collection of data*.

Amendment

The Commission shall, not later than on ... [five years after *the date of* entry into force *of this Directive*] review the application of this Directive and submit a report to the European Parliament, to the Council *and to the European Economic and Social Committee. The review process shall include consultation of the Member States and of consumer, legal and business organisations at Union level.* The report shall examine, inter alia, *interaction and compliance with the application of Regulation (EU) 2016/679 and* the case for harmonisation of rules applicable to contracts for the supply of digital content *or digital services* against *collection of personal data by the trader* other than that covered by this Directive, in particular supplied against advertisement.

EXPLANATORY STATEMENT

I. Introduction

Following the discarded Common European Sales Law proposal, the Commission has made a new attempt to address internal market problems created by diverging national contract rules, or the absence thereof, to the benefit of both businesses and consumers, by tabling two proposals on digital contracts: a proposal for a directive on certain aspects concerning contracts for the online and other distance sales of goods and this proposal for a directive on certain aspects concerning contracts for the supply of digital content. The Commission's proposal on contract rules for the supply of digital content provides for the first time the opportunity to touch upon an issue that has only started to develop in the legislation of some Member States and has not been harmonised yet at EU level: consumer remedies in case of non-conformity of digital content supplied.

Following the presentation of a joint Working Document in July 2016, the co-rapporteurs present in this draft report their joint amendments to the Commission's proposal. Overall, the co-rapporteurs confirm the Commission's approach to focus on certain aspects of contract law for the supply of digital content such as conformity and remedies, and be limited to business-to-consumer contracts.

The draft report presents some of the issues that the two co-rapporteurs consider as worth putting to further discussion but they reserve the right to come back with additional amendments and proposals on topics that have not been included in the report. This explanatory statement highlights the main changes proposed in the draft report in the form of amendments and the rationale behind them.

II. Main issues dealt with in the draft report

1. Clarification of the text and coherence with the acquis

The co-rapporteurs agree with the Commission that the directive should cover not only digital content as defined in the Directive on Consumer Rights but also services, such as cloud storage or file hosting service, social media, instant messaging services, video or audio sharing websites or platforms. This would make the directive future-proof vis-à-vis further technical developments. For the sake of consistency with the definition of "digital content" under the Consumer Rights Directive, they consider, however, that it would be more appropriate not to extend the definition of digital content to such services, but rather to create a category of "digital services" in order to make a clear distinction between digital content - data which is produced and supplied in digital form - and digital services. The co-rapporteurs specify that this should not affect the ability for Member States to determine the nature of the contracts, i.e. whether the contract for the supply of digital content is to be considered as a sales, services, rental or a sui generis contract.

2. Scope

The co-rapporteurs consider that the Commission's proposal to exclude from the scope of the directive digital content integrated in goods, such as smart products, will make it difficult to distinguish between the scope of this proposal and the proposal on certain aspects concerning contracts for the online and other distance sales of goods. The rules applicable to digital content would be different depending on whether it is embedded in a good or supplied separately, a distinction that is not always easy to make, for instance in the case of smartphones with pre-installed apps versus apps installed by the consumer. This would make it difficult for consumers and businesses to determine the applicable rule when the product is defective or otherwise not in conformity with the contract (should it be considered as a tangible good or as digital content?). Having considered different approaches, the co-rapporteurs take the view that the directive should be applicable also to embedded digital content and embedded digital, whereas as regards goods with embedded digital content or embedded digital services, the trader shall be liable under this Directive to the consumer for meeting his obligations only in respect of the embedded digital content or digital service. As one cannot over-estimate the importance of IoT products in the near future, smart goods will dominate the market. Consumers, who buy these products shall benefit from rights introduced through this directive, such as updates, interoperability, a secure digital environment and the right to recover their data upon termination.

To reduce further the possible impact of delineation problems between the scopes of application of the digital contract proposals, the co-rapporteurs have agreed with the rapporteur on the proposal on the sale of goods to attempt to align the conformity criteria of both legal regimes as much as possible.

3. Data as counter-performance and data protection issues

The Commission's proposal introduces the notion of counter-performance other than a price paid and foresees the obligation for traders to remedy for the failure to supply the digital content or digital service or for their lack of conformity with the contract also in cases where the counter performance is the provision of data.

Overall, the co-rapporteurs reluctantly agree with the notion of data as a counter performance. They believe that this Directive should, in no way, exacerbate the already existing phenomenon of commercialisation or monetisation of personality rights. Therefore, the scope encompasses situations when the traders supplies digital content or digital services in exchange for a price or exploitation rights on personal data of the consumer.

The report also goes further than the Commission's proposal, extending the scope to data that is collected by the trader, and does not limit it to data actively provided by the consumers, in order to avoid the creation of loopholes. Concerning the proposed exclusion from the scope of the directive of those contracts where the processing of data by the supplier is strictly necessary to perform the contract or to meet legal requirements, the co-rapporteurs also favour a limitation: the directive shall not apply where personal data or other data provided by the consumer are exclusively used by the supplier to supply the digital content or service or to

meet legal requirements to which the supplier is subject and the supplier does not process the personal data or other data for any other purpose.

When it comes to data protection, the co-rapporteurs believe that the directive should be in coherence with the General Data Protection Regulation (GDPR) and therefore clarify that the directive is without prejudice to this Regulation. In addition, they consider it necessary to guarantee that a contract term that concerns the processing of personal data in the context of the conclusion or performance of the contract and that is detrimental to the consumer as a data subject under the GDPR does not bind the consumer.

4. Supply of the digital content or the digital service

The co-rapporteurs clarify the constitutive elements of the supply, including its definition and the time of the supply, taking into account the modifications of the scope of the directive. As a result, the supplier should have to supply with undue delay after the conclusion of the contract.

5. Conformity with the contract

Regarding the requirements for conformity with the contract, contrary to the Commission's view, the co-rapporteurs consider that the conformity should not be assessed first and foremost vis-à-vis what is stipulated in the contract and propose the conformity to be assessed through both objective and subjective criteria. However, the co-rapporteurs consider that the parties could agree to exclude, derogate from or vary the effects of the objective requirements to the detriment of the consumer under certain conditions, including express acceptance by the consumer.

6. Modification of the digital content

One of the main changes introduced by the co-rapporteurs when it comes to digital content or service supplied over a period of time is that, as a rule, the supplier may not alter the functionality, interoperability and other main performance features of the digital content or digital service to the extent that those alternations adversely affect access to or use of the digital service by the consumer. However, the draft report maintains the exceptions to the rule and includes some additional guarantees to the benefit of the consumer.

7. Reference to national law

The co-rapporteurs propose that the directive should not affect national laws when it comes to the conditions under which a contract is considered to be linked with or is ancillary to another contract and the effect this has on either contract or on the remedies to be exercised under either contract.

III. Conclusion

The co-rapporteurs propose a number of changes to the Commission's proposal as a starting point for further reflection and modifications to be made along the legislative process in

Parliament.

21.11.2016

OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

for the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (COM(2015)0634 – C8-0394/2015 – 2015/0287(COD))

Rapporteur: Marju Lauristin

SHORT JUSTIFICATION

The digital revolution is profoundly impacting our society. As our reliance on IT-products and -services grows, it is becoming increasingly important to ensure that our rights are upheld in the digital world. Currently, while on a daily basis millions of European consumers access, purchase or use digital content in the broad sense of the word (e.g. video streaming, apps, games, cloud services or social networks), their rights online are not protected as they are in the offline world. This situation erodes consumer confidence and endangers online privacy since faulty or insecure digital products and services will not properly protect the vast amount of our personal data that is available online.

Your Rapporteur aims to increasing consumer confidence and online privacy by ensuring adequate protection for the purchase of digital content. Scope and definition of digital content have to be further clarified to ensure that all consumers - also those that are less tech-savvy or less technically intimate with the online environment - have their rights guaranteed. The online world - and thus the use of digital content - has become much more than simply a way for us to perform specific tasks. Our personal photos, address books and medical information are usually in the cloud. Many of our intimate conversations take place and are often stored online. And in our online activities we leave so many digital traces behind that companies can draw a surprisingly intimate portrait of us. It is therefore clear that in the online environment the protection of our personal data is even more pressing than in the offline world. This proposal, while focussing on the relation between supplier and consumer of digital content, is therefore inextricably linked to the issue of the protection of our personal data online. It is therefore important to ensure that this Directive should comply with the general rules of the new General Data Protection Regulation (2016/679) in order to ensure consistency in citizens' fundamental right to privacy and strengthen the trust of consumers in the supply of safe and secure digital content.

Your rapporteur would like to further strengthen and clarify the proposal on the following points. For these points it is important to keep in mind that this proposal aims at full harmonization, which prohibits Member States from maintaining or introducing national rules that will go further than this Directive in terms of consumer protection:

- Active provision by consumer of personal data: the proposal only covers types of contracts whereby the consumer either pays or "actively provides" personal data as counter-performance. This seems to be too limited, as often nowadays consumers' personal data (such as location data, personal contacts, shopping history etc) are being used in a form of counter-performance while consumers are unaware of it. Furthermore, this limitation could create a perverse incentive for suppliers to not ask for the consumer's consent. It might therefore be advisable to broaden this provision in such a way as to include all contracts for the supply of digital content involving the use of the consumer's personal data.
- A definition of personal data, based on Regulation 2016/679 has to be added, to ensure a clear differentiating line between personal data and any other data mentioned throughout the text.
- Conformity of digital content: the proposal stipulates that digital content should be in conformity with what was stipulated in the contract and only if nothing has been stipulated in the contract more objective criteria (like technical standards or industry codes of conducts) could be used to assess its conformity. However, one could wonder if, in the light of the complexity of digital content products, the consumer is really able to fully grasp the terms and conditions of the contract and to make an informed decision. It might therefore be advisable to use more often objective and subjective criteria (such as technical standards or legitimate expectations) to ascertain conformity;
- Suppliers' liability for damages: the proposal limits the supplier's liability to only the damages done to the hardware and software of the consumer. However, there might be cases where a consumer suffers serious economic or immaterial loss quite apart from any damage to its digital environment (for example if software contains a bug that allows hackers to gain access to a consumer's computer and steal his password for his bank account). It might therefore be advisable to broaden the scope for damages to include all damage done to the consumer. Furthermore, it might be interesting to allow Member States, in setting the detailed rules on damages, to make a differentiation between those suppliers that did everything in their power to limit the possibility of damages (e.g. by compliance to a certain IT security baseline or standards) and those that did not have "their house in order" (e.g. did not fix security vulnerabilities in their products/services that were known or reported to them) in order to encourage a stronger sense of responsibility and accountability among suppliers.
- Termination of the contract: the proposal should be clear what exact data have to be given back to the consumer when the contract is terminated.

AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on the

Internal Market and Consumer Protection and the Committee on Legal Affairs, as the committees responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) For the achievement of a genuine digital single market, the harmonisation of certain aspects concerning contracts for supply of digital content, taking as a base a high level of consumer protection, is necessary.

Amendment

(2) For the achievement of a genuine digital single market, the harmonisation of certain aspects concerning contracts for supply of digital content, taking as a base a high level of consumer protection **and the need to improve accessibility**, is necessary.

Amendment 2

Proposal for a directive

Recital 7

Text proposed by the Commission

(7) Consumers will benefit from fully harmonised rights for digital content at a high level of protection. They will have clear rights when they receive or access digital content from anywhere in the EU. This will increase their confidence in buying digital content. This will also contribute to reducing the detriment consumers currently suffer, since there will be a set of clear rights that will enable them to address problems they face with digital content.

Amendment

(7) Consumers will benefit from fully harmonised rights for digital content at a high level of protection. They will have clear rights when they receive or access digital content from anywhere in the EU. This will increase their confidence in buying digital content. This will also contribute to reducing the detriment consumers currently suffer, since there will be a set of clear rights that will enable them to address problems they face with digital content **and its accessibility**.

Amendment 3

Proposal for a directive

Recital 11

(11) **The** Directive should address problems across different categories of digital content and its supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than in Directive 2011/83/EU of the European Parliament and of the Council¹. In particular it should cover services which allow the creation, processing or storage of data. While there are numerous ways for digital content to be supplied, such as transmission on a durable 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 to all digital content independently of the medium used for its transmission. Differentiating between different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between suppliers. A level-playing field between suppliers of different categories of digital content should be ensured. ***However this Directive should not apply to digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods.***

¹. OJ L 304, 22.11.2011, p.64.

(11) **This** Directive should address problems across different categories of digital content and its supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than in Directive 2011/83/EU of the European Parliament and of the Council¹. In particular it should cover services which allow the creation, processing or storage of data. While there are numerous ways for digital content to be supplied, such as transmission on a durable 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 to all digital content independently of the medium used for its transmission. Differentiating between different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between suppliers. A level-playing field between suppliers of different categories of digital content should be ensured.

¹. OJ L 304, 22.11.2011, p.64.

Justification

Given the expected increase in the near future of the Internet of Things with all types of "smart devices" with embedded software incorporated, it is important to clarify under what rules such "smart devices" and its embedded software fall. In the future it will probably become rather difficult to differentiate what would be the predominant element of the product between the digital content and the tangible good. Therefore, the chosen exemption seems unworkable in practice and a separate Commission proposal on this issue would be

preferable.

Amendment 4

Proposal for a directive Recital 14

Text proposed by the Commission

(14) As regards digital content supplied not in exchange for a price but against counter-performance other than money, this Directive should apply ***only*** to contracts where the ***supplier requests and the consumer actively provides*** data, ***such as name and e-mail address or photos***, directly or indirectly ***to*** the supplier ***for example through individual registration or on the basis of a contract which allows access to consumers' photos***. This Directive should not apply to situations where the supplier collects data ***necessary*** for the digital content to function in conformity with the contract, for example geographical location where necessary for a mobile application to function properly, or for the sole purpose of meeting legal requirements, for instance where the registration of the consumer is required for security and identification purposes by applicable laws. ***This Directive should also not apply to situations where the supplier collects information, including personal data, such as the IP address, or other automatically generated information such as information collected and transmitted by a cookie, without the consumer actively supplying it, even if the consumer accepts the cookie. It should also not apply to situations where the consumer is exposed to advertisements exclusively in order to gain access to digital content.***

Amendment

(14) As regards digital content supplied not in exchange for a price but against counter-performance other than money, this Directive should ***also*** apply to contracts where the ***consumer provides personal data or any other data that may be used*** directly or indirectly ***by*** the supplier. ***This should also include contracts in which the consumer allows access to, and processing of his or her personal data by the supplier.*** This Directive should not apply to situations where the supplier collects data ***that are exclusively used by the supplier in order*** for the digital content to function, ***including software updating***, in conformity with the contract, for example geographical location where necessary for a mobile application to function properly, or for the sole purpose of meeting legal requirements, for instance where the registration of the consumer is required for security and identification purposes by applicable laws.

Amendment 5

Proposal for a directive

Recital 17

Text proposed by the Commission

(17) Digital content is highly relevant in the context of the Internet of Things. However it is opportune to address specific issues of liability related to the Internet of Things, including the liability for data and machine-to-machine contracts, in a separate way.

Amendment

deleted

Amendment 6

Proposal for a directive

Recital 18

Text proposed by the Commission

(18) Contracts may include general terms and conditions of the supplier that need to be accepted by the consumer. For some digital content, suppliers often describe the service and measurable service targets in a service level agreement. These service level agreements are generally appended to the main contract and form an important component of the contractual relationship between the supplier and the consumer. They should be covered by the definition of a contract under this Directive, and should thus comply with the rules laid down therein.

Amendment

(18) Contracts may include general terms and conditions of the supplier that need to be accepted by the consumer. For some digital content, suppliers often describe the service and measurable service targets in a service level agreement. These service level agreements are generally appended to the main contract and form an important component of the contractual relationship between the supplier and the consumer. They should be covered by the definition of a contract under this Directive, and should thus comply with the rules laid down therein. ***In cases where consent to the processing of personal data is given as a counter-performance other than money, the contract should contain the information about the processing prescribed by Regulation (EU) 2016/679 of the European Parliament and of the Council¹, but that information should be clearly distinguishable from other elements of the contract. In addition, easily understandable icons should illustrate the main elements of the processing of personal data.***

¹ Regulation (EU) 2016/679 of the

European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation))OJ L 119, 4.5.2016, p. 1).

Amendment 7

Proposal for a directive Recital 22

Text proposed by the Commission

(22) *The protection of individuals with regard to the processing of personal data is governed by Directive 95/46/EC of the European Parliament and of the Council¹ and by Directive 2002/58/EC of the European Parliament and of the Council² which are fully applicable in the context of contracts for the supply of digital content. Those Directives already establish a legal framework in the field of personal data in the Union. The implementation and application of this Directive should be made in full compliance with that legal framework.*

¹. *OJ L 281, 23/11/1995, p. 31 - 50) [to be replaced by the General Data Protection Regulation, once adopted].*

². OJ L 201, 31.7.2002, p. 37–47.

Amendment

(22) *The pursuit of activities falling within the scope of this Directive involves the processing of personal data. This Directive is without prejudice to the rules of Union law applicable to the processing of personal data within the Union, in particular Regulation (EU) 2016/679 and Directive 2002/58/EC of the European Parliament and of the Council², which govern the processing of personal data carried out in the Member States under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States. Those legal acts already establish a legal framework in the field of personal data in the Union **and are fully applicable in the context of contracts for the supply of digital content.** The implementation and application of this Directive should be made in full compliance with that legal framework.*

². OJ L 201, 31.7.2002, p. 37–47.

Justification

It is important to ensure that the processing of personal data which is conducted for the provision of digital content fully complies with EU data protection legislation, including the new General Data Protection Regulation, which is of a horizontal nature.

Amendment 8

Proposal for a directive Recital 25

Text proposed by the Commission

(25) In cases where the contract does not stipulate sufficiently clear and comprehensive benchmarks to ascertain the conformity of the digital content with the contract, it is necessary to set **objective** conformity criteria to ensure that consumers are not deprived of their rights. In such cases the conformity with the contract should be assessed considering the purpose for which digital content of the same description would normally be used.

Amendment

(25) In cases where the contract does not stipulate sufficiently clear and comprehensive benchmarks, ***adjusted to the consumers at whom it is targeted***, to ascertain the conformity of the digital content with the contract, it is necessary to set conformity criteria to ensure that consumers ***sufficiently comprehend, and*** are not deprived of their rights. In such cases, the conformity with the contract should be assessed considering the purpose for which digital content of the same description would normally be used, ***available technical standards, and consumers' reasonable expectations***.

Amendment 9

Proposal for a directive Recital 27

Text proposed by the Commission

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. As recognised by the Digital Single Market Strategy a high level of network and information security is essential across the European Union to ensure respect of fundamental rights such as the right to privacy and personal data, to increase user

Amendment

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. As recognised by the Digital Single Market Strategy, a high level of network and information security is essential across the European Union to ensure respect of fundamental rights, such as the right to ***the protection of online*** privacy and personal

confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those data-driven services and technologies ensure that those qualities are guaranteed, ***to the extent that is proportionate to the role and function those technologies play.*** In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains.

Amendment 10

Proposal for a directive Recital 37

Text proposed by the Commission

(37) As a second step, the consumer should be entitled to have the price reduced or the contract terminated. The right of a consumer to have the contract terminated should be limited to those cases where for instance bringing the digital content to conformity is not possible and the non-conformity impairs the main performance features of the digital content. Where the consumer terminates the contract, the supplier should reimburse the price paid by the consumer or, where the digital content is supplied not in exchange for a price but against access to data provided by the consumer, the supplier should refrain from using it, from transferring that data to third parties or allowing third parties to access it after termination of the contract. Fulfilling the obligation to refrain from using data should mean in the case when the counter-performance consists of personal data, that the supplier should take all measures in order to comply with data protection rules by deleting it or rendering it anonymous in such a way that the consumer cannot be

data, to increase user confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those data-driven services and technologies ensure that those qualities are guaranteed ***to the greatest possible extent.*** In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains.

Amendment

(37) As a second step, the consumer should be entitled to have the price reduced or the contract terminated. The right of a consumer to have the contract terminated should be limited to those cases where, for instance, bringing the digital content ***into*** conformity is not possible and the non-conformity impairs the main performance features of the digital content. Where the consumer terminates the contract, the supplier should reimburse the price paid by the consumer or, where the digital content is supplied not in exchange for a price but against access to data provided by the consumer ***as a counter-performance for the digital content supplied or data produced by the consumer during the duration of the contract,*** the supplier should refrain from using it, from transferring that data to third parties or allowing third parties to access it after termination of the contract. Fulfilling the obligation to refrain from using data should mean, in the case when the counter-performance consists of personal data, that

identified by any means likely reasonably to be used either by the supplier or by any other person. Without prejudice to obligations of a controller under *Directive 95/46/EC* the supplier should not be obliged to undertake any further steps in relation to data which the supplier has lawfully provided to third parties in the course of the duration of the contract for the supply of the digital content.

the supplier should take all measures in order to comply with data protection rules by deleting it or rendering it anonymous in such a way that the consumer cannot be identified by any means likely reasonably to be used either by the supplier or by any other person. *If personal data protection techniques, such as pseudonimisation, as prescribed in Regulation (EU) 2016/679, are used by the supplier, only after the request made by the consumer, the supplier should refrain from using these data.* Without prejudice to obligations of a controller under *Regulation (EU) 2016/679*, the supplier should not be obliged to undertake any further steps in relation to data which the supplier has lawfully provided to third parties in the course of the duration of the contract for the supply of the digital content.

Amendment 11

Proposal for a directive Recital 38

Text proposed by the Commission

(38) Upon termination the supplier should also refrain from using the content *generated* by the consumer. However, in those cases where more than one consumer *generated* particular content, the supplier is entitled to continue to use the content *generated* by the consumer where those other consumers make use of it.

Amendment

(38) Upon termination, the supplier should also refrain from using the content *produced* by the consumer. However, in those cases where more than one consumer *produced* particular content, the supplier is entitled to continue to use the content *produced* by the consumer where those other consumers make use of it.

Amendment 12

Proposal for a directive Recital 39

Text proposed by the Commission

(39) In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the

Amendment

(39) In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the

contract, the supplier should allow the consumer to retrieve all data uploaded by the consumer, produced by the consumer with the use of the digital content *or generated through the consumer's use of the digital content*. This obligation should extend to data which the supplier is obliged to retain under the contract for the supply of the digital content as well as to data which the supplier has effectively retained in relation to the contract.

Amendment 13

Proposal for a directive Recital 44

Text proposed by the Commission

(44) The principle of the supplier's liability for damages is an essential element of the contracts for supply of digital content. In order to increase consumers' trust in digital content this principle should thus be regulated at Union level to ensure that consumers do not suffer a detriment if *their hardware or software is damaged* by digital content which is not in conformity with the contract. Therefore, consumers should be entitled to a compensation for damages caused to the *consumer's digital environment* by a lack of conformity with the contract or a failure to supply the digital content. However, it should be for Member States to lay down the detailed conditions for the exercise of the right to damages while taking into account that discounts on prices for future supplies of the digital content, especially when offered by suppliers as an exclusive compensation for losses, do not necessarily put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract.

contract, the supplier, *upon request by the consumer*, should allow the consumer to retrieve all data uploaded by the consumer *or* produced by the consumer with the use of the digital content. This obligation should extend to data which the supplier is obliged to retain under the contract for the supply of the digital content as well as to data which the supplier has effectively retained in relation to the contract.

Amendment

(44) The principle of the supplier's liability for damages is an essential element of contracts for supply of digital content. In order to increase consumers' trust in digital content, this principle should thus be regulated at Union level to ensure that consumers do not suffer a detriment if *they sustain damage* by digital content which is not in conformity with the contract. Therefore, consumers should be entitled to a compensation for damages caused to the *consumer* by a lack of conformity with the contract or a failure to supply the digital content. However, it should be for Member States to lay down the detailed conditions for the exercise of the right to damages while taking into account that discounts on prices for future supplies of the digital content, especially when offered by suppliers as an exclusive compensation for losses, do not necessarily put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract. *It should be possible for Member States, when laying down the rules in that regard, to provide for a*

reduced or increased degree of liability for damages in order to differentiate between suppliers that have done everything in their power to limit the possibility of damage, for example by observing industry codes of best practice, security baselines or international standards, and those that have been negligent in this respect.

Justification

The proposal limits the supplier's liability to economic damages suffered by the hardware and software of the consumer. This is too limited since there might be cases where a consumer suffers serious economic or immaterial loss quite apart from any damage to its digital environment. Furthermore, in order to encourage a stronger sense of responsibility and accountability among suppliers, Member States should be allowed, in setting the detailed rules on damages, to make a differentiation between those suppliers that did everything in their power to limit the possibility of damages and those that did not.

Amendment 14

Proposal for a directive Recital 55

Text proposed by the Commission

(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 specifically **Article** 16, 38 and 47 thereof.

Amendment

(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 specifically **Articles 7, 8, 16, 38 and 47** thereof.

Amendment 15

Proposal for a directive Article 2 – point 1 – point a

Text proposed by the Commission

(a) data which is produced and supplied in digital form, *for example* video, audio, applications, digital games and any other software,

Amendment

(a) data which **are** produced and supplied in digital form, **including** video, audio, applications, digital games and any other software,

Amendment 16

Proposal for a directive Article 2 – point 1 a (new)

Text proposed by the Commission

Amendment

1a. *'personal data' means personal data as defined by point (1) of Article 4 of Regulation (EU) 2016/679;*

Amendment 17

Proposal for a directive Article 2 – point 5

Text proposed by the Commission

Amendment

5. 'damages' means a sum of money to which consumers may be entitled as compensation for ***economic damage to their digital environment***;

5. 'damages' means a sum of money to which consumers may be entitled as compensation for ***material and non-material damage***;

Justification

The proposal limits the supplier's liability to economic damages suffered by the hardware and software of the consumer. This is too limited since there might be cases where a consumer suffers serious economic or immaterial loss quite apart from any damage to its digital environment, for example if a software contains a bug that allows hackers to gain access to a consumer's computer and steal his identity in order to perform identity fraud. A similar provision is also included in the new General Data Protection Regulation

Amendment 18

Proposal for a directive Article 3 – paragraph 1

Text proposed by the Commission

Amendment

1. This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer ***actively provides counter-***

1. This Directive shall apply to any contract where the supplier supplies digital content ***or a digital service*** to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer ***makes***

performance other than money in the form of personal data or any other data.

available his or her personal data or any other data instead of a payment in money, insofar this is possible in line with Regulation (EU) 2016/679. The contract shall explicitly indicate which personal data are exchanged for the content supplied.

Amendment 19

Proposal for a directive Article 3 – paragraph 4

Text proposed by the Commission

4. This Directive shall not apply to *digital content provided against counter-performance other than money to the extent the supplier requests the consumer to provide personal data the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements and the supplier does not further process them in a way incompatible with this purpose. It shall equally not apply to any other data the supplier requests the consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes.*

Amendment

4. This Directive shall not apply *where personal data or other data made available by the consumer are exclusively used by the supplier to supply the digital content or to meet legal requirements, and the supplier does not process those data for any other purpose.*

Amendment 20

Proposal for a directive Article 3 – paragraph 7

Text proposed by the Commission

7. If any provision of this Directive conflicts with a provision of another Union act *governing a specific sector or subject matter*, the provision of that other Union

Amendment

7. If any provision of this Directive conflicts with a provision of another Union act, the provision of that other Union act shall take precedence over this Directive.

act shall take precedence over this Directive.

Amendment 21

Proposal for a directive Article 3 – paragraph 8

Text proposed by the Commission

8. This Directive **is without prejudice to** the protection of individuals with regard to the processing of personal data.

Amendment

8. **No provision of this Directive or of any act transposing it into national law shall in any way reduce or undermine** the protection of individuals with regard to the processing of personal data **as provided for in Regulation (EU) 2016/679 and in Directive 2002/58/EC.**

Amendment 22

Proposal for a directive Article 3 – paragraph 9 a (new)

Text proposed by the Commission

Amendment

9 a. Where, in the context of supplying digital content within the scope of this Directive, the law of Member State other than that of the consumer's permanent residence applies, the supplier shall inform the consumer accordingly before entering into the contract.

Amendment 23

Proposal for a directive Article 5 – paragraph 2

Text proposed by the Commission

2. The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise. The supply shall be deemed to take place when the digital content is

Amendment

2. The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise, **and without prejudice to point (m) of Article 16 of Directive 2011/83/EU.**

supplied to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is the earlier.

The supply shall be deemed to take place when the digital content is supplied to the consumer or, where point (b) of paragraph 1 *of this Article* applies, to the third party chosen by the consumer, whichever is the earlier.

Amendment 24

Proposal for a directive Article 6 – paragraph 1 – introductory part

Text proposed by the Commission

1. In order to conform with the contract, the digital content shall, where relevant:

Amendment

1. ***The contract shall include all relevant characteristics for the assessment of the conformity of the digital content, as well as all relevant information regarding the processing of personal data in compliance with the obligation under Regulation (EU) 2016/679.*** In order to conform with the contract, the digital content shall, where relevant:

Amendment 25

Proposal for a directive Article 6 – paragraph 1 – point d

Text proposed by the Commission

(d) be updated as stipulated by the contract.

Amendment

(d) be updated as stipulated by the contract ***or as necessary to guarantee the characteristics provided for in points (a) and (b), in particular continuity and security.***

Amendment 26

Proposal for a directive Article 6 – paragraph 2 – introductory part

Text proposed by the Commission

2. ***To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1,*** the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and security, taking into account:

Amendment

2. ***In addition to complying with any conformity requirements included in the contract as provided for by paragraph 1,*** the digital content shall be fit for the purposes for which digital content of the same description would normally be used ***and shall possess the qualities,*** including its functionality, interoperability and other performance features such as accessibility, continuity and security, ***which consumers may reasonably expect,*** taking into account:

Amendment 27

Proposal for a directive Article 6 – paragraph 2 – point a

Text proposed by the Commission

(a) whether the digital content is supplied in exchange for a price or other counter-performance than money;

Amendment

(a) whether the digital content is supplied in exchange for a price or counter-performance ***other*** than money ***by the provision of personal data or any other data pursuant to Article 3(1);***

Amendment 28

Proposal for a directive Article 6 – paragraph 2 – point a a (new)

Text proposed by the Commission

Amendment

(aa) consumers' legitimate expectations;

Justification

In the proposal, digital content has to be in conformity with what was stipulated in the contract and only if nothing has been stipulated in the contract more objective criteria (like technical standards or codes of conducts) could be used to assess its conformity. However, digital content products are often so complex that the consumer cannot be expected to fully

grasp the terms and conditions of the contract and to make an informed decision. It would therefore be advisable to use more often criteria such as technical standards or legitimate expectations to ascertain conformity.

Amendment 29

Proposal for a directive

Article 6 – paragraph 2 – point b

Text proposed by the Commission

(b) *where relevant*, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; and

Amendment

(b) any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices; and

Amendment 30

Proposal for a directive

Article 6 – paragraph 2 – point b a (new)

Text proposed by the Commission

Amendment

(b a) any existing best practices relating to the security of information systems and digital environments;

Amendment 31

Proposal for a directive

Article 6 – paragraph 3

Text proposed by the Commission

3. Where the contract stipulates that the digital content shall be supplied over a period of time, the digital content shall be in conformity with the contract throughout the duration of that period.

Amendment

3. Where the contract stipulates that the digital content *is to* be supplied over a period of time, the digital content, ***including, where necessary, security updates to be provided by the supplier,*** shall be in conformity with the contract throughout the duration of that period.

Amendment 32

Proposal for a directive
Article 6 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5 a. In order to be in conformity with the contract, the digital content or digital service shall respect the principles of “privacy by design” and “privacy by default” set out in Article 25 of Regulation (EU) 2016/679.

Amendment 33

Proposal for a directive
Article 9 – paragraph 3

Text proposed by the Commission

Amendment

3. The consumer shall cooperate with the supplier to the extent possible and necessary to determine the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are the least intrusive for the consumer. Where the consumer fails to cooperate, the burden of proof with respect to the non-conformity with the contract shall be on the consumer.

3. The consumer shall cooperate with the supplier to the extent possible and necessary to determine the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are the least intrusive for the consumer. Where the consumer fails to cooperate, the burden of proof with respect to the non-conformity with the contract shall be on the consumer. ***The consumer shall not have to cooperate where the supplier requests access to private or personal information and communications.***

Amendment 34

Proposal for a directive
Article 10 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) any lack of conformity which exists at the time the digital content is supplied;
and

(b) any lack of conformity which exists at the time the digital content is supplied;

Amendment 35

Proposal for a directive
Article 10 – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(b a) any lack of security which was known to the supplier or could reasonably have been known to it according to best practices relating to the security of information systems and digital environments; and

Amendment 36

Proposal for a directive
Article 12 – paragraph 2

Text proposed by the Commission

Amendment

2. The supplier shall bring the digital content **in** conformity with the contract pursuant to paragraph 1 **within a reasonable time** from the time the supplier has been informed by the consumer about the lack of conformity with the contract and without any significant inconvenience to the consumer, taking account of the nature of digital content and the purpose for which the consumer required this digital content.

2. The supplier shall bring the digital content **into** conformity with the contract pursuant to paragraph 1 **without undue delay** from the time the supplier has been informed by the consumer about the lack of conformity with the contract and without any significant inconvenience to the consumer, taking account of the nature of digital content and the purpose for which the consumer required **that** digital content.

Amendment 37

Proposal for a directive
Article 12 – paragraph 5

Text proposed by the Commission

Amendment

5. The consumer may terminate the contract **only** if the lack of conformity with the contract impairs functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security where required by Article 6 **paragraphs** (1) and (2). The burden of proof that the lack of conformity with the

5. **Without prejudice to other legal grounds for terminating the contract**, the consumer may terminate the contract if the lack of conformity with the contract impairs functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity and security where required by Article 6 (1) and (2). The burden of proof

contract does not impair functionality, interoperability and other main performance features of the digital content shall be on the supplier.

that the lack of conformity with the contract does not impair functionality, interoperability and other main performance features of the digital content shall be on the supplier.

Amendment 38

Proposal for a directive Article 13 – paragraph 2 – point b

Text proposed by the Commission

(b) the supplier shall **take all measures which could be expected in order to** 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 with the exception of the content which has been **generated** jointly by the consumer and others who continue to make use of the content;

Amendment

(b) the supplier shall refrain from the use of **personal data or any other data** which the consumer has **made available instead of a payment in money** 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 with the exception of the content which has been **produced** jointly by the consumer and others who continue to make use of the content. **The supplier shall refrain from processing personal data for the mere purpose of allowing non-personal data and content to be linked to the consumer in order to be able to allow the consumer to retrieve it under point (c). The supplier shall comply with the obligations applicable under Regulation (EU) 2016/679;**

Amendment 39

Proposal for a directive Article 13 – paragraph 2 – point c

Text proposed by the Commission

(c) the supplier shall provide the

Amendment

(c) the supplier, **on request by the**

consumer with technical means to retrieve all content provided by the consumer and any other data produced *or generated* through the consumer's use of the digital content to the extent that data has been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without *significant* inconvenience, in reasonable time and in a commonly used data format;

consumer, shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced through the consumer's use of the digital content to the extent that data *have* been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without inconvenience, in reasonable time and in a *structured*, commonly used *and machine-readable* data format *and to transmit that content to another supplier without hindrance from the initial supplier*;

Amendment 40

Proposal for a directive Article 14 – paragraph 1

Text proposed by the Commission

1. The supplier shall be liable to the consumer for any economic damage to the *digital environment of the* consumer caused by a lack of conformity with the contract or a failure to supply the digital content. Damages shall put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract.

Amendment

1. The supplier shall be liable to the consumer for any economic damage to the consumer caused by a lack of conformity with the contract or a failure to supply the digital content. Damages shall put the consumer as nearly as possible into the position in which the consumer would have been if the digital content had been duly supplied and been in conformity with the contract.

Amendment 41

Proposal for a directive Article 14 – paragraph 2

Text proposed by the Commission

2. The Member States shall lay down detailed rules for the exercise of the right to damages.

Amendment

2. The Member States shall lay down detailed rules for the exercise of the right to damages. *When laying down those rules, Member States may provide for a reduced or increased degree of liability for damages based on objective criteria for assessing the efforts made by the supplier to avoid non-conformity of the*

digital content and the occurrence of the damage, such as best practices in relation to security or state-of-the-art technology.

Amendment 42

Proposal for a directive

Article 15 – paragraph 1 – introductory part

Text proposed by the Commission

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 alternations adversely affect access to or use of the digital content by the consumer**, only if:

Amendment

1. Where the contract provides that the digital content **is to** 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 **and** continuity, only if:

Amendment 43

Proposal for a directive

Article 15 – paragraph 1 – point a (new)

Text proposed by the Commission

Amendment

(a a) such alteration is necessary for the security of the content in line with best practices;

Amendment 44

Proposal for a directive

Article 15 – paragraph 1 – point b

Text proposed by the Commission

(b) the consumer is notified reasonably in advance of the modification by an explicit notice **on a durable medium**;

Amendment

(b) the consumer is notified reasonably in advance of the modification by an explicit notice;

Amendment 45

Proposal for a directive Article 15 – paragraph 1 – point d

Text proposed by the Commission

(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).

Amendment

(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 ***point (c) of Article 13(2) or point (b) of Article 16(4).***

Amendment 46

Proposal for a directive Article 16 – paragraph 4 – point a

Text proposed by the Commission

(a) the supplier shall ***take all measures which could be expected in order to*** refrain from the use of ***other counter-performance 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;

Amendment

(a) the supplier shall refrain from the use of ***personal data or any other data*** which the consumer has ***made available instead of a payment in money*** in exchange for the digital content and any other data ***provided*** by the ***consumer*** in relation to the ***use*** of the digital content including any content provided by the consumer, ***with the exception of content which has been produced jointly by the consumer and others who continue to make use of it. The supplier shall refrain from processing personal data for the mere purpose of allowing non-personal data and content to be linked to the consumer in order to be able to allow the consumer to retrieve it under point (b). The supplier shall comply with the obligations applicable under Regulation (EU) 2016/679;***

Amendment 47

Proposal for a directive Article 16 – paragraph 4 – point b

Text proposed by the Commission

(b) the supplier shall provide the consumer with technical means to retrieve all **any** content **provided** by the consumer and any other data produced **or generated** through the consumer's use of the digital content to the extent **this** data **has** been retained by the supplier. The consumer shall be entitled to retrieve the content without significant inconvenience, in reasonable time and in a commonly used data format; and

Amendment

(b) the supplier, **on request by the consumer**, shall provide the consumer with technical means to retrieve all content **made available** by the consumer and any other data produced through the consumer's use of the digital content to the extent **that those** data **have** been retained by the supplier. The consumer shall be entitled to retrieve the content **and data** without significant inconvenience, in reasonable time and in a **structured**, commonly used **and machine-readable** data format **and shall have the right to transmit the content and data in question to another supplier without hindrance from the initial supplier**; and

Amendment 48

Proposal for a directive Article 18 – paragraph 1

Text proposed by the Commission

1. Member States shall ensure that **adequate and** effective means exist to ensure compliance with this Directive.

Amendment

1. Member States shall ensure that effective **and dissuasive** means exist to ensure compliance with this Directive.

Justification

Real enforcement of these new consumers' rights will only take place if truly effective and dissuasive sanctions are put in place by the Member States, given also the important commercial advantages that providers of digital content could gain by aggressively increasing their market share at the detriment of consumers' rights.

Amendment 49

Proposal for a directive
Article 18 – paragraph 2 – point c a (new)

Text proposed by the Commission

Amendment

(ca) organisations which are active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data.

Justification

based on Art. 80 GDPR

Amendment 50

Proposal for a directive
Article 19 a (new)

Text proposed by the Commission

Amendment

Article 19 a

Data protection

Processing of personal data carried out in the context of activities conducted pursuant to this Directive shall comply with the provisions of Regulation (EU) 2016/679 and Directive 2002/58/EC.

Amendment 51

Proposal for a directive
Article 22 – paragraph 1

Text proposed by the Commission

Amendment

1. The Commission shall, not later than on [the date of **five** years after entry into force] review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content against counter-performance other than that covered by this Directive, in particular

1. The Commission shall, not later than on ... [**three** years after the date of entry into force of this Directive] review the application of this Directive and submit a report to the European Parliament and the Council. The report shall examine, inter alia, the **interaction and compliance with Regulation (EU) 2016/679, and the** case for harmonisation of rules applicable to contracts for the supply of digital content

supplied against advertisement or indirect collection of data.

against counter-performance other than that covered by this Directive, in particular supplied against advertisement or indirect collection of data.

PROCEDURE – COMMITTEE ASKED FOR OPINION

Title	Contracts for the supply of digital content	
References	COM(2015)0634 – C8-0394/2015 – 2015/0287(COD)	
Committees responsible Date announced in plenary	IMCO 21.1.2016	JURI 21.1.2016
Opinion by Date announced in plenary	LIBE 21.1.2016	
Rapporteur Date appointed	Marju Lauristin 16.3.2016	
Rule 55 – joint committee meetings Date announced in plenary	28.4.2016	
Discussed in committee	12.7.2016	8.11.2016
Date adopted	8.11.2016	
Result of final vote	+: 41	–: 4
	0: 2	
Members present for the final vote	Martina Anderson, Gerard Batten, Malin Björk, Michał Boni, Caterina Chinnici, Rachida Dati, Agustín Díaz de Mera García Consuegra, Cornelia Ernst, Tanja Fajon, Mariya Gabriel, Kinga Gál, Ana Gomes, Nathalie Griesbeck, Jussi Halla-aho, Sophia in 't Veld, Barbara Kudrycka, Marju Lauristin, Juan Fernando López Aguilar, Roberta Metsola, Claude Moraes, Péter Niedermüller, Judith Sargentini, Birgit Sippel, Csaba Sógor, Helga Stevens, Bodil Valero, Udo Voigt, Beatrix von Storch, Josef Weidenholzer, Cecilia Wikström, Kristina Winberg, Tomáš Zdechovský	
Substitutes present for the final vote	Kostas Chrysogonos, Carlos Coelho, Anna Maria Corazza Bildt, Pál Csáky, Miriam Dalli, Daniel Dalton, Teresa Jiménez-Becerril Barrio, Ska Keller, Miltiadis Kyrkos, Jeroen Lenaers, Ulrike Lunacek, Andrejs Mamikins	
Substitutes under Rule 200(2) present for the final vote	Vilija Blinkevičiūtė, Agnieszka Kozłowska-Rajewicz, Maria Noichl	

PROCEDURE – COMMITTEE RESPONSIBLE

Title	Contracts for the supply of digital content		
References	COM(2015)0634 – C8-0394/2015 – 2015/0287(COD)		
Date submitted to Parliament	9.12.2015		
Committees responsible Date announced in plenary	IMCO 21.1.2016	JURI 21.1.2016	
Committees asked for opinions Date announced in plenary	ITRE 21.1.2016	CULT 21.1.2016	LIBE 21.1.2016
Not delivering opinions Date of decision	ITRE 28.1.2016	CULT 25.1.2016	
Rapporteurs Date appointed	Evelyne Gebhardt 14.4.2016	Axel Voss 14.4.2016	
Rule 55 – Joint committee procedure Date announced in plenary	28.4.2016		
Discussed in committee	14.7.2016	29.11.2016	22.3.2017
Date adopted	21.11.2017		
Result of final vote	+: –: 0:	55 4 2	
Members present for the final vote	John Stuart Agnew, Max Andersson, Pascal Arimont, Joëlle Bergeron, Marie-Christine Boutonnet, Jean-Marie Cavada, Dita Charanzová, Kostas Chrysogonos, Carlos Coelho, Sergio Gaetano Cofferati, Lara Comi, Anna Maria Corazza Bildt, Daniel Dalton, Nicola Danti, Dennis de Jong, Mady Delvaux, Pascal Durand, Laura Ferrara, Evelyne Gebhardt, Lidia Joanna Geringer de Oedenberg, Maria Grapini, Sergio Gutiérrez Prieto, Liisa Jaakonsaari, Philippe Juvin, Sylvia-Yvonne Kaufmann, Gilles Lebreton, Antonio López-Istúriz White, António Marinho e Pinto, Jiří Maštálka, Eva Maydell, Marlene Mizzi, Nosheena Mobarik, Emil Radev, Julia Reda, Evelyn Regner, Virginie Rozière, Christel Schaldemose, Andreas Schwab, Olga Sehnalová, Jasenko Selimovic, Ivan Štefanec, Catherine Stihler, Pavel Svoboda, József Szájer, Mylène Troszczynski, Mihai Țurcanu, Anneleen Van Bossuyt, Axel Voss, Francis Zammit Dimech, Marco Zullo, Tadeusz Zwiefka		
Substitutes present for the final vote	Lucy Anderson, Heidi Hautala, Kaja Kallas, Angelika Niebler, Ulrike Trebesius, Josef Weidenholzer, Rainer Wieland		
Substitutes under Rule 200(2) present for the final vote	Zbigniew Kuźmiuk, Bolesław G. Piecha, Michaela Šojdřová		
Date tabled	27.11.2017		

FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE

55	+
ALDE	Jean-Marie Cavada, Dita Charanzová, Kaja Kallas, António Marinho e Pinto, Jasenko Selimovic
ECR	Daniel Dalton, Zbigniew Kuźmiuk, Nosheena Mobarik, Bolesław G. Piecha, Ulrike Trebesius, Anneleen Van Bossuyt
EFDD	Joëlle Bergeron
GUE/NGL	Kostas Chrysogonos, Jiří Maštálka, Dennis de Jong
PPE	Pascal Arimont, Carlos Coelho, Lara Comi, Anna Maria Corazza Bildt, Philippe Juvin, Antonio López-Istúriz White, Eva Maydell, Angelika Niebler, Emil Radev, Andreas Schwab, Michaela Šojdrová, Ivan Štefanec, Pavel Svoboda, József Szájer, Mihai Țurcanu, Axel Voss, Rainer Wieland, Francis Zammit Dimech, Tadeusz Zwiefka
S&D	Lucy Anderson, Sergio Gaetano Cofferati, Nicola Danti, Mady Delvaux, Evelyne Gebhardt, Lidia Joanna Geringer de Oedenberg, Maria Grapini, Sergio Gutiérrez Prieto, Liisa Jaakonsaari, Sylvia-Yvonne Kaufmann, Marlene Mizzi, Evelyn Regner, Virginie Rozière, Christel Schaldemose, Olga Sehnalová, Catherine Stihler, Josef Weidenholzer
Verts/ALE	Max Andersson, Pascal Durand, Heidi Hautala, Julia Reda
4	-
EFDD	John Stuart Agnew
ENF	Marie-Christine Boutonnet, Gilles Lebreton, Mylène Troszczynski
2	0
EFDD	Laura Ferrara, Marco Zullo

Key to symbols:

+ : in favour

- : against

0 : abstention