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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)

{SWD(2015) 274 final}

{SWD(2015) 275 final}

EXPLANATORY MEMORANDUM

The Digital Single Market Strategy¹ adopted by the Commission on 6 May 2015 announced a legislative initiative on harmonised rules for the supply of digital content and online sales of goods. This initiative is composed of (i) a proposal on certain aspects concerning contracts for the supply of digital content, and (ii) a proposal on certain aspects concerning contracts for the online and other distance sales of goods.

As announced by the Commission in its 2015 Work Programme, these two proposals draw on the experience acquired during the negotiations for a Regulation on a Common European Sales Law. In particular, they no longer follow the approach of an optional regime and a comprehensive set of rules. Instead, the proposals contain a targeted and focused set of fully harmonised rules. The proposals also build on a number of amendments adopted by the European Parliament in first reading concerning the proposal for a Regulation on the Common European Sales Law, in particular the restriction of the scope to online and other distance sales of goods and the extension of the scope to certain digital content which is provided against another counter-performance than money.

While this explanatory memorandum covers specifically the proposal on certain aspects of contracts for the supply of digital content, the parts of this explanatory memorandum about the reasons for the proposal, the collection of expertise and the impact assessments concern both proposals as these two proposals are envisaged as a package with common objectives.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The general objective of the proposals is to contribute to faster growth of the Digital Single Market, to the benefit of both consumers and businesses. By eliminating the key contract law-related barriers hindering cross-border trade, the rules put forward in the proposals will reduce the uncertainty faced by businesses and consumers due to the complexity of the legal framework and the costs incurred by businesses resulting from differences in contract law between Member States. The initiative will increase consumer trust by providing uniform rules with clear consumer rights.

39 % of businesses selling online but not cross-border quote different national contract laws as one of the main obstacles to cross-border sales.² This applies particularly to remedies in case of a faulty product as mentioned by 49% of EU retailers selling online and 67% of those who are currently trying to sell or considering selling online cross-border.³ Different national contract law rules have created one-off costs for retailers selling to consumers of approximately €4 billion; these costs mostly affect micro and small- and medium-sized enterprises (SMEs). The purpose of these proposals is to create a business-friendly environment and make it easier for businesses, especially SMEs, to sell cross-border. Businesses should be given legal certainty and avoid unnecessary costs caused by differing national laws when selling goods and digital content outside their domestic market.

Only 18% of consumers who used the Internet for private purposes in 2014 purchased online from another EU country while 55% did so domestically.⁴ Consumers suffer detriment due to

¹ COM (2015) 192 final <http://ec.europa.eu/priorities/digital-single-market/>

² Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015).

³ Flash Eurobarometer 396 "Retailers' attitudes towards cross-border trade and consumer protection" (2015).

⁴ Eurostat survey on ICT usage in households and by individuals (2014).

lack of clear contractual rights for faulty digital content. Digital content covers a wide range of items, such as music, movies, apps, games, films, cloud storage services or broadcasts of sport events. The combined value of the financial detriment resulting from the most recent problem faced by consumers with digital content and the time spent trying to resolve these problems during the last 12 months is estimated at between €9 and 11 billion. Consumers are also not confident when buying online across borders. One of the major reasons is their uncertainty about their key contractual rights. As a result, they miss opportunities and face a narrower range of offers at less competitive prices.

- **Consistency with existing policy provisions in the policy area**

This proposal aims at filling the current legal gap in the *consumer acquis* at EU level regarding certain contractual aspects for which there are currently no rules.

The proposal supplements 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 Council⁵, which has already fully harmonised certain rules for the supply of digital content (mainly pre-contractual information requirements and the right of withdrawal). While some Member States like the United Kingdom and the Netherlands have already adopted legislation specifically on digital content, there are currently no specific EU rules to protect consumers against digital content which is not in conformity with the contract. Therefore there is a need to act quickly in order to prevent possible further legal fragmentation due to the emerging different national rules.

In addition, the proposal tackles two contractual rights (modification and termination of long term contracts), which have been identified as problematic⁶ and which are currently only subject to the general clause on the unfairness control in Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁷.

The proposal also supplements Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market⁸, which, among others, partially establishes harmonised rules on electronic contracts.

The proposal is compatible with the existing EU rules on applicable law and jurisdiction in the Digital Single Market⁹. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁰ and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)¹¹, which provide rules to determine the competent jurisdiction and applicable law, apply also in the digital environment. These instruments have been adopted quite recently and the implications of the internet were considered closely in the legislative

5 OJ L 304, 22.11.2011, p.64

6 See in particular Expert Group on Cloud Computing Contracts - Detailed information on the composition of the Expert Group and minutes of the meetings available at: http://ec.europa.eu/justice/contract/cloud-computing/expert-group/index_en.htm.

7 OJ L 095, 21.04.1993 p. 29.

8 OJ L 178, 17.7.2000, p. 1.

9 A detailed explanation of the EU rule on applicable law and jurisdiction in the Digital Single Market can be found in Annex 7 to the Commission Staff Working Document containing the Impact Assessment accompanying the Proposals for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, SWD (2015) 275.

10 OJ L 351, 20.12.2012, p. 1.

11 OJ L 177, 4.07.2008, p. 6.

process. Some rules take specific account of internet transactions, in particular those on consumer contracts. These rules aim at protecting consumers inter alia in the Digital Single Market by giving them the benefit of the non-derogable rules of the Member State in which they are habitually resident. Together with the proposed new contract rules for the purchase of digital content as set out in this proposal, the existing rules on private international law establish a clear legal framework for buying and selling in a European digital market, which takes into account both consumers' and businesses' interests. Therefore, this legislative proposal does not require any changes to the current framework of EU private international law, including to the Regulation (EC) No 593/2008 (Rome I).

- **Consistency with other Union policies**

The Digital Single Market Strategy intends to deal with all major obstacles to the development of cross-border e-commerce in the Digital Single Market in a holistic manner. The proposal should be seen in the context of this holistic approach. The Strategy covers among others the initiatives related to the cross-border portability of content, role of platforms, the Free Flow of Data, European Cloud, VAT related burden and parcel delivery. Especially, in the context of the cross-border portability of content and European Cloud, the Strategy envisages decisive actions towards ensuring portability and interoperability of content, which is crucial for the supply of digital content within the EU. The Strategy also covers initiatives related to enforcement/redress, i.e. the entry into operation of the Online Dispute Resolution platform¹² and the review of Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)¹³. In particular, fully harmonised contract law rules in the EU will also facilitate coordinated enforcement actions undertaken by the Consumer Protection Co-operation authorities¹⁴. The proposal will also be consistent with the general EU framework on copyright and will be without prejudice to any rights and obligations according to copyright law.

Finally, the protection of individuals with regard to the processing of personal data is governed by Directive 1995/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹⁵ and 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 sector¹⁶ which are fully applicable to supplies of digital content. Those Directives already establish a legal framework in the field of personal data in the Union. The application and implementation of this proposal should be made in full compliance with that legal framework.

¹² Regulation (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.06.2013, p.1.

¹³ OJ L 364, 9.12.2004, p. 1.

¹⁴ This Directive will amend the Regulation on consumer protection cooperation to add a reference of this Directive in the Annex of that Regulation enabling coordinated enforcement actions by the Consumer Protection authorities in the field covered by this Directive.

¹⁵ OJ L 281, 23/11/1995, p. 31 - 50) [to be replaced by the General Data Protection Regulation] and 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).

¹⁶ OJ L 201, 31.7.2002, p. 37–47.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The legal basis of this proposal is Article 114 of the Treaty on the Functioning of the European Union and its main objective is the improvement of the establishment and the functioning of the internal market.

When supplying digital content to consumers in other Member States, businesses are confronted with different mandatory consumer contract law rules. Contracts for the supply of digital content are categorised differently from one Member State to another. Depending on the Member State, these contracts are considered as sales contracts, as services contracts or as rental contracts. In addition, contracts for the supply of digital content are sometimes categorised differently within the same Member State depending on the type of digital content offered.¹⁷ As a consequence, for digital content, national rights and obligations as well as the remedies for consumers vary between Member States. While some of these national rules are non-mandatory and can be modified contractually by the parties, others are of a mandatory character.

Moreover, several Member States have recently enacted or started preparatory work to adopt specific mandatory rules on contracts for the supply of digital content. These national rules differ however in scope and content. It is also to be expected that other Member States will follow this trend. If the EU does not act, businesses will thus increasingly be confronted with different mandatory consumer contract law rules on the supply of digital content.

The existing and upcoming fragmentation creates obstacles for businesses to sell cross-border because they have to incur contract law-related costs. Businesses are also uncertain about their rights and obligations. This has a direct effect on the establishment and functioning of the internal market and negatively affects competition. Given the heterogeneity of the online market for digital content it would be difficult for the market to overcome this fragmentation.

• Subsidiarity (for non-exclusive competence)

The proposal complies with the subsidiarity principle as set out in Article 5 of the Treaty on European Union.

The objectives of the proposal cannot be adequately achieved by the Member States.

The general objective of the initiative is to remove consumer contract law barriers in the online world and help to establish a genuine Digital Single Market for the benefit of businesses and consumers. Member States cannot on their own initiative sufficiently be able to remove the barriers that exist between national legislations. An initiative at EU level is able to better achieve this.

More specifically, the initiative aims to provide consumers with specific rights in a coordinated manner and to create legal certainty for businesses which want to sell their digital content in other Member States. When developing specific legislation on the supply of digital content, each Member State individually would not be able to ensure an overall coherence of its national legislation with other Member States legislations. An initiative at EU level would therefore help to ensure the development of specific consumer rights for digital content in a coherent manner.

Action at EU level would be more effective than action at national level.

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Comparative Study on cloud computing contracts (2014) DLA Piper, p.33 and seq.; Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts; University of Amsterdam: Centre for the Study of European Contract Law (CSECL)/Institute for Information Law (IViR): Amsterdam Centre for Law and Economics (ACLE) p.32 and seq.

Furthermore, an initiative at EU level will secure the application of consumer rights in a coherent manner while ensuring that all consumers in the EU benefit from the same high level of consumer protection. It will create legal certainty for businesses which want to sell their digital content in other Member States. Such an initiative will provide a consistent legal basis for coordinated enforcement actions as the proposed Directive will be included in the Annex of Regulation (EC) No 2006/2004¹⁸ on cooperation of national authorities responsible for the enforcement of consumer protection laws. Moreover, enforcement actions would be largely facilitated by the proposed uniform fully harmonised rules. Thus, the enforcement of EU legislation will be strengthened for the benefit of EU consumers. Such a result can only be achieved by an action at the EU level.

- **Proportionality**

The proposal complies with the principle of proportionality as set out in Article 5 of the Treaty on European Union because the proposal will not go beyond what is necessary for the achievement of the objectives.

The proposal will not harmonise all aspects concerning contracts for the supply of digital content; among many other examples, rules on the conclusion of the contract will not be regulated. Instead, it will focus on harmonising at Union level only those targeted, key mandatory consumer EU contractual rights, which are essential in cross-border online transactions, and which have been identified as barriers to trade by stakeholders and are necessary to build consumer trust when buying online abroad. Moreover, the choice of the legal form of a Directive instead of a Regulation will have as a result considerably less interference into national laws (see below under "Choice of the instrument") as it will leave Member States freedom to adapt the implementation to their national law.

- **Choice of the instrument**

The Commission presents a set of two full harmonisation Directives: a Directive on certain aspects concerning contracts for the supply of digital content and a Directive on certain aspects concerning contracts for the online and other distance sales of goods.

The choice of a Directive leaves Member States freedom to adapt the implementation to their national law. For instance, the proposal does not determine whether the contract for the supply of digital content is to be considered as a sales, services, rental or a sui generis contract; it would leave this decision to Member States. A Regulation would require a much more detailed and comprehensive regime than a Directive in order to allow its effects to be directly applicable. As a consequence, this would have considerably more interference into national laws. It may also jeopardise the future-proof character of the instrument, since, contrary to a Directive, it would have to go to a level of details that would not allow the margin to adapt the implementation of the fully harmonised rules to a technologically and commercially fast-moving market like the one for digital content.

The choice of full harmonisation will lead to simple and modern rules that remove contract law barriers and create a favourable legal framework for businesses while at the same time ensuring that consumers benefit from the same high level of consumer protection throughout the EU.

A non-binding instrument such as a voluntary model contract would not achieve the objective to improve the establishment and functioning of the internal market. Traders would still be obliged to comply with different mandatory national rules of the consumer's country of

18 OJ L 364, 9.12.2004, p. 1

residence, when the latter provide for a higher level of consumer protection than the model contract, and would thus still face contract law-related costs.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Stakeholder consultations

Consultation process

An extensive consultation strategy has been developed to ensure a wide participation throughout the policy cycle of this initiative. This strategy was based on a mix of public and targeted consultations. The Commission has sought a wide and balanced range of views on this issue by giving the opportunity to all relevant parties (businesses, consumers, national authorities, lawyers and academics) to express their opinions.¹⁹

- Public Consultation: An open 12 weeks web-based public consultation resulted in 189 responses from all categories of stakeholders from across the EU.

- Targeted consultations: A stakeholder consultation group was composed of 22 organisations representing a wide range of interests. The group met 7 times.

In-depth interviews with businesses were also conducted from June to August 2015 in order to gather data on contract law related costs faced by business when selling abroad.

Within the framework of the Digital Single Market Strategy, two surveys, a consumer survey²⁰ and a business survey²¹, were used in 2015 to collect data identifying the main cross-border obstacles to the Digital Single Market.

Finally, as part of an economic study on consumer digital content, consumers and businesses were asked about the type of problems they have encountered when purchasing digital content.²²

- Consultation of Member States: three workshops with Member States were organised between June and October 2015. The relevant issues were also discussed with national enforcement authorities at the Consumer Protection Cooperation committee meeting (April 2015) and the national authorities responsible for consumer policy at the Consumer Policy Network meeting (May 2015).

Summary of the results

A majority of general businesses see a need for EU action in the form of full harmonisation; the IT industry and legal professions are more divided. Consumer organisations also recognise the need to act and support full harmonisation provided that a high level of consumer protection is guaranteed. A majority of responding Member States also welcome action on digital content at EU level. Some of them specify they would prefer full harmonisation or targeted full harmonisation. Other Member States would prefer a better enforcement and an assessment of existing rules. A number of them express the need to ensure consistency between rules for goods and digital content.

The vast majority of respondents support an approach including contracts between businesses and consumers only. The vast majority of consumers, Member States and legal professions

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For more details about the consultations, please see: http://ec.europa.eu/justice/newsroom/contract/opinion/index_en.htm.

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GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, 2015.

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Flash Eurobarometer 413 "Companies engaged in online activities" (2015) http://ec.europa.eu/public_opinion/flash/fl_413_en.pdf.

22

Economic study on consumer digital Content products, ICF International, 2015.

are in favour of covering digital content supplied not only for a price but also in exchange for (personal and other) data provided by consumers. Businesses are more divided on this issue.

On the substance of the rules, consumers and legal professions argue that users should be able to terminate the contract as a first remedy. Businesses underline that suppliers of digital content should have the choice to bring the goods into conformity before giving the possibility to terminate the contract. For some IT associations, consumers should only have a right to terminate the contract and to receive a reimbursement of the price, but not the right to request that the content is brought into conformity, as this may be too costly for traders. Other IT associations do not consider remedies for non-conformity to be appropriate at all for digital content. Member States are almost unanimous in supporting the inclusion of all remedies already available for goods. The vast majority of respondents agree that traders should be able to modify the features of the supplied digital content under certain conditions (such as the prior information of the consumer) and that consumers should be able to terminate long term contracts.

- **Collection and use of expertise**

Mainly over 2014, an Expert Group on Cloud Computing Contracts met seven times. The Expert Group was established under the European Cloud Computing Strategy and composed of practitioners and organisations representing cloud service providers and customers, as well as representatives of legal professions or academics with expertise in cloud computing contracts and in personal data protection issues relevant to cloud computing contracts.

Cloud computing contracts played a particularly important role in identifying contractual problems relevant for this Directive. These issues, which were extensively discussed by the Group, relate to quality, liability or modification of the contracts.²³

The Commission also relied on several economic and legal studies, which were either commissioned for the specific purpose of this initiative or as a part of the Digital Single Market Strategy.²⁴

- **Impact assessment**

The Regulatory Scrutiny Board delivered an initial opinion on the draft impact assessment on 16 October 2015 which has been modified taking into account comments from the Board and resubmitted. The second opinion, which approved the draft impact assessment subject to comments, was delivered by the Board on 9 November 2015.²⁵

The revised impact assessment report and an executive summary are published with the proposals.²⁶

Policy alternatives examined

²³ Expert Group on Cloud Computing Contracts - detailed information on the composition of the Group and minutes of its meetings available at: http://ec.europa.eu/justice/contract/cloud-computing/expert-group/index_en.htm.

²⁴ See, in particular:

- GfK for the European Commission, Consumer survey identifying the main cross-border obstacles to the Digital Single Market and where they matter most, 2015
- Eurostat survey on ICT usage in households and by individuals (2014)
- Comparative Study on cloud computing contracts (2014) DLA Piper, p.33 and seq.; Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts; University of Amsterdam: Centre for the Study of European Contract Law (CSECL)/Institute for Information Law (IViR): Amsterdam Centre for Law and Economics (ACLE) p.32 and seq.
- Flash Eurobarometer 413 "Companies engaged in online activities" (2015) http://ec.europa.eu/public_opinion/flash/fl_413_en.pdf.
- Economic study on consumer digital Content products, ICF International, 2015.

²⁵ The opinion of the Regulatory Scrutiny Board is available at: http://ec.europa.eu/justice/contract/index_en.htm.

²⁶ The impact assessment report and the Executive summary are available at : http://ec.europa.eu/justice/contract/index_en.htm.

In addition to examining the consequences of the absence of policy change, the impact assessment examined the following policy alternatives: (i) option 1: targeted fully harmonised rules for digital content and goods; (ii) option 2: targeted fully harmonised rules for digital content and application of the trader's law combined with the existing harmonised rules on goods; (iii) option 3: targeted fully harmonised rules for digital content and no policy change for goods; (iv) option 4: minimum harmonisation rules for digital content and no policy change for goods; (v) option 5: a voluntary European model contract combined with an EU trust-mark.

On a comparative analysis of the impacts of these options, the Impact Assessment Report arrived at the conclusion that option 1 would best meet the policy objectives. This option will reduce contract law-related costs for traders and facilitate cross-border e-commerce. Businesses will be able to rely largely on their own law when selling cross-border as the main rules, which are relevant for cross-border trade, will be the same in all Member States. While the new rules on digital content may entail certain additional costs for businesses, these costs will be limited compared to the existing situation as the new rights will be fully harmonised. Therefore they will provide businesses with a legally certain and business friendly environment. Consumers will have a clear set of rights throughout the EU and will thus be more confident in buying goods or acquiring access to digital content cross-border. This will create a win-win situation for businesses and consumers. Competition will be increased, leading to an overall increase of trade and consequently an increased and better choice at more competitive prices for consumers, with significant macroeconomic gains for the EU.

Lack of policy change would not contribute to achieving the objectives of the Digital Single Market, and would risk having negative economic impacts relative to the current situation.

Option 2 would have the positive impact of fully harmonised rules for digital content. For goods, it would lead to increased incentives for cross-border supply, since traders would be able to sell their products cross-border entirely on the basis of their own law. Consumers may to some extent benefit from increased choice and lower prices. However, under such an option, consumers would no longer benefit from a higher level of consumer protection that their own national law provide. Vice versa, consumers may benefit from a potentially higher level of consumer protection of the trader's law if that goes beyond their own national law on specific points.

Option 3 would have the positive impact of fully harmonised rules for digital content but contract law-related obstacles to cross-border trade would remain for goods.

Option 4 would create minimum rights for consumers concerning the contracts for the supply of digital content in the EU and therefore increase consumers' trust to a certain extent. Member States would be able to adopt more protective rules. However, this option would not reduce costs for traders, who would still need to comply with different national mandatory consumer contract law rules that provide a higher level of consumer protection when selling in other Member States.

Option 5 could help businesses sell digital content across the EU and provide consumers with a satisfactory level of consumer protection, very much depending on the content of the model contract rules to be agreed upon by the industry and on the degree of usage and acceptance of the trust mark by EU businesses. Consumers may be more confident to buy from foreign traders to whom the EU trust mark has been awarded. However, traders would still be obliged to comply with mandatory national rules of the consumer's country of habitual residence, when they provide for a higher level of consumer protection than the model contract rules, and may thus still face contract law-related costs.

Main impacts of the proposal

The impact assessment considers the impact of both proposals, the Directive on certain aspects concerning contracts for the supply of digital content and the Directive on certain aspects concerning contracts for the online and other distance sales of goods.

The two proposals will eliminate contract law-related barriers to cross-border online trade, both for consumers and traders. Removing these obstacles is an incentive for cross-border trade: if the barriers related to contract law were lifted, 122,000 more businesses would be selling online across borders. Intra-EU exports would increase by around €1 billion. Increased online retail competition will lead to retail prices going down in all Member States, averaging -0.25% at EU level. As a result of this price decrease and increased consumer trust stemming from uniform EU rights, there will be additional consumer demand. Household consumption, which mirrors consumers' welfare, would rise in every Member State with an EU average of +0.23%, which corresponds to about €18 billion. Between 7.8 and 13 million additional consumers would start buying online cross-border. The average amount spent annually by each cross-border buyer would also increase by €40. This increase in supply and demand will have direct effects on the main macroeconomic variables in each Member State and in the EU as a whole. Overall real EU GDP is expected to gain about €4 billion per year.

Who would be affected and how

Businesses will face costs to comply with the new Directive but eventually benefit even more from fully harmonised rules to export goods and digital content throughout the EU. SMEs will not be exempted from the new legislation: exemptions would decrease consumers' trust when purchasing from them. There is no justification for giving consumers less protection when they buy from SMEs instead of bigger suppliers. An exemption would also undermine the benefits for SMEs of having one single set of rules applying throughout the EU. On the contrary, the initiative will be particularly beneficial to SMEs, which are more affected by the costs to adapt their contract to mandatory rules of other Member States and are more often confined to their home market than their bigger competitors. Cross-border trade is an important way for them to benefit from the advantages of economies of scale. SMEs face a problem in finding customers. This would be easier to cope with in the online context, since the internet enables online sales at reduced costs compared to offline trade.

• **Fundamental rights**

The proposal for the supply of digital content will impact positively a number of rights protected under the EU Charter of Fundamental Rights, in particular Article 38 on consumer protection and Article 16 on the freedom to conduct a business.

A targeted set of fully harmonised rules for digital content will meet the objective of Article 38 of the Charter of Fundamental Rights by enhancing consumer protection throughout the EU, since it will provide EU consumers with clear and specific rights when they buy/ acquire access to digital content domestically or from other Member States.

A set of fully harmonised rules for key aspects of the supply of the digital content will also contribute to achieving the objective of Article 16 because businesses will be facilitated to sell digital content in the EU, both domestically and cross-border. Their ability to expand their business will therefore be reinforced.

Finally, clear contract law rights will help fulfilling the objective of Article 47 (Right to an effective remedy) because it will increase the ability to exercise one's right to an effective remedy before the courts. The new rules should clarify the remedies available in case of disputes.

4. BUDGETARY IMPLICATIONS

The proposal will not have any budgetary implications.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Member States will be required to send to the Commission the measures implementing the Directive on certain aspects concerning contracts for the supply of digital content. These measures will set out the text of the adopted legislation by the Member States. The Commission will monitor these measures to ensure that they comply with the Directive.

The Commission will launch a monitoring and evaluation exercise to assess how effectively the Directive is achieving the objectives. The results of the evaluation will feed into a review process, to be carried out 5 years after the entry into force of the Directive, which will examine the effectiveness of the Directive.

- **Explanatory documents**

In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, it is considered that the transmission of such documents is justified.

- **Detailed explanation of the specific provisions of the proposal**

The proposal consists of 20 articles.

Article 1 sets the subject matter of the Directive, which is to fully harmonise a set of key rules concerning contracts for the supply of digital content. It clarifies that the Directive includes rules on conformity of the digital content, remedies available to consumers in cases of lack of conformity of digital content with the contract, as well as certain aspects concerning the right to terminate a long term contract and the modification of the digital content.

Article 2 contains a list of definitions for terms used in the Directive. Some definitions stem from the current *acquis*, such as the definition of a consumer or from the proposal for a Regulation on a Common European Sales Law. Other definitions reflect the specificity of digital content and reflect the rapid technological and commercial evolution. For example, the definition of digital content is deliberately broad and encompasses all types of digital content, including for example, downloaded or web streamed movies, cloud storage, social media or visual modelling files for 3D printing, in order to be future-proof and to avoid distortions of competition and to create a level playing field.

Article 3 sets, based on the subject matter, the personal and material scope of the Directive. The Directive covers only business-to-consumer transactions. Contract law related problems in B2B relations, especially in relation to specific needs of SMEs, has been recognised in the Digital Single Market Strategy and will be analysed in the context of other actions announced in the Strategy. The Directive covers the supply of all types of digital content. It also covers digital content supplied not only for a monetary payment but also in exchange for (personal and other) data provided by consumers, except where the data have been collected for the sole purpose of meeting legal requirements. The Directive does not cover services performed with a significant element of human intervention or contracts governing specific sectorial services such as healthcare, gambling or financial services. Article 3 also clarifies that in case of

conflict between the Directive and another EU act, the other EU act takes precedence. In particular, it clarifies that the Directive is without prejudice to the rules on data protection. Finally, it clarifies that the Directive does not affect national laws to the extent that they are not regulated in this Directive, such as national rules providing for obligations of the consumer towards the supplier of digital content or regulating the qualification, formation or validity of contracts.

Article 4 establishes that the present Directive is a full harmonisation Directive. It precludes Member States, within its scope of application, from adopting or maintaining laws remaining below or going beyond the requirements of the Directive. The effect of Article 4 combined with Article 1 is also to determine that in the other areas not included in the scope of application of this Directive, Member States are free to provide national solutions.

Article 5 clarifies the modalities and time of supply of digital content. The digital content must be supplied to the consumer or to a third party which operates a physical or virtual facility allowing processing of, access to or transmission of digital content to the final consumer and with which the consumer is in a contractual relation. As a default rule, the digital content should be supplied instantly unless the parties agree otherwise.

Article 6 contains a mixture of contractual and statutory conformity criteria against which the quality of the digital content is assessed. The digital content must primarily conform to what was promised in the contract. In the absence of such explicit benchmarks, the conformity of the digital content must be assessed according to an objective criterion, i.e. it must be fit for the purpose for which digital content of the same description would normally be used. Article 6 also clarifies that when the digital content is supplied over a period of time, the digital content must be in conformity with the contract throughout the duration of the contract and that the version of digital content supplied to the consumer shall also be the most recent version available at the time of the conclusion of contract.

Article 7 explains that a lack of conformity of the digital content resulting from an incorrect integration into the consumer's hardware and software should be equal to a lack of conformity of the digital content itself if the reasons for the incorrect integration are in the sphere of the supplier.

Article 8 contains an additional conformity requirement according to which the digital content must be cleared from any third-party rights, including those based on intellectual property.

Article 9 imposes the burden of proof for the absence of lack of conformity on the supplier, unless the consumer's digital environment is not compatible with the digital content. This reversal of the burden of proof is not limited in time as digital content is not subject to wear and tear. Article 9 specifies that the consumer shall cooperate with the supplier in order to allow the supplier to ascertain the consumer's digital environment. The obligation to cooperate shall be limited to the least intrusive means technically available to the supplier.

Article 10 states the cases of liability of the supplier towards the consumer, namely where the digital content is not in conformity with the contract or the supplier failed to supply the digital content altogether. Given that digital content may be supplied over a period of time, the supplier should also be liable for any lack of conformity which occurs during that period.

Article 11 gives the right to the consumer to terminate the contract immediately when the supplier failed to supply the digital content altogether as set out in Article 5.

Article 12 lists the remedies available to the consumer in case of any failure to supply or lack of conformity of the digital content. In a first step, the consumer shall be entitled to have the digital content brought to conformity within a reasonable time, without significant inconvenience and without incurring any costs. In a second step, the consumer shall be

entitled to have the price reduced or the contract terminated if the lack of conformity relates to main performance features.

Article 13 details the consequences of termination of the contract for lack of conformity of the digital content. For example, it provides that the supplier shall reimburse the price or if the counter-performance consisted of data refrain from using these data and any other information which the consumer has provided in exchange for the digital content. It also clarifies that the consumer shall also refrain from using further the digital content after termination.

Article 14 establishes a right to damages restricted to cases where damage has been done to the digital content and hardware of the consumer. However, it provides that Member States should lay down the detailed conditions for the exercise of the right to damages.

Article 15 lists the conditions, such as prior agreement and prior information of the consumer or the right for the consumer to terminate the contract, under which the supplier can modify the contract for the supply of digital content as regards main performance features.

Article 16 establishes the conditions under which the consumer has a right to terminate contracts concluded for an indeterminate duration or for duration exceeding 12 months and thereby is able to switch provider. For example, the consumer shall notify the supplier 14 days before the termination becomes effective. Article 16 also details the consequences of termination of the long term contract. It also provides that the supplier shall refrain from using data and any other information which the consumer has provided in exchange for the digital content.

Article 17 provides the supplier with a right to redress in case of an act or omission by a person in earlier links of the chain of transactions which triggered the supplier's liability for lack of conformity or a failure to supply towards the consumer. The modalities for exercising this right are to be regulated by the national laws of Member States.

Article 18 obliges Member States to ensure that adequate and effective means exist to ensure compliance with this Directive.

Article 19 contains the clause about the mandatory nature of consumer contract law rules, i.e. it states that any derogation from the requirements contained in the Directive to the detriment of the consumer is not binding on the consumer.

Article 20 provides for amendments to other EU legislation. It amends Directive 1999/44/EC in order to avoid overlaps between the two instruments. Article 20 also adds a reference to this Directive in the Annex of Regulation (EC) No 2006/2004 so as to facilitate cross-border cooperation on enforcement of this Directive. It also adds a reference to this Directive in Annex I of Directive 2009/22/EC of the European Parliament and of the Council ²⁷ so as to ensure that the consumers' collective interests laid down in this Directive are protected.

Article 21 establishes the deadline for transposition by Member States.

Article 22 establishes an obligation for the Commission to review the application of this Directive no later than 5 years after its entering into force.

Article 23 sets the date of entry into force of the Directive.

Article 24 specifies the addressees of the Directive.

²⁷

OJ L110, 1.05.2009, p.30.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain aspects concerning contracts for the supply of digital content

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee²⁸,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (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.
- (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.
- (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.

²⁸

OJ C , , p .

²⁹

COM (2015) 192 final.

- (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 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.
- (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.
- (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.
- (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.
- (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.
- (9) By fully harmonising all requirements related to the topics regulated by this Directive, it precludes Member 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.
- (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.
- (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 main functionalities of the goods.

- (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 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.
- (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.
- (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,

³⁰

OJ L 304, 22.11.2011, p.64.

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.

- (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.
- (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.
- (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.
- (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.
- (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.
- (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.

- (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.
- (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 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.
- (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.
- (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.
- (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.
- (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.
- (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

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.

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.

- (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.
- (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 available at the time of the conclusion of the contract.
- (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.
- (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.
- (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.

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

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

- (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.
- (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.
- (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.
- (48) Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual rights should be afforded the right to initiate proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.

- (49) Nothing in this Directive should prejudice the application of the rules of private international law, in particular Regulation (EC) No 593/2008 of the European Parliament and of the Council³³ and Regulation (EC) No 1215/2012 of the European Parliament and the Council.³⁴
- (50) Directive 1999/44/EC of the European Parliament and of the Council³⁵ 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.
- (51) Regulation (EC) No 2006/2004 of the European Parliament and of the Council³⁶ should be amended to include a reference to this Directive in its Annex so as to facilitate cross-border cooperation on enforcement of this Directive.
- (52) Directive 2009/22/EC of the European Parliament and of the Council³⁷ should be amended to include a reference to this Directive in its Annex so as to ensure that the consumers' collective interests laid down in this Directive are protected.
- (53) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents³⁸, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (54) Since the objectives of this Directive, namely to contribute to the functioning of the internal market by tackling in a consistent manner contract law-related obstacles for the supply of digital content while preventing legal fragmentation cannot be sufficiently achieved by the Member States but can rather, by reasons of ensuring the overall coherence of the national legislations through harmonised contract law rules which would also facilitate coordinated enforcement actions, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (55) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Article 16, 38 and 47 thereof.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

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,

33 OJ L 177, 4.7.2008, p. 6–16.
 34 OJ L 351, 20.12.2012, p.1.
 35 OJ L 171, 7.7.1999, p.12.
 36 OJ L 364, 9.12.2004, p. 1.
 37 OJ L110, 1.05.2009, p.30.
 38 OJ C 369, 17.12.2011, p. 14.

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.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

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
 - (c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service;
2. 'integration' means linking together different components of a digital environment to act as a coordinated whole in conformity with its intended purpose;
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;
4. 'consumer' means any natural person who in contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession;
5. 'damages' means a sum of money to which consumers may be entitled as compensation for economic damage to their digital environment;
6. 'price' means money that is due in exchange for digital content supplied;
7. 'contract' means an agreement intended to give rise to obligations or other legal effects;
8. 'digital environment' means hardware, digital content and any network connection to the extent that they are within the control of the user;
9. 'interoperability' means the ability of digital content to perform all its functionalities in interaction with a concrete digital environment;
10. 'supply' means providing access to digital content or making digital content available;
11. 'durable medium' means any instrument which enables the consumer or the supplier to store information addressed personally to that person in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

Article 3

Scope

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.
2. This Directive shall apply to any contract for the supply of digital product developed according to consumer's specifications.
 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.
 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.
 5. This Directive shall not apply to contracts regarding:
 - (a) services performed with a predominant element of human intervention by the supplier where the digital format is used mainly as a carrier;
 - (b) electronic communication services as defined in Directive 2002/21/EC;
 - (c) healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU;
 - (d) gambling services meaning services which involve wagering a stake with monetary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means and at the individual request of a recipient of a service;
 - (e) financial services.
 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.
 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.
 8. This Directive is without prejudice to the protection of individuals with regard to the processing of personal data.
 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.

Article 4

Level of harmonisation

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.

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.

Article 6

Conformity of the digital content with the contract

1. In order to conform with the contract, the digital content 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;
 - (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;
 - (c) be supplied along with any instructions and customer assistance as stipulated by the contract; and
 - (d) be updated as stipulated by 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.

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 with Article 6(2).

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.

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 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.

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
- (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.

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.

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.

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;
 - (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 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.

Article 13

Termination

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

Article 14

Right to damages

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

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 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.

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.
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 paragraph (4) point (b).

Article 17

Right of redress

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.

Article 18

Enforcement

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:
 - (a) public bodies or their representatives;
 - (b) consumer organisations having a legitimate interest in protecting consumers;
 - (c) professional organisations having a legitimate interest in acting.

Article 19

Mandatory nature

Unless otherwise provided for in this Directive, any contractual term which, to the detriment of the consumer, excludes the application of the national measures transposing this Directive, derogates from them or varies their effects before the lack of conformity with the contract is brought to the supplier's attention by the consumer, shall not be binding on the consumer.

Article 20

Amendments to Directive 1999/44/EC, Regulation (EC) No 2006/2004, Directive 2009/22/EC

1. In Article 1 (2) of Directive 1999/44/EC, point (b) is replaced by the following:

"(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."*
2. In the Annex to Regulation (EC) No 2006/2004, the following point is added:

³⁹

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

"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...)"

3. In Annex I to Directive 2009/22/EC the following point is added:

"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...)"

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by *[the date of two years after the entry into force]* at the latest.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 22

Review

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.

Article 23

Entering into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President