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**NOTE**

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From: Presidency  
To: Permanent Representatives Committee

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No. prev. doc.: WK 458/2019  
No. Cion doc.: 15251/15

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Subject: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content  
- Confirmation of the final compromise text with a view to agreement

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1. On 9 December 2015, the Commission submitted a proposal for a Directive on certain aspects concerning contracts for the supply of digital content and digital services. The proposal is a key deliverable under the 'Digital Single Market Strategy for Europe', which also includes the closely related proposal for a Directive on certain aspects concerning contracts for the sales of goods.
2. The Council reached a general approach on the draft text in its meeting on 8 and 9 June 2017. Previous Presidencies of the Council have conducted negotiations with the European Parliament and the Commission with a view to a first reading agreement.

3. On 22 January 2019, a provisional agreement was reached, which resulted in the final compromise text set out in Annex to this note.
4. It is in this light that the Permanent Representatives Committee is invited to:
  - a) approve the final compromise text regarding the Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services, as set out in the Annex to this note, and
  - b) confirm that the Presidency can indicate to the European Parliament that, should the European Parliament adopt its position at first reading as regards the Directive as set out in the Annex to this note, subject, if necessary, to revision of that text by the legal linguists of both institutions, the Council would approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

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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 and digital services**

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 Committee,

Acting in accordance with the ordinary legislative procedure,

Whereas:

HAVE ADOPTED THIS DIRECTIVE:

- (1) The growth potential of e-commerce in the Union has not yet been fully exploited. The Digital Single Market Strategy for Europe<sup>2</sup> 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 digital services and making it easier for businesses to supply digital content and digital services can contribute to boosting the Union's digital economy and stimulating overall growth.

- (1a) Article 26(1) and (2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, which shall comprise an area without internal frontiers in which the free movement of goods and services is ensured. Article 169(1) and point (a) of Article 169(2) TFEU provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU in the context of the completion of the internal market. This Directive aims to strike the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity.
- (2) Certain aspects concerning contracts for supply of digital content or digital services should be harmonised, taking as a base a high level of consumer protection, in order to achieve a genuine digital single market, increase legal certainty and reduce transaction costs, especially for small and medium-sized enterprises.
- (3) Businesses, especially small and medium-sized enterprises, often face additional costs stemming from differences in national mandatory consumer contract law rules and legal uncertainty when offering cross-border digital content or digital services. Businesses also face costs when adapting their contracts to specific mandatory rules for the supply of digital content or digital services which are already emerging in several Member States, creating differences in scope and content between specific national rules governing these contracts.

- (4) Consumers are not always confident when buying cross border and especially online. One of the major factors for this lack of confidence is uncertainty about their key contractual rights and the lack of a clear contractual framework for digital content or digital services. Many consumers experience problems related to the quality of, or access to, digital content or digital services. For instance, they receive wrong or faulty digital content or digital services, or they are not able to access the digital content or digital service in question. As a result, consumers suffer financial and non-financial detriment.
- (5) In order to remedy these problems, both businesses and consumers should be able to rely on fully harmonised contractual rights in certain core areas concerning the supply of digital content or digital services across the Union. Full harmonisation of some key regulatory aspects should considerably increase legal certainty for consumers and businesses.
- (6) Harmonised consumer contract law rules in all Member States will make it easier for businesses, especially small and medium-sized enterprises, to supply digital content or digital services EU-wide. They will provide businesses a stable contract law environment when supplying digital content or digital services to other Member States. They will also prevent legal fragmentation that otherwise would arise from new national legislations regulating specifically digital content and digital services.
- (7) Consumers should benefit from harmonised rights for the supply of digital content and digital services at a high level of protection. They should have clear mandatory rights when they receive or access digital content or digital services from anywhere in the Union. This should increase their confidence in acquiring digital content or digital services. This should also contribute to reducing the detriment consumers currently suffer, since there will be a set of clear rights that will enable them to address problems they face with digital content or digital services.

- (8) This Directive should fully harmonise certain key rules that are so far not regulated at Union or national level.
- (8a) This Directive should define its scope in a clear and unequivocal manner and provide clear substantive rules for the digital content or digital services falling within its scope. Both the scope of this Directive and its substantive rules should be technologically neutral and future-proof.
- (9) This Directive lays down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or a digital service. For this purpose, rules on the conformity of digital content or a digital service with the contract, remedies in case of the lack of such conformity or a failure to supply and the modalities for the exercise of those remedies, as well as the modification of digital content or a digital service should be fully harmonised. Fully harmonised rules on some essential elements of consumer contract law will make it easier for businesses, especially small and medium sized enterprises, to offer their products in other Member States. Consumers will benefit from a high level of consumer protection and welfare gains by fully harmonising key rules. Member States are precluded within the scope of application of this Directive from providing any further formal or substantive requirements. For example, Member States should not provide for any rules on the reversal of the burden of proof different from what is provided for in this Directive, or for an obligation for the consumer to notify the trader of a lack of conformity within a specific period.

(10) This Directive should not affect national law to the extent that the matters concerned are not regulated by this Directive, such as national rules on the formation, validity, nullity or effects of contracts or the legality of the digital content or the digital service. This Directive should also not determine the legal nature of the contracts for the supply of digital content or a digital service and the question of whether such contracts constitute, for instance, a sales, service, rental or sui generis contract, is left to national law.

This Directive should also not affect national rules not specific to consumer contracts providing for specific remedies for certain types of defects that were not apparent at the time of conclusion of the contract, referring to national provisions which may lay down specific rules for the seller's liability for hidden defects. This Directive should also not affect national laws providing for non-contractual remedies of the consumer in case of lack of conformity of the digital content or the digital service against persons in earlier links of the chain of transactions or other persons fulfilling their obligations.

(10b) Member States also remain free, for example, to regulate liability claims of the consumer against a third party other than a trader that supplies or undertakes to supply the digital content or the digital service, such as developers, which are not at the same time the trader according to this Directive.

(10c) Member States should also remain free, for example, to regulate the consequences of a failure to supply or a lack of conformity of the digital content or digital service where such failure to supply or lack of conformity is due to an impediment beyond the control of the trader and the trader could not be expected to have avoided or overcome the impediment or its consequences, such as force majeure.

- (10d) Member States should also remain free, for example, to regulate the rights of the parties to withhold the performance of their obligations or part thereof until the other party performs its obligations. For example, Member States should be free to regulate whether the consumer, in cases of a lack of conformity, is to be entitled to withhold payment of the price or part thereof until the trader has brought the digital content or digital service into conformity, or whether the trader is to be entitled to retain any reimbursement due to the consumer upon termination of the contract until the consumer complies with the obligation under this Directive to return the tangible medium to the trader.
- (10e) Member States should remain free to extend the application of the rules of this Directive to contracts which are excluded from the scope of this Directive, or to otherwise regulate such contracts. For instance, Member States should remain free to extend the protection afforded to consumers by this Directive also to legal or natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or SMEs.
- (10f) The definition of a consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, Member States should also remain free to determine in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, whether and under which conditions that person should also be considered as a consumer.



- (10g) This Directive should apply to any contract where the trader supplies or undertakes to supply digital content or digital service to the consumer. Platform providers can be traders under this Directive if they are acting for purposes relating to their own business as the direct contractual partner of the consumer for the supply of digital content or a digital service. Member States remain free to extend the application of the rules of this Directive to platform providers which do not fulfil the requirements of being a trader as defined in this Directive.
- (11) The Directive should address problems across different categories of digital content, digital services, and their supply. In order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content or digital service, this Directive should cover, among others, computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, and also digital services which allow the creation, processing, access to or storage of data including software-as-a-service such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.

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

(12) The rules of this Directive and the rules of the Sales of Goods Directive [XXX] complement each other. While this Directive lays down rules on certain requirements concerning contracts for the supply of digital content or digital services, the Sales of Goods Directive lays down rules on certain requirements concerning contracts for the sales of goods. Therefore, in order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for suppliers of digital content, this Directive should also apply to digital content which is supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium functions only as a carrier of the digital content. However, instead of the provisions of this Directive on the supplier's obligation to supply as well as on the consumer's remedies for failure to supply, the provisions of Directive 2011/83/EU of the European Parliament and of the Council on obligations related to the delivery of goods and remedies in the event of the failure to deliver should apply. In addition, the provisions of Directive 2011/83/EU, for example on the right of withdrawal and the nature of the contract under which those goods are supplied, should also continue to apply to such tangible media and the digital content supplied on it. This Directive is also without prejudice to the distribution right applicable to these goods under copyright law.

(12aa) The Sales of Goods Directive should apply to contracts for the sale of goods, including goods with digital elements. The notion of goods with digital elements should refer to goods that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions. The digital content or digital service incorporated in or interconnected with goods in that manner should fall within the scope of the Sales of Goods Directive if it is provided with the goods under a sales contract concerning these goods. Whether the supply of the incorporated or inter-connected digital content or digital service forms part of the sales contract with the seller should depend on the content of this contract. This should include incorporated or inter-connected digital content or digital services the supply of which is explicitly stipulated by the contract. It should also include those sales contracts which can be understood as covering the supply of specific digital content or digital service because they are normal in goods of the same type and the consumer may reasonably expect them given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions, including the producer. If, for example, a smart TV was advertised as including a particular video application, this video application would be part of the sales contract. This applies regardless of whether the digital content or digital service is pre-installed in the good itself or has to be downloaded subsequently on another device and is only inter-connected to the good. For example, a smart phone may come with a standardised pre-installed application provided according to the sales contract (e.g. an alarm application or a camera application). Another example could be a smart watch. In this case, the watch itself would be the good with digital elements which can perform its functions only with an application that is provided under the sales contract but has to be downloaded by the consumer onto a smart phone. In this case the application would be the inter-connected digital element. This should also apply if the incorporated or inter-connected digital content or digital service is not provided by the seller himself but is supplied according to the sales contract by a third party.

In order to avoid uncertainty for both traders and consumers, in case of doubt on whether the supply of the digital content or the digital service forms part of the sales contract, the Sales of Goods Directive should apply. Furthermore, ascertaining a bilateral contractual relationship between the seller and the consumer of which the supply of the incorporated or inter-connected digital content or digital service forms part should not be affected by the mere fact that the consumer has to consent to a licensing agreement with a third party in order to benefit from the digital content or the digital service.

(12ab) In contrast, if the absence of the incorporated or inter-connected digital content or digital service would not prevent the goods from performing their functions or if the consumer concludes a contract for the supply of digital content or a digital service which does not form part of a sales contract concerning goods with digital elements, this contract would be separate from the contract on the sale of the goods, even if the seller acts as an intermediary of this second contract with the third party supplier, and could fall within the scope of this Directive. For instance, if the consumer downloads a game application from the app store onto a smart phone, the contract for the supply of the game application is separate from the contract for the sale of the smart phone itself. Therefore, the Sales of Goods Directive could only apply to the sales contract concerning the smart phone while the supply of the game application could fall under this Directive. Another example for a digital content or digital service which does not form part of the sales contract and therefore would not fall within the scope of the Sales of Goods Directive would be a case where it is expressly agreed that the consumer buys a smart phone without a specific operating system and the consumer subsequently concludes a contract for the supply of an operating system from a third party. In this case the separately bought operating system could fall within the scope of this Directive.

(12a) Digital representations of value such as electronic vouchers or e-coupons are used by consumers to pay for different goods or services in the digital single market. Such digital representations of value are becoming important in relation to the supply of digital content or a digital services, and should therefore be considered as a method of payment within the meaning of this Directive. They also include virtual currencies, to the extent that they are recognised by national law. A differentiation depending on the methods of payment can be a cause of discrimination and provide an unjustified incentive for businesses to move towards supplying digital content or a digital service against digital representations of value. However, since digital representations of value have no other purpose than to serve as a method of payment, they themselves should not be considered as digital content or a digital service within the meaning of this Directive.

(13) Digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader. Such business models are used in different forms in a considerable part of the market. While fully recognising that the protection of personal data is a fundamental right and therefore personal data cannot be considered as a commodity, this Directive should ensure that consumers are in the context of such business models entitled to contractual remedies. Therefore this Directive should apply to contracts where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data. The personal data may be provided to the trader either at the time when the contract is concluded or at a later time, e.g. when the consumer gives consent for the trader to use the personal data that the consumer may upload or create with the use of the digital content or digital service. Union legislation on the protection of personal data provides for an exhaustive list of legal grounds for the lawful processing of personal data. This Directive should apply to any contract where the consumer provides or undertakes to provide personal data to the trader. For example, this Directive should apply where the consumer opens a social media account and provides a name and e-mail address that are used for purposes other than solely supplying the digital content or complying with legal requirements. It should equally apply where the consumer gives consent for any material that constitutes personal data, such as photographs or posts that he will upload, to be processed by the trader for marketing purposes. Member States should however remain free to determine whether the requirements for the formation, existence and validity of a contract under national law are fulfilled.

(14) Where digital content and digital services are not supplied in exchange for a price, this Directive should not apply to situations where the trader collects personal data exclusively to supply digital content or a digital service or for the sole purpose of meeting legal requirements. Such situations can include, for instance, cases where the registration of the consumer is required by applicable laws for security and identification purposes. This Directive should also not apply to situations where the trader only collects metadata such as information concerning the consumer's device or the browsing history, except where this situation is considered a contract under national law. It should also not apply to situations where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service. However, Member States should remain free to extend the application of the rules of this Directive to such situations or to otherwise regulate such situations which are excluded from the scope of this Directive.

[...]

(16) This Directive should apply to contracts for the development of digital content tailor-made to the specific requirements of the consumer, including tailor made software. This Directive should also apply to the supply of electronic files required in the context of 3D printing of goods, to the extent that these files fall under the definition of digital content or digital services within the meaning of this Directive. However this Directive should not regulate any rights or obligations related to the goods produced with the use of 3D printing technology.

[...]

- (19) As this Directive applies to contracts which have as their object the supply of digital content or a digital service to the consumer, it should not apply where the main subject matter of the contract is the provision of professional services such as translation services, architectural services, legal services or other professional advice services which are often performed personally by the trader, regardless of whether digital means are used by the trader in order to produce the output of the service or to deliver or transmit it to the consumer. Similarly, this Directive should not apply to public services such as social security services or public registers where the digital means are only used for transmitting or communicating the service to the consumer. This Directive should also not apply to authentic instruments and other notarial acts, regardless of whether they are performed, recorded, reproduced or transmitted by digital means.
- (19a) The market for number-independent interpersonal communication services, which do not connect with publicly assigned numbering resources, is rapidly evolving. In recent years, the emergence of new digital services which allow interpersonal communication over the internet, such as web-based e-mail and online messaging services, has led more consumers to use such services. For these reasons, it is necessary to provide effective consumer protection with respect to these services. This Directive should therefore also apply to number-independent interpersonal communication services.



- (19b) This Directive should not apply to healthcare which should therefore be excluded from its scope. Directive 2011/24/EU defines healthcare as 'health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices'. The exclusion of 'healthcare' from the scope of this Directive should therefore also apply to any digital content or digital service that constitutes a medical device, as defined by Directive 93/42/EEC, 90/385/EEC or 98/79/EC, where such medical device is prescribed or provided by a health professional as defined by Directive 2011/24/EU. However, the provisions of this Directive should apply to any digital content or digital service that constitutes a medical device, such as health applications, that can be obtained by the consumer without being prescribed or provided by a health professional.
- (19c) The existing Union legislation relating to financial services contains numerous rules on consumer protection. Financial services as defined by the legislation in that sector, in particular by Directive 2002/65/EC, cover also digital content or digital services relating to or giving access to financial services and are therefore covered by the protection of Union financial services legislation. Contracts relating to digital content or digital services that constitute a financial service should therefore be excluded from the scope of this Directive.
- (19d) This Directive should not apply to digital content or digital service which is provided to a public audience as part of an artistic or other event, such as a cinematographic projection or an audio-visual theatrical performance.<sup>24</sup> However, this Directive should apply if digital content or digital service is provided to a public audience by signal transmission such as digital television services.

- (19e) Free and open source software, where the source code is openly shared and users can freely access, use, modify and redistribute the software or modified versions thereof, can contribute to research and innovation in the market for digital content and digital services. In order to avoid imposing obstacles to such market developments, this Directive should also not apply to free and open source software, provided that it is not supplied in exchange for a price and that the consumer's personal data are exclusively used for improving the security, compatibility or interoperability of the software.
- (20) Digital content or digital services are often combined with the provision of goods or other services and offered to the consumer within the same contract comprising a bundle of different elements, such as the provision of digital television and the purchase of electronic equipment. In such cases, the contract between the consumer and the trader includes elements of a contract for the supply of digital content or digital service but also elements of other contract types, such as sales of goods or services contracts. This Directive should only apply to the elements of the overall contract which consist of the supply of digital content or digital services. The other elements of the contract should be governed by the rules applicable to those contracts under national law or, as applicable, other Union laws governing a specific sector or subject matter. Likewise, any effects that the termination of one element of the bundle contract may have on the other parts of the bundle contract should be governed by national law. However, in order to ensure consistency with the sector-specific provisions of the EECC regulating bundle contracts, where a trader offers, within the meaning of the EECC, digital content or a digital service in combination with a number-based interpersonal communication service or an internet access service, the provisions of this Directive on modification of digital content should not apply to the digital content or digital service element of the bundle. The respective provisions of the EECC regulating this aspect should instead apply to all elements of the bundle, including the digital content or digital service.

- (20aa) The provisions of this Directive concerning bundle contracts should only apply to cases where the different elements of the bundle are offered by the same trader to the same consumer under a single contract. This Directive should not affect national laws governing the conditions under which a contract for the supply of digital content or digital services may be considered to be linked with or ancillary to another contract which the consumer has concluded with the same or another trader, the remedies to be exercised under each contract or the effect that the termination of one contract would have on the other contract.
- (20a) The commercial practice of bundling offers of digital content or digital services with the provision of goods or other services is subject to Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market. Such bundling is not in itself prohibited under Directive 2005/29/EC. However, it is prohibited where it is deemed unfair, following a case-by-case assessment pursuant to the criteria laid down in that Directive. Union competition law also allows addressing tying and bundling practices, when they affect the competitive process and harm consumers.
- (21) This Directive should be without prejudice to other Union acts governing a specific sector or subject matter such as telecommunication, e-commerce and consumer protection. It should also be without prejudice to national and Union laws on copyright and related rights, including the portability of online content services.

- (22) The pursuit of activities falling within the scope of this Directive may involve the processing of personal data.

Union law provides a comprehensive framework on the protection of personal data. In particular, this Directive is without prejudice to the provisions of Regulation (EU) 2016/679<sup>1</sup> and Directive 2002/58/EC<sup>2</sup>. That framework applies to any personal data processed in connection with the contracts covered by this Directive. Consequently, personal data should only be collected or otherwise processed in accordance with Regulation (EU) 2016/679 and Directive 2002/58/EC. In case of conflict between this Directive and Union law on the protection of personal data, the latter prevails.

- (22a) This Directive should not regulate the conditions for the lawful processing of personal data, as this question is regulated especially by Regulation (EU) 2016/679, in particular its Article 6(1). As a consequence, any processing of personal data in connection with a contract coming within the scope of this Directive is lawful only if it is in conformity with the provisions of Regulation (EU) 2016/679 relating to the legal grounds for the processing of personal data. When processing of personal data is based on consent, in particular point (a) of Article 6(1) of Regulation (EU) 2016/679, the specific provisions of Regulation (EU) 2016/679 including the conditions whether consent is freely given apply. This Directive should not regulate the validity of the consent given. Regulation (EU) 2016/679 also contains comprehensive rights as to the erasure of data and data portability. This Directive should be without prejudice to these rights. These rights apply to any personal data provided by the consumer to the trader or collected by the trader in connection with any contract coming within the scope of this Directive and when the consumer terminated the contract in accordance with this Directive.

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

<sup>2</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

- (22b) The right to erasure and the consumer's right to withdraw consent for the processing of personal data should apply fully also in connection with the contracts covered by this Directive. The right of the consumer to terminate the contract in accordance with this Directive should be without prejudice to the consumer's right in accordance with Regulation (EU) 2016/679 to withdraw any consent given to the processing of the consumer's personal data.
- (22c) This Directive should not regulate the consequences for the contracts covered by this Directive in case the consumer withdraws the consent for the processing of the consumer's personal data. This remains a matter for national law.

(23) There are various ways for the trader to supply digital content or digital services to consumers. It is opportune to set simple and clear rules as to the modalities and the time for performing this main contractual obligation of the trader by making the digital content or a digital service available or accessible to the consumer. The digital content or digital service should be considered to be made available or accessible to the consumer when the digital content or the digital service, or any means suitable for accessing or downloading it, has reached the sphere of the consumer and no further action is required by the trader in order to enable the consumer to use the digital content or digital service in accordance with the contract. Considering that the trader is not in principle responsible for acts or omissions of a third party which operates a physical or virtual facility, for instance an electronic platform or a cloud storage facility, which the consumer selected for receiving or storing the digital content or digital service, it should be sufficient for the trader to supply the digital content or digital service to this third party. However, the physical or virtual facility cannot be considered to be chosen by the consumer if this facility is under the trader's control or is contractually linked with the trader as well as where the consumer selected this physical or virtual facility for receiving the digital content or digital service but that choice was the only one offered by the trader to receive or access the digital content or digital service. Where the physical or virtual facility cannot be considered to be chosen by the consumer, the obligation of the trader to supply the digital content or digital service is not fulfilled if the digital content or digital service is supplied to the physical or virtual facility but the consumer cannot receive or access the digital content or digital service in accordance with this Directive. In those cases, the consumer should have the same remedies as if the trader had failed to supply the digital content or digital service. With regard to the time of supply, in line with market practices and technical possibilities, and in order to provide for a certain degree of flexibility, the digital content or digital service should be supplied without undue delay, unless the parties decide to agree otherwise in order to cater for other supply models.

- (24) The digital content or digital service should comply with the requirements agreed between the trader and the consumer in the contract. In particular, it should comply with the description, quantity, for example the number of music files that can be accessed, quality for example the picture resolution, language and version agreed in the contract. It should also possess the security, functionality, compatibility, interoperability and other features, as required by the contract. The requirements of the contract should include those resulting from the pre-contractual information which, in line with Directive 2011/83/EU, forms an integral part of the contract. These requirements might also be set forth in a service level agreement, where, under the applicable national law, a service level agreement forms part of the contractual relationship between the consumer and the trader.
- (24a) The notion of functionality should refer to the ways in which digital content or a digital service can be used. For instance, the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding may have an impact on the possibility of the digital content or digital service to perform all its functions having regard to its purpose. The notion of interoperability describes whether and to what extent digital content or a digital service is able to function with hardware or software different from the ones with which digital content or services of the same type are normally used. The successful functioning would include, for instance, the ability of the digital content or digital service to exchange information with such other software or hardware and to use the information exchanged.

- (24b) Given that digital content and digital services are constantly developing, traders may agree with consumers to provide updates and features as they become available. Therefore the conformity of the digital content or digital service should also be assessed in relation to whether the digital content or service is updated in the manner that has been stipulated in the contract. A lack of updates that are agreed to in the contract should be considered a lack of conformity of the digital content or digital service. Moreover, defective or incomplete updates should also be considered a lack of conformity of the digital content or digital service, as this would mean that they are not performed in the manner stipulated in the contract.
- (25) In order to be in conformity and to ensure that consumers are not deprived of their rights, for example in cases where the contract sets very low standards, the digital content or digital service should not only comply with the subjective requirements for conformity, but should in addition comply with objective requirements for conformity set out in this Directive. The conformity should be assessed *inter alia* considering the purpose for which digital content or digital services of the same type would normally be used. It should also possess the qualities and performance features which are normal in digital content or digital services of the same type and which consumers may reasonably expect, given the nature of the digital content or digital service and, taking into account any public statements on the specific characteristics of the digital content or digital service made by or on behalf of the trader or other persons in earlier links of the chain of transactions.



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

(25a1) During a period of time that the consumer may reasonably expect, the trader should provide the consumer with updates, including security updates, in order to keep the digital content or digital service in conformity and secure. For instance, as regards digital content or digital service, the purpose of which is limited in time, the obligation to provide updates should be limited to that time, while for other types of digital content or digital service the period during which updates should be provided may be equal to the liability period for lack of conformity or may extend beyond that period, which might be the case particularly with regard to security updates. The consumer should remain free to install those updates provided. Where the consumer decides not to install the updates, the consumer should however not expect the digital content or digital service to remain in conformity. The trader should inform the consumer that the consumer's decision to refrain from installing updates which are necessary for keeping the digital content or digital service in conformity, including security updates, will impact on the trader's liability for conformity of those features of the digital content or digital service which the relevant updates are supposed to maintain in conformity.

This Directive should not affect obligations to provide security updates laid down in Union law or national law.

(25a2) Regulation (EU) 2016/679 or any other data protection law should fully apply to the processing of personal data in connection with any contract falling within the scope of this Directive. In addition this Directive should be without prejudice to the rights, obligations and non-contractual remedies provided for by Regulation (EU) 2016/679. Facts leading to a lack of compliance with requirements provided for by Regulation (EU) 2016/679, including core principles such as the requirements for data minimisation, data protection by design and data protection by default, may, depending on the circumstances of the case, also be considered to constitute a lack of conformity of the digital content or digital service with subjective or objective conformity criteria provided for in this Directive. One category can be cases where a trader explicitly assumes an obligation in the contract, or the contract can be interpreted in this way, which is also linked to the trader's obligations under Regulation (EU) 2016/679. In this case, such a contractual commitment can become part of the subjective conformity criteria. A second category of cases can be where a non-compliance with the obligations under Regulation (EU) 2016/679 can at the same time render the digital content or service unfit for its intended purpose and therefore constitute a lack of conformity with the objective requirements for conformity which requires the digital content or service to be fit for the purposes for which digital content or a digital service of the same type would be normally used. Such would be the case, for example, if the trader of a data encryption software fails to implement appropriate measures as required by Regulation (EU) 2016/679 to ensure that by design personal data are not disclosed to unauthorised recipients, thus rendering the encryption software unfit for its intended purpose which is the secure transferring of data by the consumer to its intended recipient.

Finally, there can be cases where the trader's non-compliance with its obligations under Regulation (EU) 2016/679 can also constitute a lack of conformity of the digital content or service with the objective conformity criterion which requires the digital content or digital service to possess the features which are normal for digital content or digital service of the same type and which the consumer can reasonably expect. For instance, if the trader of an online shopping application fails to take the measures provided for in Regulation (EU) 2016/679 for the security of processing of the consumer's personal data and as a result the consumer's credit card information is exposed to malware or spyware, this could also constitute a lack of conformity of the digital content or digital service within the meaning of this Directive, as the consumer would reasonably expect that an application of this type would normally possess features preventing the disclosure of payment details. Where the facts leading to a non-compliance with requirements under Regulation (EU) 2016/679 also constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity provided for in this Directive, the consumer should be entitled to the remedies for the lack of conformity provided for by this Directive, unless the contract is already void or voidable under national law.

(25a3) In order to ensure sufficient flexibility, it should be possible for the parties to deviate from the objective requirements for conformity. Such a deviation should only be possible if the consumer was specifically informed about it and the consumer accepts it separately from other statements or agreements and by way of active and unequivocal conduct. Both conditions could for instance be fulfilled by ticking a box or activating a button or a similar function.

[...]

- (28) When applying the rules of this Directive, traders should make use of standards, open technical specifications, good practices and codes of conduct, including in relation to the commonly used and machine-readable format for retrieving the content other than personal data which was provided or created by the consumer when using the digital content or digital service, and including on the security of information systems and digital environments, whether established at the international level, the European level or at the level of a specific industry sector. In this context, the Commission may call for the development of international and European standards and the drawing up of a code of conduct by trade associations and other representative organisations that could support the uniform implementation of this Directive.
- (29) Many types of digital content or digital services are supplied continuously over a period of time, such as access to cloud services. It is therefore necessary to ensure that the digital content or digital service is in conformity throughout the duration of the contract. Short-term interruptions of the supply of digital content or digital service should be treated as instances of lack of conformity where those interruptions are more than negligible or are recurring. Moreover, given the frequent improvement of digital content and digital services, notably by updates, the version of digital content or of a digital service supplied to the consumer should be the most recent one available at the time of the conclusion of the contract, unless the parties have agreed otherwise.

- (30) In order to work properly, digital content or a digital service needs to be correctly integrated into the consumer's hardware and software environment. A lack of conformity of the digital content or digital service resulting from an incorrect integration should be regarded as a lack of conformity of the digital content or digital service itself, where it was integrated by the trader or under its control, or by the consumer following the trader's instructions for integration and the incorrect integration was due to shortcomings, in the required integration instructions, such as incompleteness or a lack of clarity of the installation instructions which the average consumer would find difficult to use.
- (31) Restrictions of the consumer's use of the digital content or digital service in accordance with this Directive may result from limitations imposed by the holder of intellectual property rights in accordance with intellectual property law. Such restrictions may arise from the end-user license agreement under which the digital content or service is supplied to the consumer. This can be the case when, for instance, the end-user license agreement prohibits the consumer from making use of certain features related to the functionality of the digital content or digital service. Such restriction can render the digital content or digital service in breach of the objective requirements for conformity laid down in this Directive, if it concerns features usually found in digital content or digital services of the same type which the consumer can reasonably expect. In such cases the consumer should be able to claim the remedies for the lack of conformity against the trader who supplied the digital content. The trader can only avoid such liability by fulfilling the conditions for derogating from the objective requirements for conformity as laid down in this Directive, namely only if the trader specifically informs the consumer before the conclusion of the contract that a particular characteristic of the digital content or digital service deviates from the objective requirements for conformity and the consumer has expressly and separately accepted this deviation.

(31a) Moreover, legal defects are a particularly important concern for digital content or digital services, which are subject to intellectual property rights. Restrictions to the consumer's use of the digital content or digital service in accordance with this Directive can be a result of a violation of third party rights. Such violation of third party rights might effectively bar the consumer from enjoying the digital content or digital service or some of its features. This can for instance be the case when the consumer cannot access the digital content or digital service at all or when the consumer cannot lawfully access the digital content or digital service. The reason can be that the third party rightfully compels the trader to stop infringing those rights and to discontinue offering the digital content or digital service in question or that the consumer cannot use the digital content or digital service without infringing the law. In the event of a violation of third party rights which results in a restriction that prevents or limits the use of the digital content or digital service in accordance with the subjective and objective requirements for conformity, the consumer should be entitled to the remedies for the lack of conformity, unless national laws provides for the nullity of the contract, or for its rescission, for example for breach of legal warranty against eviction.

[...]

(34) The trader should be liable to the consumer in the event of a lack of conformity and for any failure to supply the digital content or digital service. As digital content or digital services can be supplied to consumers through one or more individual acts of supply or continuously over a period of time, it is justified that the time for establishing conformity of the digital content or digital service should be determined according to those different moments of supply.

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

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



(34c) Member States should remain free to regulate national limitation periods. However, such limitation periods should not prevent consumers from exercising their rights throughout the period during which the trader is liable for a lack of conformity. While this Directive should therefore not harmonise the starting point of national limitation periods, it should ensure that such periods still allow consumers to exercise their remedies for any lack of conformity that becomes apparent at least throughout the period during which the trader is liable for a lack of conformity.

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

- (34e) Without prejudice to the fundamental right to the protection of private life, including confidentiality of communications, and to the protection of personal data of the consumer, the consumer should cooperate with the trader in order for the trader to ascertain whether the cause of the lack of conformity lay in the consumer's digital environment using the technically available means which are least intrusive for the consumer. This can often be done for instance by providing the trader with automatically generated incident reports, or with details of the consumer's internet connection. Only in exceptional and duly justified circumstances where, with the best use of all other means, there is no other way possible, consumers may need to allow virtual access to their digital environment. However, where the consumer does not cooperate with the trader and provided that the consumer was informed of this consequence of non-cooperation, it should be for the consumer to prove not only that the digital content or digital service is not in conformity, but also that the digital content or digital service was not in conformity at the time of supply of the digital content or digital service or, where the contract provides for continuous supply over a period of time, during the duration of the contract.
- (35) Where the trader has failed to supply the digital content or digital service, the consumer should call upon the trader to supply the digital content or digital service. In those cases, the trader should act without undue delay, or within an additional period of time as expressly agreed to by the parties. Considering that digital content or a digital service is supplied in digital form, the supply does not require, in the majority of situations, any additional time to make the digital content or digital service available to the consumer. Therefore, in such cases the obligation of the trader to supply the digital content or digital service without undue delay would mean to supply it immediately. If the trader then fails to supply the digital content or digital service, the consumer should be entitled to terminate the contract. In specific circumstances, such as where it is clear that the trader will not supply the digital content or digital service or where a specific time for the supply is essential for the consumer, the consumer should be entitled to terminate the contract without first calling upon the trader to supply the digital content or digital service.

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

(36ba) Where bringing the digital content or digital service into conformity is legally or factually impossible or where the trader refuses to bring the digital content or digital service in conformity because this would impose disproportionate costs on the trader, or where the trader has failed to bring the digital content or digital service in conformity within a reasonable time, free of charge or without any significant inconvenience to the consumer the consumer should be entitled to the remedies of price reduction or termination of the contract. In certain situations it is justified that the consumer should be entitled to have the price reduced or the contract terminated immediately, for instance where the trader previously failed to successfully bring the digital content or digital service in conformity or where the consumer cannot be expected to maintain confidence in the ability of the trader to bring the digital content or digital service into conformity due to the serious nature of the lack of conformity. For example, the consumer should be entitled to directly request the termination of the contract or the price reduction where the consumer is supplied anti-virus software which itself is infected with viruses and would constitute an instance of lack of conformity of such a serious nature. The same should apply where it is clear that the trader will not bring the digital content or digital service in conformity within a reasonable time or without significant inconvenience for the consumer.

(36c) In a situation where the consumer is entitled to a reduction of the price paid for the digital content or digital service which is supplied over a period of time, the calculation of the price reduction should take into consideration the decrease of value due both to the lack of conformity and to the time during which the consumer was unable to enjoy the digital content or digital service in conformity.

(36ca) Where the digital content or digital service is supplied in exchange for a price, the consumer should be able to terminate the contract only if the lack of conformity is not minor. However, where the digital content or service is not supplied in exchange for a price but personal data are provided by the consumer, the consumer should be entitled to terminate the contract also in cases where the lack of conformity is minor, since the remedy of price reduction is not available to the consumer. In cases where the consumer pays a price and provides personal data, the consumer should be entitled to all available remedies in the event of a lack of conformity. In particular, provided all other conditions are met, the consumer should be entitled to have the digital content or digital service brought into conformity, to have the price reduced in relation to the money paid for the digital content or digital service or the contract terminated.

[...]

(37a) Where the consumer terminates the contract, the trader should reimburse the price paid by the consumer. However, there is a need to balance the legitimate interests of consumers and traders where the digital content or digital service is supplied over a period of time and the digital content or digital services was in conformity only for part of that period. Therefore, upon termination, the consumer should only be entitled to the proportionate part of the price paid corresponding to the time when the digital content or digital service was not in conformity. The consumer should also be entitled to any part of the price paid in advance for any period remaining after the contract was terminated.

(38) Where personal data are provided by the consumer to the trader, the trader should comply with Regulation (EU) 2016/679. These obligations must also be complied with in cases where the consumer pays a price and provides personal data. Upon termination, the trader should also refrain from using any content other than personal data that was provided or created by the consumer when using the digital content or digital service supplied by the trader. Such content may include digital images, video and audio files and content created on mobile devices.

However, the trader should be entitled to continue to use the content provided or created by the consumer in those cases where such content either has no utility outside the context of the digital content or digital service supplied by the trader, only relates to the consumer's activity, has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts, or has been generated jointly by the consumer and others, and other consumers can continue to make use of it.

[...]

(39a) The consumer can be discouraged from exercising remedies for a lack of conformity of the digital content or digital services if the consumer is deprived of access to content other than personal data, which the consumer provided or created through the use of the digital content or digital service. In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the contract, the trader should therefore, at the request of the consumer, make such content available to the consumer following the termination of the contract.

(39b) The consumer should be entitled to retrieve the content within a reasonable time, without hindrance from the trader, in a commonly used machine-readable format and free of cost, with the exception of costs generated by the consumer's own digital environment, for instance the costs of a network connection as they are not specifically linked to the retrieval of the content. However, the obligation of the trader to make available such content should not apply where the content only has utility within the context of using the digital content or digital service, or relates only to the consumer's activity when using the digital content or digital service or has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts. In those cases the content does not have significant practical use or interest for the consumer while taking into account also the interests of the trader.

Moreover, the obligation of the trader to make available to the consumer upon termination any content that is not personal data and has been provided or created by the consumer should be without prejudice to the trader's right to not disclose certain content in accordance with applicable law.

[...]

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

However, the consumer should also refrain from using the digital content or digital service and from making it available to third parties, for instance by deleting the digital content or any usable copy or rendering the digital content or digital service otherwise inaccessible.

[...]

(44) The principle of the liability of the trader for damages is an essential element of contracts for the supply of digital content or digital services.

Therefore, the consumer should be entitled to claim compensation for detriment caused by a lack of conformity with the contract or a failure to supply the digital content or digital services. The compensation should put the consumer as much as possible into the position in which the consumer would have been if the digital content or digital service had been duly supplied and been in conformity with the contract. As the existence of such a right to damages is already ensured in all Member States, this Directive is without prejudice to national rules on the compensation of consumers for harm resulting from infringement of those rules.



(45) This Directive should also address modifications, such as updates and upgrades, which are done by traders on the digital content or digital service which is supplied or made accessible to the consumer over a period of time. Considering the fast evolving character of digital content and digital services, such updates, upgrades or similar modifications may be necessary and are often advantageous for the consumer. Some of those modifications, for instance stipulated as updates in the contract, may form part of the contractual commitment. Other modifications can be required to fulfil the objective requirements for conformity of the digital content or digital service as set out in this Directive. Yet other modifications, which would deviate from the objective requirements for conformity and which are foreseeable at the time of conclusion of the contract, would have to be expressly agreed to by the consumer when concluding the contract.

(45a1) Besides the modifications aimed at maintaining conformity, the trader should be allowed under certain conditions to modify features of the digital content or digital services provided that the contract gives a valid reason for such a modification. Such valid reasons can encompass cases where the modification is necessary to adapt the digital content or digital service to a new technical environment or to an increased number of users or for other important operational reasons. These changes are often to the advantage of the consumer as they improve the digital content or digital service. Consequently, the parties to the contract can include respective clauses in the contract which allow the trader to undertake modifications. In order to balance consumer and business interests, such a possibility for the trader should be coupled with a right of the consumer to terminate the contract where these modifications negatively impact the use of or access to the digital content or digital service in a more than only minor manner. To what extent modifications negatively impact the use of or access to the digital content or digital service by the consumer should be objectively ascertained having regard to the nature and purpose of the digital content or digital service and to the quality, functionality, compatibility and other main features which are normal in digital content or service of the same type. The rules concerning such updates, upgrades or similar modifications should however not concern situations where, for instance as a consequence of distributing a new version of the digital content or digital service, the parties conclude a new contract for the supply of the digital content or digital service.

- (45a2) The consumer should be informed of modifications in a clear and comprehensible manner. Where a modification negatively impacts in a more than minor manner the access or use of the digital content or digital service by the consumer, the consumer should be informed in a way that allows receiving or storing the information on a durable medium. A durable medium should enable the consumer to store the information for as long as it is necessary to protect the consumer's interests stemming from the relationship with the trader. Such media should include, in particular, paper, DVDs, CDs, USB sticks, memory cards or the hard disks as well as e-mails.
- (45b) Where a modification negatively impacts in a more than minor manner the access or use of the digital content or digital service by the consumer, the consumer should enjoy as a result of such a modification the right to terminate the contract free of any cost. Alternatively, the trader can decide to enable the consumer to maintain access to the digital content or digital service at no additional costs without the modification and in conformity with the contract, in which case the consumer should not be entitled to terminate the contract. However, if the digital content or digital service that the trader enabled the consumer to maintain is no longer in conformity with the subjective and the objective conformity requirements, the consumer should be able to rely on the remedies for a lack of conformity as provided for under this Directive.

Where the requirements for such a modification as indicated under this Directive are not satisfied and the modification results in a lack of conformity, the consumer's rights of bringing the digital content or digital service in conformity, having the price reduced or the contract terminated as provided for under this Directive remain unprejudiced. Similarly, where, subsequently to a modification a lack of conformity of the digital content or digital service occurs that has not been caused by the modification, the consumer should continue to be entitled to rely on remedies for the lack of conformity in relation to this digital content or digital service as provided for under this Directive.

[...]

- (47) The lack of conformity of the digital content or digital service as supplied to the consumer is often due to one of the transactions in a chain, from the original designer to the final trader. While the final trader should be liable towards the consumer in case of lack of conformity between these two parties, it is important to ensure that the trader has appropriate rights vis-a-vis different members of the chain of transactions in order to be able to cover the liability towards the consumer. These rights should be limited to commercial transactions; it should therefore not cover situations where the trader is liable towards the consumer for the lack of conformity of the digital content or digital service composed of or built upon software which was supplied without the payment of a price under a free and open-source licence by a person in previous links of the chain of transactions. However, it should be for the applicable national law to identify the members of the chains of transactions against which the final trader can turn and the modalities and conditions of such actions.

- (48) Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual and data protection rights should be afforded the right to initiate proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.
- (49) Nothing in this Directive should prejudice the application of the rules of private international law, in particular Regulations (EC) No 593/2008<sup>3</sup> and (EC) No 1215/2012<sup>4</sup> of the European Parliament and of the Council.
- (50) Directive 1999/44/EC of the European Parliament and of the Council<sup>5</sup> should be amended to reflect the scope of this Directive in relation to a tangible medium used exclusively as carrier of the digital content to the consumer.
- (51) Regulation (EU) No 2017/2394 of the European Parliament and of the Council<sup>6</sup> should be amended to include a reference to this Directive in Annex I to that Regulation so as to facilitate cross-border cooperation on enforcement of this Directive.

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<sup>3</sup> OJ L 177, 4.7.2008, p. 6–16.

<sup>4</sup> OJ L 351, 20.12.2012, p.1.

<sup>5</sup> OJ L 171, 7.7.1999, p.12.

<sup>6</sup> OJ L 345, 27.12.2017, p. 1.

- (52) Directive 2009/22/EC of the European Parliament and of the Council<sup>7</sup> 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.
- (52a) Consumers should be able to benefit from the rights provided to them by this Directive as soon as the national transposition measures begin to apply pursuant to this Directive. Therefore, the national transposition measures should also apply to contracts of an indefinite or fixed duration which were concluded before the application date and provide for the supply of digital content or digital services over a period of time, either continuously or through a series of individual acts of supply, but only as regards the digital content or digital service that is supplied as from the date of application of the national transposition measures. However, in order to ensure a balance between legitimate interests of consumers and traders, the national measures transposing the provisions of this Directive, the modification of the digital content or digital service and the right to redress should only apply to contracts concluded after the application date pursuant to this Directive.
- (53) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>8</sup>, 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.

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<sup>7</sup> OJ L110, 1.05.2009, p.30.

<sup>8</sup> OJ C 369, 17.12.2011, p. 14.

- (53a) The European Data Protection Supervisor was consulted and delivered an opinion on 14 March 2017.<sup>9</sup>
- (54) Since the objectives of this Directive, namely to contribute to the functioning of the internal market by tackling in a consistent manner contract law-related obstacles for the supply of digital content or a digital service while preventing legal fragmentation cannot be sufficiently achieved by the Member States but can rather, by reasons of ensuring the overall coherence of the national laws through harmonised contract law rules which would also facilitate coordinated enforcement actions, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (55) This Directive respects fundamental rights and freedoms and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, including those enshrined in Articles 16, 38 and 47 thereof.

HAVE ADOPTED THIS DIRECTIVE:

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<sup>9</sup> OJ C 200, 23.6.2017, p. 10–13.

## *Article 1*

### **Subject matter**

The purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection by laying down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or a digital service, in particular rules on:

- conformity of digital content or a digital service with the contract,
- remedies in case of the lack of such conformity or a failure to supply and the modalities for the exercise of those remedies, as well as on
- the modification of digital content or a digital service.

## *Article 2*

### **Definitions**

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

1. 'digital content' means data which is produced and supplied in digital form;
- 1a. 'digital service' means:
  - (a) a service that allows the consumer to create, process, store or access data in digital form; or
  - (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service.



- 1b. 'goods with digital elements' means any tangible movable items that incorporate or are interconnected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions;
2. 'integration' means the linking and incorporation of digital content or a digital service with the components of the consumer's digital environment in order for the digital content or digital service to be used in accordance with the conformity criteria as provided for by this Directive;
3. 'trader' means any natural or legal person, irrespective of whether privately or publicly owned, who, in relation to contracts covered by this Directive, 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 relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession;

[...]

6. 'price' means money or a digital representation of value that is due in exchange for the supply of digital content or a digital service;

6a. 'personal data' means personal data as defined by Article 4(1) of Regulation (EU) 2016/679;

[...]

8. 'digital environment' means hardware, software and any network connection used by the consumer to access or make use of digital content or a digital service;

9. 'compatibility' means the ability of the digital content or digital service to function with hardware or software with which digital content or digital services of the same type are normally used, without the need to convert the digital content or digital service;
- 9a. 'functionality' means the ability of the digital content or digital service to perform its functions having regard to its purpose;
- 9b. 'interoperability' means the ability of the digital content or digital service to function with hardware or software different from the ones with which digital content or digital services of the same type are normally used;
- [...]
11. 'durable medium' means any instrument which enables the consumer or the trader 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<sup>10</sup>;

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<sup>10</sup> Note to translators: the definition of 'durable medium' corresponds to the definition used in Article 2(10) of Directive 2011/83/EU (Consumer Rights Directive).

### *Article 3*

#### **Scope**

1. This Directive shall apply to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price.

This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content or digital service in accordance with this Directive or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose.

2. This Directive shall also apply where the digital content or digital service is developed in accordance with the consumer's specifications.
3. With the exception of Articles 5 and 11, this Directive shall apply also to any tangible medium which serves exclusively as a carrier of digital content.

3a. This Directive shall not apply to digital content or digital services which are incorporated in or inter-connected with goods in the meaning of Art. 2 (1b) and which are provided with the goods under a sales contract concerning these goods, irrespective of whether such digital content or digital service is supplied by the seller or by a third party. In case of doubt whether the supply of an incorporated or inter-connected digital content or digital service forms part of the sales contract, the digital content or digital service shall be presumed to be covered by the sales contract.

[...]

5. This Directive shall not apply to contracts regarding:

- (a) the provision of services other than digital services as defined in this Directive, regardless of whether digital forms or means are used by the trader to produce the output of the service or to deliver or transmit it to the consumer;
- (b) electronic communication services as defined in Article 2(4) of Directive (EU) 2018/1972, with the exception of number-independent interpersonal communication services as defined in Article 2(7) of Directive (EU) 2018/1972;
- (c) healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU of the European Parliament and of the Council;
- (d) gambling services meaning services which involve wagering a stake with pecuniary 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 or any other technology for facilitating communication and at the individual request of a recipient of a service;

- (e) financial services as defined in point (b) of Article 2 of Directive 2002/65/EC;
  - (ea) software offered by the trader under a free and open-source license, where the consumer does not pay a price and the personal data provided by the consumer is exclusively processed by the trader for improving the security, compatibility or interoperability of the specific software;
  - (f) supply of digital content where the digital content is made available to the general public other than by signal transmission as a part of a performance or event, such as digital cinematographic projections;
  - (g) digital content provided in accordance with Directive 2003/98/EC<sup>11</sup> by public sector bodies of the Member States.
6. Without prejudice to paragraph 3a, where a single contract between the same supplier and the same consumer includes in a bundle elements of supply of digital content or a digital service and elements of the provision of other services or goods, this Directive shall only apply to the elements of the contract concerning the digital content or digital service.

Article 15 shall not apply where a bundle in the meaning of Directive (EU) 2018/1972 includes elements of an internet access service as defined by Article 2(2) of Regulation (EU) 2015/2120 or a number-based interpersonal communication service as defined by Article 2(6) of Directive (EU) 2018/1972.

The effects that the termination of one element of the bundle contract may have on the other elements of the bundle contract shall be governed by national law, without prejudice to Article 107(2) of the Directive (EU) 2018/1972.

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<sup>11</sup> Directive 2003/98/EC of the EP and the Council of 17 November 2003 on the re-use of public sector information (as amended by Directive 2013/37/EU).

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. Union law on the protection of personal data applies to any personal data processed in connection with contracts referred to in paragraph 1.

In particular, this Directive is without prejudice to the provisions of Regulation (EU) 2016/679 and Directive 2002/58/EC. In case of conflict between the provisions of this Directive and Union law on the protection of personal data, the latter prevails.

- 8a. This Directive is without prejudice to national and Union laws on copyright and related rights, including Directive 2001/29/CE of the European Parliament and of the Council.
9. This Directive shall not affect the possibility of Member States to regulate general contract law aspects, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract in so far as they are not regulated in this Directive, or the right to damages.

#### *Article 4*

#### **Level of harmonisation**

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

## *Article 5*

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

1. The trader shall supply the digital content or digital service to the consumer. Unless the parties have agreed otherwise, the trader shall supply the digital content or digital service without undue delay after the conclusion of the contract.
2. The trader shall have complied with his obligation to supply when:
  - (a) the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose;
  - (b) the digital service is made accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose.

## *Article 5a*

### **Conformity of the digital content or digital service**

The trader shall supply to the consumer digital content or a digital service which shall meet the requirements of Articles 6, 6a and 7, where applicable, without prejudice to Article 8.

## *Article 6*

### **Subjective requirements for conformity**

1. In order to conform with the contract, the digital content or digital service shall, in particular, where applicable:
  - (a) be of the description, quantity and quality and possess the functionality, compatibility, interoperability and other features as required by the contract;

- (b) be fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader at the latest at the time of the conclusion of the contract and which the trader has accepted;
- (c) be supplied along with all the accessories, any instructions, including on installation, and customer assistance as stipulated by the contract; and
- (d) be updated as stipulated by the contract.

*Article 6a*

**Objective requirements for conformity**

1. In addition to complying with any conformity requirements stipulated in the contract, the digital content or digital service shall:
  - (a) be fit for the purposes for which digital content or a digital service of the same type would normally be used, taking into account, where applicable, any existing national and Union laws, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;
  - (b) be of the quantity and possess qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, which are normal in digital content or digital services of the same type and which the consumer may reasonably expect, given the nature of the digital content or digital service and taking into account any public statement made by or on behalf of the trader or other persons in earlier links of the chain of transactions, particularly in advertising or on labelling, unless the trader 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 in the same or a comparable way as it had been made; or
  - (iii) the decision to acquire the digital content or digital service could not have been influenced by the statement;
- (c) where applicable, be supplied along with any accessories and instructions which the consumer may reasonably expect to receive; and
  - (d) comply with any trial version or preview of the digital content or digital service made available by the trader before the conclusion of the contract;
- 1a. The trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity:
- (a) throughout the period of time during which the digital content or digital service is to be supplied under the contract, where the contract provides for continuous supply over a period of time; or
  - (b) during the period of time which the consumer may reasonably expect, given the type and purpose of the digital content or digital service and taking into account the circumstances and nature of the contract, where the contract provides for a single act of supply or a series of individual acts of supply.

- 1b. Where the consumer fails to install within a reasonable time updates supplied by the trader in accordance with paragraph 1a, the trader shall not be liable for any lack of conformity resulting solely from the lack of the relevant update, provided that:
  - (a) the trader informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it; and
  - (b) the failure of installation or the incorrect installation of the update by the consumer was not due to shortcomings in the installation instructions provided by the trader.
2. Where the contract provides for a continuous supply of digital content or digital service over a period of time, the digital content or digital service shall be in conformity throughout the duration of that period.
  - 2a. There shall be no lack of conformity within the meaning of paragraph 1 or 1a if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the digital content or digital service was deviating from the conformity requirements stipulated in paragraph 1 or 1a and the consumer has expressly and separately accepted this deviation when concluding the contract.
3. Unless the parties have agreed otherwise, digital content or a digital service shall be supplied in conformity with the most recent version of the digital content or digital service available at the time of the conclusion of the contract.

## *Article 7*

### **Integration of the digital content or digital service**

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

- (a) the digital content or digital service was integrated by the trader or under the trader's responsibility; or
- (b) the digital content or digital service was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions where those instructions were provided by the trader.

## *Article 8*

### **Third party rights**

Where a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the digital content or digital service in accordance with Articles 6 and 6a, Member States shall ensure that the consumer is entitled to the remedies for the lack of conformity provided for by Article 12, unless national law provides for the nullity or rescission of the contract for the supply of the digital content or digital service for such cases.

## *Article 9*

### **Liability of the trader**

1. The trader shall be liable for any failure to supply the digital content or digital service in accordance with Article 5.
2. Where a contract provides for a single act of supply or a series of individual acts of supply, the trader shall be liable for any lack of conformity under Article 6, 6a, and 7, of the digital content or digital service which exists at the time of supply, without prejudice to Article 6a(1a)(b).

If, under national legislation, the trader is only liable for any lack of conformity that becomes apparent within a period of time after supply, that period shall not be less than two years from the time of supply, without prejudice to Article 6a(1a)(b).

If, under national legislation, the rights laid down in Article 12 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 12 for any lack of conformity that exists at the time indicated in the first subparagraph and becomes apparent within the period of time indicated in the second subparagraph.

3. Where the contract provides for continuous supply over a period of time, the trader shall be liable for a lack of conformity under Articles 6, 6a, and 7, of the digital content or digital service that occurs or becomes apparent throughout the period of time during which the digital content or service is to be supplied under the contract.

If, under national legislation, the rights laid down in Article 12 are also subject or only subject to a limitation period, Member States shall ensure that such limitation period allows the consumer to exercise the remedies laid down in Article 12 for any lack of conformity that occurs or becomes apparent throughout the period indicated in the first subparagraph.

## *Article 10*

### **Burden of proof**

1. The burden of proof with respect to whether the digital content or digital service was supplied in accordance with Article 5 shall be on the supplier.
  - 1a. In cases referred to Article 9(2), the burden of proof with respect to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the supplier for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied.
  - 1b. In cases referred to in Article 9(3), the burden of proof with respect to whether the digital content or digital service was in conformity during the duration of the contract shall be on the supplier for a lack of conformity which becomes apparent during the duration of the contract.
2. Paragraphs 1a and 1b shall not apply where the trader demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service and where the trader informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract.
3. The consumer shall cooperate with the trader to the extent reasonably possible and necessary to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified in Article 9(2) and (3), as applicable, lay in the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are least intrusive for the consumer.

Where the consumer fails to co-operate, and where the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, the burden of proof with respect to whether the lack of conformity existed at the time specified in Article 9(2) or (3), as applicable, shall be on the consumer.

*Article 11*

**Remedy for the failure to supply**

1. Where the trader has failed to supply the digital content or digital service in accordance with Article 5, the consumer shall call upon the trader to supply the digital content or digital service. If the trader then fails to supply the digital content or digital service without undue delay, or within an additional period of time as expressly agreed to by the parties, the consumer shall be entitled to terminate the contract.
2. Paragraph 1 shall not apply and the consumer shall be entitled to terminate the contract immediately where:
  - (a) the trader has declared, or it is equally clear from the circumstances, that the trader will not supply the digital content or digital service; or
  - (b) the consumer and the trader have agreed, or it is clear from the circumstances attending the conclusion of the contract, that a specific time for the supply is essential for the consumer and the trader fails to supply the digital content or digital service by or on that time.
3. Where the consumer terminates the contract under paragraphs 1 or 2, Articles 13, 13a, 13b and 13c shall apply accordingly.

*Article 12*

**Remedies for the lack of conformity**

- a. In the case of a lack of conformity, the consumer shall be entitled to have the digital content or digital service brought into conformity, or to receive a proportionate reduction in the price, or to terminate the contract under the conditions set out in this Article.
1. The consumer shall be entitled to have the digital content or digital service brought into conformity, unless this would be impossible or would impose costs on the trader that would be disproportionate, taking into account all circumstances of the case including:
  - (a) the value the digital content or digital service would have if there were no lack of conformity; and
  - (b) the significance of the lack of conformity.
2. The trader shall bring the digital content or digital service into conformity pursuant to paragraph 1 within a reasonable time from the time the trader has been informed by the consumer about the lack of conformity, free of charge and without any significant inconvenience to the consumer, taking account of the nature of the digital content or digital service and the purpose for which the consumer required the digital content or digital service.
3. The consumer shall be entitled to either a proportionate reduction of the price in accordance with paragraph 4 where the digital content or digital service is supplied in exchange for a payment of a price, or the termination of the contract in accordance with paragraph 5, in any of the following cases:
  - (a) the remedy to bring the digital content or digital service into conformity is impossible or disproportionate in accordance with paragraph 1;

- (b) the trader has not brought the digital content or digital service into conformity in accordance with paragraph 2;
  - (ba) a lack of conformity appears despite the trader's attempt to bring the digital content or digital service into conformity;
  - (c) the lack of conformity is of such a serious nature as to justify the immediate price reduction or termination of the contract;
  - (d) the trader has declared, or it is clear from the circumstances, that the trader will not bring the digital content or digital service into conformity within a reasonable time or without significant inconvenience for the consumer.
4. The reduction in price shall be proportionate to the decrease in the value of the digital content or digital service which was supplied to the consumer compared to the value that the digital content or digital service would have if it was in conformity.

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

5. Where the digital content or digital service has been supplied in exchange for the payment of a price, the consumer shall be entitled to terminate the contract only if the lack of conformity is not minor. The burden of proof that the lack of conformity is minor shall be on the trader.



### *Article 13*

#### **Exercise of the right of termination**

The consumer shall exercise the right to terminate the contract by means of a statement to the trader expressing the decision to terminate the contract.

### *Article 13a*

#### **Obligations of the trader in the event of termination**

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

However, in cases where the contract provides for the supply of the digital content or digital service in exchange for a payment of a price and over a period of time, and the digital content or digital service had been in conformity for a period of time prior to the termination of the contract, the trader shall reimburse to the consumer only the proportionate part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity, and any part of the price paid by the consumer in advance for any remaining period of the contract had it not been terminated.

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

3. The trader shall refrain from using any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content:
  - (a) has no utility outside the context of the digital content or digital service supplied by the trader;
  - (b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader,
  - (c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts, or
  - (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.
4. Except in the situations referred to in points (a), (b) or (c) of paragraph 3, the trader shall, at the request of the consumer, make available to the consumer any content that is not personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader.

The consumer shall be entitled to retrieve that digital content free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.

5. Upon termination, the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service no longer accessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph 4.

### *Article 13b*

#### **Obligations of the consumer in the event of termination**

1. After the termination of the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.
2. Where the digital content was supplied on a tangible medium, the consumer shall, upon the request of the supplier, return, at the supplier's expense, the tangible medium to the supplier without undue delay after the receipt of the supplier's request. If the supplier decides to request the return of the tangible medium, that request shall be made within 14 days from the day on which the supplier is informed of the consumer's decision to terminate the contract.
3. The consumer shall not be liable to pay for any use made of the digital content or the digital service in the period prior to the termination of the contract during which the digital content or the digital service was not in conformity.

### *Article 13c*

#### **Time limits and means of reimbursement by the trader**

1. Any reimbursement to be done by the trader to the consumer pursuant to Article 12(4) or 13a(1) due to price reduction or termination of the contract shall be done without undue delay and in any event within 14 days from the day on which the trader is informed of the consumer's decision to invoke his right for a price reduction or his right to terminate the contract.

2. The trader shall carry out the reimbursement using the same means of payment as the consumer used to pay for the digital content or digital service, unless the consumer expressly agrees otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.
3. The trader shall not impose any fee on the consumer in respect of the reimbursement.

[...]

### *Article 15*

#### **Modification of the digital content or digital service**

1. Where the contract provides that the digital content or the digital service is to be supplied or made accessible to the consumer over a period of time, the trader may modify the digital content or digital service beyond what is necessary to maintain the digital content or digital service in conformity in accordance with Articles 6 and 6a if the following conditions are met:
  - (a) the contract allows, and gives a valid reason, for such a modification;
  - (b) such a modification is made without additional cost to the consumer;
  - (c) the consumer is informed in a clear and comprehensible manner of the modification;  
and
  - (d) in cases referred to in paragraph 2, the consumer is informed reasonably in advance on a durable medium of the features and time of the modification and of the right to terminate the contract in accordance with paragraph 2 or of the possibility to maintain the digital content or digital service without such a modification in accordance with paragraph 4.

2. The consumer shall be entitled to terminate the contract if the modification negatively impacts the access to or the use of the digital content or digital service by the consumer, unless such negative impact is only minor. In that case, the consumer shall be entitled to terminate the contract free of charge within 30 days after the receipt of the information or from the time when the digital content or digital service has been modified by the trader, whichever is later.
3. Where the consumer terminates the contract in accordance with paragraph 2 of this Article, Articles 13, 13a, 13b and 13c shall apply accordingly.
4. Paragraphs 2 and 3 shall not apply if the trader has enabled the consumer to maintain without additional costs the digital content or digital service without the modification, and the digital content or digital service remains in conformity.

[...]

#### *Article 17*

#### **Right of redress**

Where the trader is liable to the consumer because of any failure to supply the digital content or digital service or because of a lack of conformity resulting from an act or omission by a person in earlier links of the chain of transactions, the trader shall be entitled to pursue remedies against the person or persons liable in the chain of commercial transactions. The person against whom the trader 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.
  - (ca) not-for-profit bodies, organisations or associations, active in the field of the protection of data subjects' rights as defined in Article 80 of Regulation (EU) 2016/679.

## *Article 19*

### **Mandatory nature**

1. 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 failure to supply or the lack of conformity with the contract is brought to the trader's attention by the consumer or before the modification of the digital content or digital service in accordance with Article 15 is brought to the consumer's attention by the trader, shall not be binding on the consumer.

2. This Directive shall not prevent traders from offering consumers contractual arrangements which go beyond the protection provided for in this Directive.

#### *Article 20*

#### **Amendments to Regulation (EU) No 2017/2394 and Directive 2009/22/EC**

[...]

2. In the Annex to Regulation (EU) No 2017/2394, the following point is added:

"21a. Directive (EU) .../... of the European Parliament and of the Council of ... on certain aspects concerning contracts for the supply of digital content and digital services (OJ L..., p. ...)"

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

"15a. Directive (EU) .../... of the European Parliament and of the Council of ... on certain aspects concerning contracts for the supply of digital content and digital services (OJ L..., p. ...)"

#### *Article 21*

#### **Transposition**

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by *[the date (first of the month) of two years after the entry into force]* at the latest.
  - 1a. They shall apply those measures to the supply of digital content or digital services which occurs from six months from the deadline of transposition according to paragraph 1 onwards, with the exception of measures transposing Articles 15 and 17 of this Directive which shall only apply to contracts concluded from that date onwards.

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 and to the European Economic and Social Committee. The report shall examine, inter alia, the case for harmonisation of rules applicable to contracts for the supply of digital content or digital services other than that covered by this Directive including supplied against advertisements.

#### *Article 23*

#### **Entry 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

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