



2015/0287(COD)

7.11.2016

*****I**

DRAFT REPORT

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

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

Rapporteurs: Evelyne Gebhardt, Axel Voss

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

Symbols for procedures

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

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

Amendments to a draft act

Amendments by Parliament set out in two columns

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

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

Amendments by Parliament in the form of a consolidated text

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

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

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

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

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2015)0634),
 - having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0394/2015),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the reasoned opinion submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the French Senate, asserting that the draft legislative act does not comply with the principle of subsidiarity,
 - having regard to the opinion of the European Economic and Social Committee of 27 April 2016¹,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the joint deliberations of the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs under Rule 55 of the Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A8-0000/2016),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a directive Title 1

¹ OJ C 264, 20.7.2016, p. 57.

Text proposed by the Commission

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

(Text with EEA relevance)

Amendment

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

(Text with EEA relevance)

Or. en

Amendment 2

**Proposal for a directive
Recital 1**

Text proposed by the Commission

(1) The growth potential of e-commerce has not yet been fully exploited. ***The Digital Single Market Strategy for Europe***²⁹ tackles ***in a holistic manner the*** major obstacles to the development of cross-border e-commerce in the Union in order to unleash this potential. Ensuring better access for consumers to digital content and facilitating businesses to supply digital content is necessary to boost the Union's digital economy and stimulate overall growth.

Amendment

(1) The growth potential of e-commerce has not yet been fully exploited. ***This Directive*** tackles ***some*** 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 ***or digital services*** and facilitating businesses to supply digital content ***or digital services*** is necessary to boost the Union's digital economy and stimulate overall growth.

²⁹ COM (2015) 192 final.

Or. en

Amendment 3

**Proposal for a directive
Recital 2**

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 4

Proposal for a directive Recital 3

Text proposed by the Commission

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

Amendment

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

mandatory.

Or. en

Amendment 5

Proposal for a directive Recital 4

Text proposed by the Commission

(4) Consumers are not confident when **buying** cross border and especially online. One of the major factors for this lack of confidence is uncertainty about their key contractual rights and the lack of a clear contractual framework for digital content. Many consumers of digital content experience problems related to the quality of, or access to, digital content. For instance, they receive wrong or faulty digital content, or they are not able to access the digital **content** in question. As a result, consumers suffer financial and non-financial detriment.

Amendment

(4) Consumers are not confident when **contracting** 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 **and digital services**. Many consumers of digital content **or digital service** experience problems related to the quality of, or access to, digital content **or digital service**. For instance, they receive wrong or faulty digital content, or they are not able to access the digital **service** in question. As a result, consumers suffer financial and non-financial detriment.

Or. en

Amendment 6

Proposal for a directive Recital 5

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 7

Proposal for a directive Recital 7 a (new)

Text proposed by the Commission

Amendment

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

Or. en

Amendment 8

Proposal for a directive Recital 10 a (new)

Text proposed by the Commission

Amendment

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

Or. en

Amendment 9

Proposal for a directive Recital 11

Text proposed by the Commission

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

Amendment

(11) ***This*** Directive should address problems across different categories of digital content ***or digital services and their*** supply. In order to ***ensure consistency with the acquis, the notion of digital content should correspond with that used*** in Directive 2011/83/EU of the European Parliament and of the Council³⁰ ***and should cover, for example, video, audio, applications, digital games and any other software. In order to cater for rapid technological developments and to make this Directive future-proof, this Directive should also cover digital services which allow the creation, processing or storage of data, for example cloud storage or file hosting services. It should likewise cover digital services allowing sharing and other interaction, for example social media, instant messaging services, video or audio-sharing websites or platforms which fall outside the scope of electronic communication services.*** While there are numerous ways for digital content ***or digital services*** 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 ***services*** or access to the use of social media, this Directive should apply to all digital content ***or digital services*** independently of the medium used for ***their*** transmission. Differentiating between different categories in this technologically fast changing market is not desirable because it would hardly be possible to avoid discriminations between suppliers. A level playing-field between suppliers of different categories of digital content ***or digital services*** should ***be ensured.***

³⁰ OJ L 304, 22.11.2011, p.64.

³⁰ OJ L 304, 22.11.2011, p. 64.

Or. en

Amendment 10

Proposal for a directive Recital 12

Text proposed by the Commission

(12) In order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for suppliers of digital content offered on a **durable** medium, in relation to conformity requirements and remedies available to consumers for non-conformity, this Directive should apply to goods **such as DVDs and CDs, incorporating digital content** in such a way that the goods **function only as a carrier** of the **digital content** . **The** Directive should apply to the digital content supplied on a **durable** medium, independently whether it is **sold** at a distance or in face-to-face situations, so as to avoid fragmentation between the different distribution channels. **The** Directive 2011/83 should continue to apply to those goods, including **to** obligations related to the delivery of goods, remedies in case of the failure to deliver and the nature of the contract under which those goods are supplied. **The** Directive is also without prejudice to the distribution right applicable to **these** goods under copyright law.

Amendment

(12) In order to meet the expectations of consumers and ensure a clear-cut and simple legal framework for suppliers of digital content offered on a **tangible** medium, in relation to conformity requirements and remedies available to consumers for non-conformity, this Directive should **also** apply to goods **in which digital content is embedded** in such a way that **it operates as an integral part of** the goods **and cannot easily be de-installed unless the supplier proves that the defect lies in the hardware of the good. This assumption of applicability can be justified by the increasing complexity of goods with embedded data. This** Directive should apply to the digital content supplied on a **tangible** medium, independently whether it is **supplied** at a distance or in face-to-face situations, so as to avoid fragmentation between the different distribution channels. Directive 2011/83 should continue to apply to those goods, including **the** obligations related to the delivery of goods, remedies in case of the failure to deliver and the nature of the contract under which those goods are supplied. **This** Directive is also without prejudice to the distribution right applicable to **those** goods under copyright law.

Or. en

Amendment 11

Proposal for a directive Recital 13

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 12

Proposal for a directive Recital 16

Text proposed by the Commission

(16) In order to ensure a common set of

Amendment

(16) In order to ensure a common set of

rights for consumers and a level playing field for **business**, consumers should have the same remedies for digital content which **is** not in conformity with the contract irrespective of the way the content has been developed. Consequently **the** Directive should apply to contracts for the development of digital content tailor made to the specific requirements of the consumer including tailor made software. This Directive should also apply to the supply of visual modelling files required in the context of 3D printing. However this Directive should not regulate goods produced with the use of 3D printing technology or the damage caused to them.

rights for consumers and a level playing field for **businesses**, consumers should have the same remedies for digital content **or digital services** which **are** not in conformity with the contract irrespective of the way **in which** the content has been developed. Consequently, **this** Directive should apply to contracts for the development of digital content **or digital services** tailor-made to the specific requirements of the consumer, including tailor-made software. This Directive should also apply to the supply of visual modelling files required in the context of 3D printing. However, this Directive should not regulate goods produced with the use of 3D printing technology or the damage caused to them.

Or. en

Amendment 13

Proposal for a directive

Recital 17

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 14

Proposal for a directive

Recital 22

(22) The protection of individuals with regard to the processing of personal data is governed by Directive 95/46/EC of the European Parliament and of the Council³¹ and by Directive 2002/58/EC of the European Parliament and of the Council³² which are fully applicable in the context of contracts for the supply of digital content. **Those Directives** already establish a legal framework in the field of personal data in the Union. The implementation and application of this Directive should be made in full compliance with that legal framework.

(22) The protection of individuals with regard to the processing of personal data is governed by Directive 95/46/EC of the European Parliament and of the Council³¹, **by Regulation (EU) 2016/679 of the European Parliament and of the Council^{31a}** and by Directive 2002/58/EC of the European Parliament and of the Council³², which are fully applicable in the context of contracts for the supply of digital content. **The aforementioned Regulation and Directives** already establish a legal framework in the field of personal data in the Union. The implementation and application of this Directive should be made in full compliance with that legal framework.

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

³¹ **Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data** (OJ L 281, 23.11.1995, p. 31).

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

³² OJ L 201, 31.7.2002, p. 37–47.

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

Or. en

Amendment 15

Proposal for a directive

Recital 23

Text proposed by the Commission

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

Amendment

(23) There are various ways for digital content **or digital services** to reach consumers. It is opportune to set simple and clear rules as to the modalities and the time for performing the supplier's main contractual obligation to supply digital content **or digital services** to the consumer. Considering that the supplier is not in principle responsible for acts or omissions of an internet provider or an electronic platform which the consumer selected for receiving the digital content **or digital service**, it should be sufficient for the supplier to supply the digital content **or digital service** to **that** third party **or to a third party designated by the consumer**. With regard to the time of supply, in line with market practices and technical possibilities, the digital content **or digital service** should be supplied **without undue delay, but in any event not later than 30 days from the date of conclusion of the contract**, unless the parties decide to agree otherwise in order to cater for other supply models.

Or. en

Amendment 16

Proposal for a directive

Recital 24

Text proposed by the Commission

(24) In order to promote innovation in the Digital Single Market and cater for technological developments reflected in

Amendment

deleted

the fast changing characteristics of digital content, it is justified for the digital content to be, above all, in conformity with what was agreed in the contract.

Or. en

Amendment 17

Proposal for a directive Recital 25

Text proposed by the Commission

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

Amendment

(25) In *order to provide clarity as to what a consumer can expect from the digital content or digital service concerned and what the supplier would be liable for in the event of failure to supply what is expected, it is essential to fully harmonise rules for determining conformity with* the contract. *The contract should* stipulate sufficiently clear and comprehensive benchmarks to ascertain the conformity of the digital content *and digital services* with the contract. *It is also* necessary to set objective conformity criteria to ensure that consumers are not deprived of their rights. In such cases the conformity with the contract should be assessed considering the purpose for which digital content *or digital services* of the same description would normally be used.

Or. en

Amendment 18

Proposal for a directive Recital 26

Text proposed by the Commission

(26) Due to *its* nature digital content *needs* to interact with other digital

Amendment

(26) Due to *their* nature, digital content *or digital services need* to interact with

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

other digital equipment to function properly; interoperability should therefore form a part of the conformity criteria. In particular, **the digital content or digital services need** to interact with hardware including processor speed and graphics card features and software including a specific version of the operating system or specific multi-media player. The notion of functionality should refer to the ways in which digital content **or digital services** can be used; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or regional coding. **The notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features.**

Or. en

Amendment 19

Proposal for a directive Recital 27

Text proposed by the Commission

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. **As recognised by the Digital Single Market Strategy** a high level of network and information security is essential across the European Union to ensure respect of fundamental rights such as the right to privacy and personal data, to increase user confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those

Amendment

(27) While data-driven services and technologies bring significant benefits, they also create some vulnerabilities. A high level of network and information security is essential across the European Union to ensure respect of fundamental rights such as the right to privacy and personal data, to increase user confidence and strengthen their trust in the digital economy. As software becomes pervasive, qualities such as reliability, security and adaptability to evolving needs are also becoming a prime concern. It is therefore increasingly important that those data-driven services and technologies ensure

data-driven services and technologies ensure that those qualities are guaranteed, to the extent that is proportionate to the role and function those technologies play. In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains.

that those qualities are guaranteed, to the extent that is proportionate to the role and function those technologies play. In particular, quality in terms of security and reliability is becoming an important concern for innovative, composite services that have to rely on the interconnection of diverse systems in different domains.

Or. en

Amendment 20

Proposal for a directive Article 1

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 21

Proposal for a directive Article 2 – point 1

Text proposed by the Commission

1. 'digital content' means

Amendment

1. 'digital content' means data *that are produced and supplied in digital form;*

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

(b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and

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

Or. en

Amendment 22

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

Text proposed by the Commission

Amendment

1a. 'digital service' means

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

(b) a service allowing sharing of and any other interaction with data in digital form uploaded or created by the consumer and/or by other users of the service;

Or. en

Amendment 23

Proposal for a directive
Article 2 – point 2

Text proposed by the Commission

Amendment

2. 'integration' means linking **together** different components of **a** digital environment **to act as a coordinated whole**

2. 'integration' means linking **of digital content or of a digital service with the** different components of **the**

in conformity with its intended purpose;

consumer's digital environment in order that the digital content or digital service can be used in accordance with the contract;

Or. en

Amendment 24

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

Text proposed by the Commission

Amendment

2a. 'embedded digital content or digital service' means pre-installed digital content which operates as an integral part of the goods and cannot easily be de-installed by the consumer or which is necessary for the conformity of the good with the contract;

Or. en

Amendment 25

Proposal for a directive Article 2 –point 3

Text proposed by the Commission

Amendment

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

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

Or. en

Amendment 26

Proposal for a directive

Article 2 – point 4

Text proposed by the Commission

4. 'consumer' means any natural person who in contracts covered by this Directive, is acting for purposes which are outside **that person's** trade, business, craft, or profession;

Amendment

4. 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside **his** trade, business, craft or profession;

Or. en

Amendment 27

Proposal for a directive

Article 2 – point 8

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 28

Proposal for a directive

Article 2 – point 9

Text proposed by the Commission

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

Amendment

deleted

Or. en

Amendment 29

Proposal for a directive

Article 2 – point 10

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 30

Proposal for a directive

Article 2 – point 11 a (new)

Text proposed by the Commission

Amendment

11a. 'tangible medium' means a tangible moveable item which serves exclusively as a carrier of digital content.

Or. en

Amendment 31

Proposal for a directive

Article 3 – paragraph 1

Text proposed by the Commission

Amendment

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

1. This Directive shall apply to any contract where the supplier supplies ***or undertakes to supply*** digital content ***or a digital service*** to the consumer in exchange ***for payment of a price and/or personal data or other data provided by the consumer or collected by the supplier or a third party in the interest of the supplier.***

Or. en

Amendment 32

Proposal for a directive Article 3 – paragraph 2

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 33

Proposal for a directive Article 3 – paragraph 3

Text proposed by the Commission

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

Amendment

deleted

Or. en

Amendment 34

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

Text proposed by the Commission

Amendment

3a. This Directive shall apply to goods in which digital content is embedded unless the supplier proves that the lack of conformity lies in the hardware of the good.

Amendment 35

Proposal for a directive Article 3 – paragraph 4

Text proposed by the Commission

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

Amendment

4. This Directive shall not apply *where personal data or other data provided by the consumer are exclusively used by the supplier to supply the digital content or service or to meet legal requirements to which the supplier is subject and the supplier does not process the personal data or other data for any other purpose.*

Or. en

Amendment 36

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

Text proposed by the Commission

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

Amendment

(a) services *other than the supply of digital content or of a digital service provided by the supplier by digital means* where the digital *means are only used in order to provide such services by the supplier to the consumer*;

Or. en

Amendment 37

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

Text proposed by the Commission

(d) gambling services meaning services which involve wagering a stake with **monetary** value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means and at the individual request of a recipient of a service;

Amendment

(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 and at the individual request of a recipient of a service;

Or. en

Amendment 38

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

Text proposed by the Commission

(e) financial services.

Amendment

(e) financial services **as defined in point (b) of Article 2 of Directive 2002/65/EC where the supply of digital content or a digital service is an integral part of the service and is available to the consumer only within the framework of the provision of the wider financial service.**

Or. en

Amendment 39

Proposal for a directive Article 3 – paragraph 6

Text proposed by the Commission

6. Where a contract **includes elements**

Amendment

6. Where a contract **for** the supply of

in addition to the supply of digital content, this Directive shall only apply to the obligations and **remedies** of the parties as supplier and consumer of the digital content.

digital content *or a digital service includes additional contractual obligations*, this Directive shall only apply to the obligations and **rights** of the parties as supplier and consumer of the digital content *or digital service concerned*.

Or. en

Amendment 40

Proposal for a directive Article 3 – paragraph 7

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 41

Proposal for a directive Article 3 – paragraph 8

Text proposed by the Commission

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

Amendment

8. This Directive is without prejudice to the protection of **personal data as provided for by Directive 95/46/EC and by Regulation (EU) 2016/679**.

Or. en

Amendment 42

Proposal for a directive Article 3 – paragraph 9

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 43

Proposal for a directive Article 4 a (new)

Text proposed by the Commission

Amendment

Article 4a

Contract terms detrimental to the consumer's data protection rights

A contract term that concerns the processing of personal data provided by the consumer to the supplier or collected by the supplier or a third party in the interest of the supplier in the context of the conclusion or performance of the contract, and which violates any right afforded to the consumer as a data subject under Directive 95/46/EC and Regulation (EU) 2016/679, including any term defining the functionality, interoperability and other performance features of the digital content or digital service in a way that is not in conformity with Directive 95/46/EC and Regulation (EU) 2016/679, shall not be binding upon the consumer. The contract shall continue to bind the parties as regards the rest of its terms if it is capable of continuing in existence without the non-binding term.

Or. en

Amendment 44

Proposal for a directive

Article 5 – title

Text proposed by the Commission

Supply of the digital content

Amendment

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

Or. en

Amendment 45

Proposal for a directive

Article 5 – paragraph 1 – introductory part

Text proposed by the Commission

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

Amendment

1. ***The*** supplier shall supply the digital content ***or digital service by making it available or giving access to it to:***

Or. en

Amendment 46

Proposal for a directive

Article 5 – paragraph 1 – point a

Text proposed by the Commission

(a) the consumer; ***or***

Amendment

(a) the consumer;

Or. en

Amendment 47

Proposal for a directive

Article 5 – paragraph 1 – point b

Text proposed by the Commission

(b) a third party which operates a

Amendment

(b) a third party which operates a

physical or virtual facility making the digital content available to the consumer or allowing the consumer to access it and which has been chosen by the consumer for receiving the digital content.

physical or virtual facility ***such as an electronic platform*** making the digital content ***or digital service*** available to the consumer or allowing the consumer to access it and which has been chosen by the consumer for receiving the digital content ***or digital service; or***

Or. en

Amendment 48

Proposal for a directive Article 5 – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) another third party designated by the consumer.

Or. en

Amendment 49

Proposal for a directive Article 5 – paragraph 2

Text proposed by the Commission

Amendment

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

2. ***Unless the consumer and the supplier have agreed otherwise,*** the supplier shall supply the digital content ***or digital service without undue delay, but not later than 30 days from*** the conclusion of the contract. ***The supplier shall have fulfilled his obligation to supply*** when the digital content ***or digital service is made available or is accessible*** to the consumer or, where point (b) ***or (c)*** of paragraph 1 applies, to the third party chosen by the consumer, whichever is ***applicable***.

Or. en

Amendment 50

Proposal for a directive Article 5 a (new)

Text proposed by the Commission

Amendment

Article 5a

***Conformity of the digital content or
digital service with the contract***

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

Or. en

Amendment 51

Proposal for a directive Article 6 – title

Text proposed by the Commission

Amendment

Conformity of the digital content with the
contract

Subjective requirements for conformity
with the contract

Or. en

Amendment 52

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

Text proposed by the Commission

Amendment

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

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

Or. en

Amendment 53

Proposal for a directive

Article 6 – paragraph 1 – point a

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 54

Proposal for a directive

Article 6 – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) comply with the trial version or preview of the digital content or digital service, made available by the supplier, unless the difference between the digital content or digital service supplied and the trial version or preview was brought to the consumer's attention before the contract was concluded;

Or. en

Amendment 55

Proposal for a directive

Article 6 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Any agreement excluding, derogating from or varying the effects of Articles 6a, 7 and 8 to the detriment of the

consumer shall be valid only if, at the time of conclusion of the contract, the consumer knew of the specific condition of the digital content or digital service and the consumer expressly accepted that specific condition when concluding the contract.

Or. en

Amendment 56

Proposal for a directive Article 6 – paragraph 2

Text proposed by the Commission

Amendment

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

deleted

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

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

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

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

(ii) by the time of conclusion of the contract the statement had been corrected;

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

Or. en

Amendment 57

Proposal for a directive Article 6 – paragraph 3

Text proposed by the Commission

Amendment

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

Or. en

Amendment 58

Proposal for a directive Article 6 – paragraph 4

Text proposed by the Commission

Amendment

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

Or. en

Amendment 59

Proposal for a directive Article 6 – paragraph 5

Text proposed by the Commission

Amendment

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

deleted

Or. en

Amendment 60

Proposal for a directive Article 6 a (new)

Text proposed by the Commission

Amendment

Article 6a

Objective requirements for conformity with the contract

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

(a) possess qualities and performance features including its functionality, interoperability, accessibility, continuity and security, taking into account, where relevant, any existing international technical standards or, in the absence of such technical standards, applicable industry codes of conduct and good practices, which are normal in digital content or digital services of the same type and which the consumer may expect given the nature of the digital content or digital service;

(b) take into account any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions, unless the supplier can show that:

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

(ii) by the time of the conclusion of the contract the statement had been

corrected; or

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

2. In the case of contracts where the digital content or digital service is to be supplied over a period of time, the digital content or digital service shall be in conformity with the contract throughout the duration of that period. Temporary interruptions to the supply of the digital content or digital service which fall within the responsibility of the supplier shall be treated as cases of non-conformity.

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

4. The supplier must ensure that the consumer is notified of, and supplied with, updates to digital content or a digital service that are necessary in order to bring the digital content or digital service into conformity with the contract. Where the consumer chooses to remain with his or her present version of the digital content or the digital service, that present version shall remain available or accessible within a reasonable timeframe.

Or. en

Amendment 61

Proposal for a directive Article 15 – title

Text proposed by the Commission

Modification of the digital content

Amendment

Modification of the digital content *or*
digital service

Amendment 62

Proposal for a directive

Article 15 – paragraph 1 – introductory part

Text proposed by the Commission

1. Where the contract provides that the digital content **shall** be supplied over the period of time stipulated in the contract, the supplier may alter functionality, interoperability and other main performance features of the digital content **such as its accessibility, continuity and security**, to the extent those **alternations** adversely affect access to or use of the digital content by the consumer, **only** if:

Amendment

1. Where the contract provides that the digital content **or digital service is to** be supplied **or made accessible** over the period of time stipulated in the contract, the supplier may **only** alter **the** functionality, interoperability and other main performance features of the digital content **or digital service**, to the extent **that** those **alterations** adversely affect access to or use of the digital content **or digital service** by the consumer, if:

Or. en

Amendment 63

Proposal for a directive

Article 15 – paragraph 1 – point a

Text proposed by the Commission

(a) the contract **so stipulates**;

Amendment

(a) the contract **allows for and gives a valid reason for such an alteration**;

Or. en

Amendment 64

Proposal for a directive

Article 15 – paragraph 1 – point a (new)

Text proposed by the Commission

Amendment

(aa) **such an alteration can reasonably**

be expected by the consumer;

Or. en

Amendment 65

Proposal for a directive

Article 15 – paragraph 1 – point b

Text proposed by the Commission

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

Amendment

(b) the ***supplier notifies the consumer*** reasonably in advance of the modification by an explicit notice on a durable medium ***or through other means which are equally clear and easily accessible to the consumer;***

Or. en

Amendment 66

Proposal for a directive

Article 15 – paragraph 1 – point c

Text proposed by the Commission

(c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the receipt of the notice; and

Amendment

(c) the consumer is allowed to terminate the contract free of any charges within no less than 30 days from the ***day of*** receipt of the notice ***or from the time when the digital content is altered by the supplier, whichever is later;*** and

Or. en

Amendment 67

Proposal for a directive

Article 15 – paragraph 2 – point a

Text proposed by the Commission

(a) the supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time after modification of the digital content;

Amendment

(a) the supplier shall reimburse to the consumer the part of the price paid corresponding to the period of time after modification of the digital content ***or digital service***;

Or. en

Amendment 68

**Proposal for a directive
Article 15 – paragraph 2 – point b**

Text proposed by the Commission

(b) the supplier shall refrain from the use of the ***counter-performance other than money*** which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer.

Amendment

(b) the supplier shall refrain from the use of the ***personal data*** which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer.

Or. en

EXPLANATORY STATEMENT

I. Introduction

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

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

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

II. Main issues dealt with in the draft report

1. Clarification of the text and coherence with the acquis

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

2. Scope

The co-rapporteurs consider that the Commission's proposal to exclude from the scope of the directive digital content integrated in goods, such as smart products, will make it difficult to distinguish between the scope of this proposal and the proposal on certain aspects concerning contracts for the online and other distance sales of goods. The rules applicable to digital content would be different depending on whether it is embedded in a good or supplied separately, a distinction that is not always easy to make, for instance in the case of smartphones with pre-installed apps versus apps installed by the consumer. This would make it difficult for consumers and businesses to determine the applicable rule when the product is defective or otherwise not in conformity with the contract (should it be considered as a tangible good or as digital content?). Having considered different approaches, the co-rapporteurs take the view that the rules applying to digital content should also apply to digital content embedded in goods, if the digital content operates as an integral part of the goods and cannot easily be deinstalled. However, if the supplier can prove that the defect lies in the hardware of the good, the goods regime would apply.

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

3. Data as counter-performance and data protection issues

The Commission's proposal introduces the notion of counter-performance other than a price paid and foresees the obligation for suppliers to remedy for the failure to supply the digital content or digital service or for their lack of conformity with the contract also in cases where the counter performance is the provision of data. Overall, the co-rapporteurs agree with this approach. The draft report specifies that counter-performance can also be a combination of payment of a price and provision of data. It also goes further than the Commission's proposal, extending the scope to data that is collected by the supplier, and does not limit it to data actively provided by the consumers, in order to avoid the creation of loopholes. Concerning the proposed exclusion from the scope of the directive of those contracts where the processing of data by the supplier is strictly necessary to perform the contract or to meet legal requirements, the co-rapporteurs also favour a limitation: the directive shall not apply where personal data or other data provided by the consumer are exclusively used by the supplier to supply the digital content or service or to meet legal requirements to which the supplier is subject and the supplier does not process the personal data or other data for any other purpose.

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

4. Supply of the digital content or the digital service

The co-rapporteurs clarify the constitutive elements of the supply, including its definition and the time of the supply, taking into account the modifications of the scope of the directive. As a result, the supplier should have to supply immediately after the conclusion of the contract without undue delay but no later than 30 days.

5. Conformity with the contract

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

6. Modification of the digital content

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

7. Reference to national law

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

III. Conclusion

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